THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: InjuryComp:JDhm739130

28 May 2013

The Hon. G. S. Pearce, MLC.
Minister for Finance and Services and Minister for the Illawarra
Parliament House
Macquarie Street
Sydney NSW 2000

By email: office@pearce.minister.nsw.gov.au

Dear Minister,

Amendments to the Motor Accident Injuries Amendment Bill 2013

As you will be aware, the Law Society of NSW does not support the Motor Accident Injuries Amendment Bill 2013, the provisions of which will be unfair, complicated and costly to administer. We were therefore pleased to work with the NSW Bar Association and Australian Lawyers Alliance to develop an alternate proposal for a fair and sustainable CTP scheme in NSW.

However, should the government continue to pursue this Bill, there are a number of amendments which are necessary to correct some of its most significant defects. These are set out in the attached submission which is made on behalf of the legal profession by the Law Society, Bar Association and Australian Lawyers Alliance.

I commend these amendments for your urgent consideration.

Yours sincerely,

John Dobson
President

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AMENDING THE MOTOR ACCIDENT INJURIES AMENDMENT BILL 2013

Summary of Proposals put forward by the Legal Profession

MAJOR AMENDMENTS

1. 5 years economic loss for children
2. Lifetime treatment for children
3. Clarify: Insurers to deduct tax from gross weekly payments
4. The tax paid on weekly statutory benefits (*Fox v Wood* damages)
5. Don't reduce weekly benefits for the job that doesn't exist – s 65P
6. Stop claims assessors reducing agreed redemptions- s.65ZP(2)
7. Provide for fund management fees for children and the legally incapacitated.
8. Capital costs of home/vehicle for paraplegics and quadriplegics.

ANCILLARY AMENDMENTS

9. Farm workers and the definition of "*earnings*" – s.65L(3)(a).
10. Older workers and s.65R.
11. Pay lump sums in the event of death – s.65ZZB(b).
12. Statutory benefits and the uninsured driver – s.65ZZD.
13. The interplay between workers compensation and motor accident benefits.
14. Force insurers to share information – s.69A(3)(b).
15. Legal Costs – A right you cannot assert is no right at all.

AMENDING THE MOTOR ACCIDENT INJURIES AMENDMENT BILL 2013

The New South Wales Bar Association, the Law Society of NSW and the Australian Lawyers Alliance do **not** support the Motor Accident Injuries Amendment Bill 2013 ("the MAIA Bill"). The legal profession believes that the primary focus of the compensatory scheme should be looking after innocent accident victims, rather than paying benefits to the drivers who cause injuries.

Having said that, if the Bill is to be passed, there are currently some serious deficiencies within it which can be fixed and which are addressed below.

1. KIDS AND TREATMENT EXPENSES

Currently the motor accidents scheme provides a special benefit for all children under 16 years of age, irrespective of fault. Their treatment and care expenses are met for life. (Section 7J *Motor Accidents Compensation Act 1999*).

The MAIA Bill cuts that special benefit for children and where their injuries do not exceed 10% WPI, it limits the future treatment to be paid to a period of five years. This is despite the fact that with many children, their injuries will create treatment needs that stretch well beyond that five year window. With growing children, surgical and scar revision treatment is routinely postponed until they reach adulthood.

It would be straightforward to amend the legislation to continue to provide that the future care and treatment needs of children will be met for life. That does no more than preserve the status quo under existing legislation.

2. ECONOMIC LOSS AND CHILDREN

For everyone whose injuries are under 10% WPI, the "*window*" to claim economic loss closes after five years. This is despite the fact that children will be injured who have a permanent loss of earning capacity, but who never get to claim it as their five years runs out whilst they are still at school.

At least adults get the chance to claim some economic loss – most kids will miss out entirely. This could be fixed by providing that any person under the age of 18 would have the right to claim economic loss (and redeem that claim) for a period of five years, commencing at age 18. This would apply to children who have a permanent impairment up to 10% and who can establish that they will in fact experience an economic loss in the future.

3. WEEKLY BENEFITS AND TAX

Part 3A.3 (Sections 65F-65ZC) appears to provide that weekly statutory benefits are calculated from **gross** earnings. Section 65L(2)(a) defines income from personal exertion to include earnings, salaries, wages, commissions, fees, bonuses and the like.

The payment of weekly benefits seems likely to require deduction of tax payments. The Bill is completely silent on the tax arrangements to be put in place, including the obligation of the CTP insurer to deduct the tax and mechanisms for the CTP insurer to report to the claimant the amount of tax deducted.

The latter can probably be dealt with through regulation, but if a CTP insurer is to make a deduction from a statutory payment, then it would seem sensible that the Act specify their capacity and obligation to do so.

The Solution:

(i) Add to Section 65ZC (which provides for payments to be made fortnightly) a provision for tax to be deducted from a payment and remitted to the Australian Tax Office as appropriate.

4. TAX PAID ON STATUTORY BENEFITS WHEN PURSUING A DAMAGES CLAIM

The following argument is technical and complex, but it is important for those who are seriously injured and have a damages claim.

Under the MAIA Bill, it seems that weekly statutory benefits are paid on a gross basis. The CTP insurer will be required to deduct tax.

When pursuing a damages claim, the common law principle is that damages are awarded on a net basis (as tax is not payable on lump sum compensation).

In pursuing a damages claim, both past and future losses are claimed and any statutory benefits paid are refunded pursuant to Section 65ZZH.

The problem is that Section 65ZZH(1)(b) requires repayment of the gross loss of earnings (from which tax has been deducted) whilst damages are only being paid for the net loss of earnings. The injured person is left out of pocket to the extent of the tax payments made whilst receiving weekly benefits.

This issue comes up in the current motor accidents scheme where there have been workers compensation payments made and tax deducted. In that special circumstance, the motor accident victim is able to claim and recover in the damages claim the tax paid (called *Fox v Wood* damages).

It is assumed that one of the unintended drafting oversights in this Bill is that there will now be a *Fox v Wood* gap in a damages claim. Given the drafting of s123A of the MAIA Bill, the *Fox v Wood* damages may not be recoverable in the damages claim.

The Solution:

(i) Amend the proposed s123A to specifically permit the recovery of tax paid on statutory weekly benefits (and workers compensation benefits where they have been paid instead of statutory benefits under this scheme). It would not be enough to amend the payback

provision as that would not cover the case where workers compensation benefits have been paid (with tax deducted) rather than motor accident statutory weekly benefits.

5. DON'T REDUCE WEEKLY BENEFITS FOR A JOB THAT DOESN'T EXIST

Section 65P(1)(a) provides that weekly entitlements can only be reduced during the first and second entitlement period for the capacity the injured person still has to earn in their pre-accident employment.

In short, if the claimant cannot perform their pre-accident job then entitlements will not be reduced because of a theoretical capacity to perform some other employment.

Section 65P(1)(b) provides that after the second entitlement period (18 months post-accident), benefits can be reduced if the person has the capacity to earn in any employment reasonably available to the person.

This means that if an injured school teacher with a traumatic brain injury is certified fit for 2 hours light duties per day in an unspecified position then their payments will be reduced just because the insurer asserts they are fit to work as a cleaner.

It is anticipated that in such cases, the CTP insurer would seek to reduce weekly payments by 10 hours per week on the basis of the capacity to perform light duties, even if no employment were actually available. The injured school teacher would find herself or himself fighting with the insurer over the interpretation as to what is *"employment reasonably available"*.

It is noted the Act provides that insurers are to assist the injured with vocational rehabilitation. The acid test of employment being reasonably available is that the insurer has found a job for the claimant and the claimant is refusing to work in it.

It is strongly recommended that Section 65P be amended to only allow for a reduction in weekly benefits where the insurer has found a job for the claimant and the claimant is refusing to perform it.

If the onus is put on insurers to find employment before they can argue for any reduction in weekly benefits, then insurers will take vocational rehabilitation seriously.

On the other hand, if insurers can obtain a reduction in weekly benefits without having to take job retraining seriously, then they can be expected to act accordingly. Weekly benefits will be cut on the basis of the medical certificate finding a fitness for restricted duties and restricted hours, not the availability of a job that matches the capacity.

The Solution:

(i) Amend Section 65P by adding subsection (4) in something like the following terms:

> *"'Where an insurer seeks to reduce weekly payments on the basis of a post-accident earning capacity, the onus is on the insurer to establish the availability of suitable employment in the pre-accident role under 65P(1)(a)) or the availability of suitable employment generally (under s.65P(1)(b)).*"

6. STOP CLAIMS ASSESSORS FROM REDUCING AN AGREED REDEMPTION

Section 65ZO provides for the Guidelines to specify cases in which a claim requires the approval of a claims assessor before it can be redeemed.

Section 65ZP(2) provides that the claims assessor may reject the agreed figure and substitute any amount the claims assessor deems adequate.

These are protective provisions designed to ameliorate the lopsided bargaining position of the parties – the knowledgeable insurer as against the uninformed claimant. The assessor's role is to make sure the claimant is not being short changed.

However, if these are protective provisions then why give the claims assessor the power to reduce an award of damages? If the powerful insurer makes a bad bargain, why do they deserve protection?

There may be cases where an insurer changes its mind about an agreement between the time an agreement is struck and the claims assessor considers the redemption. The insurer may submit to the assessor that the agreement should not be enforced and a lower amount should be awarded which would still be "*adequate*".

There is just no need for claims assessors to have the power to reduce agreed redemptions. A provision designed to protect claims should not be used against claimants.

If the argument is *"no assessor would ever lower the amount"* then there is no need for the assessor to have the power.

The Solution:

(i) Amend Section 65ZP(2) by removing the words *"an amount"* and substituting *"a higher amount*".

7. PROTECTING CHILDREN AND THE BRAIN INJURED

Currently, when a lump sum is awarded to a child, an adult with a legal incapacity (such as mental illness) or a person with a traumatically acquired brain injury, the damages are sent to the NSW Trustee and Guardian or a private trustee company to be managed. These institutions charge substantial fees – over the lifetime of a brain injured person, management fees on $1 million in damages would exceed $200,000.

Currently the costs of such management fees are recoverable. However, under the MAIA Bill there is no provision for the recovery of these fees for children and the brain injured. Unless this oversight is fixed, the costs of managing the funds will have to come out of the damages being awarded. This is simply wrong in principle. In relation to those with a brain injury, it is penalising some of the most severely injured.

It is noted that the MAIA Bill was amended in the Legislative Assembly to give claims assessors power to direct that damages be paid to the NSW Trustee and Guardian.

That amendment made no provision for appointment of a private trustee, which most prefer. Nor, critically, was there any proper consideration of management fees. In the Committee stage in the Legislative Assembly the Government spoke of covering those fees from the damages awarded - perhaps the speaker was unaware of just how significant the fees can be. It is hard to believe the Government means to penalise children and the most seriously injured in this way.

The Solution:

(i) Amend Part 3A.6 in relation to redemption of statutory benefit claims at 65ZO or 65ZP, perhaps adding to 65ZO additional paragraphs as follows:

(4) In approving a claim for a person with legal incapacity, the claims assessor shall make direction to provide for the safe and appropriate investment of the redeemed amount on behalf of the injured person.

(5) In approving the redemption of a claim for a person with legal incapacity, the claims assessor may add an appropriate sum to the redemption amount to reflect the future costs of financial management of the redeemed amount at a rate no greater than that charged by the NSW Trustee and Guardian.

With damages claims, Section 123A needs to be amended by adding 123A(1)(c), the costs of financial management of damages awarded, in order to allow those costs to be recovered separately..

8. CAPITAL COSTS FOR QUADRIPLEGICS AND PARAPLEGICS

Those with catastrophic spinal injury face a lifetime in a wheelchair. The Lifetime Care and Support ("LTCS") Authority will meet the costs of modifying a vehicle so that a paraplegic can still drive. They will meet the costs of modifying a home so that it is wheelchair friendly.

However, the LTCS Authority will not meet the capital costs of acquiring a suitable home or acquiring a suitable vehicle.

Currently, damages can be recovered on behalf of a paraplegic or quadriplegic to cover the capital costs involved. Damages have been recovered for a paraplegic who lived in a caravan and could not afford to buy accommodation to be modified. Damages have been recovered for a public transport user who post-injury had difficulty accessing public transport and needed to purchase a vehicle in order to have it modified. Such damages are regularly allowed in the ten or so significant spinal injury cases that arise each year. The total cost to the scheme is small, but the difference it makes to the lives of those who are catastrophically injured is significant.

The introduction of Section 123A and 124 and the provision that only damages for economic loss and non-economic loss may be recovered abolishes these claims (perhaps unintentionally).

The Solution:

(i) Remove Section 123A and 124 from the amending Act. They are not really necessary. If the intention is that future treatment expenses only be paid through the statutory benefit then this situation can be addressed by simply providing that, in a damages claim, no damages may be recovered for future treatment expenses where those expenses have been the subject of redemption as a statutory benefit.

(ii) Alternatively, Section 123A can be amended by adding s.123A(1)(c) to allow recovery of *"damages to cover the capital cost of equipment not otherwise provided for as a treatment expense."*

FURTHER AMENDMENTS

9. FARM WORKERS - THE DEFINITION OF "*EARNINGS*"

Section 65L(2)(a) endeavours to provide a comprehensive definition of income from personal exertion. However, there is concern that insurers will argue that earnings in kind may not fit within the scope of the definition. For example, the payment of board and lodgings to a farm worker would not be considered "*earnings*" or "*wages*". Board and lodging might arguably be considered "*allowances*", but if there is no actual monetary payment and just the provision of food and accommodation, then it is foreseeable that some insurer will seek to argue the issue.

Why risk ambiguity when clarity can be provided in the drafting of the Bill?

Exactly the same argument would apply to the provision of a company car, a company telephone and other non-wage benefits.

The Solution:

(i) Amend Section 65L(2)(a) to include reference to *"benefits"*.

10. OLDER WORKERS AND S 65R

This section provides that weekly payments terminate within twelve months for anyone who is injured and is already working past the statutory retirement age. For someone still earning at age 66, the mandatory assumption is that they will retire at 67. For anybody working past age 67, the mandatory assumption is that they will retire within twelve months of accident.

This frankly discriminates against those who have already demonstrated a will and a capacity to work past age 67. There are already caps upon the weekly payments and 5 year time limits upon the recovery of weekly payments. This additional restriction is unduly harsh.

Subsections (2) and (3) suffice to provide that for anybody under age 67, the assumption is made that they will retire at age 67. However, for somebody who has already proven a willingness to work beyond the retirement age, subsection (1) simply represents an unfair cap on their future earnings. It should be removed.

The Solution:

(i) Remove subsection (1) so that anyone who is actually over age 67 and still working is entitled to try and prove their future economic loss claim and continue receiving weekly payments (for up to 5 years) so long as a claims assessor can be satisfied that, but for the accident, they would continue to work. All of the other caps would still apply.

11. LUMP SUMS IN THE EVENT OF DEATH

Section 65ZZB(b) provides that no lump sum benefits are payable under the statutory scheme where the payment has not been made at the time of death. This could lead to insurers trying to string out the resolution of a lump sum benefits claim, hoping the claimant will die before payment has to be made.

The workers compensation scheme recognises an entitlement to lump sum benefits that have been clearly established prior to death and there is no reason for this scheme to be any different.

The Solution:

(i) Amend Section 65ZZB(b) to read:

> *"Statutory benefits under Part 3A.5 (lump sum statutory benefits for permanent impairment) are payable to the deceased's estate provided the deceased lived for more than six months post-accident and provided injuries are capable of assessment (in whole or in part) for the purposes of determining the applicable lump sum."*

12. STATUTORY BENEFITS AND THE UNINSURED DRIVER

Section 65ZZD provides that there is no statutory benefit if the at fault driver is using a vehicle that did not have motor accident insurance cover. This will not only apply to the drivers of unregistered motor vehicles, but also kids on trail bikes (on roads or public property).

If there has been a policy decision made that children on trail bikes should be excluded from the CTP scheme, whereas drivers of registered vehicles who lose control and cause accidents ought to be covered by the statutory benefit scheme, then so be it. However, there should be consideration of the more complex factual circumstances that sometimes arise.

Take for example, an accident where the fault primarily lies with the driver of a motor vehicle who turns across in front of a trail bike without seeing the trail bike rider. Assume there is some small degree of fault on the part of the trail bike rider, but that 90% of the responsibility lies with the driver of the registered vehicle.

In such circumstances, an insurer might argue that s.65ZZD relieved the insurer of the obligation to pay statutory benefits on the basis that the injury is (at least partially) due to the fault of the rider of the unregistered vehicle.

There is a risk that a small amount of contributory negligence on the part of the rider/driver of an uninsured vehicle will effectively become a complete defence to making statutory payments. This is presumably an unintended consequence of the drafting. It can be fixed.

The Solution:

(i) Amend Section 65ZZD to add the word "*sole*" in front of the word "*fault*" in the second line of subsection (1).

13. WORKERS COMPENSATION AND MOTOR ACCIDENTS BENEFITS

Under the statutory benefits component of the motor accidents scheme weekly benefits and treatment expenses are payable up to 5 years. However, a person is not entitled to statutory benefits if compensation is payable under the Workers Compensation Act. (Section 65ZZC(2) MAIA Bill).

The difficulty is that the payment of statutory entitlements under the workers compensation legislation is for a lesser period than under the motor accidents scheme. Under the amendments to workers compensation law passed in 2012, in most instances, weekly payments will stop after 130 weeks (2.5 years) and medical expenses will stop twelve months thereafter (3.5 years).

In the case of workers who do not receive weekly benefits, payment for the medical expenses stops twelve months after the claim was first made. There may also be cases, where weekly payments are made, that have those payments cut inside of two and half years because the insurer makes a work capacity decision as to the claimant's residual earning capacity.

None of these cut-offs or denials constitute a "*denial of liability*". Accordingly, the worker could be cut off under workers compensation legislation, but, because of the earlier payments, be unable to access rights under the motor accidents scheme. This anomaly needs to be addressed and fixed.

Someone should not be penalised from pursuing motor accident damages in circumstances where a workers compensation insurer is refusing to pay benefits (or no longer has an obligation to pay benefits) where the worker would otherwise be entitled to motor accident benefits.

14. FORCING INSURERS TO SHARE INFORMATION

Section 69A(2)(b) makes it a duty for a claimant to disclose all relevant information (including reports by health professionals) to the insurer in a timely manner. There is not the corresponding duty on an insurer. Under Section 69A(3)(b) the only duty on the insurer is to provide a claimant with details of the information (including reports by health professionals) relied on to make a decision on a claim.

An insurer could write to a claimant saying, "*We are denying your claim for weekly benefits on the basis of a medical report of Dr. Smith of 1 June*", without having to supply the report of Dr. Smith. The insurer could also write saying: "*We are denying your claim on legal advice that the circumstances of accident fall outside the scope of the legislation*", without supplying more details.

If claimants are being compelled to disclose all relevant information then why shouldn't the exact same onus be on an insurer?

The Solution:

(i) Make the onus on the insurer exactly the same as it is upon the claimant: *"A duty to disclose all relevant information (including reports by health professionals) in a timely manner."*

15. ASSISTANCE IN ASSERTING RIGHTS

Every single suggestion raised above is designed to protect the injured, predominantly by preserving rights that already exist and which are being unfairly or thoughtlessly cut. None of the suggestions above provide a single dollar in extra income for the legal profession.

It is only this part of the submission that addresses legal costs.

It is noted that in the Explanatory Memorandum to the Bill, Clause (K) provides:

> *"Generally, legal costs will not be recoverable for statutory benefit claims."*

This is despite the fact that there will be significant disputes within the statutory benefit scheme. These will include:

(a) Do the circumstances of the accident constitute a motor accident? [Is a boot or bonnet falling on someone's head a motor accident? Is a child's fingers jammed in an electric window by a sibling a motor accident?]

Insurers currently deny claims on the basis that the circumstances of accident do not fall within the scope of the Act. They will continue to do so.

(b) Insurers will dispute the treatment as reasonable and necessary.

(c) Insurers will dispute pre-accident earnings, residual earning capacity and wage rates.

(d) Insurers will send claimants to favoured medico-legal practitioners who specialise in finding nothing wrong with anybody. These reports will be used to deny treatment and deny economic loss claims.

(e) Insurers will haggle and negotiate over lump sum redemptions of future benefits.

(f) Insurers will make detailed written submissions to MAS (as they currently do) arguing that injuries should not be assessed over 10% WPI. Insurers will seek reviews and further assessments desperate to get injuries under 10% (or 20% where there is economic loss at stake).

(g) For the purposes of statutory lump sums, every single percentage point is important. Insurers will contest individual injuries on the basis that each 5% that can be cut from the WPI assessment saves the insurer money.

Each and every one of these disputes has the potential to be complex. With each and every one of these disputes the claimant, without legal advice, is in an extraordinarily poor position

to assert their rights. The reality is that without legal services, most claimants will not effectively assert their rights.

The statutory benefit scheme is going to deal with $1 million lump sums. For example, an above the knee amputee is going to recover over $150,000 for pain and suffering, anywhere up to $500,000 for future treatment expenses and possibly up to $500,000 for future loss of earnings. However, the future treatment needs are complex. The appropriate prosthetic needs, the time intervals for replacement and servicing, whether there should be a spare or recreational prosthesis and other questions all need to be properly addressed to recover the proper damages. Very few claimants could hope to take on an insurance company and fight these issues on their own. If no provision is made for legal assistance, then the claimant will be short-changed by hundreds of thousands of dollars.

There will apparently be scope to have guidelines providing for legal assistance in statutory benefits claims. However, the existence of such guidelines is inconsistent with the introductory note. It is suggested that the introductory note in the explanatory memorandum to the Bill, (Clause (K)) should be removed and that the Parliament should carefully scrutinise the guidelines as to their adequacy as and when they are provided.

With damages claims, the proposal is made in a schedule at the tail-end of the Act to remove contracting out from regulations that have not yet been supplied. Again, until the regulations are provided and the adequacy of payments to cover legal costs is established, why remove the right to contracting out?

The self-interest of the legal profession in this issue has to be fairly and frankly acknowledged. We want to be able to continue to help the injured to bring their claims and we want to be able to charge a reasonable fee for doing so. There is nothing dishonourable in making a living assisting the injured to assert the rights they have to adequate compensation for their injuries.

There are plenty of mechanisms already in place and additional mechanisms proposed within the Bill to regulate charging by the legal profession. Removing lawyers entirely (or setting such low fees that no competent services are available) only serves to profit the insurers and punish the injured.