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**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

**MOTOR ACCIDENT INJURIES BILL 2019
SUPPLEMENTARY EXPLANATORY STATEMENT
AMENDMENTS**

**Presented by
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Treasurer**

Explanatory Statement – Government Amendments

Motor Accident Injuries Bill 2019

Background

This explanatory statement accompanies amendments to be moved by the Treasurer to the Motor Accident Injuries Bill 2019 (the Bill). The amendments address a number of minor and technical issues that have arisen through stakeholder consultation.

The amendments will give greater certainty to injured people about how the new Motor Accident Injuries scheme (MAI scheme) will operate, increase penalties for insurers that contravene licence conditions, and will also ensure that confidential information given by lawyers and other service providers to the MAI Commission is taken to be protected information.

Amendment 1: Clause 50 (3), proposed new note

The amendment inserts a note below clause 50 (3) of the Bill that clarifies that for an injured person that has made a successful application for workers' compensation, that person does not need to make an election at 13 weeks to remain in their workers' compensation scheme. This reflects the reality that a workers compensation application occurs close in time to the accident as an employer is obligated to report a workplace accident.

Amendment 2: Clause 71 (2)

Clause 71 of the Bill enables an insurer to refuse to accept liability for an application for defined benefits, or reimburse or pay for treatment and care expenses if the insurer suspects the information or request is false and misleading.

The amendment to clause 71 (2) will clarify that an insurer can refuse to accept an application or pay expenses only if the insurer reasonably suspects information in an application or request was false or misleading.

Amendment 3: Clause 73 (1), proposed new note

The amendment inserts a note below clause 73 (1) of the Bill that clarifies that a person that has a right to make a claim under the workers compensation scheme and the MAI scheme does not need to make a defined benefits application under the MAI scheme.

Amendment 4: Clause 73 (4), proposed new note

The amendment inserts a note below clause 73 (4) of the Bill that clarifies that an injured person that has made a successful application for workers compensation and does not withdraw that application within 13 weeks of a motor accident, is not required to give a notice to an insurer under clause 73 (4) of the Bill.

Amendment 5: Proposed new clause 105 (5)

Clause 105 of the Bill allows an insurer to suspend defined benefits payments if an insurer determines a person failed to comply with a reasonable request to undergo a medical or other examination to assess their fitness for work.

The amendment inserts new clause 105 (5) in the Bill so the MAI guidelines can make provision about the circumstances an insurer may request an assessment of a person's fitness for work and for

the conduct of an assessment of a person's fitness for work. This is consistent with clause 121 of the Bill that provides for guidelines for the assessments of treatment and care needs.

Amendment 6: Clause 110 (1) definition of treatment and care, paragraph (a)(i)

The amendment clarifies that mental health treatment is medical treatment for the purposes of the definition of treatment and care.

Amendment 7: Clause 121 (4)

The amendment relocates provisions about the suspension of treatment and care and income replacement payments for an injured person that fails to attend an assessment of their treatment and care needs from the MAI guidelines to clauses 121 (4) and (5) the MAI Bill. This will provide transparency about safeguards available to an injured person if an insurer makes a decision to suspend their benefits and will also be consistent with clause 105 of the Bill.

Amendment 8: Clause 123(3A)

The draft treatment and care guidelines already require a recovery plan to be reviewed in consultation with an injured person and their nominated treating doctor.

The amendment clarifies that the relevant insurer may incorporate into the recovery plan the recommendations of the injured person's doctor for treatment and care that are reasonable and necessary.

Amendment 9: 127(3) and (4)

These amendments will also clarify that if the relevant insurer amends the recovery plan (after review or on request of the injured person), the relevant insurer must allow the injured person and the injured person's doctor a reasonable opportunity to consider the proposed amendments; and the relevant insurer may incorporate any recommendations of the injured person's doctor for treatment and care that are reasonable and necessary.

Amendment 10: Clause 136

The amendment changes 'damages for loss of quality of life' to 'quality of life damages.' The term quality of life damages is a defined term for the Bill. The amendment brings the clause into line with its use elsewhere.

Amendment 11: Clause 141(3)(b)

This clause previously stated that a person's estimated WPI is taken to be the person's WPI if their injuries have not stabilised at the 4 year and 6 month mark. Amendment 12 below now gives an injured person a choice in relation to their estimated WPI when their injuries have not stabilised at the 4 year and 6 month mark.

Amendment 11 substitutes clause 141(3)(b) to state that for a person who is not mentioned in subsection (3A), i.e. a person who does not meet the threshold of at least 5 per cent and can make a motor accident claim, the injured person's estimated WPI is taken to be the person's WPI.

Amendment 12: Proposed new clause 141(3A) to (3E)

The amendment introduces a choice for an injured person whose injuries have not stabilised at 4 years and 6 months and have a WPI assessment resulting in an estimated WPI. The estimated WPI will be taken on the higher estimated WPI, where there are separate reports in accordance with

clause 149 (to be amended by amendment number 15). The injured person can either agree to use their estimated WPI, and that estimate is taken to be their WPI, or the injured person can lodge a common law claim and stay proceedings on the basis that their WPI has not stabilised.

Clauses (3B) and (3C) will only apply if the injured person's estimated WPI is at least 5 per cent and the injured person is entitled to make a motor accident claim in relation to the motor accident.

The relevant insurer for the motor accident must, within 14 days after receiving the WPI report about the injured person, give the injured person a written notice including a copy of the report and telling the person that the person must, within 26 weeks after receiving the notice, accept the estimated WPI as the person's WPI or make a motor accident claim and apply to stay a proceeding on the claim until the person's injuries have stabilised.

The insurer must tell the person if the person decides to commence a motor accident claim (being eligible, ie. not at fault) and the application to stay proceedings is successful, the person must notify the relevant insurer when their injuries have stabilised and that the relevant insurer will refer the person to an authorised Independent Medical Examiner (IME) for a second WPI assessment. The insurer is required to tell the injured person they will be liable for the cost of the second WPI assessment and if the WPI report from the second WPI assessment assesses the person's WPI as less than 10 per cent, the person is not able to proceed with the motor accident claim and is liable for their own costs in relation to the claim. Where the injured person receives a second WPI report over 10 per cent and makes a motor accident claim, the cost of the report is to be paid for by the relevant insurer. The injured person must make their decision within 26 weeks after the date the person is notified of the person's estimated WPI. If the injured person's estimated WPI is taken to be the person's WPI division 2.6.3 and chapter 3 apply to the person.

Where the injured person does not notify the insurer within 26 weeks, the injured person is taken to have accepted the estimated WPI as the person's WPI.

The relevant insurer must take all reasonable steps to notify the injured person about the consequences of failing to notify the insurer as stated in the notice within 26 weeks.

Amendment 13: Proposed new clause 141A

The amendment will apply where an injured person makes a motor accident claim in relation to the motor accident and applies to stay a proceeding on the claim until the person's injuries have stabilised.

The injured person must tell the relevant insurer for the motor accident in writing that the person's injuries have stabilised. The relevant insurer must refer the injured person to an authorised IME provider for a second WPI assessment. The IME provider must give the WPI report about the assessment to the relevant insurer.

Where the WPI report assesses the injured person's WPI as 10 per cent or more, the injured person is entitled to proceed with the motor accident claim.

If the WPI report assesses the injured person's WPI as less than 10 per cent, the relevant insurer must, within 14 days after receiving the report, give the injured person a written notice stating that the person is not entitled to proceed with the motor accident claim, and is liable for their own costs in relation to the motor accident claim, and is not entitled to a further WPI assessment and is not entitled to an SOI assessment.

A further WPI assessment is not permitted, nor is a dispute able to be made, because the period of defined benefits will have ended or is close to ending. It is appropriate to provide for finality with respect to an offer for the defined quality of life benefits.

The insurer must offer the injured person the amount of quality of life benefits payable for their WPI under division 2.6.4 and tell the person that the person must, within 28 days after receiving the notice, notify the insurer in writing whether they accept the offer. If the injured person does not notify the relevant insurer within 28 days, the person is taken to have accepted the offer. The relevant insurer must take all reasonable steps to notify the injured person about the consequences of failing to notify the insurer within 28 days.

If the injured person accepts (or is taken to accept) the offer, the person's application for quality of life benefits is taken to have been finally dealt with and the relevant insurer must pay to the person the amount of quality of life benefits payable for their WPI under division 2.6.4.

Amendment 14: Proposed new clause 146(1)(e)

This amendment inserts clause 141A as an additional item, for how a WPI assessment is to be arranged where an injured person is referred to an authorised IME provider for a WPI assessment for an injuries stabilised assessment.

Amendment 15: Clause 149

These amendments will substitute all of clause 149. The amendments are to enable an injured person to request separate WPI assessments for physical and primary psychological injuries. However, to request a psychological WPI assessment an injured person will need to have received mental health treatment and also provide a notice from a psychiatrist or clinical psychologist stating the practitioner reasonably believes the person is likely to have a permanent psychological injury resulting from the motor accident.

The amendment also clarifies that a WPI assessment of a physical injury may take into account a secondary psychological injury that results from the physical injury and that a WPI assessment of a primary psychological injury must not take into account a secondary psychological injury. The amendment includes a definition and example of a primary psychological injury – post-traumatic stress disorder resulting from witnessing the motor accident. The amendment also includes a definition and example of a secondary psychological injury that results from the physical injury – depression and anxiety as a result of ongoing pain from the physical injury.

Amendment 16: Clause 150(1)(c)

This amendment will clarify that WPI assessments for each physical body system may be combined in accordance with the WPI guidelines to decide an injured person's WPI for their physical injuries. Similarly, that WPI assessments for each psychological body system may be combined in accordance with the WPI guidelines to decide an injured person's WPI for their psychological injuries.

Amendment 17: Clause 150(2)

This amendment removes the requirement for an independent medical assessor to only assess either physical or psychological injuries. Under the amendments to clause 149 an injured person will be able to request separate WPI assessments for physical and primary psychological injuries.

Amendment 18: Proposed new clause 151A

This clause will enable an insurer to take into account WPI assessments of a person's physical injuries and psychological injuries (if the assessment of the WPI for each kind of injury is more than 0 per cent) to determine the amount of quality of life benefits the insurer may offer the injured person.

Amendment 19: Clause 152(1)

Clause 152 provides for the process to be followed by a relevant insurer where the WPI is less than 5%. Subclause (1) is proposed to be substituted to provide for the separate WPI assessments for physical and psychological injuries. Upon the receipt of the separate WPI reports the insurer may consider that it is appropriate to make an offer to the person taking into account each WPI report. In doing so, the insurer must give the injured person a written notice, including how the injured person can disagree with each report.

Amendments 20, 22, 24: Proposed new clause 152(2A), 153(2A), 154(3A)

An offer of an amount of quality of life benefits will be taken to be accepted under clauses 152, 153 and 154 of the bill, if an injured person does not notify an insurer whether they accept or disagree with a WPI report and give the insurer a second WPI report, within 26 weeks.

These amendments will require that the relevant insurer to take all reasonable steps to notify the injured person about the consequences of failing to notify the insurer, and failing to give the insurer the 2nd WPI report as stated in the notice within 26 weeks. The amendments also include examples of what reasonable steps taken by the insurer may be.

Amendments 21, 23, 25: Clause 153(1), clause 154(1) and (2), and clause 155(1) and (2)

These amendments substitute their respective subclauses to replace references to WPI report to 'each report'; and provided for the process the relevant insurer must follow with respect to giving a notice to the injured person following their receipt of the report. It is an amendment consequential to the amendment to clause 149.

Amendment 26: Proposed new clause 155 (4A)

A WPI offer under clause 155 of the bill will be taken to be accepted if an injured person does not notify an insurer by a due date that they accept the offer, or have given the insurer a second WPI report. The amendments will require a relevant insurer to take all reasonable steps to notify the injured person about an upcoming due date and consequences of failing to notify the insurer by the due date.

Amendment 27: Proposed new Clause 156 (5A)

An insurer will be required to reimburse the cost of a second WPI assessment, carried out by a private medical examiner, if the person's first WPI assessment from an independent medical examiner was below 10 per cent and the second WPI assessment was 10 per cent or more and the injured person makes a common law claim.

Amendment 28: Clause 158(3)

This amendment substitutes clause 158(3) to provide that the final offer must not be less than the first WPI report in accordance with the clause.

Amendment 29 and 30: Clause 159(1)(b)(ii) and Proposed new clause 159(1)(c)

This amendment removes clause 159(1)(b)(ii) and inserts a new subparagraph that makes it clear that a relevant insurer may offer the injured person the amount of quality of life benefits payable for their final offer if this is considered appropriate, having taken into account separate physical and psychological WPI assessment reports.

Amendment 31, 32, 33: Proposed new clause 160(2A), 161(3A), 162 (4A)

Final WPI offers under clauses 160 and 161 will be taken to be accepted if an injured person does not notify an insurer within 28 days of receiving the offer, whether they accept the offer or whether they have applied to ACAT for review of the WPI offer decision.

Clauses 160(2A) and 161(3A) insert a requirement for the relevant insurer to take all reasonable steps to notify the injured person about the consequences of failing to notify the insurer within 28 days.

A final WPI offer under clause 162 of the Bill will be taken to be accepted if the injured person does not notify an insurer by a due date whether they accept the offer or whether they have applied to ACAT for review of the WPI offer decision. The amendment to clause 162(4A) inserts a requirement the relevant insurer to take all reasonable steps to notify the injured person about the due date and consequences of failing to notify the insurer.

All the amendments include examples of what may constitute reasonable steps by the insurer.

Amendment 34: Clause 163(2)

Under clause 163, the relevant insurer is liable for the costs of a WPI assessment. Subclause (2) is substituted to take account of 1 WPI assessment of the person's physical injuries, and if the injured person requests a WPI assessment of the person's psychological injuries, for 1 WPI assessment.

Amendment 35: Proposed new clause 163A

This amendment provides for the effect certain WPI assessments have on motor accident claims and the *Limitation Act 1985*. Despite the *Limitation Act* section 16AA, a person injured in a motor accident who has had a certain WPI assessment has 3 months from whichever of the following dates:

- If the injured person receives a notice under clause 141(3B) – the date that is 26 weeks after the date of the notice;
- If the injured person receives a notice under clause 155(2) or clause 162(2) – the due date of the notice.

This is to ensure an individual is not prevented from proceeding with a common law claim for the motor vehicle accident.

Amendment 36: Clause 164(1)(a) and (b)

This amendment provides for the date upon which the relevant insurer is to assess the quality of life benefits payable. The date is relevant as the amount is AWE indexed.

Amendment 37: Clause 183, definition of internally reviewable decisions

The amendment will omit the definition of an internally reviewable decision, currently a decision of an insurer prescribed by regulation, and replace the definition to mean a decision set out in the table

in part 1A.1, of schedule 1A, or a decision prescribed by regulation. The regulation making power is provided to allow for any additional reviewable decisions that might be identified.

Amendment 38: Proposed clause 188 (2A)

The amendment will clarify that if an internally reviewable decision is not affirmed by an insurer then a substituted or amended decision will apply from the date of the original reviewable decision.

Amendment 39: Clause 189, definition of ACAT reviewable decision

The amendment will omit the definition of an ACAT reviewable decision, currently a decision of an insurer prescribed by regulation and replace the definition to mean a decision set out in the table in part 1A.2, of schedule 1A, or a decision prescribed by regulation. The regulation making power is provided to allow for any additional reviewable decisions that might be identified.

Amendment 40: new clause 195(1A) and (1B)

Clause 195 provides that ACAT may order a party to pay the costs of the other party to an application for external review and provides for a regulation.

This amendment will provide in addition to the current provision that the ACAT must not award costs of, or incidental to, an application for external review against an injured person seeking review of an ACAT reviewable decision where the application for external review was made in good faith and that there was an arguable basis for the application. ACAT may be satisfied an applicant has an arguable basis for their application if the applicant appears in person (that is, if an applicant is self-represented, in relation to (1A)(b)).

Amendment 41: Proposed clause 196 (2) (b)

The amendment will clarify that if an externally reviewable decision is not affirmed by ACAT then a substituted or amended decision will apply from the date of the original reviewable decision, unless ACAT otherwise orders. The amendment will ensure an injured person is not disadvantaged where the timing of a decision may affect the injured person's eligibility for a common law claim or a medical treatment payment.

Amendment 42: Clause 206(1)(b) and Amendment 43: Proposed new clause 206(3)

This amendment and the following amendment 43, relate to significant occupational impact. The amendment to clause (1)(b) provides for where there are separate WPI reports, then it is the higher of the WPI assessment that applies for a significant occupational impact. Amendment 43 makes it clear that it is the relevant insurer who is liable for the costs of a significant occupational impact assessment, unless otherwise provided in this chapter.

Amendment 44: Proposed new clause 236(2A)

This amendment provides for where there are separate WPI reports, then it is the higher of the WPI assessment that applies with respect to the requirement for having at least 10% whole person impairment for an award of damages.

Amendment 45: Clause 239(1)

This clause deals with circumstances where quality of life damages may be awarded. The amendment clarifies that damages may only be awarded for non-economic loss (quality of life

damages) in accordance with clause 241 (where the claimant was a child on the date of the motor accident) or clause 240, in any other case.

Amendment 46: Clause 240(1) to (3)

This clause deals with the amount that may be awarded for quality of life damages. The amount stated in the scale of damages is determined based on the date of the physical or psychological WPI assessment report the claimant relies on to make the motor accident claim.

The amendment clarifies the position that where a court considers that the claimant's WPI assessment relied upon to make the claim did not take into account a particular injury, or a particular effect on the claimant's quality of life – an additional amount of up to 20 per cent may be awarded on top of their quality of life payment calculated based on their assessed Whole Person Impairment.

The amendment also inserts an example of a particular effect on a claimant's quality of life as chronic pain. Likewise, it clarifies that the court must not award any additional amount under clause 240(1)(b) if the claimant is awarded damages for the particular injury or particular effect on the claimant's quality of life under another head of damages.

Amendment 47: Clause 255(1A)

Before a claimant for a motor accident claim brings a court proceeding based on the claim, the parties to the claim must have a conference. This amendment clarifies that where a claimant brings a proceeding based on the claim and applies to stay proceedings based on clause 141(3B) (WPI Assessment 4 years 6 months after motor accident), the parties to the claim must have a compulsory conference before the proceeding can further proceed.

This is in recognition that the WPI estimate will mean the proceeding needs to be stayed but in order to commence proceedings there is a requirement to hold the compulsory conference. This requirement is suspended until the stabilised WPI assessment is received by the parties.

The amendment also inserts a note reflecting the *Civil Law (Wrongs) Act 2002*, section 79 (need for urgent proceeding) may apply to a claimant in relation to a motor accident claim.

Amendment 48 and 49: Clause 376 (1) penalty and clause 378 penalty

The amendments to clause 376 (1) and clause 378 will increase the maximum penalty for an offence committed by insurers for contravening a condition of an MAI insurer licence from 100 to 200 penalty units.

Increasing maximum penalties is intended to reinforce compliance with statutory licence conditions under the MAI scheme, particularly conditions that apply to an insurer's conduct and practices in handling applications and claims for injured people. A penalty unit for a corporation is currently \$810.

Amendment 50: Proposed new clause 466 (6) and (7)

The amendment to clause 466 (6) will prohibit the MAI Commission from publishing statistical data based on information the MAI Commission receives from a lawyer or other stated service provider if the publication of that information would disclose confidential information about the practices of the lawyer or service provider. Under clause 466 (7) confidential information about the practices of a lawyer or stated service provider, including the practices of a partnership, will be taken to be protected information for the purposes of the offence in section 473 of the MAI Act.

Amendment 51: Proposed new schedule 1A

This amendment inserts new schedule 1A setting out defined benefit decisions that are subject to dispute resolution. Part 1A.1 sets out a table of internally reviewable decisions and Part 1A.2 sets out a table of ACAT reviewable decisions.

Amendment 52: Schedule 2, part 2.2, Amendment 2.13, Proposed new section 51 (3A) (aa)

This part deals with consequential amendments made to the *Civil Law (Wrongs) Act 2002*. This amendment inserts in the clause that for a proceeding based on a motor accident claim, the notice must be given within 3 months after the date that is 26 weeks after the date of the notice where a claimant receives a notice under section 141(3B) (WPI assessment 4 years and 6 months after motor accident) of the *Motor Accident Injuries Act 2019*.

Amendment 53: Schedule 2, part 2.2, Amendment 2.32

This amendment substitutes the previous note in the *Civil Law (Wrongs) Act 2002* and clarifies that the only damages that may be awarded for non-economic loss are damages for loss of quality of life.

Amendment 54: Schedule 2, part 2.6, Amendment 2.69 Proposed new section 16AA, note

This amendment inserts an additional note into the *Limitation Act 1985*, section 16AA to reflect proposed clause 163A in the *Motor Accident Injuries Act 2019*. Under clause 163A, a person who has had a WPI assessment has 3 months from the latest of the following dates to make a motor accident claim:

- if the person receives a notice under that Act, s 141 (3B)—the date that is 26 weeks after the date of the notice;
- if the person receives a notice under that Act, s 155 (2) or s 166 (2)—the due date for the notice.