THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC:JBsb101025

10 October 2025

The Hon. Greg Donnelly, MLC
Chair, Standing Committee on Law and Justice
Legislative Council
Parliament House
SYDNEY NSW 2000

By e-mail: law@parliament.nsw.gov.au

Dear Chair,

2025 REVIEW OF THE COMPULSORY THIRD PARTY INSURANCE SCHEME

The Law Society welcomes the opportunity to provide a submission to the Standing Committee on Law and Justice in relation to its 2025 Review of the Compulsory Third Party (**CTP**) insurance scheme. The Law Society's Injury Compensation Committee has contributed to this submission.

The *Motor Accident Injuries Act 2017* (NSW) (**MAI Act**), which commenced on 1 December 2017, established a new scheme of CTP insurance and system of benefits and support in relation to the death of or injury to persons as a consequence of motor accidents in NSW. The introduction of the MAI Act represented a major departure from the previous CTP scheme in NSW which was 'almost entirely based on injured persons recovering lump-sum damages from persons at fault in a motor accident, as compensation for injury and resulting loss'.[1]

In this submission, we suggest that the following changes to the scheme would assist in promoting its objectives, including providing timely access to statutory benefits for treatment, care and loss of income to assist injured people to return to work and other pre-injury activities:

1. Full implementation of the recommendations arising from the 2021 Statutory Review of the MAI Act (**Statutory Review**).
2. Legislative amendments to clarify definitions under the MAI Act, including 'public transport' and 'threshold injury', in light of recent case law.
3. Increased education of insurers on certain issues.
4. Minimising pressures facing the scheme.
5. Reasonable and appropriate legal costs in the CTP scheme.
6. Ensuring NSW is at the forefront of developments in the motor accident landscape.

[1] Clayton Utz, Statutory Review of the Motor Accident Injuries Act, *Discussion Paper*, 5 July 2021, 3: https://www.sira.nsw.gov.au/__data/assets/pdf_file/0007/994471/Statutory-review-of-the-Motor-Accident-Injuries-Act-2017-discussion-paper.pdf.

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1. Full Implementation of the recommendations arising from the Statutory Review

The Statutory Review undertaken by Clayton Utz in 2021 resulted in 49 recommendations. The Law Society supports those recommendations and is pleased that a number of them have been implemented through the *Motor Accident Injuries Amendment Act 2022* (NSW).[2]

We support implementation of the outstanding recommendations from the Statutory Review and particularly highlight the following, which we consider will be of benefit to the scheme:

a) Removal of 'adjustment disorder' from the definition of threshold injury

The Statutory Review recommended that 'adjustment disorder' should not be included within the definition of 'minor injury' (now 'threshold injury') because the diagnosis is not an indication that the injured person's psychiatric injury will resolve by 26 weeks after the accident.[3] The Law Society is of the view that same rationale applies notwithstanding the extension of the first entitlement to statutory benefits to up to 52 weeks.[4]

Categorising all adjustment disorders as threshold injuries is at odds with the experience of our members that many claimants who suffer from a chronic adjustment disorder continue to experience disabling symptoms years after the accident.

Further, psychiatric injuries are not time dependent and/or often have a delayed onset of symptoms. As a consequence, if a person has sustained a significant psychiatric injury, they may not be able to be fully diagnosed less than nine months post-accident, at which time an insurer is required to make its second liability determination.

b) Threshold injury and permanent impairment

The Statutory Review recommended that injured persons with a degree of permanent impairment greater than 10% should be entitled to claim damages irrespective of the 'minor injury' (now 'threshold injury') classification of their injuries.[5]

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[2] Important changes to the MAI Act through the *Motor Accident Injuries Amendment Act 2022* (NSW) included:
- Ensuring the Nominal Defendant is liable in statutory benefit claims in the same way it is liable in common law damages claims (MAI Act s 1.10A).
- The extension of statutory benefits for weekly compensation and medical treatment from 26 to 52 weeks to injured persons wholly or mostly at fault, or injured persons with a threshold injury (MAI Act ss 3.18 and 3.28).
- No longer requiring internal review in relation to a decision relating to the degree of permanent impairment (MAI Act s 7.19).
- Requiring an insurer's second liability notice to be lodged nine months rather than three months after a claim is made (MAI Act s 6.19).
- Removal of the 20-month waiting period required before commencing a damages claim where the injured person's whole person impairment (WPI) does not exceed 10% (MAI Act ss 6.14, 6.23, 7.33).

[3] Clayton Utz, Statutory Review of the Motor Accident Injuries Act, *Final Report*, 22 September 2021, 87-88, Recommendation 34: https://www.sira.nsw.gov.au/__data/assets/pdf_file/0017/1031390/Statutory-Review-of-the-Motor-Accidents-Injuries-Act-2017-Report.pdf (**Statutory Review Final Report**).

[4] MAI Act, ss 3.18 and 3.28.

[5] Statutory Review Final Report, Recommendation 36, ss 89-90.

The Review noted the anomalous situation where a person has multiple threshold injuries (and no injuries that are not threshold injuries) but permanent impairment of greater than 10%.[6] We consider that it is in keeping with the objectives of the Scheme that all seriously injured people (including those that fall within this category) are given the right to claim damages for non-economic loss.

c) Reversal of a threshold injury decision

Recommendation 39 of the Statutory Review proposed that a change of the insurer's position in relation to classifying a person's injuries as threshold injuries should be confirmed independently if the change occurs more than 18 months after the motor accident.[7]

The Law Society agrees with the rationale set out in the Statutory Review that the reversal of an insurer's position at a later stage, while necessary in certain circumstances, may adversely affect the injured person's treatment and financial support at a time when they might think that the issue has settled.[8] An independent assessment is therefore warranted in the interests of fairness.

d) The 5% discount rate on future economic loss

Section 4.9 of the MAI Act sets out that an award of damages in respect of future economic loss is to be qualified by adopting the prescribed discount rate, which is the rate set by the *Motor Accident Injuries Regulation 2017* (NSW) (**Regulations**), or 5% if no rate applies. Recommendation 18 of the Statutory Review was as follows:

> The Minister consider the making of a regulation under section 4.9(2)(a) of the Act to specify a discount rate lower than 5% and which properly qualifies the present value of future economic loss.[9]

The Law Society supports this recommendation, noting its particular importance for young people who are catastrophically injured and have needs above and beyond the treatment and care that can be provided under the Lifetime Care and Support Scheme.

2. Legislative amendments to clarify definitions under the MAI Act, including 'public transport' and 'threshold injury', in light of recent case law

There have been a number of recent NSW Court of Appeal decisions which have highlighted a lack of clarity arising from various provisions in the MAI Act. We encourage legislative amendments to ensure certainty within the CTP scheme with regards to the following:

a) Public Transport Accidents

Legislative reform is required to address continuing legal uncertainty for people injured in public transport accidents. The recent Court of Appeal decision in *McTye v Ching Yu Chang by his tutor Leo Alexander Birch* [2025] NSWCA 3 found that a motor vehicle accident involving state operated buses, regardless of whether

[6] Ibid., 90.
[7] Ibid., Recommendation 39, 93-95.
[8] Ibid.
[9] Ibid., Recommendation 18, 191.

they occur before or after 1 December 2017, will have damages assessed in accordance with the *Motor Accidents Compensation Act 1999* (NSW).

In that decision, Bell CJ, Basten AJA and Griffiths AJA expressed the view that legislative simplification in this area is desirable. This is important given the fact that there remains uncertainty as to whether a motor vehicle accident involving a privately operated bus under contract to the Government would be treated in a like manner to a State operated bus. Griffiths AJA noted the following at [74]:

> The experience of the present litigation highlights the need to simplify and make more coherent the tangled web of legislation which is potentially relevant in determining the rights and liabilities of injured persons and CTP insurers respectively concerning public transport accidents. Further clarification and rationalisation is needed if, for example, the administration of the 2017 Act is to achieve the stated policy objectives set out in s 1.3 of keeping all CTP premiums affordable and keeping the overall costs of the scheme within reasonable bounds.

We agree with the observations of Griffiths AJA that clarity on public transport accidents under the CTP scheme should be achieved by legislative reform rather than through litigation. This is relevant given that the Government frequently contracts private bus companies to administer public transport services. We therefore support reform to clarify the definition of 'public transport accident' for the purpose of the MAI Act.

b) Definition of 'threshold injury'

We support legislative reform to clarify the definition of 'threshold injury' under the MAI Act.

The recent NSW Court of Appeal decision in *Allianz Australia Insurance Limited v Estate of the Late Summer Abawi* [2025] NSWCA 85 clarified that an injury to the skin, which is not also an injury to nerves, is a 'soft tissue injury' (and therefore threshold injury) as defined in s 1.6 of the MAI Act. Despite this clarification, uncertainties arising from the definition of 'threshold injury' remain. One example could be whether skin injuries, which also involve an injury to nerves, are similarly characterised as threshold injuries. Kirk AJA suggested at [66], for example, that skin injuries caused by burns or road rash 'may well fall outside the definition'.

The Law Society encourages consultation on possible amendments to 'threshold injury' to achieve greater definitional clarity. A comprehensive review of the functioning of the threshold injury definition is timely given its pivotal role in the functioning of the scheme and the fact that no focused review of the definition has been conducted since the State Insurance Regulatory Authority (**SIRA**) considered the former 'minor injury' definition in 2019.[10]

c) 'Threshold injury' - Impact of consequential surgery

In *Mandoukos v Allianz Australia Insurance Limited* [2024] NSWCA 71, Stern JA (with whom Leeming JA and Kirk JA agreed) made comments in obiter at [54] which cast doubt on whether 'reasonable and necessary'

[10] SIRA, *Review of Minor Injury Definition in the NSW CTP Scheme*, Report, February 2020: https://www.sira.nsw.gov.au/__data/assets/pdf_file/0005/600737/Review-of-Minor-Injury-Definition-in-the-NSW-CTP-Scheme-report.pdf.

surgery, caused by an injury sustained in a motor accident, fell within the definition of 'injury' in s 1.4 of the MAI Act. Her Honour reasoned that 'injury' involved some kind of harm or detriment to a claimant, whereas surgery is typically performed for the claimant's benefit rather than the claimant's detriment. It followed that if changes to a claimant's body caused by consensual surgery did not constitute an injury for the purposes of the MAI Act, those changes could not constitute a non-threshold injury which would entitle the claimant to ongoing statutory benefits and common law damages.

We suggest that the definition of 'injury' in s 1.4 of the MAI Act should be amended to accommodate physical changes caused to the claimant's body by surgery, provided the surgery is related to the injuries caused by the accident and is a reasonable and necessary response to those injuries.

d) Medical causation disputes

As set out in the Court of Appeal decision in *Allianz Australia Insurance Limited v Bell* [2025] NSWCA 187 (***Allianz v Bell***), '(f)or the purposes of the scheme of motor accident compensation in NSW, causation is a matter for the medical assessor and Review Panel, but the question of whether or not the events which caused a relevant injury constitute a "motor accident", as defined, is a matter for the court.'[11]

We agree that it is entirely appropriate that a medical assessor/Review Panel has exclusive jurisdiction to determine a medical dispute concerning an injury, but does not have jurisdiction to decide legal issues, even if the dispute is at the Review Panel stage where a legal member is present. In *Allianz v Bell*, the issue was complicated by the fact that the Review Panel was required to make a Whole Person Impairment (**WPI**) assessment where there was a dispute about whether the incident involved two events, only one of which was said to fall within the scope of s 1.9(1) of the MAI Act.

A practical consequence of requiring the Review Panel to make its WPI assessment, by reference to injuries which may subsequently be held by the Personal Injury Commission (**PIC**) not to fall within the scope of s 1.9(1), means that a further medical assessment may be required to determine WPI arising from the 'motor accident' as defined for the purpose of the statutory scheme.

In the interests of efficiency, we suggest that it would be desirable for there to be a mechanism by which the PIC Member can, at the outset, make a finding as to legal causation, and direct the Medical Assessor to conduct their assessment by reference to that finding.

3. Increased education of insurers on certain issues.

In light of SIRA's role as scheme regulator, we encourage it to undertake further education with insurers on the following issues, which have arisen in recent case law and have been observed by our members in the course of their practice.

[11] *Allianz Australia Insurance Limited v Bell* [2025] NSWCA 187 at [4] (Payne JA).

a) The use of psychometric testing

Section 6.7(1) of the MAI Act permits a claimant to decline to comply with a request for an examination which is 'unreasonable, unnecessarily repetitious or dangerous'. As a result, unless a treatment provider or independent medical expert requires psychometric testing to provide an opinion on the injured person's alleged injuries and disabilities, it would normally be impermissible for insurers to require a claimant to undertake such testing.

We acknowledge that there can be a valid role for the use of psychometric testing in cases involving allegations of cognitive deficits (eg impairment of memory or concentration), but only where the 'overriding purpose' of the testing is to determine an aspect of the alleged injuries or disabilities, as opposed to impugning the injured person's credibility.[12]

We note concerns raised by some of our members that the law around the appropriate use of psychometric testing is not well-understood by all insurers, and therefore suggest that it would be useful for SIRA to reinforce this issue as part of its educative role.

b) Panel rehabilitation providers

In our view, injured persons are sometimes unaware that they are able to select a rehabilitation provider to assist their recovery. We suggest as part of its education of insurers, SIRA should emphasise that this should be communicated directly to claimants, considering that where an injured person selects a rehabilitation provider, they may feel more empowered in their recovery. Additionally, it may also be appropriate for insurers to be required to propose up to three different providers to an injured person to offer them more options for their consideration.

4. Minimising pressures facing the Scheme

a) Delays in the PIC

In the experience of our members, there continue to be delays in the PIC, including for panel reviews of single medical assessment disputes, in particular those involving psychiatrists.[13] We support the efforts of the PIC to address these delays and look forward to the results of the PIC's Psychiatry Medical Review Panel Pilot.

b) Shortage of doctors in the scheme

Our members have observed an increasing shortage of doctors available for medico-legal appointments who are willing to charge regulated fees. As a result, parties are having to wait for extended periods of time, which extends claim duration and is contrary to the objects of the scheme, which emphasise early and appropriate

[12] Note the discussion in *Maea v Acciona Infrastructure Australia Pty Ltd* [2025] NSWSC 567 at [17] where Justice Harrison endorsed the 'overriding purpose' approach and canvassed the authorities on the exercise of the Court's discretion under UCPR 23.4 to direct a claimant to participate in a medical examination, including *Rowlands v State of New South Wales* (2009) 74 NSWLR 715; [2009] NSWCA 136 and *Chopra v State of New South Wales (South Western Sydney Local Health District)* [2023] NSWCA 142.
[13] PIC, *Annual Review 2023-24*, 48.

treatment and care. We understand that SIRA is looking into this issue, which is important given the critical role played by doctors and medical professionals in the administration of the scheme.

5. Reasonable and appropriate legal costs in the CTP scheme

The Law Society continues to be concerned that the current level of regulated costs is insufficient to meet the actual costs of providing advice in motor accident matters.

The fact that there is typically no entitlement to paid legal costs until a dispute proceeds beyond the internal review stage means that lawyers are required to undertake significant unpaid work. Further, the regulated fee for certain items, for example, the determination of threshold disputes and complex treatment disputes is inadequate for the time required to undertake such work.

An inadequate costs regime has flow-on effects for access to justice. It means that clients must rely on lawyers providing their services pro bono at different stages through the matter, in order to be guided to navigate a complex scheme. The extent of the impact of the current regulated costs regime on access to justice was highlighted in the Taylor Fry Report.[14] Its authors noted that those without legal representation are less likely to seek an internal review despite evidence that, if they did instruct lawyers, a significant proportion would be successful. Further, some claimants are more likely to be aware of and claim their entitlement if lawyers are engaged.[15] While we acknowledge that programs like CTP Assist can assist claimants with basic information about the scheme, support call operators are not in a position to provide legal representation. Further, the CTP Legal Advisory Service can only provide legal advice on discrete matters, rather than on the claim as a whole.

Other areas where claimants without legal representation are at a distinct disadvantage include the calculation of pre-accident weekly earnings (**PAWE**) for the purpose of calculating weekly benefits under the MAI Act. The complexities associated with PAWE calculations result in regular use of forensic accountants by insurers which increase disputes in the PIC and costs within the scheme.

In our view, any discussion of regulated legal costs should give proper weight to the access to justice concerns of injured persons without legal representation and the way in which timely, professional paid legal advice can have a positive impact on the scheme's efficient operation as a whole.

a) Maximum legal costs under clause 25 of the Motor Accidents Injuries Regulation 2017

The Law Society continues to be concerned by the impacts of the so-called 'contracting out' provisions under cl 25(1)(e) and 25(2) of the Regulations. Our correspondence to SIRA on this issue in November 2024 is attached, which sets out our concerns in detail.

[14] Taylor Fry, Review of legal support for people injured in the NSW CTP Scheme (3 September 2021): https://www.sira.nsw.gov.au/__data/assets/pdf_file/0017/1012481/Taylor-Fry-Review-of-legal-support-for-people-injured-in-the-NSW-CTP-Scheme.pdf.
[15] Ibid., 5.

6. Ensuring NSW is at the forefront of developments in the motor accident landscape

We consider it important the Government continue to engage proactively with new and emerging trends and developments in the motor accident landscape, including as regards to e-bikes/e-scooters and autonomous vehicles.

a) E-bikes and e-scooters

The Parliamentary Inquiry into the use of e-scooters, e-bikes and related mobility options conducted by Portfolio Committee No 6 – Transport and the Arts (Portfolio Committee No 6) recommended that the 'NSW Government investigate, as a matter of urgency, potential settings to create a viable model for e-mobility insurance, including compulsory insurance for owners/riders'.[16] We note that the Government has accepted this recommendation in principle, including through a consideration of existing insurance settings.

The Law Society considers that it will be important for the Government to consult with stakeholders, including the legal profession, on any proposals in relation to these issues. As noted in our submission to the Portfolio Committee, the consultation should not be confined to an examination of a regulatory model based on, or integrated with, the current CTP scheme. There may be other options that are potentially less costly and burdensome, such as requiring escooter/e-bike riders to take out tailored personal accident and public liability insurance.

b) Autonomous vehicles

We consider it important for the NSW Government and SIRA to be actively involved in the work being undertaken by the National Transport Commission in relation to autonomous vehicles. Early consultation on emerging issues will help to ensure that the considerations of the NSW CTP scheme are taken into account in national policy conversations around the end-to-end regulation of autonomous vehicles.

Thank you again for the opportunity to contribute. Should you have any further queries in relation to this submission, please contact Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

pp.
Jennifer Ball
President

Attachment

[16] Portfolio Committee No 6 – Transport and the Arts, 'Use of e-scooters, e-bikes and related mobility options', Report, February 2025, Recommendation 33: https://www.parliament.nsw.gov.au/lcdocs/inquiries/3052/Report%20No%2025%20-%20Portfolio%20Committee%20No.%206%20-%20Transport%20and%20the%20Arts%20-%20Use%20of%20e-scooters,%20e-bikes%20and%20related%20mobility%20options.pdf.

THE LAW SOCIETY
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Our ref: ICC:BMsb211124

21 November 2024

Lauren Sayer
A/Executive Director, Motor Accident Insurance Regulation
State Insurance Regulatory Authority
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Sydney NSW 2000

By email: CTPpolicy@sira.nsw.gov.au

Dear Ms Sayer

Maximum legal costs under clause 25 of the *Motor Accidents Injuries Regulation 2017*

The Law Society is writing to you in relation to costs in damages claims in the Motor Accidents scheme. In particular, we wish to note our concerns in relation to clauses 25(1)(e) and 25(2) of the *Motor Accidents Injuries Regulation* (**2017 Regulation**). Given the 2017 Regulation is due to be automatically repealed under the *Subordinate Legislation Act 1989* (NSW) on 1 September 2025, we seek to alert the State Insurance Regulatory Authority **(SIRA)** to the issues raised in this submission ahead of any consultation next year on its remake.

Background to the current provisions

***Motor Accidents Compensation Act 1999* (NSW) (MACA Act) – Accidents occurring before 1 December 2017**

In 2016, the *Motor Accidents Compensation Regulation 2015* (**2015 Regulation**) was amended by the *Motor Accidents Compensation Amendment (Claims) Regulation 2016*. The changes:

1. Prohibited contracting out of regulated solicitor-client costs for damages claims for a settlement or award of not more than $50,000.
2. Protected the first $50,000 of a settlement or award from solicitor-client costs.

This amendment was based on an interim solution proposed jointly by the Law Society, the NSW Bar Association and the Australian Lawyers Alliance, in response to the reported increase in legally represented small claims in the scheme. The rationale behind the 'contracting out' provision was primarily the protection of claimants from excessive legal fees in small claims.

The *Motor Accidents Compensation Regulation 2020* (**2020 Regulation**) replaced the 2015 Regulation. The introduction of clause 8(6) in the 2020 Regulation means that insurers' representatives are now exempt from the contracting out provisions outlined above for the purposes of the MACA Act.

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Motor Accidents Injury Act 2017 **(NSW) (MAIA) – Accidents occurring on or after 1 December 2017**

The 2017 Regulation made under the MAIA Act carried over the 'contracting out' provisions to the new scheme. However, the threshold for contracting out of regulated solicitor-client costs under clause 25(1)(e) of the Regulation was increased from $50,000, as it had been under the 2015 Regulation, to $75,000. Clause 25(2) provides that the maximum costs recoverable in any such matter on a practitioner-client basis are fixed at the amount calculated by subtracting $75,000 from the amount paid in resolution of the claim.

Application of the 'contracting out' provisions to insurers' representatives

Unlike the 2020 Regulation, the 2017 Regulation has not been amended to exempt insurers' representatives from the 'contracting out' provisions. We consider this to be an anomaly, given the rationale for their introduction was to contain the legal fees payable in small claims and therefore serve a protective purpose in relation to the claimant. This policy underpinning is reinforced in section 8.3(2) of the MAIA, which provides that the 'regulations may fix maximum costs for legal services provided to a claimant by reference to the amount recovered by the claimant'. There is no corresponding provision in the MAIA which refers to legal services provided to an insurer.

We offer the following examples provided by our members which illustrate the problems associated with the application of the 'contracting out' provisions to insurers' legal representatives.

Example 1 – Non-economic loss

Several members have cited matters where the only significant head of damage is non-economic loss. In these matters, the original medical assessment in the Personal Injury Commission (**Commission**) found that the claimant's permanent impairment was greater than the 10% threshold, thereby opening up an entitlement to recovery of damages of non-economic loss under section 4.11 of the MAIA. The insurers' representatives advised their clients to appeal the medical assessments, and the Review Panel at the Commission subsequently overturned the decisions. The matters therefore resolved for nominal damages.

Example 2 – Claims requiring extensive investigation

A further example is a matter where the insurer's solicitors received instructions in 2020 to act in a claim for damages under the MAIA. Initially, damages were expected to exceed $400,000, including non-economic loss. The solicitors conducted extensive investigations of the claim, which revealed that the claimant had provided false and misleading information to medical assessors and was running a concurrent claim with similar allegations of loss. The claimant was assessed by the Commission to have an impairment under the 10% threshold.

The matter resolved in 2024 when the claimant accepted the insurer's final offer of $100,000 inclusive of costs. Due to the complexity of the claim, the insurer's representatives' costs were approximately $80,000. Under clause 25(2) of the 2017 Regulation, the insurers' solicitors were restricted to charging $25,000 and were therefore required to write off costs of approximately $55,000.

Example 3 – Claims involving fraud

Another example is where the insurer's solicitors received instructions in 2021 to act in a claim for damages under the Act. In the course of their investigations, the solicitors identified that the claimant had fabricated evidence of employment which was relied upon to make a claim for $350,000 in economic loss. In 2023, prior to the insurer applying to have the claim exempted from the Commission, the claimant abandoned the economic loss claim and the matter settled for less than $40,000.

Under clause 25(1)(e), the insurer's legal representatives were not permitted to contract out of the regulated solicitor-client costs contained in Schedule 1. The insurer's solicitors' costs were approximately $58,000. Counsel's fees were $5,940. Total fees for legal representation under Schedule 1 amounted to $11,600. Counsel accepted a reduced fee, and the insurer's solicitors were required to write off approximately $50,000.

Unfair operation of clause 25 in relation to insurers

In our view, it is unfair that the insurers' representatives in the examples cited above lost their entitlement to recover solicitor-client costs on negotiated, commercial terms. These were all matters where the solicitors expended significant time investigating the claim and, as a direct consequence of their efforts, were required to write off significant costs. In the experience of our members, it is not uncommon that the ultimate value of a damages claim does not become known until after the insurer's solicitors have conducted their investigations. Given the requirement under section 6.39 of the MAIA for insurers to take all reasonable steps to deter and prevent the making of fraudulent claims, it is often required of insurers' representatives to undertake this work.

In the three examples cited above, the insurers' representatives are acting in accordance with their professional obligations by advising their client, for example, to appeal a medical assessment in the Commission (see example 1), or not to accept the claimant's offer but to challenge the claim based on unreliable evidence or fraud (see examples 2 and 3). The prohibition on contracting out has meant, however, that the solicitors in these matters must bear the significant cost of pursuing the lowest settlement amount for their insurer clients.

We consider there is no policy rationale for clauses 25(1)(e) and clause 25(2) to apply to insurers' solicitors. The costs of solicitors representing insurers are subject to considerable scrutiny and compliance requirements in accordance with the insurer's legal panel contracts and the application of the 'protective' provisions of clause 25 are therefore unnecessary.

We also consider that, given the changes brought about by the 2020 Regulation, it is appropriate and in the interests of consistency as far as possible between the MACA and the MAIA, that insurers' representatives receive an exemption in identical terms to clause 8(6) of the 2020 Regulation.

Application of the 'contracting out' provisions to claimants' representatives

The Law Society also suggests that further consideration is given to whether the 'contracting out' provisions continue to be necessary for claimants' representatives. While the Law Society supported the introduction of the provisions as an interim measure under the former scheme, the experience of our practitioners now suggests that this provision may have outlived its utility, particularly given the protections for claimants which underpin the new scheme.

As noted above, the MACA was affected by an increased frequency of small claims. Various mechanisms were introduced in the MAIA and the 2017 Regulation to protect against replication of similar problems in the new scheme. These include section 4.4, which prohibits damages being awarded to a person whose only injuries resulting from the motor accident are threshold injuries, and section 3.28, which concerns cessation of statutory benefits for treatment and care. These sections, coupled with the prohibition on contracting out of the regulated costs in statutory benefits disputes, means that it may not be financially sustainable for some claimant lawyers to act in matters involving small claims.

The following examples are illustrative of this issue:

Example 1 – Claim where damages are likely to fall below the $75,000 threshold

One of our members is representing an insurer in a matter brought by a self-represented claimant who, due to a psychological condition, is unable to deal directly with the insurer. While the insurer has admitted liability, damages are likely to fall below the $75,000 threshold. The

claimant has not been able to find a solicitor to represent her in this matter, which means that she is disadvantaged, as is the insurer's representative, who must spend considerable time dealing with the claimant.

Example 2 – The retired claimant

Another member has noted access to justice issues in the example of a retired person, who has no entitlement to economic loss, and where there is doubt around whether they will reach the impairment threshold for claiming non-economic loss. The operation of clause 25(2) of the 2017 Regulation means that a claimant's solicitor would be unlikely to take on this type of case, given at the conclusion of the matter, the majority (if not all) professional fees may be required to be written off.

Options for change

We consider that, in addition to reviewing the suitability of the $75,000 threshold for claimants' solicitors and whether a lower threshold may be appropriate, SIRA should consider and consult on the efficacy of models in other jurisdictions.

Thank you for your consideration of these matters. We look forward to discussing these matters with SIRA in the context of the Motor Accidents Forum. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at sophie.bathurst@lawsociety.com.au or (02) 9926 0285.

Yours sincerely,

Brett McGrath
President