

NIIS: CURRENT DEVELOPMENTS AND THE EFFECTS ON MOTOR VEHICLE CLAIMS

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1 INTRODUCTION

As of 1 July 2016, Queensland has a no-fault scheme for treatment, care and support for persons who suffer serious personal injury caused by, through or in connection with the:

- (a) driving;
- (b) collision, or action to avoid a collision;
- (c) running out of control; or
- (d) defect causing loss of control, of a prescribed vehicle, within Queensland.

2 LEGISLATION

The rollout of the National Injury Insurance Scheme (**NIIS**) in Queensland has seen the following legislative changes:

- (a) the introduction of the *National Injury Insurance Scheme (Qld) Act 2016* (**NIISQA**) NIISQA and the *National Injury Insurance Scheme (Qld) Regulation 2016* (Qld) (**NIISQR**);
- (b) amendments to the *Motor Accident Insurance Act 1994* (Qld) (**MAIA**);
- (c) amendment of the *Civil Liability Act 2003* (Qld) with the introduction of part 2A; and
- (d) amendment to the *Workers' Compensation and Rehabilitation Act 2003* (Qld) with the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Act 2016* (Qld).

The NIIS does not yet extend to personal injuries suffered in public liability accidents or through medical treatment.

3 DEFINITIONS

Some of the terms in the legislation relevant to claims for damages include:

- (a) '*eligibility criteria*';
- (b) '*serious personal injury*';
- (c) '*Buy-in*', '*Interim*' and '*Lifetime Participant*';
- (d) '*treatment, care and support*'; and
- (e) '*insurer*'.

4 ADMINISTRATION

The NIISQA establishes the National Injury Insurance Agency, Queensland (**the Agency**) under Chapter 3. The Agency is a government-owned corporation which represents State of Queensland. Its functions include:

- (a) administration of the scheme;
- (b) monitoring the operation of the scheme, including the treatment, care and support received by Participants under the scheme;
- (c) reporting to the government about the administration, efficiency and effectiveness of the scheme;
- (d) management the fund; and
- (e) keeping a register of providers of services under the scheme.

The Agency has released a strategic plan for 2016 to 2020 under which the Agency's vision is to '*make lives better*', with their role/purpose being to '*build capability to provide financially sustainable lifetime care and support for Participants through individual choice and independence*'.

5 ELIGIBILITY CRITERIA

Under section 12(1) of the NIISQA a person is eligible to participate in the scheme provided the Act applies to their injury and, they meet the eligibility criteria for a serious personal injury prescribed by the NIISQR.

Schedule 1 to the NIISQA defines serious personal injury as:

- (a) a permanent spinal cord injury resulting in a permanent neurological deficit;
- (b) a traumatic brain injury resulting in a permanent impairment of cognitive, physical or psychosocial function;
- (c) a forequarter amputation or shoulder disarticulation amputation;
- (d) the amputation of a leg through or above the femur;
- (e) the amputation of more than one limb or parts of different limbs;
- (f) a permanent injury to the brachial plexus resulting in an impairment equivalent to a shoulder disarticulation amputation;
- (g) a full thickness burn to all or part of the body;
- (h) an inhalation burn resulting in a permanent respiratory impairment; or
- (i) permanent blindness caused by a trauma.

Part 2 of the NIISQR addresses each of these injuries in further detail and explains the eligibility criteria for applicants to meet to establish that a serious personal injury has been sustained.

6 TREATMENT, CARE AND SUPPORT

Once the Agency has accepted an individual as a Participant, they will be eligible for treatment, care and support. Under section 59 of the NIISQA, the guiding principles of the Agency are to provide a level of treatment, care and support to Participants which is:

- (a) evidence-based; and
- (b) reflects community expectations; and

- (c) provides value for money.

Under section 8 of the Act, the treatment, care and support needs of a person are the person's needs for, or relating to:

- (a) medical or pharmaceutical treatment;
- (b) dental treatment;
- (c) rehabilitation;
- (d) ambulance transportation;
- (e) respite care;
- (f) attendant care and support services;
- (g) aids and appliances, other than ordinary personal or household items;
- (h) prosthesis;
- (i) education or vocational training;
- (j) home or transport modification.

There is certain treatment, care and support which is excluded. That includes treatment, care and support that:

- (a) is provided without charge;
- (b) if the Participant is a child – ordinarily falls within the ordinary costs of raising a child;
- (c) must be provided by a registered provider but is provided by a person who, at the time of provision, is not a registered provider;
- (d) is provided as part of a medical trial or another experimental basis;
- (e) is provided as part of a public sector health service, as defined in the *Hospital and Health Boards Act 2011*, schedule 2;
- (f) is provided by State Emergency Services, including the Queensland Ambulance

Service or the Queensland Fire and Emergency Services;

(g) is prescribed by regulation.

7 TYPES OF PARTICIPANTS

To receive NIIS treatment, care and support an injured person must be a *'Participant'* for the purposes of the NIISQA. Under the Act a Participant may be a:

- (a) Buy-in Participant;
- (b) Interim Participant; or
- (c) Lifetime Participant.

Participation begins on a day that an individual is accepted into the scheme (section 14(5)). Participation ends (section 14(6)):

- (a) on the death of the Participant;
- (b) on the expiry of the participation period; or
- (c) on the expiration of the Buy-in period.

Buy-in Participant

An individual may become a Buy-in Participant if they:

- (a) suffer a serious personal injury prescribed by regulation; and
- (b) are not eligible under section 12 to participate in the scheme in relation to the injury.

The Agency may decide to accept a person as a Buy-in Participant in the scheme in relation to the injury for a period agreed between the person and the Agency. For this agreement to be finalised, the individual is required to pay the Agency a contribution calculated in a way prescribed by the Regulation, towards their treatment, care and support needs. The Regulation does not currently provide a method of calculating any contribution to be paid by an

individual for buying into the scheme. Further regulations are likely to be introduced to address this and:

- (a) the circumstances in which an application may be made to the Agency for approval to participate in the scheme under section 13;
- (b) the requirements for making a Buy-in application;
- (c) the matters the Agency must consider in deciding a Buy-in application;
- (d) the period for deciding a Buy-in application;
- (e) when and how the Agency must give notice of a decision on a Buy-in application, including whether the notice must be an information notice;
- (f) how a contribution must be dealt with if the person stops being a Participant;
- (g) the method of calculating the contribution to be made by the individual to the Agency towards their treatment, care and support needs.

Interim Participant

An application may be made for an individual to join the scheme as an Interim Participant. The application is required to be in the approved form and include or be accompanied by information prescribed by regulation.

The Agency website has an application form for an interim participation.

The participation period for an Interim Participant is two years (or, to age 6 if the Participant is less than 4 years of age): Schedule 1.

Before the expiration of the participation period, the Agency must conduct a review and issue a decision to the Interim Participant within 14 days addressing:

- (a) whether the Participant is still eligible to participate in the scheme; and
- (b) if so, whether the Participant's injury is likely to continue to meet the eligibility criteria for the injury after the participation period ends.

If the Agency decides that the Participant is still eligible to participate in the scheme after the review and that the Participant's injury is likely to continue to meet the eligibility criteria, then the Agency must accept the person as a Participant in relation to the injury for the rest of the person's life. To assist the Agency in arriving at a decision, the Agency may refer a medical matter to a Medical Tribunal to consider whether the Participant's injury is likely to continue to meet the eligibility criteria for the injury after the participation period ends, to the extent the eligibility criteria relate to matters of a medical nature (section 112). The injured person and any representative of the injured person may be present or heard before a Medical Tribunal. A decision of a Medical Tribunal on a medical matter referred to it is final and it is not reviewable by the Queensland Civil and Administration Tribunal.

Lifetime Participant

A person may become a Lifetime Participant either when:

- (a) the application is decided by the Agency; or
- (b) following review of the person's ongoing participation in the scheme while they are an Interim Participant.

8 AMENDMENTS TO THE MOTOR ACCIDENT INSURANCE ACT

Notice of Accident Claim forms have been amended to require the person completing the form to advise as to whether the Claimant have made application for participation in the NIIS or, have made application to participate. Under section 61B of the MAIA, if a claim is made

against an Insurer for personal injury and the Claimant is a Participant in the NIIS or, an application has been made for approval for the Claimant to participate in the NIIS, then the Insurer must give the Agency written notice of the claim.

If an application under the NIISQA is made for participation by a person other than the Insurer and it states that a claim has been made against the Insurer for the injury, then the Agency must give notice of the application to the Insurer.

Section 37 of the MAIA has been amended to require that the Claimant authorise, when completing the authority attached to the Notice of Accident Claim form, the Insurer and the Agency to exchange information about the Claimant for the purposes of the Agency performing its functions under the NIISQA.

Section 37A has also been amended in the MAIA to permit an Insurer to ask the Claimant to provide additional information about the injury to consider whether the injury is a serious personal injury in relation to which the NIISQA applies and whether the Claimant is an eligible person.

Under section 42 of the MAIA, the Insurer is not required to make a payment in relation to the Claimant's treatment, care and support needs as a result of the injury if the needs arise after an amount is paid to the Claimant or a person acting for the Claimant under the NIISQA.

Otherwise, the Insurer's obligations to meet the Claimant's rehabilitation needs under the MAIA continue.

If the Agency is liable to contribute to the Insurer's liability on the claim for treatment, care and support damages, then section 61A of the MAIA applies. Under section 61A, the Insurer and the Agency must agree about the content of a document before the document is given by the Insurer to the Claimant which is:

- (a) a liability response under section 41(1)(b);

- (b) an offer by the Insurer;
- (c) a notice from the Insurer accepting or rejecting an offer by the Claimant.

The MAIA has also been amended to permit an authorised person appointed by the Motor Accident Insurance Commission to monitor compliance with the NIISQA and to investigate suspected offences against the MAIA and the NIISQA.

9 STATUS OF COMMON LAW ENTITLEMENTS

The NIISQA does not remove any common law rights or entitlements from Claimants. Claimant's may now also choose to give the Agency a preservation notice under the Act: section 41(2). If a Participant gives the Agency a preservation notice, the Agency will be liable to contribute towards the Insurer's liability, if any, on the claim for treatment, care and support damages.

The Agency will not be liable to contribute in certain circumstances. For example, where a Court decides, or the parties to the claim agree by way of settlement, that:

- (i) the Participant is guilty of contributory negligence in relation to the claim;
- (ii) the damages that the Participant would otherwise be entitled to in the absence of contributory negligence are to be reduced, because of the contributory negligence by 50% or more.

The Agency is only liable to contribute towards the Insurer's liability if the person is a Lifetime Participant in the scheme.

Under section 44 of the NIISQA, a Claimant may accept an amount that they have been awarded by way of settlement, judgment or sanction for treatment, care and support damages. If they do this, they stop being a Participant in the scheme and the Agency pays the relevant to the Claimant.

10 KEY DATES

	Timeframe
Commencement	1 July 2016
For Participant to submit application	1 year or a longer period as determined by the Agency
Decision-making period	Within 28 days after the Agency receives the application, service request or payment request
For Participant to notify Agency of personal injury claim	Within 14 days of making the claim
For Agency to give notice to Interim Participant of review	Within 28 days
For Agency to provide review decision to Interim Participant	Within 14 days of decision being made
For Participant to notify Agency of their absence from Australia	1 month before leaving
To suspend participation for absence from Australia	3 consecutive months absence from Australia
For Participant to submit internal review application to Agency	Within 28 days after receiving information notice
For Agency to make internal review decision	Within 28 days of receiving internal review application
For Agency to give notice of the internal review decision	Within 14 days after making the internal review decision
For Participant to submit a referral request to the Agency for a medical tribunal	Within 28 days after receiving a decision notice
For Participant to submit application to QCAT for review of internal review decision about medical matter	Within 28 days of medical tribunal giving notice of its decision on a medical matter

	Timeframe
Acceptance period	Within 14 days from sanction, settlement or after appeal period has expired
Applying after acceptance of damages	At least 5 years

11 ADVICE FOR CLAIMANTS

The Lexon Plaintiff Personal Injuries Risk Pack has been updated with additional matters to consider when representing a client who is a Participant in the NIIS. These include:

- (a) ticking the box in the Notice of Accident Claim form;
- (b) for a client that is a Participant - giving notice to the Agency of the MAIA claim within 14 days;
- (c) considering whether to give a preservation notice to the Agency within 14 days of becoming a Lifetime Participant;
- (d) considering whether a preservation notice should be given to the Agency prior to a Compulsory Conference;
- (e) if the client is an Interim Participant, confirming with the Agency that the client has not been reassessed as a Lifetime Participant;
- (f) explaining to the client the timeframes for accepting a lump sum amount for treatment, care and support and the consequences of accepting/rejecting damages for treatment, care and support.

However, Lexon's pack is non-exhaustive and practitioners should provide clients with precise advice relevant to their circumstances, the status of their claim, the identity of the Insurer and the key dates outlined herein.

12 REVIEWS OF DECISIONS

The Act permits reviews of decisions as follows:

- (a) Internal review – a person who is given, or is entitled to be given an information notice for a decision may apply for an internal review of the decision. Examples of decisions for which persons are entitled to be given an information notice include a:
 - (i) decision not to accept an application: s16;
 - (ii) decision to refuse an application: s23;
 - (iii) failure to decide an application within the decision-making period: s24;
 - (iv) decision about a service request: s31;
 - (v) failure to decide a service request: s32;
 - (vi) failure to make a decision about a payment request: s39;
 - (vii) decision about interim participation: s47;
 - (viii) decision to amend a support plan: s51;
 - (ix) decision to suspend participation: s52;
- (b) External review – a decision about a medical matter or a decision for which an Applicant is entitled to receive a decision notice may be reviewed by QCAT;
- (c) Medical tribunal decision – a decision by a medical tribunal cannot be challenged through QCAT: section 123. However, medical tribunal decisions may be open to review under the *Judicial Review Act 1991* (Qld).

13 MEANING OF INSURER

The dictionary in the NIISQA defines certain words used in the Act.

The word '*insurer*' is a word that is defined. Under the NIISQA:

'insurer means an insurer under the statutory insurance scheme under the [MAIA].'

The MAIA defines the statutory insurance scheme as, '*the insurance scheme established by [the] Act*': section 4.

Several sections in the MAIA refer to the '*statutory insurance scheme*'. Those sections concern such matters as:

- (a) the obligations of licensed insurers;
- (b) the statutory insurance scheme levy;
- (c) the industry deed;
- (d) the functions of the Motor Accident Insurance Commission;
- (e) premium rates,

and other matters that are of no consequence to Interstate Insurers.

Interstate Insurers are not, '*insurers under the statutory scheme under the [MAIA]*'.

The Transport Accident Commission (Vic) is the insurer under the statutory scheme under the *Transport Accident Act 1986* (Vic). The Territory Insurance Office (NT) administers the Motor Accidents Compensation (MAC) Scheme under the *Motor Accidents (Compensation) Act 1979* (NT). The Motor Accident Insurance Board (Tas)

administers the funding and payment under Tasmania's scheme.

While claims for damages against these Interstate Insurers are regulated by the pre-court procedures of the MAIA¹, those Interstate Insurers are '*insurers*' under their own schemes; with their own statutory policies of insurance.

Under section 32AA of the *Acts Interpretation Act 1954* (Qld) (AIA) a definition in an Act applies to an entire Act. However, under section 32A of the AIA, a definition in an Act applies except so far as the context or subject matter otherwise indicates or requires.

So, if the context or subject matter of a particular section or part of the Act requires; the term '*insurer*' could be interpreted to mean Interstate Insurers.

Section 102 is an example of a provision which requires that the word '*insurer*' be a reference to Interstate Insurers. Under section 102, the Agency may recover, as a debt, the present day value of a participant's future treatment, care and support from the '*insurer*' under an interstate CTP policy of a vehicle at-fault.

A comparison between sections 42 and sections 102 of the Act shows that the word '*insurer*' has taken on two meanings within the Act. Section 42 provides that the Agency may be liable to contribute to the liability of an '*insurer*'. It could not have been Parliament's intention for the Agency to be obliged, on the one hand, to contribute to the liability of an Interstate Insurer and, on the other, entitled to seek recovery from them.

Apart from section 102, the word '*insurer*' under the NIISQA does not appear to extend to Interstate Insurers. Of course, this does not detract from the obligation of the Agency to pay

¹ In line with *Pfieffer v Rogerson* [2000] HCA 36 at [99].

for the treatment, care and support of participants under the Scheme.

With the word *'insurer'* under the NIISQA limited to licensed insurers, the Agency has no obligation to contribute towards the liability of Interstate Insurers, against which common law claims are made. Accordingly, Claimants will be able to pursue those Interstate Insurers for the total of their damages (apart from amounts already paid by the Agency) in the usual way. However, the Agency is authorised to pursue Interstate Insurers for recovery of the present value of any future treatment, care and support required by the Claimant.

Interstate Insurers will need to consider their liability for common law damages in Queensland claims and statutory entitlements (including those under their own schemes) in the context of the NIISQA, the MAIA and any local legislation or policy applying to the vehicles registered interstate which they insure. Lawyers for Claimants will need to provide different advice to their clients as to the process under the Act, depending on the identity of the Insurers.

14 AREAS OF CONTENTION

There are several areas under the Act which have the potential to give rise to disputes. Some of these and other potentially contentious matters include:

- (a) Section 17(4): which permits a former participant who has accepted a damages payment to apply for participation in the scheme after 5 years. At this stage, the criteria for re-entry to the scheme have not been set.
- (b) Section 4: whether an injury was caused, *'by, through or in connection with'* the driving of a motor vehicle.
- (c) Section 42: claims involving contributory negligence.

- (d) Section 42: the liability of the Agency to contribute towards the *'insurer's'* liability.
- (e) Section 102: recovery actions against Interstate Insurers that are not *'insurers'* under the Act.
- (f) Claims involving fault by 2 or more vehicles where one is insured by an *'insurer'* and another is insured by an Interstate Insurer that is not an *'insurer'*.
- (g) Disputes about the advice provided by lawyers to clients about the scheme and their damages claims.
- (h) Fraud or duplication of payments where Participants may be eligible for payments under both the NIIS and other schemes.

15 CONCLUSION

Lawyers will need to ensure that they give clients appropriate advice (about their options, the advantages and disadvantages of each course of action, key dates and the process) prior to a client entering the scheme, issuing a preservation notice and before any settlement conference. Care should be taken to ensure that clients with claims involving contributory negligence or Interstate Insurers are given advice tailored appropriately.