



# **Response from the Australian Lawyers Alliance**

**to the**

**Discussion Paper: A Review of Queensland's  
Compulsory Third Party Scheme**

**September 2016**



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## EXECUTIVE SUMMARY

Queensland's Compulsory Third Party Scheme (the Scheme) is a long term policy success, and Queenslanders are right to be proud of it. This success is built on continual improvement and the Discussion Paper identifies a number of areas in which improvement is possible.

We concur with the view that Queensland's CTP Scheme is one of the most stable and affordable personal injury schemes in Australia. The scheme's design, particularly with respect to the maintenance of common law rights is consistent with the guiding principle of fairness. That retention of common law rights can occur in the context of long term competitive and affordable premiums, presently the second lowest in Australia, is a commendation of the current scheme design.

The biggest issue currently facing the Scheme is the unsustainable profit levels of the private insurers. Estimated to currently be between three and four times greater than intended by the scheme design, these profits represent an unnecessary cost on Queenslanders. MAIC should be congratulated for seeking ways to stimulate greater competition to bring prices down. However, if these efforts fail the Government must be prepared to consider a publicly underwritten model in the interests of all Queenslanders.

Some stakeholders may raise the question of legal costs. These costs have relatively high levels of regulation, strong consumer satisfaction for the role lawyers play in the current process, and data that shows our clients are on average 15 times better off than a comparable unrepresented claimant.

The ALA will always support improvements to the scheme to make it more affordable, efficient, fair and flexible. But these changes must be grounded in evidence and draw on experience of what is best for Queenslanders. The discussion paper correctly characterises the legislation as beneficial. Any attempts to diminish the beneficial nature of our CTP scheme would be unsupported by evidence.



## WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. We have, for over 15 years, been recognised as a key stakeholder in the CTP and workers' compensation areas. More information about us is available on our website.<sup>[1]</sup>

## OUR STANDING TO COMMENT

The ALA is proud of the work our members do representing our clients as they interact with the scheme. Arising from this work our experts have a deep understanding of the scheme and its impact on the lives of claimants. Our understanding is in the context of a strong interest in scheme design and compensation policy issues more broadly

Our interest is to work with MAIC and government to ensure that the scheme continues to deliver positive outcomes for those who rely on it.

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[1]

Australian Lawyers Alliance (2012) <[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)>

## FORMAL RESPONSES

**Question 1: Do the guiding principles as outlined represent an appropriate framework to underpin the Scheme? Do you have any comments on how they should be assessed?**

We agree that the guiding principles in the discussion paper represent an appropriate framework for an assessment of the scheme. In particular we concur with the view that the Queensland CTP scheme is “first and foremost beneficial legislation designed to protect injured people”.

**Question 3: On balance, which underwriting model do you believe best meets the guiding principles and why?**

The rationale for the current private underwriting model is competition. However, as the Discussion Guide identifies, the current poor and decreasing levels of competition amongst the private providers is driving excessive profitability. These profits, which currently sit at between three and four times scheme intended by design, are the key ongoing risk for the Scheme. If MAIC, working with the industry, is unable to stimulate greater competition then a government underwritten model should be seriously considered.

ALA members have experience of working in government underwritten schemes. We consider that government underwritten schemes are capable of serving the four guiding principles set out in the discussion paper.

The ALA also notes the shrinking number of CTP insurers in the market and the negative effect that reduced numbers of participants can have upon competition.

**Question 4: Do you believe there is a fair price competition in the current Scheme? If not, why not? What changes do you think need to be made to achieve fair price competition if this is seen as a desirable objective?**

The current levels of excessive insurance profits demonstrate that there is insufficient competition in the current system. The scheme is designed to deliver profits of around 8%. At the moment the range appears to be between 24-31%. At these levels these profits are an unnecessary cost for all Queenslanders and represent a risk for the Scheme long term. It is clear based on these figures that MAIC should act to adjust the operation of the scheme to bring these profits into line with scheme design and community expectations.

The discussion paper notes that “if profits increase, new entrants should be attracted to the market thereby bringing greater competition to the benefit of consumers”. The ALA notes that whilst profits have increased very substantially, there has actually been a *reduction* in the number of insurers.

**Question 6: Are there any other features of the current Vehicle Class Filing Model that need to be changed to improve the Scheme outcomes?**

The discussion paper deals with the rating philosophy and notes that “individual risk rating factors such as driver age, garaging, postcode or traffic history are presently not included in Queensland method of premium calculation”. The paper correctly notes that were individual risk rating factors part of the premium setting methodology, this would “also result in significant variations in premiums across the motor vehicle owner population”.

Statistically for example a motorcyclist is more than 30 times more likely to be killed or seriously injured in a motor vehicle incident than the driver of a car. If an unsophisticated approach to risk rating were applied, this may mean CTP premiums would be simply unaffordable for some classes of vehicle owners. This in turn would likely lead to an increase in the number of uninsured vehicles and an increase in the number of claims made against the nominal defendant. These would be undesirable outcomes and accordingly it is the view of the ALA that if there were to be further consideration of a change in rating methodologies a more detailed study of the financial and practical effects of such changes ought to be undertaken.

**Question 12: Should the MAI Act be amended to:**

- a) **Introduce a provision to remove the legal defence of inevitable accident?**
- b) **Allow children aged 16 years and under the ability to access compensation entitlements under the CTP Scheme even if he or she was at fault?**

**Inevitable Accident Defence**

The ALA notes that whilst insurers may occasionally attempt to apply the defence of “inevitable accident”, in our members’ experience they rarely succeed in maintaining this defence.

The recent tragic events at Ravenshoe had the potential for the inevitable accident defence to be applied but the specific circumstances of that accident do not support the defence being applied. We understand that the effect upon premium (all other things being equal) of the removal of the inevitable accident defence is negligible (less than \$1) and accordingly the ALA would have no objection to the statutory removal of the inevitable accident defence to cover circumstances which led to the removal of that defence in NSW.

**Children under the age of 16 years**

The ALA note that the vast majority of claimants under the system as presently structured injured when aged 16 years and under would be able to demonstrate fault and would most commonly be passengers in motor vehicles or pedestrian cases. Fault in relation to pedestrian cases is regularly an issue of contention. This causes significant uncertainty and increased cost all of which limits the amount that children receive from any resolution of the claim.

The differentiated approach of Queensland as compared to the current system in New South Wales is something that is capable of being remedied. The ALA notes that any person 16 years of age or under, irrespective of fault with a catastrophic injury (if injured on or after 1 July 2016) will be covered by NIIS(Q). The ALA also understands that the effect on premium for coverage of the 16 years and under “at fault” cohort is negligible (less than \$1), the ALA therefore has no objection to extension of coverage in that regard.

**Question 13: Do you have any other comments in relation to scheme coverage?**

We reiterate our support for the current scheme design, and in particular the “short tail” structure of all but the NIIS component.

“Long tail” no fault schemes create significant problems not only in relation to their financial performance but also in the treatment of claimants and benefit delivery. Experience in both Australia and New Zealand has demonstrated that long tail no fault models, by design, have caused significant financial failures in the schemes.

A critical determinant of the sustainable financial good health of any insurance scheme is architecture. A detailed examination of the long term performance of these models has demonstrated why these models are destined for failure.

The New Zealand ACC model and the South Australian Workcover models are two striking examples of such failures.

The ACC model since inception has endured major financial failures, culminating in an unfunded liability peaking in 2010 at circa NZ\$10.3 Billion. To remedy this problem the scheme operator has set about key changes beyond the impost already endured, including removing people from the scheme.

The fundamental design flaws with the NZ model, in our view are as follows:

- 1. Tail** – the scheme is long tail. Claimants remain on the scheme for many years and are drip fed payments through an unwieldy bureaucracy. There is no mechanism to allow a suitable method by which the claim can be resolved in the interests of all parties. The NZ scheme is 40 years’ old and has not reached actuarial maturity.
- 2. Heavy administrative costs** – The scheme, by virtue of its architecture carries with it a significant cost burden to administer claims. On each occasion a payment is sought, the administration surrounding the process adds a heavy cost.
- 3. No Choice** - There is no “one size fit all” for insurance schemes. The ACC model does not recognise this and forces all claims through a long tail process, eliminating the ability for claims to be resolved expeditiously when it is feasible to do so.



- 4. No responsibility – No Filters** – As the scheme is a no fault model, there is no requirement for either an insurer or a claimant to exercise personal responsibility. This has the obvious consequence that claim frequency becomes a major issue for the scheme. No filters exist to exercise due control over claims frequency, as occurs in other well designed schemes. The NZ accident and injury rate is higher than other comparable countries and this higher rate can (in part) be linked to its no-fault scheme.

Closer to home the South Australian Workcover scheme had until recently a similar design to the ACC model. It was a monumental failure. Ironically it's premium level was among the highest in the country, and yet it still found itself in financial crisis. Neither of these disasters has occurred by accident. They occurred because of design flaws underpinning the schemes.

A short tail hybrid insurance scheme offers all the features which will enable long term sustainable health for an insurance scheme. Queensland's CTP scheme demonstrates this.

The evidence is overwhelming that schemes which retain meaningful access to common law:

- Are far less likely to have unfunded liabilities
- Do better at rehabilitation
- Promote return to work and meaningful activities
- Act as a disincentive to negligent conduct and promote safety; and
- By achieving finality, support the themes of self-determination and empowerment so important to those with disabilities.

The common law, in the UK, Australia and Canada; and particularly here in Queensland, has proven to be a resilient, fair and flexible method to deliver compensation and self-determination to those affected by motor vehicle incidents.

**Question 14: Should Queensland legislate to require lawyers to disclose details of their fee and the final settlement received by the claimant after all expenses and statutory refunds have been paid? What are the potential implications?**

The discussion paper at page 30 (6.6) contains some material which is potentially very misleading:

“Legal costs incurred by claimants represent a significant percentage of the total agreed settlement amount. Market research conducted by MAIC in 2014, revealed that claimants only ultimately retained on average 52 per cent of the total settlement amount. The remaining 48 per cent predominately represented the amount paid in legal costs to their lawyers along with statutory reimbursements. Those claimants suffering serious or severe injuries retained approximately 61 per cent. In Queensland, lawyers are allowed to charge a client up to 50 per cent of the total settlement amount after deduction of refunds and disbursements (Regulatory Guide 3, Legal Services Commission).”

From a reading of that material the following impressions or conclusions could potentially be drawn:

- I. That the research conducted in 2014 concluded that on average 48% of settlements were taken in legal costs; and
- II. The application of the “50% rule” is such that when aligned with the 48% reference in the preceding paragraph, it is routine for personal injuries lawyers to charge at or close to the “50% rule”.

Neither proposition is supported by a closer examination of the facts and evidence. Nor is either proposition consistent with our members’ experience.

The 48% in the survey material failed to differentiate between legal costs and outlays on the one hand, and statutory refunds on the other.



From settlements paid by CTP insurers to CTP claimants the following deductions apply:

- a) Statutory refunds: these include refunds to Medicare and Centrelink. Commonly those refunds are tens of thousands of dollars. Those refunds are applied as a matter of law: the claimant and insurer are under a statutory obligation to refund to government authorities, such as Medicare, funds which had been used by the claimant in the period of time between the date of motor vehicle incident and settlement.
- b) Disbursements or outlays: these are monies paid by lawyers to third parties for the proper advancement of their clients claims. Typically those disbursements include the cost of obtaining medical and allied health reports to facilitate negotiations with the CTP insurers, court filing fees, and barristers fees and;
- c) Professional costs for lawyer's time and expertise.

The data referred to in the extract from the discussion paper above failed to differentiate between each of those three categories.

The MAIC has kindly provided the ALA with a copy of the market research upon which the extract above was based. The report is instructive in the following respects:

- (i) The chart on page 9 of the MCR report summarises the average ratings scores given by respondents to various aspects of the CTP claims process. We note that the most positive scores were registered for:
  - The solicitor keeping the claimant up to date with the claims process was the highest rating overall.
  - Satisfaction with legal representation was the second highest rating.
- (ii) Conversely, but unsurprisingly in the ALA's experience, the lowest ratings of claimants participants were rated for:
  - The time taken to settle the claim. The ALA notes in that regard that some CTP insurers adopt a delay and deny approach rather than a constructive approach to both rehabilitation and claims settlement processes.
  - Overall satisfaction of the CTP insurers management of the claim; and
  - Overall ease of the claims process.

- (iii) The ALA also notes that the report contains four recommendations none of which relate to lawyers, lawyers' fees or legal representation.

In our submission the report upon which the extract in the discussion paper was based, is a report from which one ought reasonably to conclude:

- The highest levels of satisfaction from clients were from the work and effectiveness of their lawyer.
- The lowest satisfaction levels can be attributed to insurer behaviours
- The priority for MAIC and the government should be to ensure that insurers' claims processes and the work of insurers is improved.
- People are clear that they value the right to legal representation and the advocacy that lawyers provide.

Critically, lawyers' fees are already the subject of very substantial regulatory and consumer protection oversight and we note in that regard:

- All clients are required to sign a formal costs agreement accompanied by a disclosure notice in which a reasonable estimate of fees is given.
- A cooling off period applies to contractual relationships with lawyers.
- The *Motor Accident Insurance Act* contains provisions that require the lawyer to provide an updated statement of fees prior to any compulsory alternative dispute resolution process and an estimate of future costs likely to be incurred.
- There is a statutory cap (the 50% rule referred to before) on legal fees. It should be emphasised this is a statutory cap and **not** a contingency fee or set percentage.
- Additional layers of protection exist for claimants under a legal or financial disability with the court and public trustee approving costs that have been incurred. New and enhanced safeguards are contained within the NIIS amendments to the legislation.

By those methods; fees, refunds and outlays are fully disclosed to clients: consumers of legal services have multifaceted and stringent protections. Lawyers who overcharge have been the subject of serious disciplinary action, and rightly so; this also demonstrates that the existing structures are working well.

These high levels of legal costs regulation in Queensland gives consumers, regulators and government confidence about the nature of current arrangement and in conjunction with MAIC own consumer data which supports the fact that consumers are satisfied with current arrangements mean that, in the ALA's submission, current arrangements are appropriate.

There is another startling statistic which illustrates the true access to justice value provided by lawyers in the motor accident insurance scheme in Queensland.

MAIC holds twice yearly stakeholder briefings where presentations are provided by the scheme actuaries Taylor Fry. Amongst the data provided to the attendees at these briefings, Taylor Fry compare outcomes of those legally represented with those of unrepresented claimants. That data shows that for comparable injuries a represented claimant (a claimant with a lawyer) will on average receive more than 15 times (more the 1,500%) damages (compensation) an unrepresented claimant receives. In these circumstances, issues of transparency arise in how insurers conduct themselves with regard to unrepresented claimants. It seems reasonable to conclude that insurers are seeking to take unfair advantage of unrepresented claimants by failing to advise them of their rights to obtain legal representation and by paying inadequate sums of damages and requiring that claimants sign their rights away as a consequence. This conduct is in our view unethical, and is anathema to the beneficial nature of the legislation.

In terms of issues that have a direct impact on outcomes for claimants, requiring (by statutory provision) insurers to fully explain claimants rights (including the right to legal representation and where to seek that legal representation) would have a much more powerful effect than anything proposed in the discussion paper.

It should also be noted that the scheme currently has limits on the costs that can be recovered from CTP Insurers. Currently an injured claimant who resolves their claim for \$43,020 or less does not recover any money from the insurer towards their legal costs. Similarly a settlement of between \$43,020 and \$71,730 recovers only \$3,600 towards their legal costs. Those thresholds were enacted to ensure that low end claims were discouraged. The thresholds however for cost recovery have increased annually from 1 July 2010. Average settlements and judgements have not increased accordingly or in line with the cost of inflation. Accordingly amounts which clients receive in the hand as a proportion of these settlements are impacted significantly by these thresholds.

**Question 15: What other options would improve the transparency of claimant and insurer legal costs under the Scheme?**

This is dealt with in our response to the previous question: existing structures and safeguards are robust and adequate.

**Question 16: Should the role, structure and functions of MAIC be amended in any way, and if so, how and why?**

The ALA believes that one of the key reasons the Queensland scheme has for many decades been efficient, fair and affordable is that it is a well-administered scheme. In addition to the legislative structure of the Act, the administration of the scheme by the MAIC has been of high quality. Close attention will need to be given to how the NIIS scheme is administered, to avoid the problems which exist in its NSW equivalent.

Accordingly, the ALA does not recommend any change in the role, structure, or functions of the MAIC.

Should a view be formed that the apparent inadequacy of competition and excessive insurer profits ought to be a basis for closer consideration for a government underwritten scheme; the role and functions of the MAIC would require fundamental review.

**Question 17: Should Queensland's Nominal Defendant (or 'insurer of last resort') Scheme be amended in any way and if so, how?**

No. The ALA considers that the Nominal Defendant arrangements are appropriate for our circumstances.

**Question 18: Based on your experience with the Queensland CTP Scheme, do you have any other suggestions as to how the objectives of this scheme review could be achieved?**

The decision of *Maggs v RACQ Insurance Limited* [2016]QSC 41 involved an orphaned child who sued RACQ pursuant to s65 of the *Civil Proceedings Act 2011* (CPA) for the financial loss caused as a result of the wrongful death of her parents. The *Public Trustee Act 1978* requires fund management in circumstances where the claimant is incapacitated by reason of age or within the meaning of the *Guardianship and Administration Act 2000*. RACQ argued that unlike a claim for an injured child at common law, the court could not award any amount for management fees. The Court agreed and held that management fees are not recoverable in a dependency claim.

Trustee companies perform a critical role in managing such funds, often over a long period, and rightly expect to be paid fees which can be substantial. The effect of this decision will have a significant impact on the amount of money available to pay for the living expenses of dependent children or other incapacitated claimants. Money that should be available to pay for food, schooling, books, rent, medical care and other expenses will instead remain in the hands of the insurer. Any settlement for the child will be significantly eroded by the required administration of the funds and may potentially run out far before they were calculated to do so. Whilst the ALA considers the decision to be flawed we consider that there is moral grounds for which this decision should not remain to continue. Workcover have recently resolved a matter in *Ing v Tricare* on the basis they would not be willing to pay for the administration fees in contradiction to the decision in *Maggs*. The ALA is disappointed that CTP insurers continue to utilise this decision at the expense of children who have lost one or both parents.

ALA recommends an amendment to legislation to ensure that damages awarded under the CPA include management fees where management of the funds is required by reason of the claimant's incapacity.

Furthermore, standards of conduct should be established for Scheme insurers. Government, and in this instance through the MAIC, has the capacity to put a hard floor under the conduct expected under public sector contracts. This is a well-established practice.

Recent public debates regarding the conduct of Financial Services companies demonstrate there is a need for action.

For instance one insurer has been accused of using multiple levers to severely limit the capacity of policy holders to claim benefits, including placing time limits that are contrary to legislated standards, and narrowing definitions to forms that are practically impossible to fulfil.

Another insurer is purported to represent the “interests” of motorists and is given the status by Government as such, but at the same time is willing to take part in the profit gouging discussed earlier.

This review presents a real opportunity for Government to provide leadership in standards and conduct amongst the financial services sector.