

**2023**

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

**MOTOR ACCIDENT INJURIES AMENDMENT BILL 2023**

**EXPLANATORY STATEMENT**

**and**

**HUMAN RIGHTS COMPATIBILITY STATEMENT**

***(Human Rights Act 2004, s 37)***

**Presented by**

**Chris Steel MLA  
Special Minister of State**

## MOTOR ACCIDENT INJURIES AMENDMENT BILL 2023

This Explanatory Statement relates to the Motor Accident Injuries Amendment Bill 2023 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Explanatory Statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

The Bill is not a Significant Bill. Significant Bills are bills that have been assessed as likely to have a significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

### Background

Motor accident injuries insurance in the Australian Capital Territory is regulated by the *Motor Accident Injuries Act 2019* (MAI Act) since 1 February 2020. It replaced the former Compulsory Third-party (CTP) insurance scheme. The Motor Accident Injuries (MAI) Scheme is a no-fault hybrid defined benefits common law scheme. A key feature of the MAI Scheme is that it is no longer necessary to prove another driver was at-fault in order to access defined benefits following injury in a motor accident. The provision of defined benefits, for treatment and care as well as income replacement, is for up to five years. There are some exceptions and exclusions that apply to the receipt of defined benefits.

Quality of life defined benefits to cover non-economic loss are payable to people who meet injury impairment thresholds. If a person dies as a result of a motor accident, benefits are also available for dependants and to cover funeral expenses. Additional common law benefits are available to people who are more seriously injured (meeting a Whole Person Impairment threshold of 10 per cent or more) and whose injury was caused by someone else's fault.

The MAI Scheme was developed following the 2017-18 deliberative democracy process (CTP Citizen Jury), where 50 Canberrans were asked to consider with the community and other stakeholders how to improve personal injuries insurance to reflect the priorities of Canberrans. Over the two and half years the MAI Scheme has been operating, with nearly 1100 applications being lodged, 81% of applicants have received early treatment and care – a key concern of the CTP Citizen Jury for early access – within 4 weeks of a complete application following an accident<sup>1</sup>.

The Motor Accident Injuries Amendment Bill 2023 proposes a financial penalty regime as part of the regulatory tools available to the MAI Commission. The Bill also includes miscellaneous and technical amendments to the MAI Act to address issues identified during the implementation and operation of the legislation. The miscellaneous and technical amendments do not change the substance of the provisions but clarify and clean up legislative provisions that have had or have the potential to cause confusion in the application of the legislation.

### Consultation on the proposed approach

The proposal was developed following the introduction of the MAI Scheme through discussions with the MAI Insurers, Justice and Community Safety Directorate and the legal profession.

### Consistency with Human Rights

The explanatory statement to the *Motor Accident Injuries Bill 2019* provides a detailed analysis of the human rights implications of the MAI Scheme and the reader is referred to that analysis

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<sup>1</sup> Scheme Quarterly Report, July to September 2022.

(available on the ACT Legislation Register, under Law History). The MAI Scheme extended personal injury insurance coverage to everyone injured in a motor vehicle accident, not just those who can prove fault. This has had a positive impact by removing the delay and stress of first having to prove someone was at-fault to access benefits in contrast to the previous CTP scheme. It allows an injured person to focus on their recovery through treatment and care and a financial assistance safety net.

The financial penalty provisions included in the Bill are enforceable only against licensed MAI insurers that are required by the MAI Act to be body corporates. As the *Human Rights Act 2004* (HRA) only protects the rights of individuals, the financial penalty provisions do not engage human rights.

#### *Rights engaged and limited*

##### Right to privacy

The Bill proposes a new requirement for an injured person to consent to the insurer making a referral for a significant occupational impact (SOI) assessment. This will bring this part of the MAI Act into line with the process for applying for other benefits. As such this will require personal details, including health and work/financial information, to be given by consent. This may engage the right to privacy protected by Section 12 of the HRA.

The personal, in particular the work/financial, information is required to establish the basis of the application and to enable services to be provided by the relevant insurer. The MAI Act includes safeguards for the personal information, in addition to the provisions of privacy legislation - *Information Privacy Act 2014*, the *Health Records (Privacy and Access) Act 1997* and the Commonwealth's *Privacy Act 1988*.

Personal health information is collected throughout the process of receiving defined benefits. There is some work-related information that is provided as part of defined benefits but for a SOI assessment further work and employment information is required to enable the independent assessor to complete an assessment. The SOI assessment considers whether the person's injury has reduced the person's capacity to undertake their previous employment and whether they could train in alternative employment. The assessment is only able to be undertaken if the injured person has a whole person impairment (WPI) of less than 10% and it is 4 years and 6 months since the date of the motor accident.

The consent is important to enable an insurer, as part of their duties, to arrange and monitor benefits that contribute to an injured person's recovery. Without this authority, the scheme could not provide the optimal outcome intended, which will be detrimental to the community as a whole. Strong safeguards are in place for the handling, confidentiality and permitted disclosures of information under Chapter 7, Information Collection and Secrecy, in the MAI Act.

The limits on the identified rights are reasonable and justifiable in a free and democratic society, utilising reasonable and objective criteria and by engaging the least restrictive means to achieve the purpose. The information that is required is intended to no more than that which is required by the assessor to undertake the assessment in accordance with the MAI Act and the guidelines.

## Motor Accident Injuries Amendment Bill 2023

### *Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Motor Accident Injuries Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA  
Attorney-General

## Clause Notes

### Clause 1: Name of the Act

This clause provides that the Act will be named the *Motor Accident Injuries Amendment Act 2023*.

### Clause 2: Commencement

This clause provides that the Act will commence on the 7<sup>th</sup> day after its notification day.

### Clause 3: Legislation amended

This clause provides that the Act amends the *Motor Accident Injuries Act 2019* (MAI Act).

### Clause 4: Meaning of *AWE indexed* for amount Section 18 (1), definition of *AWE indexed*, paragraph (c)

This clause changes the rounding rules for *AWE indexed* amounts referred to in formulas for calculating income replacement in the Act so rounding up occurs to the nearest dollar rather than the nearest whole \$10. This aligns with the rounding rule which is applied for the *AWE adjustment* of pre-injury income amounts and ensures the percentage of income replacement a person receives will not change as a result of indexation.

### Clause 5: Duty to act in good faith – applicants, claimants, and insurers Section 20 (5)

This clause will expand section 20(5) of the MAI Act so that if the ACT Civil and Administrative Tribunal (ACAT) is hearing a dispute in relation to an application for defined benefits then ACAT may take into account the duty of good faith the licensed insurer and applicant has under section 20 and make an order in relation to the exercise of the duty for the matter.

This amendment recognises the role that the ACAT has in the Motor Accident Injuries (MAI) Scheme in externally reviewing decisions made by insurers in relation to applications for defined benefits and ensures ACAT can directly consider the duties of each party when making an external review decision. This amendment is bringing consistency to the legislation given the existing ability of a Court to consider the duties of each party when matters are before the Court.

### Clause 6: Delegation by MAI Commission Section 30 (1) (a)

This clause removes a drafting anomaly, whereby the MAI Commission is able to delegate its functions to the MAI Commissioner. Under section 23 of the MAI Act the MAI Commission consists of the MAI Commissioner, and therefore a delegation from the MAI Commission to the MAI Commissioner is not required.

### Clause 7: Definitions – div 2.2.2, Section 42, new definition of *found guilty*

This clause inserts a new definition to clarify “found guilty” of an offence. It was identified that the reference to non-conviction orders in each of sections 44, 45, and 48 was unclear, especially as the sections also use found guilty, which is a defined term in the *Legislation Act 2001*. The new definition addresses this by making it clear that ‘found guilty’ of an offence in the MAI Act includes having an offence taken into account in sentencing but does not include having a non-conviction order made. It gives the same effect but with better clarity than the current approach used in the Act.

### Clause 8: Section 42, definition of *non-conviction order*

The clause removes the definition as it is now dealt with by the new definition of found guilty inserted by clause 7.

### Clause 9: Entitlement limited – single driving offence, Section 44 (5)

The clause removes a subsection referring to non-conviction orders, that is now dealt with by the definition of found guilty.

**Clause 10: No entitlement – multiple driving offences, Section 45 (5)**

This clause amends section 45(5). The subsection was drafted in the singular when the provision deals with multiple driving offences. To address the ambiguity, subsection (5) is amended to provide that if a person is convicted or found guilty of only 1 driving offence despite being charged with multiple driving offences, then the entitlement to income replacement benefits or quality of life ends. If a person is convicted or found guilty of 2 or more driving offences, the entitlement to treatment and care is also ended (see subsection (3)). The amendment brings subsection (5) in line with section 44, single driving offence.

**Clause 11: No Entitlement - serious offences**

The clause removes a subsection referring to non-conviction orders, that is now dealt with by the definition of found guilty.

**Clause 12: Entitlement limited – workers compensation applicant Section 50 (3), new note**

This clause inserts a second note to section 50(3) to refer to the requirement to give an insurer written notification of the withdrawal of a workers compensation application in section 73(4) of the MAI Act.

**Clause 13: When entitlement to certain benefits ends Section 51 (2), new note**

This clause inserts a note to refer to divisions 2.6.2 and 2.6.3 of the MAI Act, which provide for when a quality of life benefit application is finally dealt with.

**Clauses 14 and 15: Sections 54 (1) and 57 (5), definitions of *authority to disclose personal health information and information disclosure content***

These clauses replace references in these definitions to “independent health assessor” with “independent assessor” because of amendments to section 206 of the MAI Act.

**Clause 16: Dispute about liability for application Section 70 (5) (b)**

This clause clarifies that in the event of a dispute about a transfer of an application between two insurers, if the second insurer is found to be liable, the first insurer can recover any defined benefits amounts already paid, from the second insurer.

**Clause 17 and 18: Application for defined benefits – notification of application under workers compensation scheme Sections 73 (4) and (5)**

These clauses omit the note in s73(4) and includes a new note at the end of section 73 to provide greater clarity about a person’s entitlements to defined benefits under section 50 of the MAI Act on the withdrawal or denial of a workers compensation application.

**Clause 19: Meaning of AWE adjusted – div 2.4.3 Section 94 (4) example**

This clause amends the example to correctly refer to amounts of pre-injury income and to calculate the AWE adjustment factor. For clarity the example has also been amended to use actual AWE amounts published by the Australian Statistician for November 2019 and May 2020.

**Clause 20: Notice required to reduce or stop income replacement payments Section 107 (2) (b)**

This clause amends subsection 107(2)(b) to clarify that a notice to reduce or stop income replacement payment does not need to be provided under section 107 in circumstances where the benefits have been suspended under new section 124A. This prevents duplication of notification requirements. Under new section 124A a suspension notice will be required to be given to the injured person at least two weeks before a suspension takes effect.

**Clause 21: Assessment of injured person’s injuries, Section 121 (3)**

This clause amends section 121(3) to clarify that if an injured person, fails without reasonable

excuse, to comply with a reasonable request for an assessment of their injuries, an insurer may suspend “either or both” of the person’s treatment and care benefits and income replacement benefit payments. The amendment will ensure consistent drafting with the suspension provisions in new section 124A. There are two steps required, first that the request made by the insurer was reasonable and that the injured person offered an excuse that was not reasonable on its face. Under section 3.2.4 of the Treatment and Care Guidelines made under the Act an injured person is to be given at least two weeks’ notice of the assessment and should consult and take into account the person’s work, personal and carer commitments, and their residential area in arranging the appointment.

**Clause 22: Section 121 (4) (b)**

This clause makes an amendment to correctly refer to benefits ‘or payments’ being suspended, ensuring consistency with new section 124A.

**Clause 23: New Section 124A**

Under division 2.5.4 of the MAI Act an insurer is required to develop a recovery plan for the management of an injured person’s treatment and care in consultation with an injured person and their doctor. The recovery plan states the treatment and care approved by the insurer as reasonable and necessary treatment and care and is updated on a regular basis.

Section 124 provides as part of the content of the recovery plan that a statement is to be included that their defined benefits may be suspended if the injured person unreasonably fails to undergo the treatment and care stated in the recovery plan. While section 124 provides for the statement, the corresponding provisions providing for notice to be given or when the suspension is to take effect are not included. The clause inserts new section 124A to provide for the process to be followed by an insurer in relation to suspending entitlements. It provides that an insurer may suspend if the person does not provide a reasonable excuse for not undergoing the treatment outlined in the recovery plan.

A suspension notice will be required to be given to the injured person at least two weeks before a suspension takes effect. This will provide the injured person with an opportunity to take actions to avoid the suspension, including to follow up with the MAI insurer in relation to the treatment and care in the recovery plan. The MAI guidelines may also make provision in relation to matters to be taken into consideration by an insurer for a suspension notice. A decision made under new section 124A(1) will be both an internally reviewable decision and an ACAT reviewable decision.

The power to suspend benefits is consistent with an injured person’s duty in section 20(2)(d)(i) of the MAI Act to take all reasonable steps to minimise the loss caused by the motor accident including by undertaking all reasonable and necessary treatment and care. New section 124A will be consistent with section 121 of the MAI Act which enables an insurer to suspend benefit or payments if an injured person fails without reasonable excuse to comply with a request for an assessment of their injuries. Section 121 also requires a suspension notice to be given at least two weeks before the suspension takes effect. A statement in a recovery plan to the effect that benefits may be suspended if a person unreasonably fails to undergo treatment and care stated in the plan is also required under section 124 of the MAI Act.

**Clauses 24, 25 and 26 – Quality of life benefits application, Sections 137 (1), 137 (3) (a) and 137 (4)**

These clauses make amendments to section 137 to clarify the process for making a quality of life benefits application. The amendments confirm that a person can only make a quality of life benefits application to an insurer if the insurer accepts, or is taken to accept liability, for defined benefits under section 65. In addition, a quality of life benefits application must request an insurer refer the

person to an authorised IME provider for a WPI assessment. They also confirm that a person's first WPI assessment must occur on referral from the insurer to the authorised WPI provider under division 2.6.2, and a second WPI assessment with a private medical examiner may be arranged by the injured person, but only if they disagree with the first WPI report from the first WPI assessment. The MAI Commission has appointed a service provider with appropriate experience to select and provide independent medical examiners to undertake the first WPI assessment (the provider appoints relevant medical examiners without influence from the insurer or legal representative).

**Clause 27 – WPI assessment - 4 years and 6 months after motor accident Section 141 (1) (a)**

This clause clarifies that section 141 of the MAI Act applies in relation to a quality of life application received from a person to whom section 138, insurer believes injuries stable and permanent impairment, or section 140, insurer believes injuries not stabilised -up to 4 years 6 months after motor accident, of the MAI Act applies.

**Clause 28: Section 141 (4) (a)**

This clause amends section 141 (4) (a) to make it clear that the notification requirements in subsections (5) and (6) apply. The requirement is triggered if there are separate reports, the report with the higher estimated WPI of at least 5%, or if there is only one WPI report, if the report has estimated WPI of at least 5%.

**Clauses 29 and 30: WPI assessment-multiple body systems affected Section 151 (d) and new section 151 (2)**

These clauses clarify that a WPI assessment for a primary psychological injury must be conducted in accordance with the WPI guidelines to decide the person's WPI for their psychological injuries, and that an injury to a person's body system includes a primary psychological injury. A primary psychological injury is defined in section 150(6) of the Act.

**Clause 31: Section 154 heading**

This clause amends the heading to section 154 to make it clear that an insurer may make an offer in circumstances where a WPI report assesses a person's WPI as less than 5% and there are separate WPI reports for the person's physical and primary psychological injuries. In these circumstances the insurer may make an offer for a quality of life benefit. It is a minor amendment intended to provide clarity about the intent of the section, as the threshold for the benefit is 5 percent.

**Clause 32: Section 154 (2) (b)**

This clause deletes a reference to 'taking into account each WPI report' to remove an inconsistency with section 153 of the Act (an overall provision). Where there are separate WPI reports for a person's physical and psychological injuries, section 153 permits, but does not require, an insurer to take into account the WPI for each kind of injury when making an offer of quality of life benefits.

**Clauses 33 and 34: Section 154 (4) and (6)**

These clauses make provision in sections 154 (4) and (6) for circumstances where an insurer has made an offer of a quality of life benefits, or if no offer is made, the person is given each WPI report. Time periods for providing a second WPI report or the finalisation of a quality of life benefit application then apply in relation to the offer or a report.

**Clause 35: Section 155 heading**

The clause amends the heading to Section 155 to clarify that an insurer must make an offer in circumstances where the section applies.



**Clause 36: WPI 10% or more - injured person entitled to make a motor accident claim**  
**Section 157 (8), definition of a due date, new paragraph (c)**

This clause inserts new paragraph (c) to apply a due date to cover circumstances where a person gives an insurer a *complying notice of claim* for a motor accident claim, but liability for the claim is subsequently rejected. This will enable the person to then receive the quality of life benefit payment.

**Clause 37: Section 157 (8), new definition of *complying notice of claim***

This clause inserts a definition of a complying notice of claim for the purposes of Section 157 (8) being the definition in section 257 of the Act.

**Clause 38: Second WPI report – original WPI may be affirmed or increased Section 159 (1) (a)**

This clause clarifies that the section applies if an insurer receives at least 1 second WPI report including in circumstances where there is a separate first WPI report for a person's physical and psychological injuries.

**Clause 39: Final offer WPI less than 5% - New section 161 (1) (b) (iii)**

This clause inserts new section 161 (1) (b) (iii) so where there are separate WPI reports for a person's physical and psychological injuries, the insurer must tell the person how their final offer WPI was determined.

**Clause 40: Section 161 (1) (c)**

The clause removes a redundant paragraph. If an insurer decides after receiving a second WPI report from the injured person that the final WPI is less than 5%, below the threshold for the benefit, then no amount can be offered. The insurer is required to tell the person the Final Offer WPI and that they may apply to the ACAT for review of the decision.

**Clause 41: Section 161 (2), definition of *stated time***

The clause amends the current definition of stated time to make allowance for the circumstance where separate second WPI reports may be received by an insurer for both physical and psychological injuries. If the insurer has arranged for a review of one or more second reports, then the stated time will be 14 days after receiving a notice of affirmation for the review, or if applicable, the later review. If the insurer did not request the IME provider to arrange a review of at least one report, then the stated time will be 28 days after the date of receiving the second report, or if applicable, the later of the second WPI reports.

**Clause 42: Final offer WPI 5% to 9% - New section 162 (1) (b) (iii)**

This clause inserts new section 162 (1) (b) (iii) so where there are separate WPI reports for a person's physical and psychological injuries, the insurer must tell the person how their final offer WPI was determined.

**Clause 43: Section 162 (5), definition of *stated time***

This clause amends the current definition of stated time to make allowance for the circumstance where separate second WPI reports may be received by an insurer for both physical and psychological injuries. If the insurer has arranged for a review of one or more second reports, then the stated time will be 14 days after receiving a notice of affirmation for the review, or if applicable, the later review. If the insurer did not request the IME provider to arrange a review of at least one report, then the stated time will be 28 days after the date of receiving the second report, or if applicable, the later of the second WPI reports.

**Clause 44: Final offer WPI 10% or more – injured person not entitled to make motor accident claim, new section 163 (2) (b) (iii)**

This clause inserts new section 163 (1) (b) (iii) so where there are separate WPI reports for a person's physical and psychological injuries, the insurer must tell the person how their final offer WPI was determined.

**Clause 45: Section 163 (6), definition of *stated time***

This clause amends the current definition of stated time to make allowance for the circumstance where separate second WPI reports may be received by an insurer for both physical and psychological injuries. If the insurer has arranged for a review of one or more second reports, then the stated time will be 14 days after receiving a notice of affirmation for the review, or if applicable, the later review. If the insurer did not request the IME provider to arrange a review of at least one report, then the stated time will be 28 days after the date of receiving the second report, or if applicable, the later of the second WPI reports.

**Clause 46 Final offer WPI 10% or more – injured person entitled to make a motor accident claim, new section 164 (2) (b) (iii)**

This clause inserts new section 164 (2) (b) (iii) so where there are separate WPI reports for a person's physical and psychological injuries, the insurer must tell the person how their final offer WPI was determined.

**Clause 47: Section 164 (6)**

This clause inserts the definition of complying notice of claim and provides an addition to the due date to take into account where liability is rejected on a notice of claim, by the insurer or through court proceedings, then the quality of life benefit is payable as no quality of life damages has been paid. It is making it obvious that there is an entitlement payable in the event of no quality of life damages.

The clause also amends the current definition of stated time to make allowance for the circumstance where separate second WPI reports may be received by an insurer for both physical and psychological injuries. If the insurer has arranged for a review of one or more second reports, then the stated time will be 14 days after receiving a notice of affirmation for the review, or if applicable, the later review. If the insurer did not request the IME provider to arrange a review of at least one report, then the stated time will be 28 days after the date of receiving the second report, or if applicable, the later of the second WPI reports.

**Clause 48: WPI assessment – Relevant insurer to pay – Section 165 (2) and (3)**

This clause amends section 165 to clarify that unless a person has injuries to multiple body systems then an insurer is only liable for the cost of 1 WPI assessment for the person's physical injuries and 1 WPI assessment for the person's primary psychological injury. If an insurer has injuries to multiple body systems, then the insurer is liable for the costs of 1 WPI assessment for each affected body system.

**Clause 49: Effect of certain WPI assessments on motor accident claim: section 166 (b)**

This clause corrects a cross-reference.

**Clause 50: Section 206**

This clause amends the definition of an 'independent health assessor' to an 'independent assessor' being a person who conducts Significant Occupational Impact (SOI) assessments under an arrangement with an authorised IME provider. The person who conducts an SOI assessment will need to meet qualification and experience requirements in the SOI assessment guidelines which are relevant to conducting occupational assessments. This can include allied health professionals such as

rehabilitation counsellors who are not required to be registered health practitioners, as they do not diagnose or treat injuries. The authorised IME provider is to ensure that the assessor is appropriately qualified to be appointed an independent assessor.

**Clauses 51, 52 and 53: Meaning of *SOI assessment* and *SOI report*: section 207 (1) definition of *SOI assessment*, section 207 (1) definition of *SOI report*, section 207 (2)**

These clauses update the definitions of *SOI assessment* and a *SOI report* to refer to an assessment and an independent assessor. The word “health” limits the people who can undertake an *SOI assessment* that is an assessment of a person’s capacity to work. Information from external medical reports and other health assessments is considered as part of the *SOI assessment* process, and the assessor does not undertake a separate health assessment to form an opinion on the occupational impact of a person’s injuries. The definition of *health assessment* is also removed.

**Clause 54: *SOI assessment guidelines*: section 208 (2) (a)**

Section 208 provides for what may be included in the guidelines for an *SOI assessment*. Extraneous detail was included in the provision that could limit what the guidelines may include. The amendment removes this detail to simply provide that the guidelines may state procedures and principles to be followed in making an *SOI assessment*.

A significant occupational impact is defined by section 205 and provides that an injured person’s ability to undertake employment can have a significant occupational impact if the person is either prevented from performing the work or has reduced capacity for the work performed before the motor accident, and either is unable/has limited capacity to undertake training in another line of work or cannot take up appropriate alternative employment. As such the assessment has to include an analysis related to the person and their prospects for work.

**Clause 55: *SOI assessment 4 years 6 months after motor accident*: Section 209 (1)**

This clause amends conditions in section 209 (1) which must be satisfied before an insurer refers an injured person for an *SOI assessment*. The amendments include a new condition to require a person to give their consent to an insurer before they can be referred for an *SOI assessment*. It should be an individual’s choice to undergo the assessment even if they satisfy the conditions. The amendments also clarify that the conditions for a referral can be satisfied from 4 years and 6 months after an accident, and that a person can only be referred once under section 209 for a *SOI assessment* in relation to their injuries. The conditions in section 209 requiring a person to have made a quality of life application and received a WPI of less than 10%; and to be receiving income replacement (or by regulation would have been eligible to receive these benefits) remain unchanged.

**Clauses 56, 57 and 61: Arrangement of *SOI assessment* Sections 210 (2) (a); Sections 211 (1) and 212 (1); and ACAT review decision Section 218 (2) and (3)**

Each of the amendments provide for the new term of ‘independent assessor’ for this part.

**Clause 58: *SOI report – injury has significant occupational impact*: section 213 (1)**

The clause amends section 213 (1) so it is clear that section 213 only applies if the *SOI report* confirming that a person’s injury has a significant occupational impact was obtained following a referral from the relevant insurer to an authorised IME provider for a *SOI assessment*.

**Clause 59: section 213 (3)**

This clause was intended to preserve the quality of life benefits application while a significant occupational impact assessment was undertaken. However, it used the word ‘making’ rather than ‘reviving’. The amendment corrects this.

**Clause 60: *SOI report – no significant occupational impact – ACAT review*: new section 215 (3)**

This is a new provision to make it clear that the assessor who carries out an *SOI assessment* is not to

be made a party to a proceeding for review of the relevant SOI report. Once a SOI report is completed and provided to the insurer by the IME provider, the insurer is required by section 214 to provide a copy of the report and information to the applicant on the report. It is also the insurer that is required to provide information regarding applying to the ACAT for review of the report. The ACAT is empowered by section 218 to either affirm the report or to set aside the report confirming there is an SOI. The authorised IME provider, and not the assessor, may also be asked to provide documents in relation to the report to ACAT.

**Clause 62: New section 218 (4A)**

This clause clarifies that if ACAT makes an order confirming that the injured person's injury has had a significant occupational impact on their ability to undertake employment, then section 213 applies as if the decision of ACAT is a SOI report from an independent medical examiner or independent assessor.

**Clause 63: Future treatment payment- assessment and calculation: section 223 (d)**

This clause inserts a time limit of two months for an insurer to provide a written notice about the amount and calculation of a future treatment payment following the receipt of an application for the payment.

**Clause 64: New section 223 (d) (iv) (C)**

This clause inserts new section 223 (d) (iv) (C) to include a statement to make it clear that if a different amount is negotiated for a future treatment payment from the amount calculated in the written notice given under section 223 (d) of the MAI Act, then this amount only applies to medical treatment expenses and cannot include legal or any other costs.

The payment of future medical treatment expenses allows an agreement for funds to pay for treatment and care where at 4 years and 6 months the injured person has been receiving medical treatment continuously for at least 2 years and 6 months, was not at fault but is not entitled to make a motor accident claim. An application is made to the insurer who assesses the approved medical treatment and the period they will likely require up to a five year period following the end of the entitlement to defined benefits (five years from the date of the motor accident). By making it clear in section 223 (d) (iv) that an amount agreed applies only to future medical treatment, a person is better informed through the statement required to be provided of the effect of the agreement.

**Clause 65: Award of damages – requirements Section 239 (1) (a)**

This clause clarifies the requirements for WPI assessments for an injured person who has made a quality of life benefit application under division 2.6.2, to then proceed with a motor accident claim. In these circumstances either an assessment must have been conducted by an independent medical examiner under division 2.6.3 and the person must have been assessed with a WPI of at least 10% as a result of the accident, or the insurer must have decided that the person has a WPI of at least 10% and have made a final offer WPI. The clause confirms that the process for WPI assessments set out in divisions 2.6.2 and division 2.6.3 must be followed, with a first WPI report from an independent medical examiner being from an assessment arranged by an insurer, and any second WPI assessment report from a private medical examiner then only be used to decide a final offer WPI after considering the first WPI report.

**Clause 66: Section 239 (3)**

This clause clarifies that where there are separate WPI reports for a person's physical and psychological injuries the higher WPI assessment applies for the purposes of assessing whether the person has a WPI of at least 10%. If there is only 1 WPI report that assesses the person's injuries, then that assessment is used. It also inserts a new note to section 239, referring the reader to section 150 (4) of the Act, which enables a WPI assessment of a physical injury to take into account a secondary psychological injury.

**Clause 67: WPI assessment – application and assessment, Section 241 (3) (c)**

This clause fixes a reference. The provision currently uses ‘receipt notice’, however following the amendment to section 137(1) by clause 28, this section also should refer to accepting liability.

**Clause 69: Section 241 (4) (a)**

This clause includes section 154 (2) (b) (WPI less than 5%) and section 155 (3) (b), (5) and (7) in the exclusion from the WPI application and assessment provisions that apply to a person receiving workers compensation that makes a motor accident claim under the MAI Act. This recognises that a person who has made a successful application for workers compensation benefits within the meaning of section 239 (4) of the MAI Act is not entitled to a quality of life benefits offer under the MAI Act.

**Clause 70: New section 241 (4) (ca)**

This clause includes section 161 (1) (c) (final offer WPI less than 5%) in the exclusion from the WPI application and assessment provisions that apply to a person receiving workers compensation that makes a motor accident claim under the MAI Act. This recognises that a person who has made a successful application for workers compensation benefits within the meaning of section 239 (4) of the MAI Act is not entitled to a quality of life benefits offer under the MAI Act.

**Clause 71: New section 241 (5)**

This clause moves section 241 (3) (e) into its own subsection as it did not belong in subsection (3), which is concerned with altering certain application provisions where an injured person has come into the MAI Scheme from workers compensation for an assessment of the person’s whole person impairment, however subsection (3)(e) relates to significant occupational impact assessments, and so it is appropriate to be moved out. **Clause 68** omits section 241(3)(e).

**Clause 72: Establishment of nominal defendant fund, Section 330 (2) (a)**

Section 330 of the MAI Act provides that penalties or penalty interest imposed under the Act are paid to the nominal defendant fund. The MAI Commission has the responsibility for establishing the fund and provides the collected funds through to the ACT Insurance Authority, who are the nominal defendant, the insurer of last resort where an at fault vehicle in an accident is unknown, unidentified or unregistered. The clause amends section 330 of the MAI Act to provide that if the MAI Commission imposes a financial penalty on an MAI insurer the collected penalty remains with the MAI Commission.

**Clause 73: Compliance with certain provisions, New section 365 (h)**

This clause inserts a reference to new licence condition that will require a licensed insurer to comply with the requirements of section 412A (notice of reportable conduct).

**Clause 74: Section 366A**

This clause inserts two additional conditions on an MAI insurer’s licence relating to compliance with directions and remediation plans.

**Clause 75: Suspended Insurer selected after suspension, Section 389 (1)**

This clause replaces a reference made to the road transport authority when this should be to the MAI Commission, as the remainder of the section requires the MAI Commission to deal with MAI policies after an insurer is suspended.

**Clause 76: 389(4)**

This clause inserts a “not” between the words “must allocate”. The subsection deals with the circumstances when the MAI Commission is not to undertake an allocation of MAI policies if it decides an insurer lacks capacity to underwrite MAI policies or because another insurer becomes a

licensed insurer and therefore can be allocated the suspended insurer's policies.

**Clause 77: MAI Commission may choose occupational discipline instead of prosecution**

This clause corrects a reference to 'MAI insurer' which should have been to the 'MAI commission'.

**Clause 78: Occupational discipline order Section 394 (2), except note**

This clause removes section 394 (2) (a) as an insurer must be a corporation to be eligible for an MAI insurer licence and cannot be an individual. New section 394(2) replaces existing section 394(2)(b) and increases the maximum amount ACAT may require an insurer to pay under an occupational discipline order from \$50,000 to \$100,000. This aligns with the maximum financial penalty the MAI Commission may impose on a licensed insurer under new section 394D.

**Clause 79: New parts 7.6A and 7.6B**

This clause inserts new parts 7.6A and 7.6B into the Chapter 7 of the MAI Act which provides for the licensing and supervision of insurers providing motor accident injuries insurance.

**New Part 7.6A Financial penalties**

New part 7.6A enables the MAI Commission to impose financial penalties on insurers in relation to their failure to comply with licence and / or other obligations under the MAI Act. The penalties are based on a two-tier system, with a higher penalty applying to more serious contraventions, and appropriate procedural fairness being adopted for each tier. The new part is intended to provide an additional tool to the MAI Commission to regulate the conduct of licensed insurers in a timely and efficient manner.

New section 394A sets out definitions for the purposes of new part 7.6A. The definition of a financial penalty notice is found in section 394D(3) and a ground for financial penalty in section 394B. A minor contravention is conduct by a licensed insurer that constitutes a ground for financial penalty that does not involve a serious contravention. A serious contravention is conduct by the licensed insurer that constitutes a ground for financial penalty that involves any of the following:

- dishonest or misleading conduct
- underpayment or delay in paying defined benefits
- a failure to prevent the disclosure of protected information under section 371
- failure to comply with an ACAT order in relation to a decision under the Act
- anything else prescribed by regulation.

New section 394B sets out the meaning of a ground for financial penalty being the licensed insurer has contravened the MAI Act, a condition of a licence or the insurance industry deed

Under new section 394C the MAI Commission may propose to impose a financial penalty on the insurer if satisfied that a ground for a financial penalty exists and the imposition of the penalty is in the public interest. A written show cause notice must be given to the insurer with details of the grounds for imposing the penalty, the penalty amount and whether it is for a minor or serious contravention. The insurer has the opportunity to give a written submission to the MAI Commission about the proposed penalty. The submission has to be given to the MAI Commission within 15 business days for a minor contravention, or 20 business days for a serious contravention, unless a longer period is agreed.

New section 394D(1) sets out requirements for the MAI Commission in deciding to impose a financial penalty. The MAI Commission has to consider any written submission responding to the show cause notice and any other matter prescribed by regulation. These regulations are intended to

cover matters in relation to the nature and impact of the contravention including the potential for precedents, adverse effects on injured people or the MAI scheme, and previous remediation history. A penalty must then only be imposed if the MAI Commission is satisfied a ground for a financial penalty exists, the imposition of the penalty is in the public interest and is appropriate taking into account the nature of the contravention, and it is appropriate to impose a financial penalty on the insurer.

New section 394D(2) sets out the maximum amount of a financial penalty being \$20,000 for a minor contravention and \$100,000 for a serious contravention.

Under new section 394D(3) a financial penalty notice must be given to the insurer detailing the amount, the grounds for imposing the penalty, and payment requirements for the penalty. In the case of a serious contravention the notice is to also include a statement that the insurer may apply for mediation under section 394E.

New section 394E sets out a process for mediation if an insurer disagrees with a financial penalty for a serious contravention. An insurer may request mediation by an accredited mediator within 10 business days after being given a financial penalty notice. The mediator must be independent of the MAI Commission and the insurer and decided by agreement between both parties. Fees and expenses of the mediator are paid as agreed by both parties and if there no agreement, shared in equal proportions. After mediation, a written notice must be given by the MAI Commission to the insurer and mediator. The notice must either confirm, vary, or withdraw the financial penalty notice in accordance with the agreement, or if no agreement is reached, confirm the financial penalty notice. The mediation is to provide additional procedural fairness to the insurer and is expected to be rarely used given the show cause notice process under section 394C.

Under new section 394F insurers have 15 business days to pay a financial penalty. This applies from after the later of -the day the penalty is confirmed or varied through the mediation notice, and in any other case - the day of the financial penalty notice. A financial penalty may be recovered as a debt payable to the MAI Commission.

### **New Part 7.6B MAI insurer licences – directions to licensed insurers**

New Part 7.6B inserts new regulatory provisions, enabling the MAI Commission to direct a licensed insurer to take actions for a contravention or likely contravention of the legislation. New section 394G provides a general directions power whereas new section 394I provides a specific directions power in relation to remediation plans. Compliance with these provisions will be condition of an insurer's licence – see new section 366A

New section 394G enables the MAI Commission to direct an insurer to take rectification or compliance action if the MAI Commission believes on reasonable grounds that the insurer is contravening, has contravened, or is likely to contravene the MAI Act, a condition of a licence, or the insurance industry deed. A direction under section 394G must be in writing and include details of the contravention or likely contravention, the thing required to be done or not done by the insurer, and the timeframe to comply with the direction. A statement must also be included about how the insurer may object to the direction.

New Section 349H allows an insurer to object in writing to a direction under section 394G. An objection may only be made if the contravention did not happen or is unlikely to happen, compliance with the direction would place an unreasonable cost burden on the insurer or the time for compliance is either not reasonable or not proportionate to the action to be taken. An objection will not stay a direction or otherwise prevent action being taken based on the direction. As soon as practicable after receiving an objection, the MAI Commission is review and decide to, amend, affirm, set aside and make a different direction, or withdraw the direction. A written notice detailing the decision is to be given to the insurer, including reasons for the decision and the day any amended or

different direction takes effect.

New Section 394I enables the MAI Commission to direct an insurer to give the commission a proposed remediation plan if the commission believes on reasonable grounds the insurer is contravening, has contravened, or is likely to contravene the MAI Act, a condition of a licence, or the insurance industry deed. The direction is to be in writing and include details of the contravention or likely contravention (the *identified contravention*), and the timeframe for giving the plan to the commission for approval, being the later of 15 days after the direction or a later day agreed by the MAI Commission and the insurer. New subsection (4) requires the proposed remediation plan to include details of:

- the nature and extent of the identified contravention and any other contravention or likely contravention (a *further contravention*) that is the same or similar to the identified contravention
- actions taken, or proposed to be taken, to remediate the identified and further contraventions
- the insurer's assessment of the risk of the further contravention happening and actions to minimise this risk; and
- the timeframes for taking actions in the plan

A proposed remediation plan must be approved by the MAI Commission if it complies with subsection (4) and identifies appropriate actions and timeframes for responding to the risks identified in the proposed plan. If a proposed plan does not meet these requirements, the commission will require an insurer to amend and resubmit the plan. A written notice is to be given to the insurer confirming either the approval and compliance obligations for the plan, or the required amendments and timeframe for submitting the amended plan.

#### **Clause 80: New section 412A**

New section 412A inserts a requirement for licensed insurers to give a written notice to the MAI Commission if they become aware of conduct in relation to the insurer that causes or is likely to cause a significant contravention of the MAI Scheme legislation (*reportable conduct*). This provision is intended to ensure that a licensed insurer alerts the commission to conduct they become aware of through their business operations or internal compliance programs.

The notice is to include known details about the reportable conduct, and also about any actions the licensed insurer has taken or proposes to take to:

- investigate the nature and extent of the conduct and any other conduct that is the same or similar to the conduct; and
- remediate the conduct identified through an investigation ; and
- remove or mitigate the risk of the same or similar conduct happening.

The MAI guidelines may make provision for what constitutes a significant contravention and information to be included in a notice about the reportable conduct. It is intended that a licensed insurer will have to consider a range of factors in determining what constitutes a significant contravention with these factors being based on those which would apply to an Australian Financial Services licensee reporting similar conduct under the *Corporations Act 2001* (Cth).

#### **Clause 81: How the MAI commission is to make a request Section 464 (3), definition of certificate of correctness, new paragraph (d)**

This clause inserts new paragraph (d) so a certificate of correctness, for information requested by the MAI Commission, can be requested from an executive officer of the licensed insurer.



**Clauses 82 and 83: new items for internally reviewable and ACAT reviewable decisions**

These two clauses insert new items relating to the inclusion of new section 124A (1) so a decision to suspend benefits under this provision is both an internally reviewable and ACAT reviewable decision.

**Clauses 84, 85, 87 and 89**

These clauses insert new dictionary definitions of *financial penalty notice*, *ground for financial penalty*, *independent assessor*, *minor contravention*, and *serious contravention* for the purposes of the MAI Act.

**Clauses 86 and 88**

This clause removes the definitions of *independent health assessor* and *non-conviction order* from the dictionary to the MAI Act.