

# **SUBMISSIONS OF THE LAW SOCIETY OF SOUTH AUSTRALIA ACCIDENT AND COMPENSATION COMMITTEE TO THE *MOTOR VEHICLES (THIRD PARTY INSURANCE) AMENDMENT BILL 2010***

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## **INTRODUCTION**

In the past, the Law Society of South Australia (**the Law Society**) has been engaged in regular and open dialogue with the South Australian Motor Accident Commission (**MAC**), particularly prior to any proposed legislative changes to the Compulsory Third Party Scheme (**the Scheme**). On 20 September 2010 the Law Society received a copy of the *Motor Vehicles (Third Party Insurance) Amendment Bill 2010* and a copy of the Second Reading Speech from Hansard, from the Honourable Mr Iain Evans, State Member for Davenport.

The report on the Bill advised that MAC in consultation with its key stakeholders and partners had developed a series of legislative amendments. Consultation with the Law Society did not occur.

At the first available meeting of the Accident Compensation Committee (**ACC**) of the Law Society, on 12 October 2010, it was resolved that a Sub-Committee be formed to make submissions in respect of the Bill.

The Sub-Committee comprised a balance of insurer legal representatives and claimant legal representatives.

The views expressed herein are the views as expressed by the Sub-Committee and endorsed by the Committee and made on behalf of the Law Society. A copy of these submissions will be forwarded to the Law Society of South Australia Council, MAC,

Allianz Australia SA CTP (**Allianz**) as the current insurer agent and the Honourable Iain Evans.

## **RECOVERY FROM HIT AND RUN DRIVERS**

The Sub-Committee considered that the proposed amendments to section 124A of the Act, allowing for MAC to pursue recovery from parties who commit offences as against 43 of the *Road Traffic Act 1961*, is a “blanket” concept and does not take into account the circumstance of the breach of Section 43 of the *Road Traffic Act*. For example, *if a group of partygoers were positioned just around the corner not visible to a motorist and the motorist then rounds the corner, brakes, but is not able to avoid a collision and one of the partygoers is injured but before the motorist is able to render assistance, other partygoers threaten him and for his own safety he decamps*, is recovery seriously intended in those circumstances? Examples such as this, increase litigation and cost to the scheme.

It is also not clear what the connection between the offence created by s43 and the right to recover is, unless it could be shown that the failure to render assistance has compounded the injuries.

## **CHAIN OF RESPONSIBILITY IN HEAVY ROAD TRANSPORT**

The Sub-Committee consider that the use of wording “party” is so broad and “chain of responsibility” so complex that it will likely involve lengthy investigation, legal disputation, costs and uncertainty with reference to apportionment of liability and recovery of excess.

Those contemplated to be captured will have serious insurance issues if they are pursued.

## **EXCESS RECOVERIES**

The Sub-Committee did not consider that the proposed amendments increasing and indexing the amount of excess to be recovered by MAC, required any further comment.

However, The Bill does not remedy previous complaints in circumstances where Recovery has been sought and the Notice of such intended Recovery is not communicated to a party in a timely manner, therefore prejudicing the affected party.

## **RECOVERY FOR BAC OFFENCES**

As to recovery for BAC offences, the major issue is whether the current expert evidence is that if a driver who is partly responsible for a collision has a BAC of 0.1% it can be assumed that on balance alcohol is likely to have contributed to that driver's degree of responsibility for the collision (whatever may constitute that responsibility). If the current expert evidence is to this effect, then the amendment seems appropriate. If it is not this clear cut, then the amendment should be opposed in circumstances where there is no need to establish any connection between the BAC reading and the responsibility.

## **SANCTIONS AGAINST NON-COOPERATIVE INSUREDS AND NOMINAL DEFENDANT'S POWERS TO COMPEL UNINSURED DRIVERS TO COOPERATE**

The Sub-Committee did not consider that the proposed amendments increasing and indexing the amount of excess to be recovered by MAC, required any further comment.

## **PROVISION OF EVIDENCE**

The proposed amendments, in their current form, are strongly opposed by the Sub-Committee.

It is understood the intention is to have early access to information which allows better decision-making in relation to liability and quantum.

The strong concern of the Sub-Committee is that it has the potential to create firstly an uneven playing field, in that a claimant is required to give information regarding, in particular, liability without an equal requirement on the part of Allianz to share relevant non-privileged information concerning the same.

The view of the Sub-Committee is that wording such as "*to cooperate fully with the insurer*" is too wide and requires refinement as to what information can and cannot be relevantly and reasonably sought by the insurer and when such information is to be sought.

### **Liability – Section 127AB 1(b)**

MAC/Allianz has access to SA Police Vehicle Collision Reports which, in the normal course, are documents produced to Allianz and MAC, but in practice are not released by them to claimants.

In relation to liability early provision of such information to claimants and Allianz can assist in determining the parameters of any potential dispute as to the version of events.

If the aim of the amendments is for information to be available so that early resolution can be achieved, then this will be best achieved where there is equal access to information.

The Sub-Committee considers that if a claimant must "*cooperate fully with any request*", then there should be reciprocal rights for the claimant to access all relevant information as to the defendant's/insured's version of the events.

### **Damages – Section 127AB(2)**

The scope of Section 127AB(2) is uncertain, in that it is limited to the concept of a "*reasonable request*" by Allianz. In accordance with the usual principles of litigation, the Sub-Committee strongly believes that the section should reflect access only to reasonable and relevant information.

There is also concern as to what is intended by the concept of reasonable. In particular, the limits of information that may be requested under the context of being reasonable. There is significant concern that whilst the stated purpose is to assist with the early resolution of disputes, the wording is so broad as to invite legal disputation, costs, uncertainty and a general level of distrust which will not be conducive to the stated goal of resolution.

The Sub-Committee strongly believes that a more targeted approach to the information that is being sought is appropriate. In Queensland the *Personal Injuries Proceedings Act 2002*, by its Regulations, stipulates the information that an intending claimant must submit to the insurer before commencing a claim. It identifies the classes of documents such as income tax records and other such information.

In South Australia, a like concept is expressed in the Supreme and District Court Rules 2006 where specific information is required to be given in the Statement of Loss and in the Magistrates Court by Form 22 Particulars.

The Sub-Committee would support amendment which would enumerate the information that is sought both in relation to liability and in relation to the quantification of the claim. For ease of reference, the Sub-Committee attaches, by way of example

only, an extract from the *Personal Injuries Proceedings Regulation 2002* in Queensland at Part 2, which sets out in detail information that claimants can be required to provide. There would need to be further consultation as to what information should be required to be provided in this State to achieve the intended goal of timely information and the potential for early resolution.

It must be noted that whilst a claimant is required to provide such information in Queensland, there is a reciprocal requirement that respondents, which would include Allianz, should also provide access to relevant material. Again by way of example, Section 27 of the *Personal Injuries Proceedings Act 2002 Queensland* provides that a respondent to a claim must provide information “*directly relevant*” to a claim as follows:

1. Reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates.
2. Reports about the claimant’s medical condition or prospects of rehabilitation.
3. Reports about the claimant’s cognitive, functional or vocational capacity.
4. Information that is in the respondent’s possession about the circumstances of or the reasons for the incident.
5. If the respondent is an insurer of a person for the claim, information that can be found out from the insured person for the claim about the circumstances of or the reasons for the incident.

### **Section 127AB(3)**

It is the Sub-Committee’s submission that if a claimant is required to give information verified by Statutory Declaration, then the same should be a requirement of any respondent providing information. It is imperative that any requested information should be both reasonable and based upon matters which are directly relevant to the claim.

#### **Section 127AB(4)**

Should there be a failure to comply with section 127AB (3) this will statute bar and preclude a claimant from issuing proceedings. This does not accord with *section 36 of the Civil Liability Act 1936* and if section 127AB were to be put in practice would cause frustration and costs in the Court system in relation to application for the extension of any expired limitation period.

Pursuant to case flow management principles, the insured's ability to request information and documents should be limited to the pre-action stage as the Court has processes and procedures with respect to matters once actions are issued.

#### **Fraud - Section 127AB(5)**

The Sub-Committee has concerns with respect to this amendment.

If it is to be enacted, the Sub-Committee recommends wording which deletes "*misleading*" so that the focus is on the provision of false information.

An alternative is to rephrase the provision as follows:

*"A claimant must not furnish information or produce a document or record under this section that is to his or her knowledge misleading in a material particular or is to his or her knowledge, false in a material particular."*

Further, the principal of Privilege against Self Incrimination should remain in tact.

#### **EXPOSURE OF CTP FUND TO "INTERNATIONAL FORUM SHOPPING"**

The Sub-Committee did not consider that the proposed amendments to section 124AA (1) of the Act required any further comment.

## **ASSESSMENT FOR NON-ECONOMIC LOSS (NEL) DAMAGES**

The Sub-Committee does not support the related amendment to Section 52 of the *Civil Liability Act 1936* (Section 52). It is the view of the Sub-Committee that the existing provision is clear as to the manner in which it should be applied. In South Australia a person is only eligible for some award of damages in the first place (including for NEL) if fault on the part of another can be established.

Whilst it may be stated that the amendment is there to provide emphasis, the concern of the Sub-Committee is that in changing the wording, this will not provide clarity, but will instead introduce doubt.

In particular, the wording "*strict proportionality*" in particular will lead to legal disputation, cost and uncertainty. The following are examples of contentions that may be raised:

1. The interpretation of the word "strictly". There is a clear difficulty in applying these words when each point on the 1 to 60 scale does not have the same dollar value.
2. Given that there has been change to the wording, does this then mean that Parliament is indicating a different method of assessment.

The Sub-Committee considered the effect on damages for NEL even for the genuinely injured and the difficulty of getting more than 3-5 points (1/20<sup>th</sup> – 1/12<sup>th</sup> the gravest loss conceivable) on the wording proposed. For example, a person with a genuine injury to the neck with an assessed at 20% of the neck receive on the proposed wording (maybe 1-2 points)? Or an arm amputee, but will full motor skill of all other body parts and no residual cognitive effects (maybe 5 – 10 points)?

## **THE MEANING OF THE EXPRESSION “CAUSED BY OR ARISING OUT OF THE USE OF”, A MOTOR VEHICLE**

The insertion of examples after subsection (3) of Section 99 is not, in the view of the Sub-Committee, required. Previous amendments to Section 99 have clarified its interpretation where there has been concern as to previous judicial interpretation.

In the view of the Sub-Committee, the proposed amendment seeks to give an example of a sequence of events which, by reason of the amendments that have previously been made, does not now sound in liability to the insurer and hence will not clarify but will confuse the meaning to be given to Section 99(3).

## **TRANSITIONAL PROVISIONS**

It is the view of the Sub-Committee that all of the proposed changes should only apply to claims for injuries arising after the date of proclamation.

## **CONCLUSION**

The Law Society Accident and Compensation Committee resolved on 9 November 2010 upon receiving its Sub-Committee's report to support the Sub-Committee report. We have welcomed the opportunity to review the proposed amendments and seek to engage in the ongoing discussions with respect to same.