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Review of Legal Support for Injured People in the NSW CTP Scheme consultation
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SIRA REVIEW OF LEGAL SUPPORT FOR INJURED PEOPLE IN THE NSW CTP SCHEME

The Insurance Council of Australia (the ICA) on behalf of its NSW licensed CTP insurer members (the ICA), is pleased to provide this submission to the SIRA Review of Legal Support for Injured People in the NSW CTP Scheme (the Review).

The legislative and regulatory framework for the current CTP scheme (the Scheme) is designed to ensure more of the premium paid by motorists is paid to injured people as benefits and to make payments as soon as possible to more of those injured on NSW roads to minimise the impact of motor accidents on the community.¹ The ICA and its members strongly support this approach and consider the 2017 reforms are producing positive outcomes for customers.

The ICA supports retaining the current framework. To this extent, we hold concerns that introducing the Independent Legal Assistance and Review Service (ILARS) or modifying the current the two-tiered approach to dispute resolution under the Personal Injury Commission (PIC) model would introduce additional costs with no additional benefit for motorists and/or injured road users.

Introducing ILARS would be counterintuitive in terms of cost, efficiencies and outcomes. The ICA submits that the current legal costs structure delivers on these objects. Cost, scheme efficiency and customer outcomes were the primary drivers of the 2017 scheme reform, as indicated by the Hon Victor Dominello MP, Minister for Finance, Services and Property²:

“...the old CTP scheme is seriously broken. The adversarial nature of the scheme means that only 6 per cent of benefits are paid out in the first year, and 22 per cent by the second year. The majority of payments to injured road users do not start flowing until years three,

¹ SIRA Website, More CTP dollars going to injured people, <https://www.sira.nsw.gov.au/fraud-and-regulation/reforms/ctp-green-slip-reforms/more-ctp-dollars-going-to-injured-people>.

² Victor Dominello, Second reading speech: Motor Accidents Injuries Bill 2017, 9 March 2017, paragraph 2. <https://www.parliament.nsw.gov.au/bill/files/3373/2R%20Motor.pdf>.

four and five. Injured road users receive only 45¢ in every green slip dollar, with the balance being subsumed in costs. This is symptomatic of a grossly inefficient scheme.”

It is the ICA's view that current legal support mechanisms, together with the unique design features of the Scheme and extensive regulatory framework within which CTP insurers operate, effectively promotes the objectives of the MAI Act. In particular, the framework operates to encourage the early treatment and rehabilitation of the injured to optimise recovery and return to work, and prompt income replacement payment for claimants that work.

The MAI Act also provides for the quick, cost effective and just resolution of disputes to minimise the impact on motorists and/or injured road users. Further, the Scheme design promotes insurer compliance with claims handling responsibilities and behaviour consistent with Scheme objects by modifying the profit incentive through the excess profit and loss mechanism. Together the design features and the regulatory framework keep the overall costs of the Scheme where applicable, for premium paying motorists while promoting the recovery of injured people and the return to work.³

The ICA support the actions SIRA is taking to enhance the CTP Legal Advisory Service (LAS) and believes this will further contribute to the effectiveness of the overall framework.

The ICA notes that dispute resolution in the Scheme has been designed to be informal and accessible for those making claims, particularly those who do not work and/or have suffered less serious injuries. Accessibility and informality contribute to achieving the objects of quick, cost effective and just dispute resolution. The ICA is concerned that improvements in customer experience will be eroded if a more formal, adversarial, legalistic approach is taken to dispute resolution when it moves to the PIC.

It is our view that it would be a retrograde step to lift and shift the Workers' Compensation Commission (WCC) model (rules, practices and procedures) without tailoring to meet Scheme objectives and the needs of a more diverse group of claimants. A more formal dispute resolution process is likely to require additional legal services. While additional legal services can be provided under existing Scheme arrangements, it should be remembered that any additional cost arising will negatively impact scheme efficiency and given the Scheme is designed to minimise the need for legal services, there is potential for over utilisation that will increase cost in the Scheme disproportionately to the value delivered.

Benefits of the current framework

The ICA believes it is important to consider the broader advice and dispute resolution services available to injured people when assessing the effectiveness of the current legal support mechanisms. In addition to the LAS, insurers are required to provide information about the scheme, entitlements, claim progress and status along with options available to a

³ *Motor Accidents Injuries Act 2017*, section 1.3(2)(g) and (3)(a),
<https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2017-010#sec.1.3>.

claimant under closely monitored conduct rules set out in the Motor Accidents Guidelines (MAGs). Further support is provided to claimants by SIRA's CTP Assist service. Where an issue cannot be resolved, a two-tiered dispute resolution framework comprising of internal review and external review at the Dispute Resolution Service (DRS), operates to ensure the great majority of disputes are resolved quickly, cost effectively and informally. The regulatory framework, advisory and dispute resolution services operate in concert to provide injured people with support throughout the claims process.

The ICA supports the principles proposed by SIRA to guide the work of the Review which include:

1. Legal support frameworks should ensure that injured people can access the necessary benefits under the scheme to promote their recovery and return to work or other activities
2. Legal support should provide incentive for the early resolution of claims and the quick, cost-effective and just resolution of disputes
3. Legal support should work with other mechanisms in the scheme to ensure its continued affordability for policyholders
4. Legal support should be relative to the complexity of the issue in dispute.

The ICA considers the proposed Review principles to be well embedded in the existing Scheme framework, as discussed below.

CTP Assist

The *report of the Independent Review of the Operation of SIRA's Legal Advisory Service Pilot* (the Independent Review), noted that SIRA's CTP Assist service provides "a well-established program of independent information and navigation support".⁴ The service also provides an opportunity to identify claimants that may benefit from additional legal support.

CTP Assist staff can provide information about the availability of legal services in the Scheme and to make referrals to the LAS, where appropriate. Although this service of itself does not provide legal advice the ICA notes that CTP Assist plays an important role in the early resolution of motor accident claims by providing procedural information and independent confirmation or clarification of any information provided by an insurer.

⁴ SIRA Report of the Independent Review of the Operation of SIRA's Legal Advisory Service Pilot
https://www.sira.nsw.gov.au/__data/assets/pdf_file/0005/594572/Legal-Advisory-Service-Evaluation-Report.pdf.

Legal Advice Service

LAS provides access to free legal advice on a range of disputes. It operates as a “safety net” when an injured person is unable to access legal advice, the merit of this approach was recognised in the recent independent review of the LAS pilot.⁵

The independent review recommended that consideration be given to expanding the matters which can be referred to the LAS. The ICA supports this recommendation. We also support the recommendation to review and enhance the LAS information on SIRA’s website as well as stakeholder education generally to assist claimants identify their need for the service.⁶

Given that SIRA is currently enhancing the LAS in line with the recommendations of the independent review, the ICA would expect that increased awareness and utilisation of this service will follow and should be considered in the context of the Review.

Internal Review

As required by regulators across the financial services sector and in line with best practice in complaint and dispute resolution, the MAI Act and subordinate instruments require CTP insurers to provide the opportunity for internal review of their decision before a disputed decision is referred to an independent third-party for review. Internal review is the first tier in the two-tier dispute resolution process involving a full review of the insurer’s original decision by an experienced person within the company who was not involved in the original decision. If the customer is not satisfied with the outcome, they may proceed to the second tier, external review, where a further full review is conducted by an independent third-party at DRS (until March 2021 and the PIC thereafter).

The external DRS decision maker will consider the issues in dispute, the available evidence and any additional evidence that the decision maker has acquired, along with relevant law to make a new decision. The MAGs detail the process the parties and decision makers are to follow to ensure that the dispute is resolved as quickly and informally as possible.

The ICA supports the two-tiered approach to dispute resolution, as we believe it operates efficiently and fairly to resolve a significant volume of disputes in the Scheme. SIRA’s performance reports indicate that the two-tiered approach to dispute resolution is working. CTP insurers are committed to using learnings from internal review to continuously improve their decision making and claims handling processes to better support injured people making claims.

⁵ Report of the Independent Review of the Operation of SIRA’s Legal Advisory Service Pilot, May 2019 https://www.sira.nsw.gov.au/_data/assets/pdf_file/0005/594572/Legal-Advisory-Service-Evaluation-Report.pdf.

⁶ Ibid, pp 46-47.

SIRA's quarterly *CTP Insurer Claims Experience and Customer Feedback Comparison* (SIRA performance data) outlines insurer performance against several measures relating to the internal review process. For the period 1 October 2019 to 30 September 2020, SIRA reports that 22% of decisions subject to internal review were overturned in favour of the injured person, while 2% were overturned in favour of the insurer.⁷ Almost a quarter of insurer decisions were changed on review, while care is required in forming a conclusion as to why the decisions were overturned, it is clear that the process adds value and at the very least has produced improved outcomes for 22% of claimants using the service without the inconvenience and cost of an external review.⁸

While the SIRA performance data provides insights into the value of a two-tiered approach to dispute resolution, the ICA suggests caution is required in the interpretation of internal review and DRS outcome data as decisions may be overturned on internal review or at DRS for a range of reasons, including the provision of new information and differences in the interpretation or weighting of evidence, some of which may be conflicting. This means that not all decisions on a claim can be considered in absolute terms. Given that nature of decision making on personal injury claims, internal review provides an important opportunity for the parties to question decisions and evidence and to better understand the nature of the disagreement between them.

The internal review process has been demonstrated to be accessible to injured people. It enables new information to be considered, encourages direct communication between the insurer and the injured person, serves to check decision making, and ultimately minimises the volume of external disputes (and associated resourcing demands). The ICA submits that the internal review system must be retained as a core component of the dispute resolution framework.

External Dispute Resolution

The second tier of the dispute resolution framework is external review undertaken by the DRS which in many cases results in a decision binding the parties. Decisions at DRS are made by experts in motor accident injuries matters, both legal and medical. To support the speedy resolution of disputes, time limits apply to the process. Whilst decision makers at DRS are given considerable discretion over the proceedings before them, the legislation and the MAGs set out principles and timeframes to be followed to ensure that the object of providing informal, just, quick and cost effective dispute resolution is met in each case.

⁷SIRA 30 September 2020 CTP Insurer Claims Experience and Customer Feedback Comparison, p8, Chart 6: Outcomes of resolved internal review by review type (%) <https://www.sira.nsw.gov.au/resources-library/green-slip-resources/publications/ctp-insurer-claims-experience-and-customer-feedback-comparison-sept-2020>.

⁸ SIRA 30 September 2020 CTP Insurer Claims Experience and Customer Feedback Comparison, p8, Chart 6: Outcomes of resolved internal review by review type (%) <https://www.sira.nsw.gov.au/resources-library/green-slip-resources/publications/ctp-insurer-claims-experience-and-customer-feedback-comparison-sept-2020>.

The *Personal Injury Commission Act 2020* (PIC Act), passed on 11 August 2020, establishes the PIC which will commence operation in March 2021 as a single independent tribunal in NSW comprising of two specialist and separate motor accidents and workers compensation divisions.

The PIC will provide Government with the opportunity to deliver second-tier dispute resolution services to the statutory personal injury schemes more efficiently and cost-effectively, as elements of the service delivery task are common to both schemes. It is important to note that the PIC is comprised of two divisions as this will enable fundamental differences in scheme design and the needs of the claimants using the service to be recognised.

Before workers compensation specific practices and procedures or support mechanisms are lifted and shifted to the Scheme, close consideration is required of the possible flow through impacts on the Scheme and its operation (including user behaviour).

One of the guiding principles of the 2017 reforms was to create a more inquisitorial and less adversarial scheme,⁹ and we consider this has been embedded into the design of the Scheme.

In contrast, the ICA is of the view that the model used for the PIC, the WCC, has an approach to dispute resolution that is more adversarial in nature and design, with higher levels of legal representation in the management and resolution of disputes (which may reflect the nature of the design and complexity of that scheme). The ICA would be concerned should this approach start to surface in disputes under the Scheme. We suggest this could lead to additional Scheme costs impacting on the delivery of efficient and cost-effective dispute resolution and a deterioration in the claimant experience.

Potential changes

The Review is considering the feasibility of expanding the use of the ILARS into the Scheme. Should this occur, we anticipate that the legal costs regulations would be amended to provide a similar level of legal costs to claimant's solicitors as those provided in the workers compensation scheme. We also anticipate that there would be an increase in legal fees allowable at DRS to reflect the amount paid in the workers compensation scheme.

The ICA does not believe an expansion of the ILARS into the Scheme is necessary and questions whether there would be any additional benefit for claimants (beyond that which an enhanced LAS and CTP Assist can provide). As we have noted, Scheme design and regulation, along with a two-tiered dispute resolution framework supported by CTP Assist and LAS, currently provide support and legal assistance to claimants.

⁹ Victor Dominello, Second reading speech: Motor Accidents Injuries Bill 2017, 9 March 2017, paragraph 2. <https://www.parliament.nsw.gov.au/bill/files/3373/2R%20Motor.pdf>.

The introduction of the ILARS into the Scheme would increase administration and legal fees, paid for through higher CTP policy levies, and could introduce a more complex, adversarial and drawn out process as proceedings become more formal and legalistic, contrary to the purpose of reform and objects of the MAI Act.

There is also a risk that the introduction of additional legal costs into the MAI Act Scheme could increase the cost of premiums. The PIC structure includes two discrete divisions and has the potential to provide for flexibility to reflect the unique features of each of the schemes and their stakeholders in the PIC jurisdiction.

The ICA also considers there is a risk that an increase in the availability of legal fees may impact on the behaviour of participants and stakeholders in the Scheme. This may increase the number of disputes and consequent claim costs in liability claims, psychological injury claims and non-minor injury claims, potentially driving scheme cost up and moving to an adversarial system (reminiscent of the earlier 1999 Scheme).

The ICA welcomes and encourages lodgment of genuine psychological injury claims and acknowledges the importance of access to early and appropriate treatment and benefits to an injured person's recovery. However, there is considerable evidence both in the CTP and other statutory personal injury schemes that suggests that this class of injury has been used by some service providers and claimants to bring unmeritorious claims. The MAI Act was, in part, a response to the pricing pressure placed on the previous scheme by unmeritorious claims and gaming behaviour of some service providers and claimants.

The ICA understands that SIRA will continue to monitor the data relating to psychological injury claim frequency.¹⁰ It is the ICA's view that the frequency of claims for this injury type will continue to trend upwards with the additional incentive of legal costs recovery. The ICA also notes that this trend is apparent in other State schemes.

The ICA also suggests that a rise in the number of disputes is likely to lead to an increase, not only in legal costs but in claims costs overall. The ICA is working hard with SIRA and Government to deliver on the objects of the 2017 Scheme reform. We do not wish for a return to the experience of the prior CTP scheme where there was a doubling of minor injury legally represented claims and the care costs arising from those claims between 2011 and 2015.¹¹

To ensure that the interests of motorists and claimants are given proper consideration, the ICA requests that detailed economic modelling take place to analyse the potential impact of

¹⁰ SIRA Review of Minor Injury Definition in the NSW CTP Scheme Report
https://www.sira.nsw.gov.au/_data/assets/pdf_file/0005/600737/Review-of-Minor-Injury-Definition-in-the-NSW-CTP-Scheme-report.pdf, p 5.

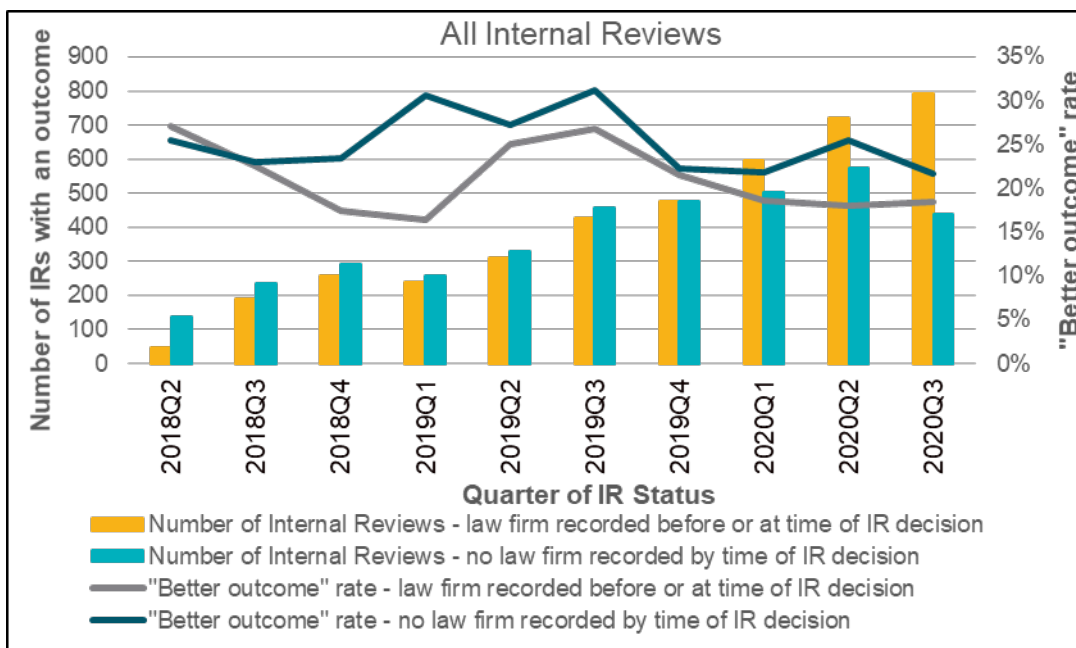
¹¹ On the road to a better CTP scheme, Options for reforming Green Slip Insurance in NSW, SIRA,
https://www.sira.nsw.gov.au/_data/assets/pdf_file/0018/95400/CTP-Reform-options-paper-final.pdf p 10-11.

any behavioural change and the impact this will have on achieving Scheme outcomes as part of the assessment of whether ILARS should be extended to the Scheme.

Finity Consulting has also analysed the internal review data contained in SIRA's Universal Claims Database (UCD) to September 2020. This data indicated claims outcomes where a legal firm was recorded for the claim before or at the time the internal review, are like those with no legal firm recorded. It should be noted that this data does not indicate exactly when the legal firm was added, including after the internal review.

Noting this limitation, Chart A below illustrates that the currently available data does not necessarily support improved outcomes for legally represented injured people at an internal review. For the purpose of this analysis, a "better outcome rate" is one where the decision was better for the claimant divided by the total number of internal review records (apart from those which were declined or withdrawn before a decision was made.)

Chart A – All Internal Reviews



Source: Finity Consulting analysis of UCD data

The ICA does not believe that the Scheme is exhibiting issues which would require a substantial reform to legal support in the Scheme at this time. It is the ICA's strongly held view that the current mechanisms for providing legal support should be retained and further assessed once the enhancements to LAS are embedded and have been given time to operate together with the other support mechanisms in the CTP scheme.

Conclusion

The ICA submits that there is no performance-based reason at this time to implement an expanded ILARS to the Scheme. To implement the change, which would amount to a

substantial reform, would be to create risks to the achievement of the goals of the 2017 scheme reform.

The ICA remains committed to working with SIRA in the advancement of the objects of the Act and improving the experiences of people injured in motor vehicle accidents in NSW.

The ICA would be pleased to discuss this submission with you further and provide any additional information that may assist you in the Review.

If you have any queries please contact [REDACTED]
[REDACTED]

Yours sincerely



Andrew Hall

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