Regulating re-entry to the National Injury Insurance Scheme

Submissions to Office of Industrial Relations ("OIR")

Response to outcome of consultation on regulating pre-conditions for re-entry

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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

The ALA welcomes the opportunity to have input into the Queensland Office of Industrial Relations' ("**the OIR**") revised Consultation Regulatory Impact Statement ("**the RIS**") on Regulating re-entry to the National Injury Insurance Scheme in Queensland after accepting treatment, care and support damages.

2020 Submission

We refer to our submission dated 17 August 2020, attached for reference. Our position has not changed, and we confirm our submission remains that the RIS has been drafted and proceeds on what, in our is a fundamentally flawed premise; that that there is a formal legal requirement for the Queensland Government to legislate the regulations which facilitate re-entry to the scheme.

Queensland has a scheme at present which meets the Minimum Benchmarks. As a consequence, there is no requirement which arises from the Bilateral Agreements containing the Minimum Benchmark criteria that a person who has received common law damages for their treatment, care and support is required to be provided with a re-entry mechanism. It follows that if Queensland elects to not promulgate re-entry regulations, it will not incur any financial penalty or impost.

If the Queensland government holds any legal advice to the effect that Queensland is obligated to legislate a re-entry mechanism, by reason of the Commonwealth-State Agreements, or otherwise; we submit that such legal advice should have been shared with all stakeholders. If such legal advice exists, the ALA seeks a copy of it urgently. From discussions with OIR and Treasury this week, we understood that legal advice about the proper construction of, and obligations flowing from the Commonwealth-State bilateral agreements was not obtained before the 2016 enactment, nor at any time since. Further, that there is no intention to commission such advice. In our submission, whether Queensland was compelled to legislate the enabling provision in the NIISQ and WCR Acts in 2016 and has an obligation now to promulgate Regulations flowing from those enabling provisions is a critical matter.

In our submission dated 17 August 2020 we outlined that there are four major questions to be answered in responding to the RIS:

i. Is there a formal legal requirement imposed upon the Queensland Government to facilitate re-entry to NIIS?

In our submission, the answer is no. Reasons are set out in the 2020 submission for that view.

A consideration of the legislative history of NIIS and the intergovernmental agreements which underpinned the genesis of NIIS is necessary and this is outlined in detail in our August 2020 submission we do not intend to re-iterate that in detail in this submission.

We would respectfully strongly encourage Treasury and OIR to commission high-level legal advice on the ambit and effect of the inter-governmental agreements; and to defer any further action on this issue until that advice has been received, considered and shared with stakeholders. A deferral of that type, in our submission will not produce undesirable outcomes as it is at least a year before any former NIISQ participant who might wish to re-enter, will have met the existing 5 year criterion.

ii. Despite (i), does the Queensland Government have the legislative power to set regulations by which re-entry to NIIS may occur at some point in time.

In our submission, the answer is yes. We accept that it is within the Queensland Government's power to legislate and/or promulgate regulations by which re-entry may occur. That power arises from the enabling provisions in the NIISQ and WCR Acts.

iii. If the Government does have the power to set regulations (albeit is not obliged to do so), should the government set regulations by which re-entry to NIIS is permitted?

We understand that the key impetus for the desire to promulgate regulations is that if the existing enabling provisions in the NIISQ and WCR Acts are left in the present state, the conditions under which a prospective re-entrant may re-enter will be left to judicial interpretation and would thus be uncertain. That uncertainty would create difficulties, inter alia, for actuarial modelling of the future of the scheme.

We submit:

(a) It is likely, although we concede, not certain; that judicial interpretation of the existing enabling provisions (without supplementary regulations) would be restrictive. We also expect that a superior court adjudication on the issue would likely provide sufficient actuarial certainty;

(b) However, if the correct construction of the intergovernmental agreements is that there is no obligation to legislate re-entry, the existing enabling provisions could be repealed;

(c) If the Queensland government formed the view, on legal advice, that there is no obligation of that type, it <u>should</u> repeal the existing provisions to extinguish the perceived uncertainties which flow from the existing enabling provisions; and because the NDIS is and ought to be the entity of last resort for people who have opted out and may need supplementary supports; and

(d) There is no evidence whatsoever that persons who have opted out will, after the existing 5 year criterion has passed, will be likely to have exhausted or so depleted funds that a further safety net is needed. To the contrary, it is the experience of our members that the vast majority of those with major injuries, whether or not they are NIISQ participants, have safeguards in place which enable continuing treatment, care and support. Trustee arrangements are a key part of the suite of protections. Moreover, it is the clear experience of our members' clients that most wish to be "off the system" and have choice and control over their own treatment, care and support. Those participants abhor and are distressed by the micro-management, bureaucracy and paternalism which is intrinsic to long-tail schemes. Even a cursory reading of participant experience stories from the multiple inquiries into the NDIS will confirm this. In our submission, absent clear empirical evidence of funds being exhausted, not academic theories of same, any proposed regulations are a solution seeking a problem.

We reiterate in this submission two crucial reasons why re-entry provisions ought not to be promulgated:

1. The NDIS provides a safety net of almost identical supports to those provided by NIISQ, and a mechanism for modifying the application of the NDIS CRA provisions, for special circumstances.

2. We remain concerned about the sustainability of NIISQ if additional people return to the scheme.

We understand that there are several drivers for NIISQ's levy growth exceeding CPI since scheme inception. Those should not, in our submission, be exacerbated by re-entrants.

iv. If the Government chooses to set re-entry criteria, what policy guidance ought to apply, and what ought the re-entry criteria specified by regulation be?

If those regulations are to be promulgated, the re-entry requirements ought to be set restrictively, and be applied by a Court.

Whilst we maintain the view that the government does not have an obligation to set regulations, if the government proceeds to set regulations, the ALA submits that any re-entry criteria should be:

(a) Clear, certain and capable of consistent application;
(b) Identical for the workers' compensation and CTP streams. There is no logical basis to differentiate the two streams;
(c) Restrictive – any re-entry criteria creates sustainability issues for the scheme

(d) Applied by a Court of competent jurisdiction and it is vital that Courts be the primary oversight mechanism by which re-entry be determined.

The primary concern remains that if NIIS levies continue to grow at an unsustainable rate, the State government will be faced with choices which have faced other long-tail schemes elsewhere, including:

- Strip back NIIS-based rights and entitlements,
- Run the NIIS scheme at perpetual deficit,
- Top up the shortfall in NIIS funding from other State sources including consolidated revenue, and/or
- Find other trade-offs in the overall system. That could involve a stripping of existing CTP rights and damaging what is Australia's best CTP scheme.

Given that the vast majority of NIISQ participants enter by the CTP route, not workers' compensation; we would expect that the potential actuarial pressures, and hence cost of living and consequent discomfort, would be more keenly felt in the CTP-Treasury space.

We refer to the further details in our submission dated 17 August 2020 and would welcome the opportunity to discuss these further with the OIR and Treasury.

To be clear, if Regulations were to be promulgated, we believe that the most recent draft proposal needs more work and discussion.

NDIS Considerations

The NDIS ought to be the insurer of last resort/safety net. Under the current structure of the NDIS, every person who'd been a lifetime participant in the NIISQ scheme:

(i) Would meet the entry criteria for the NDIS, and

(ii) Would receive a package of funded supports almost identical (save for better housing options under NDIS) to that which they'd had whilst on NIIS. That package of supports would be subject to the CRA. The CRA provisions have a "special circumstances" provision whereby the impact of the CRA can be reduced if the special circumstances are shown.

The Commonwealth ought to be the primary safety net in respect of the treatment, care and support needs. This is the very rationale for the existence of the National Disability Insurance Scheme. We expand upon this in our August 2020 submission and refer to the detail and rationale contained therein.

The financial sustainability of the NDIS, which like NIISQ, is a long-tail scheme, has been closely examined over the last 3 years and before and since the May 2022 Federal election. That the NDIS faces major sustainability issues is agreed by every commentator and politicians of all stripes. One of the reasons why the NDIS is unsustainable is poor planning and lack of foresight about eligibility (entry) requirements. The Queensland government risks making a similar mistake if it adds to sustainability concerns about NIISQ, by permitting re-entry to that scheme, when there is no demonstrated need, nor legal requirement for that.

Summary and Conclusion

In summary:

a. There is no need for the Queensland government to regulate re-entry to NIISQ. Queensland has met, and in fact exceeded, the NIIS minimum benchmarks.

b. The enabling provisions in the NIISQ and WCR Acts may give rise to uncertainty on re-entrant numbers and cost. This can and should be addressed by:
    - legal advice on the scope and effect of the intergovernmental agreements which were the genesis of the enabling provisions;
    - if Queensland has no obligation to have re-entry provisions, repealing the existing provisions. Those who may otherwise have sought to re-enter have the NDIS as their safety-net

c. The NIISQ is already under some funding pressure, despite levies being increased greater than CPI and the participant rate being lower than originally modelled. It is likely, in our view, that premiums would need to be further increased to accommodate future re-entry.

d. Promulgating re-entry criteria increases the risk of NIISQ levies continuing to grow, where the unsustainability of long-tail schemes elsewhere provides clear warning signs. Moreover, unsustainable increases in levies risks stripping existing common law rights, running the scheme at a deficit and other trade-offs within the system, including risking an excellent CTP scheme.

e. There is no evidence that participants who take a lump sum by using the opt-out mechanism, are not appropriately managing those funds noting also that many of those participants require the safeguard of a trustee to oversee their financial affairs.

f. The Commonwealth, through the NDIS, ought to be the safety net and insurer of last resort for any supports needed beyond NIISQ. Former NIISQ participants who have opted out are able to apply for a funded package of supports from the NDIS. Their package of supports would be adjusted by the Compensation Reduction Amount (CRA) in the NDIS Act. Critically, if special circumstances can be demonstrated by the NDIS participant, the NDIS Act allows for a relaxation of the CRA rules to permit an improved NDIS package.

The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Queensland Office of Industrial Relations' Consultation Regulatory Impact Statement on regulating re-entry to the National Injury Insurance Scheme in Queensland after accepting treatment, care and support damages.

Sarah Grace

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