

Three-Year Review of the *Motor Accident Injuries Act 2019 (ACT)*

Submission to the Insurance Branch, Economic and
Financial Group, Treasury (ACT Government)

5 October 2023

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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 people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into Treasury's Three-Year Review of the *Motor Accident Injuries Act 2019* (ACT) ('MAI Act'). The ALA notes this is the first three-year review of the ACT's Motor Accident Injuries Scheme ('MAI Scheme') since the MAI Scheme commenced on 1 February 2020.
2. The ALA submits that there are important reforms needed to the MAI Act and all related legislative instruments, as we are concerned that the MAI Scheme is largely not upholding the objectives underlying the MAI Scheme. This is having a negative impact on injured motorists and their support networks in the ACT.
3. In our submission, the ALA will address:
 - the significant power imbalances contained in the MAI Act;
 - drafting issues in the MAI Act, which affect the MAI Act's application and how the MAI Act's provisions interact with other pieces of legislation;
 - concerns held by ALA members about the Whole Person Impairment (WPI) assessment framework;
 - the uncertainty for injured motorists regarding how the MAI Scheme interacts with workers compensation entitlements; and
 - the resolution of common law claims.

Balance of power

4. The ALA hold concerns about the complexity of the defined benefits phase of the MAI Act (and its recent amendments commencing on 14 July 2023, version R5) and the evolving intricate network of Regulations, Guidelines and other disallowable instruments being formed around it. This creates a power imbalance for injured motorists, as they are expected to comprehend a significant amount of legislation and related materials, or attempt to arrange legal assistance (as addressed further below).

5. The ALA considers access to justice a fundamental right, and injured motorists in the ACT (including those who were injured through no fault of their own) have had this right circumscribed by the restriction placed upon personal injury lawyers practising in this area, as personal injury lawyers cannot be paid to advise these individuals. Most plaintiff personal injury law firms have historically undertaken a significant amount of pro bono work for injured individuals, and commonly act under no-win no-fee cost agreements. However, it is unlikely to be commercially viable for plaintiff personal injury firms (most of whom are ACT-based firms) to provide pro bono advice for the duration of a defined benefits claim – which, so far, appear to run for around three years.
6. The ALA’s concern about access to justice is magnified by insurers retaining an unfettered right to access any legal representation from their chosen panel of law firms – usually from national, top-tier law firms specialising in personal injury.
7. In ALA members’ experience, injured motorists are often vulnerable, confused or feel stressed by corresponding with an insurer. Many injured motorists indicate that it is harder to mentally ‘move on’ from the accident when they must continue to liaise directly with the insurer. This appears contrary to the objectives of the MAI Act, outlined in section 6, including:
 - (b) *encourage early and appropriate treatment and care of people injured in motor accidents to achieve optimum recovery and return to pre-accident levels of activity and work;*
8. Our members have received feedback that whilst the insurers’ claim managers are still learning the MAI Scheme, errors are inadvertently being made (despite the insurers’ right to access and retain lawyers), which further adds to the stressful nature of those interactions for injured motorists in the ACT. This also appears contrary to the objectives of the MAI Act, outlined in section 6, including:
 - (d) *promote and encourage the early, quick, cost-effective and just resolution of disputes;*
9. A not insignificant educational burden has been placed upon insurance claim managers in relation to defined benefits. However, ALA members have noticed that correspondence from the insurers generally does not identify the MAI Act provisions or Guidelines under which a decision has been made or is required. This appears contrary to the objectives of the MAI Act, outlined in section 6, including subsection (d), reproduced above.

10. The ALA acknowledges the important role that the Defined Benefit Information Service (DBIS) has played in advising injured motorists. However, there are significant limitations to DBIS' ability to advise:

- DBIS cannot advise about workers compensation schemes, which under the MAI Act is a significant consideration as to which scheme is most beneficial for the injured motorist;
- It is uncertain whether DBIS can meet with injured motorists, and thereby determine – as their plaintiff personal injury lawyer would – an injured motorist's capacity to provide legal instructions (which is very important after a head injury or psychological injury), or whether that injured motorist requires additional assistance with understanding written material; and
- DBIS cannot advise about motor accident claims (common law) claims, which also interact with the *Civil Law (Wrongs) Act 2002* (ACT) and the *Limitation Act 1985* (ACT).

11. The ALA would support the injured motorist (particularly those injured through no fault of their own) being able to engage a plaintiff personal injury lawyer of their choice, who would be able to provide holistic advice in relation to:

- Workers compensation schemes, which scheme is most beneficial for the injured motorist, and how the schemes interact. This is incredibly important, as the injured motorist may need return to work rehabilitation assistance or may be unable to return to work due to their injuries.
- Whether the injured motorist has capacity to provide legal instructions (which, as expressed above, is very important after a head injury or psychological injury) or whether the injured motorist requires any additional assistance with understanding written material. The medical literacy of a plaintiff personal injury lawyer can also be instrumental in ensuring that all injuries are properly diagnosed and assessed.
- Motor accident (common law) claims and the obligations under the *Civil Law (Wrongs) Act 2002* (ACT) and the *Limitation Act 1985* (ACT).

12. The ALA submits that the MAI Act contains significant power imbalances, including at the following significant stages:

- Delayed lodgement of claims:
 - Injured motorists may be unaware of the process or time limits in sections 58 and 59 (13 weeks) to lodge a MAI Act claim.
 - ‘Exceptional circumstances’ are required under clause 5.1.1 of the *Motor Accident Injuries (Treatment and Care) Guidelines 2021 (ACT)*, which relates to MAI Act section 128, for back payment of treatment or care expenses for:
 - a person who died from injuries resulting from the motor accident;
 - a person who was hospitalised for at least four weeks;
 - a close relative, spouse or child of the injured person who died from injuries resulting from the motor accident; or
 - direct result of errors or mistakes made by a MAI insurer while handling an application.
- When the insurer thinks treatment is ‘reasonable and necessary’, injured motorists are expected to be self-represented or to contact the DBIS for assistance during this stage:

Motor Accident Injuries (Treatment and Care) Guidelines 2021 –

“4.3.3 - An insurer may also approve treatment and care not mentioned in a recovery plan, if the insurer is satisfied on reasonable grounds that the treatment and care:

- *is reasonable and necessary in the circumstances; and*
 - *will assist with the injured person’s recovery or management of the person’s injury.”*
- When the injury is ‘stable’ or ‘maximum medical improvement’ (MMI), injured motorists are expected to be self-represented, or contact the DBIS for assistance during this stage.

- Section 138 of the MAI Act states that a WPI assessment can occur when the insurer considers the injury 'stable'. There is no clear metric or definition as to when an injury, particularly a psychological injury which are inherently fluctuating, is considered stable.
- However, the *Motor Accident Injuries (WPI Assessment) Guidelines 2019* (ACT) ('MAI (WPI Assessment) Guidelines') states that a WPI assessment can only occur if the assessor (doctor) considers that the injury is at MMI: *"This is considered to occur when the injured person's condition is well stabilised and is unlikely to change substantially in the next year with or without medical treatment"*.

13. Decisions provided by insurers do not appear to clearly state under what provisions of the MAI Act their decisions are made, nor the legislation relating to the due date for providing a Private Medical Examiner report or a Notice of Claim. This appears contrary to the objectives of the MAI Act, outlined in section 6.

14. Whilst power imbalances are not uncommon within statutory insurance schemes, the significant difference with the MAI Scheme is that the ACT Government has significantly hindered the ability of injured motorists to access independent legal advice during the defined benefits phase, they are restricted in their ability to access legal advice because:

- lawyers cannot be paid for providing legal advice under the defined benefits scheme, except in the below circumstance. This means injured motorists must:
 - be self-represented; or
 - utilise the ACT Government-funded DBIS; and/or
 - rely upon pro-bono advice (if possible).
- lawyers can only be paid for assisting with an external review in ACAT under the defined benefits scheme. ACAT preparation generally involves:
 - drafting all necessary paperwork;
 - drafting submissions;
 - appearances; and
 - potentially briefing doctors and counsel.

15. One such example is the matter of *Williams v GIO (Motor Accident Injuries)* [2022] ACAT 90. This matter involved a single motor vehicle collision. It involved multiple applications and a final hearing. Ultimately, the injured party decided to walk away from the claim.
16. However, a \$2,000.00 AWE Indexed legal cost cap (and filing fee) has been placed on lawyers instructed to act for an injured motorist in the ACT Civil and Administrative Appeal Tribunal (ACAT)². This amount must also incorporate any costs associated with the ACAT claim, which could include medical reports and barrister's fees.
17. It is unclear whether the legal community were consulted before the ACAT cost cap was imposed, and the ALA is concerned it significantly under reflects the work associated with appearing at ACAT. Whilst we understand many of our members would be able to assist with ACAT external reviews, the work is not commercially viable under the cost restriction.
18. It is, therefore, not commercially viable for many ACT-based, personal injury law firms to assist injured motorists with external appeals. Meanwhile, the DBIS are not funded to represent injured motorists in ACAT. This all appears contrary to the objectives of the MAI Act, outlined in section 6.
19. However, the insurers are not constrained from seeking legal advice at any stage in the defined benefits process, including briefing lawyers or counsel for external appeals to ACAT.
20. The insurers have unfettered access to legal representation without any cost restrictions when appearing in ACAT to defend their decision. The *total* legal expenditure of insurers to date can be seen in the MAIC quarterly reports; however, little is known about the actual matter-based expenditure, particularly in ACAT.

Technical concerns

21. ALA members are aware of some drafting issues in the MAI Act, which affect the MAI Act's application and how the MAI Act's provisions interact with other pieces of legislation.

² *Motor Accident Injuries (ACAT Costs Orders) Regulation 2020* (ACT) Regulation 6.

Section 157(2)

22. Section 157(2) of the MAI Act appears to be incorrectly referred to in note 1(b) of section 16AA in the *Limitation Act 1985* (ACT) and in section 51(4) of the *Civil Law (Wrongs) Act 2002* (ACT). It is unclear why section 157(2) is referenced. For example, the provision in the latter is as follows:

(c) if the claimant receives a notice under the Motor Accident Injuries Act 2019, section 157 (2) (WPI 10% or more—injured person entitled to make motor accident claim)—the due date stated in the notice.

23. There are also a very large number of defined terms in the MAI Act. However, there are many significant terms or clauses that lack definition and are prone to be subject to litigation. **The ALA submits that all terms in the MAI Act must be adequately defined in the interests of ensuring anyone seeking to comprehend the MAI Act can do so, including injured motorists.**

Inconsistencies in the wording regarding Notices of Claim

24. The ALA submits that there are inconsistencies in the wording used in the following three provisions as to when a notice of claim is due to be served:

- Section 166 of the MAI Act;
- Section 51 of the *Civil Law (Wrongs) Act 2002* (ACT); and
- Notes set out in section 16AA of the *Limitation Act 1985* (ACT).

25. **The ALA's recommendation is that this is streamlined and clarified, to avoid any misinterpretation of the legislation and missed timeframes.**

26. When the MAI Act was amended in July 2023 (version R5), it is unclear that consideration was given to implementing clear transitional provisions within the legislation, regarding the impact on injured motorists depending upon the date of injury, and date of lodgement of the defined benefits claim, Quality of Life application and Notice of Claim.

27. **The ALA recommends that consideration is given to improving the interaction between the MAI Act and other legislation, including refining all ambiguously-worded provisions.**

The Whole Person Impairment (WPI) assessment framework

28. The ALA remains of the view, as per our 2018 submission,³ that:

- Whole Person Impairment (WPI) is an ineffective way to calculate the pain and suffering, and impact on the lifestyle, of an injured motorist.
- Artificially separating the following categories of injuries is not in the best interests of injured motorists in the ACT:
 - i. Physical and psychological injuries, given the biopsychosocial model; and
 - ii. Primary and secondary psychological injuries.

29. ALA members have observed that the fluctuating nature of psychological injuries has resulted in injured motorists with psychological injuries having their primary WPI assessments significantly delayed.

30. ALA members have noted clinical psychologists reporting being unable to advise whether a psychological injury is a primary or secondary psychological injury. It has not been explained how a psychiatrist (or another specialist) can artificially distinguish between the impact of a primary and secondary psychological injury.

31. Injured motorists who develop severe secondary psychological injury (such as depression) as a result of their physical injuries are only able to achieve a one to three per cent uplift on their physical injuries. This does not make their suffering any less than someone who sustained a primary psychological injury in the accident, yet they cannot be properly assessed or compensated for that injury.

32. The ALA strongly contends that these artificial separations between injuries seems contrary to the objectives of the MAI Act outlined in section 6, including:

(b) encourage early and appropriate treatment and care of people injured in motor accidents to achieve optimum recovery and return to pre-accident levels of activity and work; and

(c) support people injured in motor accidents to access defined benefits;

³ Australian Lawyers Alliance, Submission to the Standing Committee on Justice and Community Safety of the ACT Legislative Assembly, *Inquiry into Motor Accident Injuries Bill 2018* (17 October 2018) <www.lawyersalliance.com.au/documents/item/1381>.

33. There are several categories of physical injuries which are not covered in the MAI (WPI Assessment) Guidelines:

- Whilst damage to dentures is considered a 'personal injury' under the MAI (WPI Assessment) Guidelines, no provision is made for loss or damage to teeth.
- The ALA notes that pregnancy loss is not covered under the MAI (WPI Assessment) Guidelines.

34. The ALA is concerned that in creating the *MAI (WPI Assessment) Guidelines*, this was modelled not from other road injury schemes but instead from workers compensation systems. This means that there is a built-in presumption that the injuries being assessed are for injured motorists of working age.

35. The MAI (WPI Assessment) Guidelines, therefore, do not appear to accommodate injuries to children. In particular, the Psychiatric impairment Rating scale (PIRS) and Activities of Daily Living (ADL) assessments seem to be unfairly biased towards adult lifestyles.

36. Whilst section 133 of the MAI Act contains a deeming provision for children injured in an accident, it is only applicable if the child is receiving treatment at four years and six months after the accident. With children as some of the most vulnerable road users, the ALA is concerned that this appears contrary to the objectives of the MAI Act, outlined in section 6, including:

(a) ensure benefits are available to support all people injured in motor accidents on a no-fault basis, subject to some exclusions and limitations;

37. The ALA recommends urgent consideration of the MAI (WPI Assessment) Guidelines, to ensure children are not disadvantaged.

Disputes around WPI and treatment decisions

38. The ALA notes that disputes around WPI must be escalated to external review by ACAT.

39. However, **the ALA submits that a dedicated medical tribunal is required and should be established to be able to understand and weigh up expert opinion on these issues.**

Interaction with workers compensation schemes

40. There remains uncertainty for injured motorists regarding their choice between defined benefits under the MAI Act or workers compensation entitlements under the *Workers Compensation Act 1951* (ACT) ('WCA Act').
41. Injured motorists can engage a lawyer to advise them about and assist them with workers compensation entitlements, but not the MAI Act. Sections 50, 133 and 239 of the MAI Act remain ambiguous as to their interaction with the WCA Act. The ALA notes that the DBIS cannot provide legal advice on workers compensation, common law claims, employment law claims, or income protection claims.
42. Further, the ALA notes that not all workers compensation claims are covered under the WCA Act. There remains the possibility that a claim will be notified by a person driving in the course of their Government employment (SRCA) or while interstate.
43. **The ALA recommends that injured motorists should be able to obtain holistic legal advice about the pros and cons of proceeding with either a workers compensation claim or a claim under the MAI scheme. Such advice cannot be provided by the DBIS or the insurer, and such advice can be critical in determining the outcome for the injured motorist in terms of quality of treatment and rehabilitation to return to their employment.**

Resolution of common law claims

44. ALA members submit that the inability to proceed with commutation of defined benefits (unless the injured motorist lives overseas) under a motor accident (common law) claim unnecessarily complicates the system and keeps the injured motorist 'stuck in the system' for longer.
45. **The ALA recommends that the injured motorist ought to be able to elect whether the resolution of a motor accident (common law) claim includes a commutation of defined benefits. This would allow the insurer and the injured motorist to part ways, with all entitlements resolved without need for further recourse of internal or external review, and would increase the cost effectiveness of the scheme. This would align with the objectives of the MAI Act, outlined in section 6.**

Conclusion

46. The ALA contends that a full and comprehensive review of the MAI Scheme, the MAI Act and all related legislative instruments is essential given the issues, inconsistencies and inequities we have identified in our submission above.
47. That review should have regard to whether the MAI Scheme should be continued or what substantial amendments are needed to ensure the MAI Scheme fulfils its objectives. The ALA submits this is essential so that injured motorists in the ACT can receive appropriate treatment, support and access to justice.
48. The ALA welcomes the opportunity to have input into the Three-Year Review of the *Motor Accident Injuries Act 2019* (ACT). The ALA is available to provide further assistance to Treasury on the issues raised in this submission.



Hassan Ehsan

**President, ACT Branch Committee,
Australian Lawyers Alliance**



Amber Wang

**ACT Director,
Australian Lawyers Alliance**