

# Motor Accident Injuries Act 2017 No 10

[2017-10]



New South Wales

## Status Information

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The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
Secs 2.10 (3) and 2.33 (3) of this Act (sec 2.10 (3) repeals sec 2.10 on a date to be proclaimed; sec 2.33 (3) repeals sec 2.33 on a date to be proclaimed)  
[Health Practitioner Regulation Amendment Act 2017 No 50](#) (not commenced — to commence on 8.1.2018)  
[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 2017 No 63](#) (not commenced — to commence on 7.12.2017)

### Authorisation

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File last modified 2 December 2017

# Motor Accident Injuries Act 2017 No 10



New South Wales

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# Motor Accident Injuries Act 2017 No 10



New South Wales

An Act to establish a new scheme of compulsory third-party insurance and provision of benefits and support relating to the death of or injury to persons as a consequence of motor accidents; and for other purposes.

## Part 1 Preliminary

### Division 1.1 Introductory

#### 1.1 Name of Act

This Act is the *Motor Accident Injuries Act 2017*.

#### 1.2 Commencement

This Act commences on a day or days to be appointed by proclamation.

#### 1.3 Objects of Act (cf ss 5 and 6 MACA)

- (1) This Act establishes a new scheme of compulsory third-party insurance and provision of benefits and support relating to the death of or injury to persons as a consequence of motor accidents.
- (2) For that purpose, the objects of this Act are as follows:
  - (a) to encourage early and appropriate treatment and care to achieve optimum recovery of persons from injuries sustained in motor accidents and to maximise their return to work or other activities,
  - (b) to provide early and ongoing financial support for persons injured in motor accidents,
  - (c) to continue to make third-party bodily insurance compulsory for all owners of motor vehicles registered in New South Wales,
  - (d) to keep premiums for third-party policies affordable by ensuring that profits achieved by insurers do not exceed the amount that is sufficient to underwrite the relevant risk and by limiting benefits payable for minor injuries,



- (e) to promote competition and innovation in the setting of premiums for third-party policies, and to provide the Authority with a role to ensure the sustainability and affordability of the compulsory third-party insurance scheme and fair market practices,
  - (f) to deter fraud in connection with compulsory third-party insurance,
  - (g) to encourage the early resolution of motor accident claims and the quick, cost effective and just resolution of disputes,
  - (h) to ensure the collection and use of data to facilitate the effective management of the compulsory third-party insurance scheme.
- (3) It must be acknowledged in the application and administration of this Act:
- (a) that participants in the third-party insurance scheme have shared and integrated roles with the overall aim of benefiting all members of the motoring public by keeping the overall costs of the scheme within reasonable bounds so as to keep premiums affordable and of promoting the recovery and return to work or other activities of those injured in motor accidents, and
  - (b) that the law (both the enacted law and the common law) relating to the assessment of damages in claims made under this Act should be interpreted and applied in a way that acknowledges the clear legislative intention to restrict access to non-economic loss compensation to serious injuries, and
  - (c) that:
    - (i) the premium pool from which each insurer pays motor accident claims consists at any given time of a finite amount of money, and
    - (ii) the setting of appropriate premiums requires a large measure of stability and predictability regarding the likely future number and cost of claims arising under policies sold once the premium is in place, and
    - (iii) that stability and predictability require consistent and stable application of the law, and
  - (d) that insurers, as receivers of public money that is compulsorily levied, should account for their profit margins, and their records should be available to the Authority to ensure that accountability.
- (4) In the interpretation of a provision of this Act or the regulations, a construction that would promote the objects of this Act or the provision is to be preferred to a construction that would not promote those objects.
- (5) In the exercise of a discretion conferred by a provision of this Act or the regulations, the person exercising the discretion must do so in the way that would best promote

the objects of this Act or of the provision concerned.

## Division 1.2 Interpretation

### 1.4 Definitions (cf ss 3 and 7 MACA)

(1) In this Act:

**attendant care services** means services that aim to provide assistance to people with everyday tasks, and includes (for example) personal assistance, nursing, home maintenance and domestic services.

**Authority** means the State Insurance Regulatory Authority constituted under the [State Insurance and Care Governance Act 2015](#).

**claim** means a claim for statutory benefits or a claim for damages.

**claimant** means a person who makes or is entitled to make a claim.

**claims assessor**—see Part 7.

**commencement of this Act** means the commencement of the majority of the provisions of this Act.

**damages** means damages (within the meaning of the [Civil Liability Act 2002](#)) in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle, but does not include statutory benefits.

**Dispute Resolution Service** means the Dispute Resolution Service of the Authority established under Division 7.2.

**driver** means a person driving a motor vehicle, and includes:

- (a) a person riding and operating a motor cycle, and
- (b) a person for the time being in charge of a motor vehicle.

**employment** includes self-employment.

**fault** means negligence or any other tort.

**function** includes a power, authority or duty, and **exercise** a function includes perform a duty.

**hospital** means a public hospital (within the meaning of the [Health Services Act 1997](#)), or a private health facility licensed under the [Private Health Facilities Act 2007](#).

**injured person** means a person who has suffered an injury in respect of which this Act applies as provided by Division 1.3.

***injury*** means personal or bodily injury and includes:

- (a) pre-natal injury, and
- (b) psychological or psychiatric injury, and
- (c) damage to artificial members, eyes or teeth, crutches or other aids or spectacle glasses.

***Insurance Industry Deed*** means an agreement, as in force for the time being, between the Minister on behalf of the State, the Authority, licensed insurers and other persons (if any) with respect to the third-party insurance scheme and the Nominal Defendant scheme under this Act that is designated by the agreement as the Insurance Industry Deed for the purposes of this Act.

***insured motor vehicle*** means a motor vehicle in relation to which a third-party policy is in force.

***insured person*** means a person insured under a third-party policy.

***insurer*** of a motor vehicle means the insurer who insures the owner or driver of the motor vehicle against liability in respect of the death of or injury to a person, whether or not under a third-party policy, and includes:

- (a) the Nominal Defendant, and
- (b) where a claim is handled on behalf of an insurer by another insurer, the other insurer, and
- (c) an interstate insurer, being an entity (including an authority or instrumentality of the Commonwealth or of another State or a Territory) that under a law of the Commonwealth, another State or a Territory indemnifies the owner or driver of a motor vehicle against liability in respect of the death of or injury to a person, and
- (d) a self-insurer under Division 9.3.

***licensed insurer*** means an insurer that is the holder of a licence granted under Division 9.1 and in force.

***medical assessor***—see Part 7.

***merit reviewer***—see Part 7.

***minor injury***—see section 1.6.

***motor accident*** means an incident or accident involving the use or operation of a motor vehicle that causes the death of or injury to a person where the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during:

- (a) the driving of the vehicle, or
- (b) a collision, or action taken to avoid a collision, with the vehicle, or
- (c) the vehicle's running out of control, or
- (d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control.

**Motor Accident Guidelines** means the Motor Accident Guidelines issued by the Authority under Division 10.2 and in force.

**motor vehicle** means a motor vehicle or trailer within the meaning of the [Road Transport Act 2013](#).

**Nominal Defendant** means the Nominal Defendant referred to in section 2.27.

**Note—**

Section 2.27 appoints the Authority as the Nominal Defendant for the purposes of this Act.

**Nominal Defendant's Fund** means the fund by that name established under Division 2.4.

**non-economic loss** means:

- (a) pain and suffering, and
- (b) loss of amenities of life, and
- (c) loss of expectation of life, and
- (d) disfigurement.

**owner** of a motor vehicle—see section 1.5.

**Principal Claims Assessor** means the person appointed as the Principal Claims Assessor under section 7.5.

**registration** means:

- (a) registration of a motor vehicle under the [Road Transport Act 2013](#) or the [Recreation Vehicles Act 1983](#), or
- (b) the issue of an unregistered vehicle permit under the [Road Transport Act 2013](#) for an unregistered motor vehicle, or
- (c) registration in New South Wales of a motor vehicle under the [Interstate Road Transport Act 1985](#) of the Commonwealth.

**rehabilitation** of an injured person, means the process of enabling or attempting to

enable the person to attain and maintain:

- (a) the maximum level of independent living, and
- (b) full physical, mental, social and vocational ability, and
- (c) full inclusion and participation in all aspects of life.

**relevant insurer** in relation to the payment of statutory benefits—see section 3.2.

**RMS** means Roads and Maritime Services constituted under the [Transport Administration Act 1988](#).

**road** means a road or road related area (within the meaning of section 4 (1) of the [Road Transport Act 2013](#)), but does not include an area to which the whole of that Act does not apply because of an instrument under that Act.

**SIRA Fund**—see Division 10.4.

**spouse** means:

- (a) a husband or wife, or
- (b) a de facto partner,

but where more than one person would so qualify as a spouse, means only the last person so to qualify.

**Note—**

“De facto partner” is defined in section 21C of the [Interpretation Act 1987](#).

**statutory benefits** means statutory benefits payable under Part 3.

**third-party policy** means a policy of insurance under this Act.

**trader’s plate** means a trader’s plate within the meaning of the [Road Transport Act 2013](#).

**trailer** means a trailer within the meaning of the [Road Transport Act 2013](#).

**Note—**

The [Road Transport Act 2013](#) defines “trailer” to mean generally a vehicle that is built to be towed, or is towed, by a motor vehicle and that is not capable of being propelled without being towed by a motor vehicle, but does not include a motor vehicle that is being towed.

**treatment and care** means the following:

- (a) medical treatment (including pharmaceuticals),
- (b) dental treatment,
- (c) rehabilitation,

- (d) ambulance transportation,
- (e) respite care,
- (f) attendant care services,
- (g) aids and appliances,
- (h) prostheses,
- (i) education and vocational training,
- (j) home and transport modification,
- (k) workplace and educational facility modifications,
- (l) such other kinds of treatment, care, support or services as may be prescribed by the regulations for the purposes of this definition,

but does not include any treatment, care, support or services of a kind declared by the regulations to be excluded from this definition.

**use or operation** of a motor vehicle includes:

- (a) the maintenance or parking of the vehicle, or
- (b) in the case of a motor vehicle that is not a trailer—the use or operation of a trailer attached to the motor vehicle and a trailer running out of control having become detached from the motor vehicle towing it, or
- (c) in the case of a motor vehicle that is a tow truck—the use or operation of an uninsured motor vehicle that is being towed or carried by the tow truck.

**Note—**

As a result of the above definition, a third-party policy for a motor vehicle extends to cover the matters mentioned in the definition.

**Workers Compensation Acts** means the [Workers Compensation Act 1987](#) and the [Workplace Injury Management and Workers Compensation Act 1998](#).

**Note—**

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) Notes in the text of this Act do not form part of this Act.

### **1.5 Meaning of “owner” of a motor vehicle** (cf s 4 MACA)

- (1) For the purposes of this Act:

- (a) in the case of a motor vehicle that is registered, the **owner** is:
    - (i) each registered operator of the vehicle within the meaning of the *Road Transport Act 2013*, unless the operator has sold or ceased to have possession of the vehicle, and
    - (ii) each person who, although not a registered operator of the vehicle, is a sole or joint owner of the vehicle, unless that person has sold or ceased to have possession of the vehicle, and
    - (iii) if any such registered operator or owner has sold or ceased to have possession of the vehicle—any person who solely or jointly or in common with any other person is entitled to the immediate possession of the vehicle, or
  - (b) in the case of a motor vehicle that is unregistered, the **owner** is any person who solely or jointly or in common with any other person is entitled to the immediate possession of the vehicle, or
  - (c) in the case of a motor vehicle to which a trader's plate is fixed, the **owner** is the trader to whom the trader's plate is issued.
- (2) For the purposes of this section, a person is taken not to have ceased to have possession or, as the case may be, not to have acquired possession of a motor vehicle where a change of possession occurs by way of:
- (a) any hiring (not being a hiring under a hire-purchase agreement) or lending of the vehicle for a period not exceeding 3 months, or
  - (b) the passing of the possession of the vehicle to a bailee for the purpose of sale or disposal or for the purpose of alteration, repair, renovation, garaging, storing or other like purpose not involving the use or operation of the motor vehicle for the benefit of the bailee.
- (3) In the application of any provision of this Act to and in respect of a motor vehicle to which a trader's plate is fixed (whether or not with the authority of the trader), a reference in any such provision to the owner is to be read as a reference to the trader, and a reference to the third-party policy in relation to that motor vehicle is to be read as a reference to the third-party policy in relation to motor vehicles to which the trader's plate is fixed (whether or not with the authority of the trader).

### **1.6 Meaning of "minor injury"**

- (1) For the purposes of this Act, a **minor injury** is any one or more of the following:
- (a) a soft tissue injury,
  - (b) a minor psychological or psychiatric injury.

- (2) A **soft tissue injury** is (subject to this section) an injury to tissue that connects, supports or surrounds other structures or organs of the body (such as muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes), but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage.
- (3) A **minor psychological or psychiatric injury** is (subject to this section) a psychological or psychiatric injury that is not a recognised psychiatric illness.
- (4) The regulations may:
  - (a) exclude a specified injury from being a soft tissue injury or from being a minor psychological or psychiatric injury for the purposes of this Act, or
  - (b) include a specified injury as a soft tissue injury or as a minor psychological or psychiatric injury for the purposes of this Act.
- (5) The Motor Accident Guidelines may make provision for or with respect to the assessment of whether an injury is a minor injury for the purposes of this Act (including provision for or with respect to the resolution of disputes about the matter by the Dispute Resolution Service).

### **1.7 Determination of threshold degree of permanent impairment of injured person who suffers both physical and psychological/psychiatric injuries**

- (1) This section applies for the purposes of a determination under this Act of whether the degree of permanent impairment of an injured person as a result of an injury caused by a motor accident is greater than 10% (the **impairment threshold**).
- (2) If an injured person receives both a physical injury and a psychological or psychiatric injury arising out of the same motor accident:
  - (a) the degree of permanent impairment that results from the physical injury is to be assessed separately from the degree of permanent impairment that results from the psychological or psychiatric injury (and accordingly those separate degrees of injury are not to be added together for the purposes of the impairment threshold), and
  - (b) the injured person is taken to have a degree of permanent impairment greater than the impairment threshold if either the degree of impairment caused by physical injuries or the degree of impairment caused by psychological or psychiatric injuries is greater than 10%.

#### **Note—**

If there is more than one physical injury those injuries will still be assessed together as one injury, but separately from any psychological or psychiatric injury. Similarly, if there is more than one psychological or psychiatric injury those psychological or psychiatric injuries will be assessed together as one injury, but separately from any physical injury.



## Division 1.3 Application

### 1.8 Application of Act to motor accidents occurring after commencement of Act

This Act does not apply to or in respect of a motor accident occurring before the commencement of this Act.

### 1.9 General restrictions on application of Act (cf s 3A MACA)

- (1) This Act (including any third-party policy under this Act) applies in respect of the death of or injury to a person that results from the use or operation of a motor vehicle only if the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during:
  - (a) the driving of the vehicle, or
  - (b) a collision, or action taken to avoid a collision, with the vehicle, or
  - (c) the vehicle's running out of control, or
  - (d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control.
- (2) This Act (including any third-party policy under this Act) does not apply in respect of an injury that arises gradually from a series of incidents.

### 1.10 Restrictions on application of Act—accident must be insured or work accident (cf s 3B MACA)

- (1) The application of this Act in respect of death or injury that results from the use or operation of a motor vehicle is limited to death or injury that:
  - (a) results from a motor accident for which the vehicle has motor accident insurance cover, or
  - (b) gives rise to a work injury claim, other than a work injury claim in respect of the death of or injury to a coal miner (as defined in clause 3 of Part 18 of Schedule 6 to the [Workers Compensation Act 1987](#)).
- (2) For the purposes of this Act, a motor vehicle has **motor accident insurance cover** for a motor accident if and only if:
  - (a) at the time of the motor accident the motor vehicle was subject to coverage under a third-party policy, or
  - (b) at the time of the motor accident the motor vehicle was subject to coverage under a policy of compulsory third-party personal injury insurance or a compulsory motor vehicle accident compensation scheme under the law of a place other than New South Wales or under a law of the Commonwealth, or

(c) at the time of the motor accident, the motor vehicle was owned by the Commonwealth or by any person or body of persons representing the Commonwealth, or

(d) there is a right of action against the Nominal Defendant in respect of the motor accident or there would be a right of action against the Nominal Defendant in respect of the motor accident if the motor accident had been caused by the fault of the owner or driver of the motor vehicle in the use or operation of the vehicle.

(3) For the purposes of this Act, death or injury gives rise to a **work injury claim** if it is:

(a) the death of a worker resulting from or caused by an injury to the worker (being an injury caused by the negligence or other tort of the worker's employer), or

(b) an injury to a worker caused by the negligence or other tort of the worker's employer,

with expressions used in this subsection having the same meanings as they have in Part 5 of the [Workers Compensation Act 1987](#).

### **1.11 Application of Part 6 (Motor accident claims), Part 7 (Dispute resolution) and Division 10.3 (Bulk billing arrangements)**

(1) Parts 6 and 7 and Division 10.3 apply to and in respect of a claim or injury whether or not there is a third-party policy in respect of liability for the claim or injury.

(2) This section is subject to section 1.10.

## **Part 2 Third-party insurance**

### **Division 2.1 Compulsory insurance**

#### **2.1 Offence of using uninsured motor vehicle on road** (cf s 8 MACA)

(1) A person who:

(a) uses a motor vehicle that is not an insured motor vehicle on a road, or

(b) causes or permits another person to use such a motor vehicle on a road,

is guilty of an offence.

Maximum penalty: 50 penalty units.

(2) It is a defence to proceedings for an offence against this section if the defendant establishes that at the time the motor vehicle was used on the road the defendant had reasonable grounds for believing and did in fact believe that the motor vehicle was an insured motor vehicle.

## **2.2 Exception from compulsory insurance** (cf s 9 MACA)

This Division does not apply to a motor vehicle that is used on a road if:

- (a) the motor vehicle may lawfully be used on the road although not registered, or
- (b) the motor vehicle is a trailer, or
- (c) the motor vehicle is a vehicle of a kind, and is used in the circumstances (if any), prescribed by the regulations.

## **Division 2.2 Insurance policies**

### **2.3 Third-party policies** (cf s10 MACA)

A third-party policy under this Act is a policy that is in the following terms:

#### **Third-party Policy**

The insurer insures the owner of the motor vehicle and any other person who at any time drives the vehicle (whether or not with the consent of the owner) against liability in respect of the death of or injury to a person caused by the fault of the owner or driver of the vehicle:

- (a) if the motor vehicle is not one to which paragraph (b) applies—in the use or operation of the vehicle in any part of the Commonwealth (whether or not on a road), or
- (b) if the motor vehicle is subject to an unregistered vehicle permit under the [Road Transport Act 2013](#)—in the use or operation of the vehicle on any road in any part of the Commonwealth.

In this policy, words and expressions have the same meanings as in the [Motor Accident Injuries Act 2017](#).

### **2.4 Treatment of certain vehicles for purposes of third-party policy** (cf s 10A MACA)

(1) A motor vehicle that is:

- (a) subject to conditional registration under the [Road Transport Act 2013](#), and
- (b) designed principally for use otherwise than on a road, and
- (c) a motor vehicle, or a motor vehicle of a class, prescribed by the regulations for the purposes of this section,

is taken, for the purposes of a third-party policy under this Act, to be subject to an unregistered vehicle permit and not to conditional registration.

(2) However, a regulation made for the purposes of this section does not affect a third-party policy under this Act that is in force in respect of any particular vehicle at the time that the regulation is made.

## 2.5 Issue of certificate of insurance (cf s 11 MACA)

- (1) If a licensed insurer accepts a premium for the insurance under a third-party policy of a motor vehicle, the licensed insurer must immediately issue a certificate of insurance to the owner of the vehicle.
- (2) If a licensed insurer accepts a premium for the insurance under a third-party policy of motor vehicles to which a trader's plate is or is to be fixed, the licensed insurer must immediately issue a certificate of insurance to the trader.
- (3) A licensed insurer who issues such a certificate is taken to have issued a third-party policy for the motor vehicle or motor vehicles to which the certificate relates.
- (4) If 2 or more licensed insurers issue certificates of insurance which (but for this subsection) would be capable of having effect at the same time in respect of the same motor vehicle, a third-party policy is taken to have been issued only by the licensed insurer recorded by RMS in connection with the registration or renewal of registration of the motor vehicle or issue of a trader's plate as being the insurer.

## 2.6 Evidence of insurance in respect of motor vehicle (cf s 12 MACA)

- (1) RMS must not register or renew the registration of a motor vehicle or issue a trader's plate unless:
  - (a) the applicant produces a certificate of insurance issued by a licensed insurer in relation to the motor vehicle or trader's plate, or
  - (b) RMS is satisfied that there is evidence, of a type approved by the Authority, of the existence of a third-party policy in relation to the motor vehicle or trader's plate.
- (2) This section does not apply to a trailer.

## 2.7 Commencement and duration of third-party policy (cf s 13 MACA)

- (1) A third-party policy taken to have been issued for a motor vehicle has effect for the period for which the licensed insurer who is taken to have issued the policy is on risk in accordance with this section.
- (2) In this section:

**new insurer** means the licensed insurer whose insurance is later in time.

**old insurer** means the licensed insurer whose insurance is earlier in time.

**period of grace** means the period of 14 days after the registration, or renewal of registration, of a motor vehicle expires.

**period of registration** means the period, not exceeding one year, for which the registration or renewal of registration of a motor vehicle is effected, but if, within that

period, the registration or renewal of registration is cancelled or surrendered, it means the period for which the registration or renewal of registration is actually in force.

- (3) The old insurer and the new insurer may be the same licensed insurer or different licensed insurers.
- (4) In the case of the registration (but not the renewal of registration) of a motor vehicle, the licensed insurer is on risk for the period of registration of the motor vehicle.
- (5) If registration is renewed before the previous period of registration expires, the old insurer is on risk until the previous period of registration expires and the new insurer comes on risk immediately after the previous period of registration expires.
- (6) If registration is renewed during the period of grace, the old insurer is on risk until 12 midnight on the day registration is renewed and the new insurer comes on risk immediately after 12 midnight and is on risk for the balance of the period of registration of the motor vehicle effected by the renewal of registration.
- (7) If registration is renewed after the period of grace expires, the new insurer comes on risk at the time the renewal of registration is effected. The motor vehicle is not an insured motor vehicle from the expiry of the previous period of registration until the time the renewal of registration is effected.
- (8) There is no period of grace following the cancellation or surrender of the registration (whether registration or a renewal of registration) of a motor vehicle.
- (9) A licensed insurer ceases to be on risk on the cancellation of a third-party policy under section 2.8, subject to section 2.8 (11).
- (10) A licensed insurer is on risk in respect of a motor vehicle under a third-party policy relating to a motor vehicle to which a trader's plate is fixed:
  - (a) only during the period for which the policy is issued, and
  - (b) only during the period for which the trader's plate is issued, and
  - (c) only while a trader's plate is fixed to the vehicle.
- (11) A licensed insurer is on risk in respect of a light rail vehicle under a third-party policy relating to the vehicle only during the period for which the policy is issued.

## **2.8 Cancellation of third-party policies** (cf s 14 MACA)

- (1) A licensed insurer has no power to cancel a third-party policy.
- (2) A third-party policy may only be cancelled in accordance with this section.
- (3) A third-party policy is cancelled on the cancellation of the registration of the motor vehicle to which it relates, except where the registration is cancelled under Division 3

of Part 4 of the *Fines Act 1996*.

- (4) If the whole or any part of the premium payable in respect of a third-party policy is paid by cheque or by credit or debit card, and the cheque is not met on due presentation or the card transaction is not duly honoured or is fraudulent, the licensed insurer may request RMS to suspend the registration of the motor vehicle to which the policy relates for a period of 14 days.
- (5) If the insured person under a third-party policy avoided paying the correct premium for the third-party policy because of a false statement made by or on behalf of the insured person in connection with the issue of the policy, the licensed insurer may request RMS to suspend the registration of the motor vehicle to which the policy relates for a period of 14 days.
- (6) A licensed insurer is not to request RMS to suspend the registration of a motor vehicle except with the approval of the Authority or in the circumstances authorised by the regulations, and is not to make such a request unless the amount outstanding remains unpaid.
- (7) Before requesting RMS to suspend the registration of a motor vehicle, the licensed insurer must notify the owner of the motor vehicle that the insurer intends to request RMS to suspend the registration and that the registration and third-party policy may be cancelled at the expiration of the suspension period if the amount outstanding has not been paid before the expiration of the period.
- (8) RMS must comply with a request by a licensed insurer under this section to suspend the registration of a motor vehicle.
- (9) If the amount outstanding remains unpaid, the licensed insurer may request RMS before the end of the suspension period to cancel the registration of the motor vehicle at the expiration of the suspension period. A licensed insurer is not to request RMS to cancel the registration of a motor vehicle except with the approval of the Authority or in the circumstances authorised by the regulations.
- (10) RMS must comply with a request by a licensed insurer under this section to cancel the registration of a motor vehicle.
- (11) If the registration of a motor vehicle is cancelled, otherwise than under Division 3 of Part 4 of the *Fines Act 1996* or subsection (10), but restored before the date for renewal of the registration, the third-party policy cancelled is taken to have remained in force during the period of cancellation.

## **2.9 Risks not insured under third-party policies** (cf s 15 MACA)

A third-party policy does not extend to insure the owner or driver of a motor vehicle against:

- (a) a liability to pay compensation under the Workers Compensation Acts (or any corresponding law of another State or a Territory of the Commonwealth) to a worker employed by the owner or driver, or
- (b) a liability which may be incurred by the owner or driver under an agreement unless the liability is one which would have arisen in the absence of the agreement.

**2.10 Exclusion of acts of terrorism from insurance coverage** (cf s 15A MACA)

- (1) A third-party policy does not extend to insure the owner or driver of a motor vehicle against a liability that is attributable to an act that, having regard to the nature of the act and the context in which the act was done, it is reasonable to characterise as an act of terrorism.
- (2) Any lawful activity or any industrial action cannot be characterised as an act of terrorism for the purposes of this section. An act can only be so characterised if it:
  - (a) causes or threatens to cause death, personal injury or damage to property, and
  - (b) is designed to influence a government or to intimidate the public or a section of the public, and
  - (c) is carried out for the purpose of advancing a political, religious, ideological, ethnic or similar cause.
- (3) This section is repealed on a date to be appointed by proclamation for the purposes of this section.

**2.11 Indemnification of insured persons** (cf s 16 MACA)

A licensed insurer is, despite any other law, liable to indemnify the insured persons under a third-party policy of the insurer in respect of any liability which the policy purports to cover.

**2.12 Liability of licensed insurers and insured persons where correct insurance premiums not paid** (cf s 17 MACA)

- (1) The fact that the correct insurance premium has not been paid in respect of a third-party policy does not affect the validity or operation of the policy.
- (2) A licensed insurer to whom an incorrect insurance premium has been paid may recover any balance outstanding of the premium from the person liable to pay it as a debt in a court of competent jurisdiction.
- (3) If:
  - (a) an insured person under a third-party policy incurs a liability against which he or she is insured under the policy, and

(b) the insured person avoided paying the correct premium for the third-party policy by making a statement in connection with the issue of the policy that the insured person knew was false,

the licensed insurer may recover from the insured person as a debt in a court of competent jurisdiction:

(c) where the money paid and the costs incurred by the licensed insurer in respect of the liability do not exceed \$5,000—the amount of the money paid and costs incurred, and

(d) where the money paid and costs incurred by the licensed insurer exceed \$5,000—\$5,000.

(4) The licensed insurer is not entitled to recover an amount under subsection (3) if the licensed insurer has recovered that amount in the exercise of any other right of recovery under this Division.

### **2.13 Right to recover higher premium resulting from change** (cf s 19 (2) MACA)

If, as a consequence of the change in ownership of a motor vehicle, a change in use of a motor vehicle, a change in the place at which the motor vehicle is usually garaged or any other change, a higher premium would be payable in relation to the vehicle than the premium paid or payable under the third-party policy in force in relation to the vehicle before the change occurred, the licensed insurer may recover the appropriate difference from the owner as a debt in a court of competent jurisdiction.

### **2.14 Effect of change of ownership of motor vehicle or trader's business** (cf s 18 MACA)

(1) While a third-party policy is in force in relation to a motor vehicle, the third-party policy enures in favour of the owner for the time being of the vehicle (and any driver of the vehicle) despite any change in the ownership of the vehicle.

(2) While a third-party policy is in force in relation to a motor vehicle to which a trader's plate issued in respect of any business is fixed, the third-party policy enures in favour of the person who for the time being is carrying on the business (and any driver of any such vehicle) despite any change in the ownership of the business.

### **2.15 Notice of change of registered particulars relating to motor vehicles** (cf s 19 (1) MACA)

RMS is required to notify the licensed insurer under a third-party policy in force in relation to a motor vehicle of any change in any registered particulars relating to the motor vehicle that is notified to RMS.

### **2.16 Right of insurer against unauthorised driver of motor vehicle** (cf s 20 MACA)

If:

(a) a person uses or operates a motor vehicle without the authority of the owner or



without reasonable grounds for believing that he or she had the authority of the owner, and

- (b) a licensed insurer pays any money or incurs any costs (under a third-party policy or under Part 3) in respect of a motor accident arising from that use or operation,

the insurer may recover the money so paid and the costs so incurred from the person as a debt in a court of competent jurisdiction.

**2.17 Extension of indemnity to insured person's estate** (cf s 22 MACA)

- (1) A third-party policy, to the extent of the insurance effected by that policy:
- (a) extends, if the insured person is dead, to indemnify the insured person's estate against:
- (i) liability arising under any cause of action which, by virtue of section 2 of the [Law Reform \(Miscellaneous Provisions\) Act 1944](#), survives against the insured person's estate, and
- (ii) liability arising by operation of section 2 (4) of that Act, and
- (b) extends to indemnify the insured person or, if the insured person is dead, to indemnify the insured person's estate against:
- (i) liability arising where the insured person or, as the case may be, the insured person's estate has in any proceedings been joined as an alternative defendant, and
- (ii) liability arising where the insured person or, as the case may be, the insured person's estate has served or has been served with a notice in writing under section 3 (1) of the [Law Reform \(Miscellaneous Provisions\) Act 1946](#), and
- (iii) liability arising where the insured person or, as the case may be, the insured person's estate claims contribution from some other person as a joint tortfeasor or has a claim made against the insured person or the insured person's estate, as the case may be, as a joint tortfeasor.
- (2) In subsection (1), **insured person** means a person who is insured or indemnified against liability in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle under:
- (a) a third-party policy, or
- (b) a policy of insurance complying with the provisions of any law in force in any part of the Commonwealth (other than this State) which requires the owner or driver of a motor vehicle to be insured against any such liability, or
- (c) the provisions of any other law in force in any part of the Commonwealth (other

than this State) which indemnify the owner or driver of a motor vehicle against any such liability.

**2.18 Entry of judgment against licensed insurer** (cf s 23 MACA)

- (1) If a judgment obtained in any court relating to liability in respect of the death of or injury to a person caused by the fault of the owner or driver of an insured motor vehicle in the use or operation of the vehicle is not satisfied in full within 30 days after the judgment is entered, the court must, on the application of the judgment creditor, direct that the judgment be entered against the licensed insurer of the vehicle.
- (2) If execution on the judgment is stayed pending appeal, the time during which execution is stayed is to be excluded in calculating the 30-day period.
- (3) Notice of intention to make the application is to be served on the licensed insurer at least 7 days before the hearing of the application.
- (4) If the court directs that the judgment be entered against the licensed insurer, the judgment may be enforced as a judgment against the licensed insurer to the extent to which it was not satisfied at the time it was so entered.

**Division 2.3 Insurance premiums**

**2.19 Authority guidelines for the determination of premiums** (cf ss 24 and 27A MACA)

- (1) The Motor Accident Guidelines may provide for the determination of insurance premiums for third-party policies.
- (2) Motor Accident Guidelines may (without limiting the generality of subsection (1)):
  - (a) specify the manner in which premiums are to be determined, and
  - (b) require licensed insurers to specify how they have determined premiums, and
  - (c) specify the factors to be taken into account in determining premiums (including in determining the reasonable cost of claims and claims settlement expenses), and
  - (d) specify the maximum or minimum (or both) rate of estimated investment earnings, superimposed inflation, claims frequency, acquisition expenses, agents' commission or other expenses or assumptions used in the determination of premiums, and
  - (e) exclude, from being taken into account in the determination of premiums, acquisition expenses not directly relevant to the acquisition of third-party insurance business or other expenses of the insurer, and
  - (f) specify the nature of the additional information and reports that the Authority may require licensed insurers to furnish with the premiums they file or to justify

premiums they have filed (including with respect to estimated investment earnings, superimposed inflation, claims frequency, the verification of assumptions, estimated profit, capital allocation to third-party insurance business and other relevant matters), and

(g) provide for a refund of part of the premium paid for a third-party policy during or after the period for which the policy is issued by reference to digital information recorded about the safe driving of the motor vehicle during that period or to other factors.

- (3) The Motor Accident Guidelines may only specify maximum rates of assumptions used in the determination of premiums if the Authority is satisfied that they are reasonable and will result in insurers having sufficient premium income to meet their liabilities in relation to third-party policies and to make a reasonable profit.
- (4) The cost of claims for the purpose of determining insurance premiums for third-party policies must take account of the effect of any exclusion or restriction on claims under this Act (including under section 3.32).

#### **2.20 Third-party premiums** (cf s 25 MACA)

- (1) A licensed insurer must not charge an insurance premium for a third-party policy, except in accordance with this Division.
- (2) The licensed insurer must file with the Authority a premium or set of premiums it proposes to charge.
- (3) Two or more licensed insurers can jointly file a premium or set of premiums that they propose to charge.
- (4) The licensed insurer may, on and from the proposed commencement date for the premium, charge a premium that has not been rejected by the Authority within the period allowed under this section for rejecting a premium. Except as provided by section 2.22, the licensed insurer must not charge any other premium on and from that proposed commencement date.
- (5) The proposed commencement date for a premium is the date specified in a filed premium as the date on and from which the proposed premium will be charged. The proposed commencement date cannot be earlier than the end of the period allowed for rejecting a premium but can be changed (with notice to the Authority) to accommodate a change in the period allowed for rejecting a premium.
- (6) The period allowed for rejecting a premium is (subject to subsection (7)) the period nominated by the insurer when filing the premium, being a period of not less than 6 weeks or such shorter period as the Authority may allow in a particular case.
- (7) Time does not run in relation to the period allowed for rejecting the premium of a

licensed insurer from the day on which the Authority requests any further information from the insurer, because the insurer has failed to comply with its obligations under this Act or the Motor Accident Guidelines in relation to the filing of the premium, until the day on which the insurer complies with that request for further information.

(8) A premium may only be rejected as provided by this section or section 2.22.

### **2.21 Filing of premiums** (cf s 26 MACA)

- (1) A licensed insurer must file its premiums with the Authority on such occasions or with such frequency as is required by the Motor Accident Guidelines and may (subject to any limitations specified in those Guidelines as to the frequency with which premiums may be filed) file its premiums with the Authority at such other times as the insurer considers appropriate.
- (2) A licensed insurer must also file its premiums with the Authority whenever required to do so by the Authority by notice in writing to the insurer. The notice must allow a period of at least 8 weeks after the notice is served for premiums to be filed.
- (3) An insurer files its premiums by filing with the Authority a full set of the insurance premiums it proposes to charge for third-party policies that are taken to have been issued by it together with such additional information, including actuarial reports, as the Authority may reasonably require.
- (4) Two or more licensed insurers can jointly file a premium or set of premiums under this section.
- (5) An insurer must pay to the Authority such fees as may be required by the Motor Accident Guidelines to be paid by insurers in connection with the filing of premiums by insurers.
- (6) It is a condition of a licence granted under this Act that the insurer must comply with this section.

### **2.22 Rejection of premiums by Authority** (cf s 27 MACA)

- (1) The Authority may reject an insurance premium filed with it under this Division if it is of the opinion that:
  - (a) the premium is, having regard to actuarial advice and to other relevant financial information available to the Authority, excessive or inadequate, or
  - (b) the premium does not conform to the relevant provisions of the Motor Accident Guidelines.
- (2) Written notice of the Authority's rejection of a premium, and the reasons for the rejection, must be given to the licensed insurer.

- (3) If the Authority rejects a premium of a licensed insurer, the licensed insurer may request the Authority to reconsider the rejection.
- (4) Pending its reconsideration, the Authority may request an actuary to determine a provisional premium.
- (5) A provisional premium so determined has effect, pending the Authority's reconsideration, as if it were an insurance premium which may lawfully be charged by the licensed insurer concerned.
- (6) If the Authority has not withdrawn its rejection of a premium within 4 weeks after a request to reconsider the rejection, the matter is to be arbitrated under this section. The following provisions have effect:
  - (a) The *Commercial Arbitration Act 2010* applies to an arbitration under this section, subject to this Act and the regulations. The Authority and the licensed insurer concerned may by agreement appoint a person to act as arbitrator in connection with the matter. Failing agreement within 7 days, paragraphs (b) and (c) apply.
  - (b) The Independent Pricing and Regulatory Tribunal (established by the *Independent Pricing and Regulatory Tribunal Act 1992*) may act as arbitrator to hear and determine such a matter.
  - (c) Alternatively, that Tribunal may appoint a person to act as arbitrator in connection with the matter. The person is to be appointed from a panel constituted by the Minister and consisting of persons who have appropriate knowledge and understanding of economics, general insurance and the interests of consumers.
  - (d) The regulations may make provision for or with respect to the arbitration of matters under this section.
- (7) The arbitrator may determine the premium that may be charged by the licensed insurer.
- (8) The Authority or an arbitrator is not bound by any provisions of the Motor Accident Guidelines referred to in section 2.19 (2) (c) or (d) that the Authority or arbitrator considers would be unreasonable to be applied in the particular circumstances of the case.

### **2.23 Insurers to disclose profit margins** (cf s 28 MACA)

- (1) A licensed insurer is required to disclose to the Authority the profit margin on which a premium is based and the actuarial basis for calculating that profit margin.
- (2) The Authority is to assess that profit margin, and the actuarial basis for its calculation, and to include a report on that assessment in its annual report.

## **2.24 Risk equalisation** (cf s 29 MACA)

- (1) The purpose of this section is to achieve an appropriate balance between the premium income of an insurer and the risk profile of the third-party policies issued by the insurer.
- (2) The regulations may impose any one or more of the following arrangements on licensed insurers:
  - (a) an arrangement for allocating high risk or low risk third-party policies among insurers,
  - (b) an arrangement for the adjustment of premiums collected in respect of third-party policies and for the allocation and transfer of those premiums among insurers,
  - (c) an arrangement for the adjustment of the costs of claims for motor accidents covered by high risk or low risk third-party policies and for the allocation and transfer of those costs among insurers.

An allocation of premiums or costs is to be made generally in accordance with the market share of each insurer or in any other appropriate manner.

- (3) Any such arrangement may require insurers to provide information to the Authority about third-party policies or claims, to re-imburse the Authority for the costs of administering the arrangement and to take other measures to give effect to the obligations and liabilities of insurers under the arrangement.
- (4) It is a condition of an insurer's licence under this Act that the insurer must comply with any such arrangement.
- (5) The regulations may authorise any matter arising under any such arrangement to be determined in accordance with the Motor Accident Guidelines.
- (6) For the purposes of this section, high risk or low risk third-party policies are policies of a kind that the Authority determines incur a higher or lower disproportionate share of liability for the total cost of claims for motor accidents.
- (7) An arrangement under section 29 of the *Motor Accidents Compensation Act 1999* that is in force on the commencement of this section is (subject to the regulations) taken to be an arrangement under this section. Any such arrangement may be varied by the regulations or by the agreement of the parties to which it applies.

## **2.25 Adjustment of premiums and Fund levies in case of excess profits or excess losses**

- (1) A review by the Authority of premium income of licensed insurers to determine whether premiums and Fund levies under Division 10.4 should be adjusted to avoid excess profits or excess losses:

- (a) may be undertaken, with the approval of the Board of the Authority, if the average realised underwriting profits of insurers for 1 or more years are substantially greater or less than the average filed profits of insurers, and
- (b) must be undertaken if the average realised profits of insurers for 1 or more years are greater than the average filed profits of insurers by 2% or more of the average filed profits, and
- (c) must be undertaken if, for at least 2 years in a row, the average realised profits of insurers are less than the average filed profits of insurers by 5% or more of the average filed profits.

- (2) The Motor Accident Guidelines may, following such a review, make special arrangements for the adjustment of premiums and Fund levies under Division 10.4 to avoid excess profits or excess losses, including an appropriate refund of premiums previously paid by policy holders or an appropriate reduction or increase in future premiums payable by policy holders.

**Note—**

Motor Accident Guidelines with respect to insurance premium matters may only be made with the approval of the Board of the Authority—see section 10.3.

- (3) If, as a result of the exercise of a function under this section, the Authority determines that premiums and Fund levies under Division 10.4 should be adjusted to avoid excess profits, the Authority must take action to make adjustments to avoid those excess profits.
- (4) The Authority may, following any adjustment referred to in subsection (2) of premiums and Fund levies under Division 10.4 to avoid excess losses, direct payments from the Motor Accidents Operational Fund under that Division to insurers corresponding to any increase in Fund levies otherwise payable.
- (5) The Authority must, following any adjustment referred to in subsection (2) of premiums and Fund levies under Division 10.4 to avoid excess profits, direct insurers to make payments to the Motor Accidents Operational Fund under that Division corresponding to any reduction in Fund levies otherwise payable.
- (6) An amount payable to or from the Motor Accidents Operational Fund under subsection (4) or (5) is not recoverable from or payable to policy holders.
- (7) The Motor Accident Guidelines may provide for an adjustment under this section to be made in relation to previous, current or future periods.
- (8) It is a condition of an insurer's licence under this Act that the insurer must comply with the requirements of any special arrangement under this section.
- (9) In this section:

**excess loss** means a shortfall in underwriting profit of an insurer below the filed profit of the insurer.

**excess profit** means underwriting profit of an insurer in excess of the filed profit of the insurer.

**filed profit** means estimated underwriting profit on which the premiums filed with the Authority under this Division (and not rejected by the Authority) are based.

## **2.26 Special provisions relating to taxis and hire vehicles and other vehicles**

- (1) The Motor Accident Guidelines relating to the determination of insurance premiums for third-party policies may make provision for part of the premium to be paid before the issue of a policy and for the remainder of the premium to be paid during the period for which the policy is issued.
- (2) Any such determination:
  - (a) may be made in relation to taxis or hire vehicles or in relation to any other class of vehicles, and
  - (b) may provide for the basis on which the remainder of the premium is to be paid (including on the number of trips undertaken by the vehicles, the distance travelled by the vehicles or other activity in which the vehicles are engaged), and
  - (c) may authorise the remainder of the premium to be paid on behalf of the persons to whom the third-party policies are issued (including by the providers of passenger services or booking services relating to taxis or hire vehicles or by other persons conducting a business relating to the vehicles).
- (3) Section 2.8 (Cancellation of third-party policies) extends to the cancellation of a third-party policy if a payment required to be made during the period for which the policy is issued has not been duly paid.
- (4) The Authority may, by notice in writing served on a person conducting a business relating to vehicles (including the provider of a passenger service or a booking service), require the person to provide (within the time and in the manner specified in the notice) any information that the Authority reasonably requires for the purpose of determining the guidelines for insurance premiums for third-party policies for vehicles of that kind.
- (5) A person to whom such a notice is given must not:
  - (a) fail to comply with the notice, or
  - (b) provide information to the Authority that the person knows is false or misleading in a material particular.



Maximum penalty: 100 penalty units.

- (6) In this section, taxi or hire vehicle and provider of a passenger service or booking service have the same meanings as they have in the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*.

## **Division 2.4 Uninsured or unidentified motor vehicles**

### **2.27 Nominal Defendant** (cf s 32 MACA)

- (1) The Authority is, for the purposes of this Act, the Nominal Defendant.
- (2) Any action or proceeding by or against the Nominal Defendant is to be taken in the name of the “Nominal Defendant”.

### **2.28 Application of Division to statutory benefits**

For the purposes of the application of this Division to a claim against the Nominal Defendant for statutory benefits payable under Part 3, the liability of the Nominal Defendant is deemed to be a liability in respect of death or injury caused by the fault of the owner or driver of a vehicle that is not an insured motor vehicle.

### **2.29 Claim against Nominal Defendant where vehicle not insured** (cf s 33 MACA)

- (1) An action for the recovery of damages in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle that is not an insured motor vehicle in the use or operation of the vehicle on a road in New South Wales may be brought against the Nominal Defendant.
- (2) Any such action may be brought despite the fact that the owner or driver of the motor vehicle is dead or cannot be found or is the spouse of the person whose death or to whom injury has been caused.
- (3) In respect of any such action, the Nominal Defendant is liable as if it were the owner or driver of the motor vehicle.
- (4) If the motor accident resulting in the death of or injury to a person occurred on land that is a road related area within the meaning of section 4 (1) of the *Road Transport Act 2013* because it is an area that is open to or used by the public for driving, riding or parking vehicles, there is no right of action against the Nominal Defendant under this section if at the time of the motor accident the person was a trespasser on the land.
- (5) There is no right of action against the Nominal Defendant under this section:
  - (a) if the motor vehicle is owned by the Commonwealth or by any person or body of persons representing the Commonwealth, or

- (b) if there is a right of action under section 2.32 in respect of the death or injury, or
  - (c) if, at the time the motor accident resulting in the death or injury occurred, the motor vehicle was registered under the law of a place other than New South Wales or under a law of the Commonwealth and the motor vehicle was covered under a policy of compulsory third-party personal injury insurance or was subject to coverage under a compulsory motor vehicle accident compensation scheme of that place or of the Commonwealth, or
  - (d) if the regulations provide that in the circumstances specified in the regulations there is no right of action against the Nominal Defendant.
- (6) For the purposes of this section, and any regulations made for the purposes of this section:

**motor vehicle** means a motor vehicle:

- (a) that is exempt from registration, or
- (b) that is not exempt from registration, is required to be registered to enable its lawful use or operation on a road in New South Wales and:
  - (i) was at the time of manufacture capable of registration, or
  - (ii) was at the time of manufacture, with minor adjustments, capable of registration, or
  - (iii) was previously capable of registration but is no longer capable of registration because it has fallen into disrepair.

### **2.30 Claim against Nominal Defendant where vehicle not identified** (cf s 34 MACA)

- (1) An action for the recovery of damages in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle on a road in New South Wales may, if the identity of the vehicle cannot be established, be brought against the Nominal Defendant.
- (2) A claim cannot be made against the Nominal Defendant under this section unless due inquiry and search has been made to establish the identity of the motor vehicle concerned.
- (3) If the motor accident resulting in the death of or injury to a person occurred on land that is a road related area within the meaning of section 4 (1) of the [Road Transport Act 2013](#) because it is an area that is open to or used by the public for driving, riding or parking vehicles, there is no right of action against the Nominal Defendant under this section if at the time of the motor accident the person was a trespasser on the land.

(4) The inquiry or search may be proved orally or by affidavit of the person who made the inquiry or search.

(5) In respect of any such action, the Nominal Defendant is liable as if it were the owner or driver of the motor vehicle.

**2.31 Rejection of claim for failure to make due inquiry and search to establish identity of vehicle** (cf s 34A MACA)

(1) If due inquiry and search has not been made to establish the identity of the motor vehicle concerned, a claim against the Nominal Defendant under section 2.30 cannot be referred for assessment under Division 7.6 unless:

(a) the Nominal Defendant has lost the right to reject the claim for failure to make that due inquiry and search, or

(b) the Dispute Resolution Service has determined that due inquiry and search has been made, or

(c) the claim is referred only for a certificate of exemption from assessment under Division 7.6.

(2) The Nominal Defendant loses the right to reject a claim for failure to make due inquiry and search to establish the identity of a vehicle if the Nominal Defendant:

(a) does not, within 2 months after the claim is made, reject the claim for failure to make that due inquiry and search or ask the claimant to make that due inquiry and search, or

(b) does not, within 2 months after being notified of efforts to establish the identity of the vehicle, refuse to accept that there has been due inquiry and search to establish the identity of the vehicle.

(3) If court proceedings are commenced on a claim against the Nominal Defendant under section 2.30, the Nominal Defendant may apply to the court to have the proceedings dismissed on the ground that due inquiry and search to establish the identity of the vehicle has not been made.

(4) An application to have proceedings dismissed on that ground cannot be made more than 2 months after the statement of claim is served on the Nominal Defendant and also cannot be made if the Nominal Defendant has lost the right to reject the claim on that ground.

(5) On an application to have proceedings dismissed on that ground, the court must dismiss the proceedings unless satisfied that due inquiry and search to establish the identity of the vehicle has been made.

**2.32 Claim against Nominal Defendant where a NSW registered trailer is attached to a**

**motor vehicle not registered in NSW** (cf s 35 MACA)

(1) The Nominal Defendant is taken to have issued a policy of insurance under this Act which insures:

(a) the owner of a registered trailer:

(i) which is attached to a motor vehicle which is not registered, or

(ii) which runs out of control having become detached from the towing motor vehicle which is not registered, and

(b) the owner of a motor vehicle which is not registered:

(i) to which a registered trailer is attached, or

(ii) from which a registered trailer becomes detached and runs out of control, and

(c) any other person who at any time drives such a vehicle (whether or not with the consent of the owner),

against liability in respect of the death of or injury to a person caused by the fault of the owner of the trailer or the owner or driver of the vehicle in the use or operation of the vehicle in any part of the Commonwealth (whether or not on a road).

(2) An action for the recovery of damages in respect of the death of or injury to a person as referred to in subsection (1) may be brought against the Nominal Defendant.

(3) Any such action may be brought despite the fact that the owner of the trailer or the owner or driver of the towing vehicle is dead or cannot be found or is the spouse of the person whose death or to whom injury has been caused.

(4) In respect of any such action, the Nominal Defendant is liable as if it were the owner of the trailer or the owner or driver of the towing vehicle.

(5) There is no right of action against the Nominal Defendant under this section:

(a) if the trailer or the towing vehicle is owned by the Commonwealth or by any person or body of persons representing the Commonwealth, or

(b) if, at the time the motor accident resulting in the death or injury occurred, the motor vehicle was registered under the law of a place other than New South Wales or under a law of the Commonwealth and the motor vehicle was covered under a policy of compulsory third party personal injury insurance or was subject to coverage under a compulsory motor vehicle accident compensation scheme of that place or of the Commonwealth, or

(c) if the regulations provide that in the circumstances specified in the regulations there is no right of action against the Nominal Defendant.

**2.33 Exclusion of acts of terrorism from claims against Nominal Defendant** (cf s 35A MACA)

- (1) There is no right of action against the Nominal Defendant under section 2.29, 2.30 or 2.32 for damages that are attributable to an act that, having regard to the nature of the act and the context in which the act was done, it is reasonable to characterise as an act of terrorism.
- (2) An act cannot be characterised as an act of terrorism for the purposes of this section unless it can be so characterised under section 2.10 (2).
- (3) This section is repealed on a date to be appointed by proclamation for the purposes of this section.

**2.34 Nominal Defendant as tortfeasor** (cf s 36 MACA)

- (1) The Nominal Defendant may join another person, or may be joined, for contribution or indemnity in respect of a claim or proceedings under this Act as if the Nominal Defendant were a tortfeasor.
- (2) Joinder of the Nominal Defendant is required to be effected in accordance with this section.
- (3) A person seeking to join the Nominal Defendant in respect of a claim or proceedings must give the Nominal Defendant notice of the person's intention to do so. The notice must include a copy of the notice of claim under section 6.12 given to the person.
- (4) The notice must be given within 3 months after the claim is made against the person under section 6.12, or within 3 months after the person becomes a party to proceedings in respect of the claim, whichever occurs first.
- (5) The court may extend the period for giving notice to the Nominal Defendant if the person seeking to join the Nominal Defendant gives a full and satisfactory explanation for not having given notice within the 3-month period.
- (6) Within 2 months after notice is given, the person giving notice must provide the Nominal Defendant with full details of the allegations made against the Nominal Defendant (or against the person to whom the Nominal Defendant is taken to have issued a third-party policy).
- (7) An application may not be made to join the Nominal Defendant as a party to proceedings before the court after 3 years from the date on which the claim under section 6.12 in respect of which contribution or indemnity is sought must be made, except with the leave of the court.
- (8) If the Nominal Defendant is sought to be joined because the identity of another motor vehicle is not known, joinder may not be effected unless due inquiry or search to identify the vehicle has been made. The inquiry or search may be proved orally or by

affidavit of the person who made the inquiry or search.

- (9) Except as provided by this section, nothing in this section affects any rules of court relating to the joinder of parties.

**2.35 Payment of claims against Nominal Defendant** (cf s 37 MACA)

The Nominal Defendant is not personally liable to pay any amount payable in satisfaction of any claim made or judgment obtained under section 2.29, 2.30 or 2.32 or the amount of any costs or expenses incurred by it in relation to any such claim or judgment, but every such amount is to be paid by the Nominal Defendant out of the Nominal Defendant's Fund established under this Division.

**2.36 Licensed insurers to act for Nominal Defendant** (cf s 38 MACA)

- (1) The Nominal Defendant is to allocate claims made against it to licensed insurers in accordance with the arrangements contained in the Insurance Industry Deed or as determined by the Authority.
- (2) The Nominal Defendant is not required to allocate claims that are unlikely to involve a liability of the Nominal Defendant.
- (3) A licensed insurer to whom a claim is allocated is authorised, on behalf of and in the name of the Nominal Defendant, to deal with the claim (and any proceedings relating to the claim) in such manner as it thinks fit.
- (4) A licensed insurer may settle or compromise any such claim.
- (5) A licensed insurer is authorised, on behalf of and in the name of the Nominal Defendant, to bring and prosecute proceedings under section 2.37 relating to any such claim and to settle or compromise those proceedings as it thinks fit.
- (6) A licensed insurer is required to provide to the Authority such reports as the Authority may reasonably require in relation to any thing done by the licensed insurer under the authority of this section.

**2.37 Recovery from owner or driver** (cf s 39 MACA)

- (1) Any amount properly paid by the Nominal Defendant in satisfaction of a claim made or judgment obtained under section 2.29, 2.30 or 2.32 and the amount of any costs and expenses properly incurred by it in relation to any such claim or judgment may be recovered by the Nominal Defendant as a debt:
  - (a) from the person who, at the time of the occurrence out of which the claim arose or in respect of which the judgment was obtained, was the owner of the motor vehicle, or
  - (b) where at the time of such occurrence some other person was driving the motor

vehicle, from the owner and the driver jointly or from either of them severally.

(2) However:

- (a) it is a sufficient defence in any proceedings under this section against the owner (whether severally or jointly with the driver) if the owner establishes to the satisfaction of the court that, at the time of the occurrence, some other person was driving the motor vehicle without the owner's authority, and
- (b) it is a sufficient defence in any proceedings under this section against the driver of an uninsured motor vehicle (whether severally or jointly with the owner) if the driver establishes to the satisfaction of the court that, at the time of the occurrence, the driver was driving the motor vehicle with the authority of the owner or had reasonable grounds for believing and did in fact believe that the driver had such authority, and that the driver had reasonable grounds for believing and did in fact believe that the motor vehicle was an insured motor vehicle.

(3) The Nominal Defendant is not entitled to recover any amount under this section from the owner or driver of a motor vehicle which, at the relevant time, was not required to be registered or was exempt from registration or, if required to be registered, was not required to be insured under this Act.

### **2.38 Establishment of Nominal Defendant's Fund** (cf s 40 MACA)

- (1) There is established a fund, to be known as the Nominal Defendant's Fund, belonging to and vested in the Authority.
- (2) The following is to be paid into the Fund:
  - (a) money collected under section 2.39,
  - (b) the interest from time to time accruing from the investment of the Fund,
  - (c) money recovered by the Nominal Defendant under this Division,
  - (d) money required to be paid into the Fund out of the Policyholders Protection Fund in accordance with section 16E of the *Insurance Protection Tax Act 2001*,
  - (e) money required to be paid into the Fund by or under this or any other Act.
- (3) The following is to be paid from the Fund:
  - (a) money required to be paid from the Fund under section 2.35,
  - (b) money required to be paid by the Nominal Defendant as the relevant insurer under Part 3,
  - (c) money required to be paid into the Fund out of the Policyholders Protection Fund in accordance with section 16G of the *Insurance Protection Tax Act 2001*,

(d) all other money required to be paid from the Fund by or under this or any other Act.

(4) The Authority may invest money in the Fund which is not immediately required for the purposes of the Fund:

(a) in such manner as may be authorised by the *Public Authorities (Financial Arrangements) Act 1987*, or

(b) if that Act does not confer power on the Authority to invest money in the Fund—in any other manner approved by the Minister with the concurrence of the Treasurer.

### **2.39 Collections for Nominal Defendant's Fund** (cf s 41 MACA)

(1) In this section:

**financial year** means a year commencing on 1 July.

(2) The Authority may determine the amount to be collected for the purposes of the Nominal Defendant's Fund in respect of each financial year.

(3) An amount to be collected for the purposes of the Nominal Defendant's Fund is to be collected from such persons or fund, and in accordance with such arrangements, as may be prescribed by the regulations.

(4) The Authority is not to determine an amount under subsection (2) in respect of a financial year if it is of the opinion that satisfactory arrangements have been made in respect of that year (pursuant to the Insurance Industry Deed or otherwise) by licensed insurers to meet claims made against the Nominal Defendant.

## **Part 3 Statutory benefits**

### **Division 3.1 Entitlement to statutory benefits**

#### **3.1 Statutory benefits payable in respect of death or injury resulting from motor accident**

(1) If the death of or injury to a person results from a motor accident in this State, statutory benefits are payable in respect of the death or injury as provided by this Part.

(2) Statutory benefits are payable (except as otherwise provided by this Part):

(a) whether or not the motor accident was caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle, or

(b) even if the motor accident was caused by the fault of the person to whom the statutory benefits are payable.



### 3.2 Statutory benefits payable by relevant insurer

- (1) The statutory benefits payable under this Part are payable by the relevant insurer.
- (2) The **relevant insurer** is (subject to this section and section 3.3):
  - (a) if the motor accident concerned involved only 1 motor vehicle with motor accident insurance cover—the insurer of the motor vehicle, or
  - (b) if the motor accident concerned involved more than 1 motor vehicle—the insurer of the at-fault motor vehicle, or
  - (c) in any other case—the Nominal Defendant.

**Note—**

The Nominal Defendant will be the relevant insurer where the motor vehicle concerned was not insured or identified as referred to in Division 2.4.

- (3) However, in the case of the payment of statutory benefits for treatment and care provided more than 5 years after the motor accident concerned, the **relevant insurer** is the Lifetime Care and Support Authority of New South Wales.
- (4) The insurer of the at-fault motor vehicle is the insurer who provides motor accident insurance cover to:
  - (a) the owner or driver of the motor vehicle whose fault in the use or operation of the vehicle caused the death or injury in respect of which the statutory benefits are payable, or
  - (b) if there is more than one such motor vehicle—the owner or driver of the motor vehicle who was most at fault.
- (5) For the purposes of this Act (including any motor accident insurance cover in respect of a motor vehicle) a liability that the relevant insurer has to pay statutory benefits under this Part in respect of death or injury is deemed to be a liability in respect of death or injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle (being a motor vehicle for which the insurer is the relevant insurer).
- (6) If the insurer of the at-fault motor vehicle is not a licensed insurer under this Act, statutory benefits payable under this Part are payable by the Nominal Defendant on behalf of the insurer.
- (7) The Nominal Defendant or other insurer who pays statutory benefits under this Part is entitled to recover the amount of statutory benefits properly paid from the relevant insurer liable to make those payments.

### 3.3 Determination of relevant insurer

- (1) Insurers may enter into arrangements approved by the Authority for the determination of which insurer will accept a claim for statutory benefits and be the relevant insurer in respect of the claim.
- (2) If there is a dispute about which insurer will accept a claim for statutory benefits or any delay in determining the insurer who will accept a claim, the Dispute Resolution Service may determine which insurer is the relevant insurer in respect of the claim and its determination is binding on the insurers for the purposes of this Part.

**Note—**

See also section 3.44 (Statutory benefits determinations relating to fault etc not binding in relation to common law claims).

## Division 3.2 Statutory benefits for funeral expenses

### 3.4 Statutory benefits for funeral expenses

- (1) If the death of a person results from a motor accident, statutory benefits are payable for reasonable funeral expenses to:
  - (a) the legal personal representative of the deceased, or
  - (b) if there is no legal personal representative—the person who has paid or is liable to pay those expenses.
- (2) If the usual place of residence of the deceased person was, at the time of the person's death, in Australia, funeral expenses are to include the reasonable cost of transporting the body of the deceased to either of the following:
  - (a) what would, in the circumstances, be an appropriate place for its preparation for burial or cremation,
  - (b) that usual place of residence.
- (3) If the usual place of residence of the deceased person was, at the time of the person's death, in a country other than Australia, funeral expenses are to include the reasonable cost of transporting the body of the deceased to that country.

## Division 3.3 Weekly payments of statutory benefits to injured persons

### 3.5 Definitions

- (1) In this Division:

***first entitlement period***, in respect of an injury resulting from a motor accident, means the period of 13 weeks that starts on the day after the day of the motor accident.

**maximum weekly statutory benefits amount**—see section 3.9.

**minimum weekly statutory benefits amount**—see section 3.10.

**second entitlement period**, in respect of an injury resulting from a motor accident, means the period of 65 weeks that starts on the day after the end of the first entitlement period.

- (2) Words and expressions in this Division that are defined in Schedule 1 have the meanings provided by that Schedule. The regulations may amend Schedule 1.

**Note—**

Definitions include “earner”, “loss of earnings”, “pre-accident weekly earnings”, “pre-accident earning capacity” and “post-accident earning capacity”.

**3.6 Weekly payments during first entitlement period (first 13 weeks after motor accident)**

- (1) An earner who is injured as a result of a motor accident and suffers a total or partial loss of earnings as a result of the injury is entitled to weekly payments of statutory benefits under this section during the first entitlement period.

**Note—**

Only a person who was an earner when injured is entitled to statutory benefits under this section—see Schedule 1.

- (2) A weekly payment of statutory benefits under this section is to be at the rate of 95% of the difference between the person’s pre-accident weekly earnings and the person’s post-accident earning capacity (if any) for the first entitlement period.
- (3) A weekly payment of statutory benefits to a person under this section is not to exceed the maximum weekly statutory benefits amount less the person’s post-accident earning capacity (if any) for the first entitlement period.
- (4) A weekly payment of statutory benefits to a person under this section is not to be less than the minimum weekly statutory benefits amount or the person’s pre-accident weekly earnings, whichever is the lesser.
- (5) If a weekly payment of statutory benefits is payable under this section, but further information is required to determine the amount of the payment, interim payments are to be made in accordance with the Motor Accident Guidelines until the correct amount of the payment can be determined and paid.

**3.7 Weekly payments during second entitlement period (weeks 14-78 after motor accident)**

- (1) An earner who is injured as a result of a motor accident and suffers a total or partial loss of earnings as a result of the injury is entitled to weekly payments of statutory benefits under this section during the second entitlement period.

**Note—**

Only a person who was an earner when injured is entitled to statutory benefits under this section—see Schedule 1.

- (2) A weekly payment of statutory benefits under this section is to be at the rate of the difference between:
  - (a) in the case of total loss of earning capacity—80% of the person’s pre-accident weekly earnings, or
  - (b) in the case of partial loss of earning capacity—85% of the person’s pre-accident weekly earnings,and the person’s post-accident earning capacity (if any) after the first entitlement period.
- (3) A weekly payment of statutory benefits to a person under this section is not to exceed the maximum weekly statutory benefits amount less the person’s post-accident earning capacity (if any) after the first entitlement period.
- (4) A weekly payment of statutory benefits to a person under this section is not to be less than the minimum weekly statutory benefits amount or the person’s pre-accident weekly earnings, whichever is the lesser.

### **3.8 Weekly payments after second entitlement period (after week 78)**

- (1) A person who is injured as a result of a motor accident and suffers a total or partial loss of earning capacity as a result of the injury is entitled to weekly payments of statutory benefits under this section after the end of the second entitlement period, but only if the person:
  - (a) is at least 18 years of age (whether or not the person is an earner), or
  - (b) is under 18 years of age and is an earner.

#### **Note—**

The person’s age after the second entitlement period is relevant to determining entitlement to statutory benefits after the second entitlement period. A person’s age at the date of the motor accident is not relevant. Schedule 1 defines when a person is an earner.

- (2) A weekly payment of statutory benefits under this section is to be at the rate of the difference between:
  - (a) in the case of total loss of earning capacity—80% of the person’s pre-accident earning capacity, or
  - (b) in the case of partial loss of earning capacity—85% of the person’s pre-accident earning capacity,and the person’s post-accident earning capacity (if any) after the second entitlement

period.

- (3) A weekly payment of statutory benefits to a person under this section is not to exceed the maximum weekly statutory benefits amount less the person's post-accident earning capacity (if any) after the second entitlement period.
- (4) A weekly payment of statutory benefits to a person under this section is not to be less than the minimum weekly statutory benefits amount or the person's pre-accident earning capacity, whichever is the lesser.

### **3.9 Maximum weekly statutory benefits amount**

- (1) For the purposes of this Division, the **maximum weekly statutory benefits amount** is \$3,853.
- (2) If that amount is adjusted by the operation of this section, the applicable maximum amount is the amount as at the date the statutory benefit is payable.
- (3) The Authority is, on or before 1 October 2017 and on or before 1 October in each succeeding year, to declare, by order published on the NSW legislation website, the amount that is to apply, as from the date specified in the order, for the purposes of subsection (1).
- (4) The amount declared is to be the amount applicable under subsection (1) (or that amount as last adjusted under this section) adjusted by the percentage change in the amounts estimated by the Australian Statistician of the average weekly total earnings of adults in full-time employment in New South Wales over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.
- (5) An amount declared for the time being under this section applies to the exclusion of the amount under subsection (1).
- (6) If the Australian Statistician fails or ceases to estimate the amounts referred to in subsection (4), the amount declared is to be the amount determined in accordance with the regulations.
- (7) In adjusting an amount to be declared for the purpose of subsection (1), the amount determined in accordance with subsection (4) is to be rounded up to the nearest whole dollar.

### **3.10 Minimum weekly statutory benefits amount**

- (1) For the purposes of this Division, the **minimum weekly statutory benefits amount** is the amount prescribed by the regulations.
- (2) The regulations may prescribe the amount by reference to another amount (such as the relevant maximum weekly statutory benefits amount).

### **3.11 Cessation of weekly payments to injured persons most at fault or with minor injuries after 26 weeks**

- (1) An injured person is not entitled to weekly payments of statutory benefits under this Division for any period of loss of earnings or earning capacity that occurs more than 26 weeks after the motor accident concerned if:
  - (a) the motor accident was caused wholly or mostly by the fault of the person, or
  - (b) the person's only injuries resulting from the motor accident were minor injuries.
- (2) A motor accident was caused mostly by the fault of a person if the contributory negligence of the person in relation to the motor accident (as referred to in section 3.38) was greater than 61%.

#### **Note—**

Section 3.38 provides for a reduction of statutory benefits after 26 weeks for contributory negligence of the person not mostly at fault.

### **3.12 Cessation of weekly payments to other injured persons after maximum weekly payments period**

- (1) An injured person is not entitled to weekly payments of statutory benefits under this Division for any period of loss of earnings or earning capacity that occurs more than the maximum weekly payment period after the motor accident concerned.
- (2) The maximum weekly payment period is as follows:
  - (a) 104 weeks, unless the person's injury is the subject of a pending claim for damages (whether or not the insurer has accepted liability),
  - (b) 156 weeks if the person's injury is the subject of such a pending claim and the degree of any permanent impairment of the injured person as a result of the injury is not greater than 10%,
  - (c) 260 weeks if the person's injury is the subject of such a pending claim and the degree of permanent impairment of the injured person as a result of the injury is greater than 10%.
- (3) The maximum weekly payment period ends if any such pending claim for damages is withdrawn, settled or finally determined after the period of 104 weeks after the motor accident concerned.

### **3.13 Termination of weekly payments on retiring age**

- (1) If the motor accident that causes a person's injury happens before the person reaches the retiring age, a weekly payment of statutory benefits is not to be made under this Division in respect of any resulting period of loss of earnings or earning capacity

occurring after the first anniversary of the date on which the person reaches the retiring age.

- (2) If the motor accident that causes a person's injury happens on or after the person reaches the retiring age, a weekly payment of statutory benefits is not to be made under this Division in respect of any resulting period of loss of earnings or earning capacity occurring more than 12 months after the motor accident occurs.
- (3) In this section:

**retiring age** means the age at which a person would, subject to satisfying any other qualifying requirements, be eligible to receive an age pension under the *Social Security Act 1991* of the Commonwealth.

### **3.14 Obligations to provide authorisations and medical evidence**

- (1) An insurer who commences weekly payments of statutory benefits under this Division may require the injured person to provide the insurer with:
  - (a) a medical certificate certifying as to the person's fitness for work, and
  - (b) an authority given by the person authorising a provider of treatment or other services to the person in connection with the injury to give the insurer information regarding the treatment or service provided or the person's condition or treatment relevant to the injury.
- (2) If a person fails to comply with a requirement under this section within 14 days (or other period prescribed by the regulations) after the requirement is communicated to the person by the insurer, the insurer may suspend payment of weekly payments of statutory benefits to the person under this Division during any period that the failure to comply continues. The person forfeits his or her entitlement to weekly payments during the period of any such suspension.

### **3.15 Requirements for evidence as to fitness for work**

- (1) An injured person must provide to the insurer:
  - (a) certificates of fitness for work in accordance with this section in respect of the period in respect of which the person is entitled to weekly payments of statutory benefits under this Division, and
  - (b) a declaration in accordance with the Motor Accident Guidelines as to whether or not the person is engaged in any form of employment or voluntary work for which he or she receives or is entitled to receive payment in money or otherwise or has been so engaged at any time since last providing a certificate under this section.
- (2) If a decision to reject a claim for weekly payments of statutory benefits or to cease weekly payments of statutory benefits is set aside, a person is not required to comply

with this section in respect of any period from the date that the decision took effect until the day on which the decision is set aside.

- (3) A certificate of fitness for work must:
  - (a) be a certificate given by a treating medical practitioner in accordance with the Motor Accident Guidelines, and
  - (b) certify as to the person's fitness for work and whether the person has current fitness for work or has no current fitness for work during the period, not exceeding 28 days, stated in the certificate, and
  - (c) specify the expected duration of the person's unfitness for work.
- (4) A certificate of fitness for work may cover a period exceeding 28 days if:
  - (a) the person giving the certificate states in the certificate the special reasons why the certificate covers the longer period, and
  - (b) the insurer is satisfied that, for the special reasons stated, the certificate should be accepted.
- (5) A certificate of fitness for work is of no effect to the extent that it relates to a period that is more than 90 days before the certificate is provided.
- (6) If a person fails to comply with a requirement under this section within 7 days (or other period prescribed by the regulations) after the requirement is communicated to the person by the insurer, the insurer may (subject to the Motor Accident Guidelines) suspend payment of weekly payments of statutory benefits to the person under this Division during any period that the failure to comply continues. The person forfeits his or her entitlement to weekly payments of statutory benefits during the period of any such suspension.

### **3.16 Decisions about earning capacity**

- (1) An insurer can make a decision about the pre-accident earning capacity or post-accident earning capacity of an injured person at any time.
- (2) The Motor Accident Guidelines can provide for the procedures to be followed by insurers in connection with the making of those decisions.

### **3.17 Treatment, rehabilitation and vocational training**

- (1) An insurer must require an injured person who is in receipt of weekly payments of statutory benefits under this Division to undertake such reasonable and necessary treatment, rehabilitation or vocational training as the Motor Accident Guidelines may require.
- (2) If an injured person fails without reasonable excuse to comply with a requirement of



an insurer under this section, the person's entitlement to weekly payments of statutory benefits under this Division is suspended while the failure continues.

### **3.18 Claimant to notify change of circumstances**

(1) A person in receipt of weekly payments of statutory benefits under this Division must immediately give notice to the insurer of either of the following changes in the person's circumstances:

- (a) the person's return to any employment or commencement of employment,
- (b) any change in the person's earnings from any employment.

Maximum penalty: 20 penalty units.

(2) The notice is to be given in writing or in such other manner as may be permitted by the Motor Accident Guidelines.

(3) A person is not guilty of an offence under this section if the person satisfies the court that the insurer failed to inform the person of the obligation to notify that matter.

### **3.19 Notice required before discontinuing or reducing weekly payments**

(1) If an injured person has received weekly payments of statutory benefits under this Division for a continuous period of at least 4 weeks, the insurer must not discontinue payment, or reduce the amount, of the statutory benefits without first giving the person not less than the required period of notice of intention to discontinue payment of the statutory benefits or to reduce the amount of the statutory benefits.

Maximum penalty: 50 penalty units.

(2) The **required period of notice** for the purposes of this section is:

- (a) when the discontinuation or reduction is during the first entitlement period—2 weeks, or
- (b) when the discontinuation or reduction is during the second entitlement period—4 weeks, or
- (c) when the discontinuation or reduction is after the second entitlement period—8 weeks.

(3) If the payment of statutory benefits to an injured person is discontinued, or the amount of statutory benefits is reduced, by an insurer in circumstances involving the commission by the insurer of an offence under subsection (1), the injured person may, whether or not the insurer has been prosecuted for the offence, recover from the insurer an amount of statutory benefits that:

- (a) if no period of notice has been given—is equal to the amount of statutory benefits,

or additional statutory benefits, that would have been payable during the required period of notice if payment of the statutory benefits had not been discontinued or if the amount of statutory benefits had not been reduced, or

(b) if less than the required period of notice has been given—is equal to the amount of statutory benefits that would have been payable during the balance of the required period of notice if payment of the statutory benefits had not been discontinued or if the amount of the statutory benefits had not been reduced.

- (4) This section applies to any discontinuation or reduction of the amount of a payment because the injured person ceases to be entitled to the payment or to the amount of the payment under a provision of this Division.
- (5) This section does not apply to a reduction in weekly payments of statutory benefits as a result only of an injured person's return to any employment or commencement of employment or of any change in an injured person's earnings from any employment.
- (6) This section does not apply to a reduction in weekly payments of statutory benefits as a result only of the application of different rates of statutory benefits after the expiration of earlier periods for which higher rates were payable.
- (7) This section does not apply to the suspension of weekly payments of statutory benefits by or under a provision of this Act.
- (8) This section does not affect the operation of section 3.20 (Refund of weekly payments paid after return to employment).

### **3.20 Refund of weekly payments paid after return to employment**

- (1) If, because of a claimant's return to or commencement of employment or a change in employment that affects the claimant's earnings:
  - (a) the claimant is not entitled under this Division to any weekly payments of statutory benefits that have been paid to the claimant, or
  - (b) the amount of any weekly payments of statutory benefits that have been paid to the claimant exceeds the amount to which the claimant is entitled under this Division,

the Dispute Resolution Service may direct the claimant to refund to the person who made the payments any amount to which the claimant is not entitled in respect of payments during the period of 2 years (or such shorter or longer period as the Dispute Resolution Service considers to be appropriate) from the date of payment.

- (2) Any such refund may, in accordance with the terms of the direction of the Dispute Resolution Service, be deducted from future weekly payments of statutory benefits to the claimant or be recovered as a civil debt under subsection (6).

- (3) Without limiting this section, the Dispute Resolution Service may give such directions as it thinks fit for the adjustment of weekly payments of statutory benefits to a claimant to take account of any overpayments made to the claimant (whether or not in the circumstances referred to in subsection (1)) in respect of any previous period.
- (4) A court before which proceedings for an offence under section 3.19 (Notice required before discontinuing or reducing weekly payments) are taken against a person may, on the application of the Authority (whether or not the person is convicted of the offence), give any direction that it is satisfied the Dispute Resolution Service could give under this section as a result of the return to or commencement of employment or change in employment to which the alleged offence relates. The standard of proof that applies in connection with an application under this subsection is proof on the balance of probabilities.
- (5) The power conferred on a court by subsection (4) does not authorise the giving of a direction for the adjustment of weekly payments of statutory benefits.
- (6) A direction of the Dispute Resolution Service or a court under this section is enforceable as a civil debt and may be recovered as such in any court of competent jurisdiction by the person to whom the direction requires payment to be made.
- (7) This section does not limit:
  - (a) any other right of recovery that a person may have against another person in respect of any overpayment of statutory benefits to that other person, or
  - (b) any agreement between the parties concerned for the refund of any overpayment of statutory benefits.

### **3.21 Weekly statutory benefits to persons residing outside Australia**

- (1) An injured person who resides outside Australia is not entitled to receive any weekly payment of statutory benefits in respect of any period during which the person resides outside Australia, except as provided by this section when the loss of earnings in respect of which statutory benefits are payable is likely to be of a permanent nature.
- (2) An injured person residing outside Australia is entitled to receive on a quarterly basis the amount of the weekly payments accruing due during the preceding quarter if:
  - (a) the Dispute Resolution Service has determined that the injured person's loss of earnings is likely to be of a permanent nature, and
  - (b) the person establishes, in such manner and at such intervals as may be required by the Motor Accident Guidelines, the person's identity and the continuance of the loss of earnings in respect of which the weekly payment is payable.

### 3.22 Indexation of weekly statutory benefits

- (1) The amount of a weekly payment of statutory benefits to an injured person is to be varied on each review date after the end of the first entitlement period by varying the amount of the injured person's pre-accident weekly earnings and pre-accident earning capacity (referred to in this section as **adjustable amounts**) for the purposes of the calculation of the amount of a weekly payment, in accordance with the formula:

$$A \times \frac{B}{C}$$

where:

**A** is the adjustable amount at the start of the first entitlement period or, if that amount has been varied in accordance with this section, that amount as last so varied.

**B** is NSW AWE over the 2 quarters preceding the review date for which the relevant estimates are, at that date, available.

**C** is NSW AWE over the 2 quarters immediately preceding the 2 quarters referred to in B.

- (2) In this section:

**NSW AWE** means the amounts estimated by the Australian Statistician of the average weekly total earnings of adults in full-time employment in New South Wales.

**review date** means 1 April and 1 October in each year.

- (3) The Authority is, on or before each review date, to notify, by order published on the NSW legislation website, the number that equates to the factor

$$\frac{B}{C}$$

for the purposes of the variation required for that review date under this section.

- (4) A notification published on the NSW legislation website after a review date for the purposes of the variation required for that review date under this section has effect as if published before that review date.
- (5) If the variation of an adjustable amount by operation of this section has the effect of reducing the amount:
- the variation is deemed not to have taken effect, except for the purposes of the application of this section, and
  - when the amount is varied and increased by operation of this section in respect of the next or a subsequent financial year, that variation has effect as an increase only to the extent (if any) to which the amount of the increase exceeds the

amount of the reduction in respect of a preceding period, or that part of such a reduction that has not been set off against a previous increase.

- (6) Where it is necessary for the purposes of this Division to calculate an amount that consists of or includes a fraction of a whole number, the amount is deemed to have been calculated in accordance with this section if the calculation is made to the nearest whole dollar.

### **3.23 Statutory benefits payable fortnightly**

Weekly payments of statutory benefits under this Division are payable on a fortnightly basis unless the Motor Accident Guidelines otherwise provide or the parties to a claim otherwise agree.

#### **Note—**

Section 6.5 contains provisions that authorise the insurer to suspend weekly payments of statutory benefits where the injured person fails to comply with the duty to minimise the loss caused by his or her injury.

## **Division 3.4 Statutory benefits for treatment and care**

### **3.24 Entitlement to statutory benefits for treatment and care**

- (1) An injured person is entitled to statutory benefits for the following expenses (***treatment and care expenses***) incurred in connection with providing treatment and care for the injured person:
  - (a) the reasonable cost of treatment and care,
  - (b) reasonable and necessary travel and accommodation expenses incurred by the injured person in order to obtain treatment and care for which statutory benefits are payable,
  - (c) if the injured person is under the age of 18 years or otherwise requires assistance to travel for treatment and care, reasonable and necessary travel and accommodation expenses incurred by a parent or other carer of the injured person in order to accompany the injured person while treatment and care for which statutory benefits are payable is being provided.
- (2) No statutory benefits are payable for the cost of treatment and care to the extent that the treatment and care concerned was not reasonable and necessary in the circumstances or did not relate to the injury resulting from the motor accident concerned.

### **3.25 No statutory benefits for gratuitous attendant care services**

- (1) No statutory benefits are payable under this Division for expenses incurred in connection with the provision of gratuitous attendant care services.

(2) In this section:

***gratuitous attendant care services*** means attendant care services provided to an injured person for which the injured person has not paid and is not liable to pay.

### **3.26 Statutory benefits for loss of capacity to provide gratuitous domestic services**

- (1) An injured person is entitled to statutory benefits under this Division for the reasonable expenses incurred after the motor accident in employing a person to provide domestic services to the claimant's dependants, but only if:
- (a) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition of ***dependants*** in this section—the claimant provided the services to those dependants before the motor accident, and
  - (b) the claimant's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity, and
  - (c) there is a reasonable expectation that, but for the claimant's injury, the claimant would have provided the services to the claimant's dependants for at least 6 hours per week and for a period of at least 6 consecutive months, and
  - (d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.

Statutory benefits are not so payable if the domestic services provided after the motor accident are provided gratuitously.

- (2) If a dependant of the claimant received (or will receive) assisted care during a 6-month period for periods that were (or will be) short-term and occasional and for no more than 4 weeks in total during that 6-month period:
- (a) in determining whether the claimant would have provided gratuitous domestic services to the dependant during a particular week for at least 6 hours, the week should be disregarded if the assisted care was (or will be) provided during that week, and
  - (b) in determining whether the claimant would have provided gratuitous domestic services to the dependant during a 6-month period, any periods during which the assisted care was (or will be) provided in that 6-month period should be disregarded.
- (3) The claimant (or the legal personal representative of a deceased claimant) is not entitled to statutory benefits under this section in respect of any loss of the claimant's capacity to provide gratuitous domestic services to any dependant of the claimant if the dependant has previously recovered damages in respect of that loss of capacity.

(4) The provision of domestic services to an injured person's dependants as provided by this section constitutes the provision of treatment and care for the injured person for the purposes of this Division.

(5) In this section:

**assisted care**, in relation to a dependant of a claimant, means any of the following kinds of care (whether or not the care is provided gratuitously):

- (a) any respite care (being care that includes accommodation that is provided by a person other than the claimant to a dependant who is aged or frail, or who suffers from a physical or mental disability, with the primary purpose of giving the dependant or claimant, or both, a break from their usual care arrangements),
- (b) if the dependant is a minor (but without limiting paragraph (a))—any care that is provided to the dependant by a person other than the claimant where:
  - (i) the person is a parent of the dependant (whether derived through paragraph (a) (i) or (ii) of the definition of **dependants** in this section, adoption or otherwise), and
  - (ii) the care includes the provision of accommodation to the dependant.

**dependants** means:

- (a) such of the following persons as are wholly or partly dependent on the claimant at the time of the motor accident:
  - (i) the husband or wife of the claimant,
  - (ii) a de facto partner of the claimant,
  - (iii) a child, grandchild, sibling, uncle, aunt, niece, nephew, parent or grandparent of the claimant (whether derived through subparagraph (i) or (ii), adoption or otherwise),
  - (iv) any other person who is a member of the claimant's household, and
- (b) any unborn child of the claimant (whether derived through paragraph (a) (i) or (ii), adoption or otherwise) at the time of the motor accident and who is born after that time.

**gratuitous domestic services** means services of a domestic nature for which the person providing the service has not been paid and is not entitled to be paid.

### 3.27 Verification of expenses

- (1) No statutory benefits are payable under this Division for expenses unless the expenses are properly verified in accordance with the Motor Accident Guidelines.

- (2) The Motor Accident Guidelines may make provision for how expenses for treatment and care are to be verified including verification that:
  - (a) the expenses have been incurred, and
  - (b) the treatment and care has been provided, and
  - (c) the treatment and care relates to the injury in respect of which statutory benefits are payable.

### **3.28 Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries**

- (1) An injured person is not entitled to statutory benefits under this Division for treatment and care expenses incurred more than 26 weeks after the motor accident concerned if:
  - (a) the motor accident was caused wholly or mostly by the fault of the person and the person was over 16 years of age at the time of the motor accident, or
  - (b) the person's only injuries resulting from the motor accident were minor injuries.
- (2) A motor accident was caused mostly by the fault of a person if the contributory negligence of the person in relation to the motor accident (as referred to in section 3.38) was greater than 61%.
- (3) Despite subsection (1), statutory benefits under this Division for treatment and care expenses incurred more than 26 weeks after the motor accident concerned are payable in respect of minor injuries if the Motor Accident Guidelines authorise their payment. The payment for those expenses may be so authorised if the treatment or care will improve the recovery of the injured person, the insurer delayed approval for the treatment and care expenses or in other appropriate circumstances.

### **3.29 No statutory benefits for expenses already compensated**

Statutory benefits are not payable under this Division to the extent that the treatment and care expenses concerned:

- (a) are paid for by an insurer under a claim for damages made in respect of the matter, or
- (b) are paid or recovered under Division 10.3 (Bulk billing arrangements).

### **3.30 Payment of hospital, ambulance, medical and other expenses not covered by bulk billing arrangement**

- (1) This section applies to:
  - (a) payment for the treatment and care of injured persons at hospitals, and
  - (b) payment for conveying injured persons by ambulance, and



(c) payment for any medical or dental treatment of, or rehabilitation services provided to, injured persons,

in any case where payment for the expenses concerned has not been made, and is not required to be made in accordance with a bulk billing arrangement under Division 10.3.

- (2) If an insurer is required to make that payment in accordance with this Division, the rate at which the payment is to be made is as follows:
- (a) in the case of treatment and care at public hospitals—at the rate determined by the Minister for Health by order published in the Gazette,
  - (b) in any case in which a maximum rate is fixed under Part 8 and paragraph (a) does not apply—at the maximum rate so fixed,
  - (c) in any case in which the rate is fixed by the Motor Accident Guidelines made under section 3.31 and paragraphs (a) and (b) do not apply—at the rate so fixed,
  - (d) in a case to which a rate referred to in paragraph (a), (b) or (c) does not apply—at the rate reasonably appropriate to the treatment and care.

**Note—**

Section 3.24 limits payment to the cost of treatment and care to the extent that it was reasonable and necessary in the circumstances.

- (3) If the insurer does not make that payment, the body or person who provided the treatment and care to which the payment relates may recover the payment from the insurer as a debt in a court of competent jurisdiction.

**3.31 Limits under Guidelines on statutory benefits for particular treatment and care**

- (1) The Motor Accident Guidelines may include provision for the following in connection with statutory benefits payable under this Division for treatment and care expenses:
- (a) limiting the amount of statutory benefits payable for any particular treatment and care,
  - (b) approving particular treatment and care as appropriate treatment and care in respect of any matter,
  - (c) limiting attendant care services for which statutory benefits are payable to services provided by providers of an approved class or with approved competencies.
- (2) An insurer is not required to pay statutory benefits for treatment and care expenses under this Division if the treatment and care does not accord with the treatment and care approved under the Motor Accident Guidelines for the matter concerned.

- (3) Nothing in this Division prevents an insurer from:
  - (a) paying treatment and care expenses that the insurer is not required to pay as statutory benefits under this Division, or
  - (b) approving further treatment and care for the purposes of any claim.
- (4) An injured person is not liable to pay, and a person is not entitled to recover from an injured person, the cost of treatment and care provided in respect of an injury suffered in the motor accident concerned if, and to the extent that, the cost of treatment and care exceeds any limit imposed by the Motor Accident Guidelines in respect of the treatment and care.

### **3.32 No treatment and care statutory benefits for treatment and care needs covered by Lifetime Care and Support Scheme**

- (1) This Division does not apply in respect of any treatment and care needs of a person who is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006*, or any excluded treatment and care needs, that relate to the motor accident injury in respect of which the person is a participant in the Scheme and that arise during the period in which the person is a participant in the Scheme.
- (2) This section applies:
  - (a) whether or not the treatment and care needs are assessed treatment and care needs under the *Motor Accidents (Lifetime Care and Support) Act 2006*, and
  - (b) whether or not the Lifetime Care and Support Authority is required to make a payment in respect of the treatment and care needs concerned, and
  - (c) whether or not the treatment, care, support or service (provided in connection with treatment and care needs) is provided on a gratuitous basis.
- (3) In this section, **treatment and care needs** and **excluded treatment and care needs** have the same meanings as they have in the *Motor Accidents (Lifetime Care and Support) Act 2006*.

### **3.33 Treatment and care provided while persons residing outside Australia**

An injured person who is not an Australian citizen or a permanent resident of Australia is not entitled to statutory benefits under this Division in respect of treatment and care provided outside Australia.

## **Division 3.5 Restrictions and limitations on statutory benefits**

### **3.34 Effect of death on entitlement to statutory benefits**

The following provisions apply to statutory benefits payable under this Part to an injured person if the person dies (whether or not the person's death results from the motor

accident):

- (a) statutory benefits payable under Division 3.3 (Weekly payments of statutory benefits to injured persons) are not payable in respect of any period after the person's death,
- (b) statutory benefits paid before the person's death cannot be recovered by the insurer merely because the person has died,
- (c) statutory benefits that are payable before the person's death but that are not paid before the person's death remain payable and are payable to the deceased's estate.

### **3.35 No statutory benefits if workers compensation payable**

- (1) An injured person is not entitled to statutory benefits under this Part if compensation under the *Workers Compensation Act 1987* (**workers compensation**) is payable to the injured person in respect of the injury concerned (or would be payable if the liability for workers compensation had not been commuted).
- (2) The relevant insurer for a claim for statutory benefits under this Part is not entitled to refuse payment of statutory benefits under this Part on the grounds that workers compensation is payable in respect of the injury unless:
  - (a) the injured person has made a successful claim for workers compensation in respect of the injury, or
  - (b) the injured person has failed to comply with a request by the relevant insurer under this section to make a claim for workers compensation in respect of the injury.
- (3) A claim for workers compensation is considered to have been successful if liability for any workers compensation has been accepted by the insurer for the claim under the *Workers Compensation Act 1987*. Liability is considered to have been accepted until liability is wholly denied (and for that purpose a denial of liability does not count while it is the subject of a dispute under that Act).
- (4) If the relevant insurer for a claim for statutory benefits under this Part considers on reasonable grounds that workers compensation is or may be payable in respect of the injury concerned, the insurer may require the injured person to make a claim for workers compensation in respect of the injury.
- (5) Statutory benefits are not payable under this Part in respect of any matter for which workers compensation was paid before liability for workers compensation was denied.
- (6) Statutory benefits are not payable under Division 3.2 (Statutory benefits for funeral expenses) if workers compensation is paid or payable in respect of the death under Division 1 of Part 3 of the *Workers Compensation Act 1987*.
- (7) A person who makes a claim for statutory benefits under this Part and a claim for

workers compensation must inform both insurers of that fact (unless the insurers would already be aware of both claims having been made). Insurers under this Act and the *Workers Compensation Act 1987* may exchange information for the purposes of facilitating the proper operation of this section.

### **3.36 No statutory benefits for at-fault driver or owner if vehicle uninsured**

- (1) Statutory benefits are not payable under this Part in respect of the death of or injury to a person resulting wholly or mostly from the fault of the person as the owner or driver of a motor vehicle in the use or operation of the vehicle if the vehicle was an uninsured vehicle at the time of the motor accident.
- (2) Any amount properly paid under this Part by the relevant insurer as statutory benefits in respect of death or injury resulting from the fault of a person as the owner or driver of a motor vehicle in the use or operation of the vehicle may be recovered by the insurer from the owner or driver if the vehicle was an uninsured vehicle at the time of the motor accident.
- (3) A motor vehicle is an **uninsured vehicle** if and only if at the time of the motor accident:
  - (a) the motor vehicle was not subject to coverage under a third-party policy, and
  - (b) the motor vehicle was not subject to coverage under a policy of compulsory third-party personal injury insurance or a compulsory motor vehicle accident compensation scheme under the law of a place other than New South Wales or under a law of the Commonwealth, and
  - (c) the motor vehicle was not owned by the Commonwealth or by any person or body of persons representing the Commonwealth.
- (4) A motor accident was caused mostly by the fault of a person if the contributory negligence of the person in relation to the motor accident (as referred to in section 3.38) was greater than 61%.
- (5) This section does not apply to a person who was the driver of the vehicle at the time of the motor accident if:
  - (a) the driver was driving the motor vehicle with the authority of the owner or had reasonable grounds for believing and did in fact believe that he or she had such authority, and
  - (b) the driver did not have any reasonable grounds for believing that the motor vehicle was an uninsured vehicle.

### **3.37 No statutory benefits payable to injured person who commits serious driving offence**

- (1) Statutory benefits under this Part are not payable to an injured person after the

person has been charged with or convicted of a serious driving offence that was related to the motor accident.

- (2) This section does not prevent the payment of statutory benefits if the person is acquitted of the offence charged or the proceedings are discontinued (otherwise than in circumstances of a plea of guilty to another serious driving offence that contributed to the person's injury). If the person is so acquitted or the proceedings are so discontinued:
  - (a) statutory benefits are payable from the date the person was charged with the offence, and
  - (b) any limitation period on proceedings for the recovery of those benefits does not commence until the person's acquittal or the discontinuance of the proceedings.
- (3) A serious driving offence with which an injured person is charged or convicted is considered to be related to a motor accident only if:
  - (a) the offence relates to the driving of a motor vehicle by the injured person, and
  - (b) the motor vehicle was involved in the motor accident that caused the person's injury.
- (4) A person is considered to have been charged with a serious driving offence if proceedings for a serious driving offence are pending against the person, and the person is considered to have been charged when those proceedings were commenced.
- (5) A **serious driving offence** is:
  - (a) an offence that is a major offence under the [Road Transport Act 2013](#) or an offence under section 115 or 116 (2) (a)-(e) of that Act, or
  - (b) any other offence prescribed by the regulations under this Act as a serious driving offence,but does not include an offence prescribed by the regulations under this Act as excepted from this definition.
- (6) This section does not entitle an insurer to recover payments of statutory benefits made before the person is charged with or convicted of the relevant serious driving offence.

### **3.38 Reduction of weekly statutory benefits after 6 months for contributory negligence**

- (1) The common law and enacted law as to contributory negligence that applies to an award of damages in respect of a motor accident applies (except as provided by this section) to weekly payments of statutory benefits for any period of loss of earnings or

earning capacity that occurs more than 26 weeks after the time of the motor accident.

(2) A finding of contributory negligence must be made in the following cases:

(a) where the injured person has been convicted of an alcohol or other drug-related offence in relation to the motor accident, unless the injured person satisfies the insurer or the Dispute Resolution Service that the alcohol or other drug involved in the commission of the offence did not contribute in any way to the accident,

(b) where:

(i) the injured person (not being a minor) was, at the time of the motor accident, a voluntary passenger in or on a motor vehicle, and

(ii) the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol or any other drug and the injured person was aware, or ought to have been aware, of the impairment,

unless, in the circumstances of the case, the injured person could not reasonably be expected to have declined to become a passenger in or on the motor vehicle,

(c) where the injured person (not being a minor) was, at the time of the motor accident, not wearing a seat belt when required by law to do so,

(d) where the injured person was, at the time of the motor accident, not wearing a protective helmet when required by law to do so,

(e) where the defence of *volenti non fit injuria* would have been available, but for section 4.18 (Defence of voluntary assumption of risk), in proceedings for an award of damages in respect of the motor accident,

(f) in the case of any other conduct of the injured person that is prescribed by the regulations for the purposes of this section.

(3) The weekly payments of statutory benefits payable in respect of a motor accident are to be reduced on account of contributory negligence:

(a) if subsection (4) requires the statutory benefits be reduced by a fixed percentage—by that fixed percentage, or

(b) by such percentage as the parties agree, or

(c) in any other case—by such percentage as the Dispute Resolution Service determines (for the reasons stated) is just and equitable in the circumstances of the case.

If there is a dispute about the percentage of the reduction on account of contributory negligence, the insurer is required to make the weekly payments with the reduction the insurer considers appropriate pending the determination of the dispute by the

Dispute Resolution Service.

- (4) The regulations may fix the percentage by which weekly payments of statutory benefits are to be reduced on account of contributory negligence in respect of specified conduct that constitutes contributory negligence of an injured person.
- (5) This section does not exclude any other ground on which a finding of contributory negligence may be made.
- (6) For the purposes of this section, an **alcohol or other drug-related offence** is:
  - (a) an offence of driving a motor vehicle with a particular concentration of alcohol or other drug in the person's breath or blood, or
  - (b) an offence of driving a motor vehicle under the influence of alcohol or other drug, or
  - (c) an offence of causing death or injury while driving a motor vehicle under the influence of alcohol or other drug, or
  - (d) an offence, in connection with the driving of a motor vehicle, of:
    - (i) refusing or failing to submit to breath analysis, to undergo a breath test, to submit to an assessment of sobriety or to provide samples of the person's blood and urine, or
    - (ii) wilfully altering the concentration of alcohol or other drug in the person's breath or blood, or
    - (iii) preventing a sample of the person's blood from being taken for analysis.

### **3.39 Limitation on statutory benefits in relation to certain mental harm**

Part 3 (Mental harm) of the *Civil Liability Act 2002* applies to the payment of statutory benefits under this Part in connection with an injury in the same way as it applies to the award of damages in connection with an injury, subject to any necessary modifications and to any modifications prescribed by the regulations.

### **3.40 Effect of recovery of damages on statutory benefits**

- (1) If a person (**the claimant**) recovers damages in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle then (except to the extent that subsection (2) or (3) covers the case):
  - (a) the claimant ceases to be entitled to any further statutory benefits under Division 3.3 (Weekly payments of statutory benefits to injured persons) in respect of the injury concerned (including statutory benefits claimed but not yet paid), and

- (b) the amount of any statutory benefits already paid under Division 3.3 in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the statutory benefits.
- (2) If damages are recovered in an action under the *Compensation to Relatives Act 1897* in respect of the death of a person, the amount of any statutory benefits under Division 3.2 (Statutory benefits for funeral expenses) paid in respect of the death is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the statutory benefits.
- (3) If a person recovers damages in respect of an injury from the employer liable to pay compensation under the *Workers Compensation Act 1987*:
  - (a) the person ceases to be entitled to any further statutory benefits under this Part in respect of the injury concerned (including statutory benefits claimed but not yet paid), and
  - (b) the amount of any statutory benefits already paid under Division 3.3 in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the statutory benefits.

## **Division 3.6 Miscellaneous**

### **3.41 Vocational and return to work support provided by Authority**

- (1) The Authority may institute, administer or co-ordinate vocational and return to work support schemes for injured persons.
- (2) The Authority may pay from the SIRA Fund such amounts as may be necessary or desirable for the purposes of vocational and return to work support for injured persons.
- (3) Without limiting the generality of subsection (2), the Authority may pay from the SIRA Fund such amounts as the Authority considers appropriate:
  - (a) to provide financial incentives to employers who offer employment to injured persons unable to find suitable employment and who provide (or assist in the provision of) vocational support for those injured persons, or
  - (b) to provide financial incentives to employers who retain or re-employ injured persons and who provide (or assist in the provision of) vocational support for those injured persons, or
  - (c) to provide financial assistance to employers or others who offer injured persons work-trial experience or other voluntary work as part of the vocational support for



those persons (being assistance in connection with the cost of any necessary insurance arrangements relating to the persons or for other incidental expenses).

### **3.42 Statutory benefits claim cannot be redeemed**

A liability to pay all or any statutory benefits cannot be redeemed by payment to the claimant of a lump sum.

### **3.43 Recovery of overpayments of statutory benefits**

- (1) If an insurer pays to a person an amount of statutory benefits that exceeds the amount due to the person or that is an amount the insurer is not liable to pay, the person is liable to refund that amount to the insurer.
- (2) This section extends to a payment made to a person who is a service provider in connection with expenses for which statutory benefits are payable.
- (3) An insurer may recover any amount that a person is liable to refund to the insurer under this section as a debt due to the insurer.
- (4) The Authority may act for and on behalf of an insurer for the purposes of proceedings to recover any such amount due to the insurer.

### **3.44 Statutory benefits determinations relating to fault etc not binding in relation to common law claims**

- (1) This section applies to a determination made by an insurer or the Dispute Resolution Service in connection with a claim for statutory benefits as to:
  - (a) any fault of the owner or driver in the use or operation of the motor vehicle, or
  - (b) contributory negligence in relation to the motor accident, or
  - (c) any other matter prescribed by the regulations.
- (2) Any such determination is not binding in connection with a claim for damages in relation to the same motor accident.

### **3.45 Special provisions relating to payment of statutory benefits for treatment and care by Lifetime Care and Support Authority as relevant insurer**

- (1) The description of the Lifetime Care and Support Authority as the relevant insurer for the purposes of this Act does not make that Authority an insurer when it exercises functions under this Act, but provisions of this Act relating to insurers extend (subject to the regulations) to that Authority in connection with the exercise of those functions.
- (2) The Lifetime Care and Support Authority may enter into an agreement with a relevant insurer to assume responsibility for the payment of statutory benefits for treatment and care provided during the period of 5 years after the motor accident concerned if

that Authority is satisfied that the injured person is likely to be entitled to statutory benefits for treatment and care after the end of that 5-year period. When the agreement takes effect, the Lifetime Care and Support Authority becomes the relevant insurer in relation to treatment and care for the purposes of this Part in place of the insurer.

- (3) An insurer who enters into such an agreement is required to pay to the Lifetime Care and Support Authority such amount as that Authority determines as the amount required to fund the payment of statutory benefits for the future treatment and care needs of the person that the insurer would have otherwise been required to pay.
- (4) Any such agreement may require the insurer to provide a report and medical assessments to the Lifetime Care and Support Authority on the treatment and care provided or required to be provided to the injured person and any other relevant information relating to the injured person.
- (5) Treatment and care provided to an injured person after the period of 5 years after the motor accident concerned is taken to have been provided before that period if the Lifetime Care and Support Authority determines that the relevant insurer delayed the provision of the treatment and care so that the Lifetime Care and Support Authority became the relevant insurer responsible for the payment of statutory benefits for that treatment and care. The Dispute Resolution Service may determine any dispute between that Authority and the insurer about any such delay in the provision of treatment and care.

## **Part 4 Award of damages**

### **Division 4.1 Application**

#### **4.1 Damages in respect of motor accidents** (cf s 122 MACA)

- (1) This Part applies to and in respect of an award of damages that relates to the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle.
- (2) This Part applies to and in respect of:
  - (a) the award of damages by a court, and
  - (b) the assessment of the amount of damages by a claims assessor.

A reference in this Part to the award of damages includes a reference to any such assessment of the amount of damages.

#### **Note—**

See [Motor Accidents Act 1988](#) for motor accidents occurring before the commencement of the [Motor Accidents Compensation Act 1999](#). See [Motor Accidents Compensation Act 1999](#) for motor accidents occurring before the

commencement of this Act.

See section 121 of the *Transport Administration Act 1988* in relation to the application of Chapter 5 of the *Motor Accidents Compensation Act 1999* or this Act to railway, ferry and other public transport accidents.

#### **4.2 General regulation of award of damages** (cf s 123 MACA)

- (1) Damages cannot be awarded to a person in respect of a motor accident contrary to this Part.
- (2) To remove doubt it is declared that if the substantive law of New South Wales is to govern a claim for damages in respect of a motor accident, the provisions of this Part are part of that substantive law and are to be applied accordingly by a court of this or another jurisdiction that determines the claim and by the claims assessor.
- (3) If damages are awarded to a person in respect of a motor accident contrary to this Part, the person against whom the award is made:
  - (a) is not required to pay those damages to the extent that the award is contrary to this Part, and
  - (b) is, to the extent that the person has paid as damages an amount in excess of the amount awarded in conformity with this Part, entitled to recover the excess as a debt from the person to whom the payment is made.

#### **4.3 Damages that may be awarded**

- (1) The only damages that may be awarded are:
  - (a) damages for economic loss as permitted by Division 4.2, and
  - (b) damages for non-economic loss as permitted by Division 4.3.
- (2) This section does not apply to an award of damages in an action under the *Compensation to Relatives Act 1897*.

#### **4.4 No damages for minor injuries**

No damages may be awarded to an injured person if the person's only injuries resulting from the motor accident were minor injuries.

### **Division 4.2 Damages for economic loss**

#### **4.5 Limits on economic loss**

- (1) The only damages that may be awarded for economic loss are (subject to this Division):
  - (a) damages for past or future economic loss due to loss of earnings or the deprivation or impairment of earning capacity, and

- (b) damages for costs relating to accommodation or travel (not being the cost of treatment and care) of a kind prescribed by the regulations, and
- (c) damages for the cost of the financial management of damages that are awarded, and
- (d) damages by way of re-imbursement for income tax paid or payable on workers compensation benefits arising from the injury that are required to be repaid on an award of damages to which this Part applies.

**Note—**

See also section 3.40 for repayment out of damages awarded of weekly payments of statutory benefits (and certain other payments of statutory benefits) made before the award of damages.

- (2) This section does not apply to an award of damages in an action under the [Compensation to Relatives Act 1897](#).

**4.6 Maximum for loss of earnings etc** (cf s 125 MACA)

- (1) This section applies to an award of damages:
  - (a) for past or future economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
  - (b) for the loss of expectation of financial support.
- (2) In the case of such an award, the amount (if any) by which the injured or deceased person's net weekly earnings would (but for the injury or death) have exceeded the maximum weekly statutory benefits amount under Division 3.3 is to be disregarded (even though that maximum weekly statutory benefits amount is a maximum gross earnings amount).
- (3) The maximum amount of damages that may be awarded for economic loss due to the loss of employer superannuation contributions is the relevant percentage of damages payable (in accordance with this Division) for the loss of earnings or the deprivation or impairment of the earning capacity on which the entitlement to those contributions is based. The relevant percentage is the percentage of earnings that is the minimum percentage required by law to be paid as employer superannuation contributions.

**4.7 Future economic loss—claimant's prospects and adjustments** (cf s 126 MACA)

- (1) Damages may not be awarded for future economic loss unless the claimant first satisfies the court or claims assessor that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
- (2) The amount of damages for future economic loss that would have been sustained on those assumptions is to be adjusted by reference to the percentage possibility that the

events concerned might have occurred but for the injury.

- (3) If an award for future economic loss is made, the court or claims assessor is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted.

#### **4.8 Assessment of impairment of earning capacity if dispute over degree of impairment**

If there is a dispute about the degree of impairment of an injured person's earning capacity, the degree of that impairment may be referred for assessment by a medical assessor under Division 7.5 before damages are awarded.

**Note—**

Section 7.20 (Medical assessment procedures) authorises a court, claims assessor or party to a dispute, to refer the dispute about the degree of impairment to the Dispute Resolution Service for assessment by a medical assessor. The assessment of the medical assessor is prima facie evidence in proceedings before a court or claims assessor—see section 7.23 (Status of medical assessments).

#### **4.9 Damages for future economic loss—discount rate** (cf s 127 MACA)

- (1) If an award of damages is to include compensation, assessed as a lump sum, in respect of damages for future economic loss that is referable to:

- (a) deprivation or impairment of earning capacity, or
- (b) loss of expectation of financial support,

the present value of the future economic loss is to be qualified by adopting the prescribed discount rate.

- (2) The **prescribed discount rate** is:

- (a) a discount rate of the percentage prescribed by the regulations, or
- (b) if no percentage is so prescribed—a discount rate of 5%.

- (3) Except as provided by this section, nothing in this section affects any other law relating to the discounting of sums awarded as damages.

#### **4.10 Economic loss reduction** (cf s 130 MACA)

In an award of damages for economic loss of an injured or deceased person as a consequence of a motor accident, the amount of economic loss is to be reduced by any amount of a kind prescribed by the regulations for the purposes of this section.

### **Division 4.3 Damages for non-economic loss**

#### **4.11 No damages for non-economic loss unless permanent impairment greater than impairment threshold**

No damages for non-economic loss may be awarded in respect of injury unless the degree

of permanent impairment of the injured person as a result of the injury caused by a motor accident is greater than 10%.

#### **4.12 Assessment of permanent impairment required if dispute over impairment threshold**

- (1) If there is a dispute about whether the degree of permanent impairment of an injured person is sufficient for an award of damages for non-economic loss, damages may not be awarded unless the degree of permanent impairment has been assessed by a medical assessor under Division 7.5.

**Note—**

The assessment of the medical assessor is conclusive in proceedings before a court or claims assessor—see section 7.23. Section 7.20 authorises a court, claims assessor or party to a dispute, to refer the dispute about the degree of permanent impairment to the Dispute Resolution Service for assessment by a medical assessor.

- (2) This section does not prevent:
  - (a) the degree of impairment from being re-assessed under Division 7.5, or
  - (b) a claim from being settled at any time.

#### **4.13 Maximum of amount of damages for non-economic loss** (cf s 134 MACA)

- (1) The maximum amount of damages that may be awarded for non-economic loss is \$521,000.
- (2) If that amount is adjusted by the operation of section 4.22 (Indexation of maximum for non-economic loss damages), the applicable maximum amount is the amount as at the date the award is made.

#### **4.14 Publication of information to assist determination of non-economic loss** (cf s 135 MACA)

- (1) The Authority may publish information, or promote the publication of information, to assist the determination of the appropriate level of damages for non-economic loss as a result of motor accidents.
- (2) A court or claims assessor may have regard to any such information, but is not bound to act on it.

### **Division 4.4 Other matters**

#### **4.15 Mitigation of damages** (cf s 136 MACA)

- (1) An injured person is under a duty to mitigate his or her damages.
- (2) Accordingly, in assessing damages in respect of a claim, consideration is to be given to the steps taken by the injured person to mitigate those damages and to the reasonable steps that could have been or could be taken by the injured person to

mitigate those damages.

(3) Those steps include the following:

- (a) undergoing medical treatment,
- (b) undertaking rehabilitation (including the formulation and undertaking of an appropriate rehabilitation program),
- (c) pursuing alternative employment opportunities,
- (d) giving the earliest practicable notice of the claim in order to enable the assessment and implementation of the above matters.

(4) In any proceedings, the onus of proving that an injured person has not mitigated his or her damages as required by this section lies with the person who makes that allegation.

(5) In any proceedings, a written report by a person who provided medical or rehabilitation services to the injured person is admissible as evidence of any such steps taken by that person.

(6) If any dispute arises over an alleged failure by the injured person to mitigate his or her damages, consideration is also to be given to any evidence that the insurer failed to assist in mitigating damages.

#### **4.16 Payment of interest** (cf s 137 MACA)

(1) **Limited statutory entitlement** A claimant has only such right to interest on damages payable in relation to a motor accident as is conferred by this section.

(2) **Non-economic loss** No interest is payable on damages awarded for non-economic loss. The court or claims assessor cannot order the payment of interest on any such damages.

(3) **Other heads of damages** The following provisions apply to damages, other than damages to which subsection (2) applies, payable in relation to a motor accident:

- (a) Interest is not payable (and the court or claims assessor cannot order the payment of interest) on such damages unless:
  - (i) information that would enable a proper assessment of the claim has been given to the defendant and the defendant has had a reasonable opportunity to make an offer of settlement (where it would be appropriate to do so) in respect of the full entitlement to all damages of any kind but has not made such an offer, or
  - (ii) the defendant has had a reasonable opportunity to make a revised offer of settlement (where it would be appropriate to do so) in the light of further

information given by the claimant that would enable a proper assessment of the full entitlement to all damages of any kind but has not made such an offer, or

(iii) if the defendant has made an offer of settlement, the amount of all damages of any kind that is awarded (without the addition of any interest) is more than 20% higher than the highest amount offered by the defendant and the highest amount is unreasonable having regard to the information available to the defendant when the offer was made.

(b) The highest amount offered by the defendant is not unreasonable if, when the offer was made, the defendant was not able to make a reasonable assessment of the full entitlement to all damages of any kind.

(c) For the purposes of this subsection, an offer of settlement must be in writing.

(4) **Calculation of interest** If interest on damages is payable under subsection (3):

(a) the amount of interest is to be calculated for the period from when the loss to which the damages relate was first incurred until the date on which the damages are awarded, and

(b) the amount of interest is to be calculated in accordance with the principles ordinarily applied by a court for that purpose, subject to this section.

(5) **Rate of interest** The rate of interest to be used in any such calculation is three-quarters of the rate prescribed for the purposes of section 101 of the *Civil Procedure Act 2005* for the period concerned.

(6) **Judgment debts** Nothing in this section affects the payment of interest on a debt under a judgment or order of a court.

#### **4.17 Contributory negligence—generally** (cf s 138 MACA)

(1) The common law and enacted law as to contributory negligence apply to an award of damages in respect of a motor accident, except as provided by this section.

(2) A finding of contributory negligence must be made in the following cases:

(a) where the injured person or deceased person has been convicted of an alcohol or other drug-related offence in relation to the motor accident, unless the claimant satisfies the court or claims assessor that the alcohol or other drug involved in the commission of the offence did not contribute in any way to the accident,

(b) where:

(i) the injured person (not being a minor) or the deceased person was, at the time of the motor accident, a voluntary passenger in or on a motor vehicle, and



- (ii) the driver's ability to drive the motor vehicle was impaired as a consequence of the consumption of alcohol or any other drug and the injured person or the deceased person was aware, or ought to have been aware, of the impairment, unless, in the circumstances of the case, the injured person or deceased person could not reasonably be expected to have declined to become a passenger in or on the motor vehicle,
  - (c) where the injured person (not being a minor) or the deceased person was, at the time of the motor accident, not wearing a seat belt when required by law to do so,
  - (d) where the injured person or the deceased person was, at the time of the motor accident, not wearing a protective helmet when required by law to do so,
  - (e) in the case of any other conduct of the injured person or deceased person that is prescribed by the regulations for the purposes of this section.
- (3) The damages recoverable in respect of the motor accident are to be reduced on account of contributory negligence by such percentage as the court or claims assessor thinks just and equitable in the circumstances of the case unless subsection (4) requires that the damages be reduced by a fixed percentage. The court or claims assessor must state the reasons for determining the particular percentage.
- (4) The regulations may fix the percentage by which damages are to be reduced on account of contributory negligence in respect of specified conduct that constitutes contributory negligence of an injured or deceased person. Damages recoverable in respect of a motor accident that are to be reduced on account of contributory negligence attributable to any such conduct are to be reduced by that fixed percentage.
- (5) For the purposes of this section, a deceased person is taken to have been convicted of an offence if any circumstances exist in respect of the deceased person which, but for the deceased person's death, would have resulted in the conviction of the deceased person for the offence or the proving of the offence against the deceased person.
- (6) This section does not exclude any other ground on which a finding of contributory negligence may be made.
- (7) For the purposes of this section, an **alcohol or other drug-related offence** is:
- (a) an offence of driving a motor vehicle with a particular concentration of alcohol or other drug in the person's breath or blood, or
  - (b) an offence of driving a motor vehicle under the influence of alcohol or other drug, or
  - (c) an offence of causing death or injury while driving a motor vehicle under the

influence of alcohol or other drug, or

- (d) an offence, in connection with the driving of a motor vehicle, of:
  - (i) refusing or failing to submit to breath analysis, to undergo a breath test, to submit to an assessment of sobriety or to provide samples of the person's blood and urine, or
  - (ii) wilfully altering the concentration of alcohol or other drug in the person's breath or blood, or
  - (iii) preventing a sample of the person's blood from being taken for analysis.

**4.18 Defence of voluntary assumption of risk** (cf s 140 MACA)

- (1) Except as provided by subsection (2), the defence of volenti non fit injuria is not available in proceedings for damages arising from a motor accident but, where that defence would otherwise have been available, the amount of any damages is to be reduced to such extent as is just and equitable on the presumption that the injured person or deceased person was negligent in failing to take sufficient care for his or her own safety.
- (2) If a motor accident occurs while a motor vehicle is engaged in motor racing, the defence of volenti non fit injuria is available in proceedings for damages brought in respect of the death of or injury to:
  - (a) the driver of the vehicle so engaged, or
  - (b) a passenger in the vehicle so engaged, other than a passenger who is less than 18 years of age or who otherwise lacked capacity to consent to be a voluntary passenger.
- (3) For the purposes of subsection (2), a motor vehicle is engaged in motor racing if it is participating in:
  - (a) an organised motor sports event, or
  - (b) an activity that is an offence under section 115 of the *Road Transport Act 2013*.

**4.19 Standard of care not affected by knowledge of driver's skill and experience** (cf s 141 MACA)

- (1) For the purposes of proceedings for damages payable in relation to a motor accident, the standard of care required of the driver of a motor vehicle who owes another person a duty of care is not diminished or otherwise affected by any actual or imputed knowledge of the other person as to the skill or experience of the driver as the driver of a motor vehicle.
- (2) This section does not affect any determination of whether a person who has suffered

harm has been contributorily negligent in failing to take precautions against risk of harm, or any determination as to voluntary assumption of risk by such a person.

#### **4.20 Exemplary or punitive damages** (cf s 144 MACA)

Exemplary or punitive damages cannot be awarded to a person in respect of a motor accident.

#### **4.21 Apportionment of damages** (cf s 145 MACA)

- (1) If a judgment of a court is obtained for payment of damages in respect of the death of or injury to any person caused by the fault of the owner or driver of an insured motor vehicle in the use or operation of the vehicle as well as for damages in respect of any other matter, the court must, as part of the judgment, declare what portion of the sum awarded by the judgment is in respect of the death or injury.
- (2) In any such case, the court is to apportion any costs awarded.

#### **4.22 Indexation of maximum for non-economic loss damages** (cf s 146 MACA)

- (1) The Authority is, on or before 1 October 2017 and on or before 1 October in each succeeding year, to declare, by order published on the NSW legislation website, the amount that is to apply, as from the date specified in the order, for the purposes of section 4.13.
- (2) The amount declared is to be the amount applicable under section 4.13 (or that amount as last adjusted under this section) adjusted by the percentage change in the amounts estimated by the Australian Statistician of the average weekly total earnings of adults in full-time employment in New South Wales over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.
- (3) An amount declared for the time being under this section applies to the exclusion of the amount under section 4.13.
- (4) If the Australian Statistician fails or ceases to estimate the amounts referred to in subsection (2), the amount declared is to be the amount determined in accordance with the regulations.
- (5) In adjusting an amount to be declared for the purpose of section 4.13, the amount determined in accordance with subsection (2) is to be rounded to the nearest \$1,000 (with the amount of \$500 being rounded up).

## **Part 5 Recovery for no-fault motor accidents**

### **5.1 Definition of “no-fault motor accident”** (cf s 7A MACA)

In this Part:

***no-fault motor accident*** means a motor accident in the State not caused by the fault of

the owner or driver of any motor vehicle involved in the accident in the use or operation of the vehicle and not caused by the fault of any other person.

**5.2 Liability in case of no-fault motor accident** (cf s 7B MACA)

- (1) The death of or injury to a person that results from a no-fault motor accident involving a motor vehicle that has motor accident insurance cover for the accident (within the meaning of section 1.10) is, for the purposes of and in connection with any claim for damages or statutory benefits in respect of the death or injury, deemed to have been caused by the fault of the owner or driver of the motor vehicle in the use or operation of the vehicle.
- (2) If the no-fault motor accident involved more than one motor vehicle that has motor accident insurance cover for the accident (within the meaning of section 1.10), the death or injury is deemed to have been caused by the fault of the owner or driver of each of those motor vehicles in the use or operation of the vehicle.

**5.3 Presumption that motor accident is no-fault** (cf s 7C MACA)

- (1) In proceedings on a claim for damages in respect of the death of or injury to a person resulting from a motor accident, an averment by the plaintiff that the motor accident was a no-fault motor accident is evidence of that fact in the absence of evidence to the contrary.
- (2) In connection with an application for statutory benefits in respect of the death of or injury to a person resulting from a motor accident, a declaration by the applicant that the motor accident was a no-fault motor accident is evidence of that fact in the absence of evidence to the contrary.

**5.4 No coverage for driver who caused accident** (cf s 7E MACA)

- (1) There is no entitlement to recover damages or statutory benefits because of the operation of this Part in respect of the death of or injury to the driver of a motor vehicle if the motor accident concerned was caused by an act or omission of that driver.
- (2) The death of or injury to a person is taken to have been caused by an act or omission of the driver for the purposes of subsection (1) even if:
  - (a) the act or omission does not constitute fault by the driver in the use or operation of the vehicle, or
  - (b) the act or omission was involuntary, or
  - (c) the act or omission was not the sole or primary cause of the death or injury.

### **5.5 Contributory negligence** (cf s 7F MACA)

This Part does not prevent the reduction of damages or statutory benefits by reason of the contributory negligence of the deceased or injured person.

### **5.6 Recovery of contribution to damages or statutory benefits from person actually at fault** (cf s 7G MACA)

A person whose liability for damages or statutory benefits in respect of the death of or injury to a person results from the person being deemed under this Part to be a person whose fault caused the death or injury is entitled to recover contribution in respect of that liability from a person (whether or not the driver of a motor vehicle) whose fault actually caused the death or injury.

### **5.7 No recovery by Nominal Defendant unless owner or driver actually at fault** (cf s 7H MACA)

The Nominal Defendant is not entitled to recover any amount under section 2.37 (Recovery from owner or driver) from the owner or driver of a motor vehicle in respect of amounts properly paid by the Nominal Defendant in connection with the operation of this Part unless the motor accident concerned was actually caused by the fault of the owner or driver of the motor vehicle in the use or operation of the vehicle.

### **5.8 Other entitlements not affected** (cf s 7I MACA)

This Part does not affect any entitlement to damages or statutory benefits apart from this Part.

## **Part 6 Motor accident claims**

### **Division 6.1 Preliminary**

#### **6.1 Motor Accident Guidelines may deal with the handling of claims** (cf s 68 MACA)

The Motor Accident Guidelines may make provision with respect to the manner in which insurers and those acting on their behalf are to deal with claims.

#### **6.2 Meaning of “full and satisfactory explanation” by claimant** (cf s 66 MACA)

- (1) For the purposes of this Part, a full and satisfactory explanation by a claimant for non-compliance with a duty or for delay is a full account of the conduct, including the actions, knowledge and belief of the claimant, from the date of the accident until the date of providing the explanation.
- (2) The explanation is not a satisfactory explanation unless a reasonable person in the position of the claimant would have failed to have complied with the duty or would have been justified in experiencing the same delay.

## **Division 6.2 General duties of claimants and insurers**

### **6.3 Duty of claimants and insurers to act with good faith**

- (1) A claimant and an insurer each have a duty to act towards the other with good faith in connection with a claim.
- (2) The duty of a claimant to act with good faith includes the following duties:
  - (a) a duty to act honestly and not mislead,
  - (b) a duty to disclose all relevant information (including reports by health professionals) in a timely manner,
  - (c) a duty to promptly do all things reasonably necessary to facilitate the resolution of any dispute involving the claim.
- (3) The duty of an insurer to act with good faith includes the following duties:
  - (a) the duty to provide a claimant with information about entitlements to statutory benefits and damages,
  - (b) the duty to provide a claimant with all relevant information (including reports by health professionals) relied on to make a decision on a claim,
  - (c) the duty to provide written reasons for all decisions that materially affect a claimant's entitlement to statutory benefits or damages,
  - (d) the duty to advise a claimant of any right under this Act to review any such decision of the insurer,
  - (e) the duty to make prompt payment of statutory benefits and damages.
- (4) It is a condition of an insurer's licence under this Act that the insurer must comply with a duty under this section.

### **6.4 Duty of claimants and insurers to try to resolve claim justly and expeditiously** (cf s 80 MACA)

- (1) It is the duty of an insurer and a claimant to endeavour to resolve a claim as justly and expeditiously as possible.
- (2) It is a condition of an insurer's licence under this Act that the insurer must comply with this section.

### **6.5 Duty of claimants to minimise loss**

- (1) A claimant has a duty to take all reasonable steps to minimise loss caused by injury resulting from a motor accident.

- (2) This duty of a claimant includes the following duties:
  - (a) the duty to undergo reasonable and necessary treatment and care and do all such things as may be reasonable and necessary for the claimant's rehabilitation,
  - (b) the duty to commence or return to work as soon as reasonably practicable.
- (3) If a claimant fails to comply with a duty arising under this section, the insurer may, if authorised to do so by the Motor Accident Guidelines, suspend payment of weekly payments of statutory benefits to the claimant during any period that the failure to comply continues. The person forfeits their entitlement to weekly payments of statutory benefits during the period of any such suspension.

**Note—**

Division 3.3 contains other provisions that authorise the insurer to suspend weekly payments of statutory benefits.

### **6.6 Directions for compliance with duties**

- (1) The Dispute Resolution Service, when undertaking a claims assessment or merit review under Part 7, may give directions to a party to a claim for the purpose of ensuring compliance by the party with a duty arising under this Division.
- (2) If a claimant fails to comply with such a direction without reasonable excuse, the Dispute Resolution Service may direct the insurer to suspend weekly payments of statutory benefits to the claimant under Part 3 while the failure continues.
- (3) If an insurer fails to comply with such a direction without reasonable excuse, the Dispute Resolution Service may direct the insurer not to discontinue or reduce weekly payments of statutory benefits to the claimant under Part 3 while the failure continues.

### **6.7 Reports to Authority on compliance**

The Dispute Resolution Service may provide reports to the Authority on the failure of a claimant or insurer to comply with any duty arising under this Division.

## **Division 6.3 Preliminary matters relating to claims**

### **6.8 Motor accident verification requirements** (cf s 70 MACA)

- (1) The Motor Accident Guidelines may set out the obligations of claimants relating to the verification of the motor accident concerned (the **motor accident verification requirements** for a claim).
- (2) The motor accident verification requirements may include a requirement for the motor accident to be reported to the NSW Police Force within a specified period after the motor accident.

- (3) The Authority is to take all reasonable steps to ensure public awareness of the motor accident verification requirements.

#### **6.9 Compliance with verification requirements—claim for statutory benefits**

A claim for statutory benefits need not be dealt with until:

- (a) the motor accident verification requirements have been complied with, or
- (b) the claimant provides to the insurer a full and satisfactory explanation for any non-compliance or the Dispute Resolution Service determines that sufficient cause existed to justify non-compliance.

#### **6.10 Compliance with verification requirements—claim for damages** (cf s 70 MACA)

- (1) If the motor accident verification requirements have not been complied with, a claim for damages cannot be referred to the Dispute Resolution Service for assessment under Division 7.6 unless:
  - (a) the insurer has lost the right to reject the claim on the ground of that non-compliance, or
  - (b) the Dispute Resolution Service determines that sufficient cause existed to justify the non-compliance, or
  - (c) the claim is referred only for a certificate of exemption from assessment.
- (2) The insurer loses the right to reject a claim for damages on the ground of non-compliance with the motor accident verification requirements if the insurer:
  - (a) does not, within 2 months after receiving the claim, reject the claim on the ground of that non-compliance or ask the claimant to provide a full and satisfactory explanation for the non-compliance, or
  - (b) does not, within 2 months after receiving an explanation for the non-compliance, reject the explanation.
- (3) The insurer may apply to the court in which proceedings on a claim for damages are commenced to have the proceedings dismissed on the ground that the motor accident verification requirements have not been complied with if:
  - (a) the application to have the proceedings dismissed is made not more than 2 months after the statement of claim is served on the defendant and received by the insurer, and
  - (b) the insurer has not lost the right to reject the claim on the ground of that non-compliance.

The court must dismiss the proceedings unless satisfied that sufficient cause existed



to justify the non-compliance.

- (4) In this section, **insurer** includes the person against whom the claim for damages is made.

**6.11 Authority's access to police information** (cf s 71 MACA)

- (1) At the written request of the Authority with respect to a specified motor accident, the Commissioner of Police must provide a statement to the Authority in relation to the following matters if information as to those matters is held by a member of the NSW Police Force:
- (a) the registration numbers of all motor vehicles involved in the accident,
  - (b) the names of all persons killed or injured in the accident,
  - (c) the names of the hospitals to which the injured persons were taken,
  - (d) the motor vehicle or vehicles most likely to have been at fault in the accident.
- (2) The Authority is authorised to give a copy of any such statement to the next of kin of a person killed in the accident, to a person injured in the accident (or to an appropriate representative of either such person) or to an insurer.
- (3) A statement or copy of a statement provided to or by the Authority under this section is not admissible in legal proceedings concerning a claim made under this Act.

**6.12 Notice of claims for statutory benefits or damages** (cf s 72 MACA)

- (1) A claim for statutory benefits is made by giving notice of the claim to the relevant insurer under Part 3.
- (2) A claim for damages is made by giving notice of the claim:
- (a) to the insurer of the motor vehicle concerned, or
  - (b) to the person against whom the claim is made if there is no insurer of the motor vehicle concerned.
- (3) The requirement under this section (only in so far as it is a requirement to give notice of a claim to the person against whom the claim is made and without affecting the requirement to give notice to the insurer) does not apply if:
- (a) that person is dead, or
  - (b) that person cannot be given notice.
- (4) Notice of a claim for statutory benefits and a claim for damages are to be given separately.

- (5) Notice of a claim is taken to be given to the insurer or other person to whom it is required to be given if the notice is given in accordance with section 6.15.

### **6.13 Time for making of claims for statutory benefits**

- (1) A claim for statutory benefits must be made within 3 months after the date of the motor accident to which the claim relates. The regulations may amend this subsection to change the date within which the claim must be made.
- (2) If a claim for statutory benefits is not made within 28 days after the date of the motor accident, weekly payments of statutory benefits are not payable in respect of any period before the claim is made.
- (3) However, a claim for statutory benefits may be made after the time required by subsection (1) if the claimant provides a full and satisfactory explanation for the delay in making the claim, and either:
  - (a) the claim is made within 3 years after the date of the motor accident, or
  - (b) the claim is in respect of the death of a person or injury resulting in a degree of permanent impairment of the injured person that is greater than 10%.

### **6.14 Time for making of claims for damages** (cf ss 72 and 73 MACA)

- (1) A claim for damages cannot be made before the expiration of 20 months after the motor accident to which the claim relates unless the claim is in respect of the death of a person or injury resulting in a degree of permanent impairment of the injured person that is greater than 10%.
- (2) A claim for damages must be made within 3 years after the date of the motor accident to which the claim relates. The regulations may amend this subsection to change the date within which the claim must be made.
- (3) A claim for damages may be made after the time required by subsection (2) (a **late claim**) if the claimant provides a full and satisfactory explanation for the delay in making the claim. The explanation is to be provided in the first instance to the insurer.
- (4) Evidence as to any delay in the onset of symptoms relating to the injury suffered by the injured person as a result of the motor accident may be given in any such explanation.
- (5) If a late claim for damages is made, the claim cannot be referred for assessment under Division 7.6 unless:
  - (a) the insurer has lost the right to reject the claim on the ground of delay, or
  - (b) the Dispute Resolution Service has determined that the claimant has a full and satisfactory explanation for the delay in making the claim, or

(c) the claim is referred only for a certificate of exemption from assessment under Division 7.6.

(6) The insurer loses the right to reject a late claim on the ground of delay if the insurer:

(a) does not, within 2 months after receiving the claim, reject the claim on the ground of delay or ask the claimant to provide a full and satisfactory explanation for the delay, or

(b) does not, within 2 months after receiving an explanation for the delay, reject the explanation.

(7) The insurer may apply to the court in which proceedings on a late claim for damages are commenced to have the proceedings dismissed on the ground of delay if:

(a) the application to have the proceedings dismissed is made not more than 2 months after the statement of claim is served on the defendant and received by the insurer, and

(b) the insurer has not lost the right to reject the claim on the ground of delay.

The court must dismiss the proceedings unless satisfied that the claimant has a full and satisfactory explanation for the delay in making the claim.

(8) In this section, **insurer** includes the person against whom a claim for damages is made.

#### **6.15 How notice of claims given** (cf ss 74 and 76 MACA)

(1) A notice of a claim under this Division is to be given in the manner and containing the information required by the Motor Accident Guidelines.

(2) The Motor Accident Guidelines may (without limitation) provide for the giving of notices of claims by a computer system (whether or not operated by insurers) that makes the notices available to the insurers or other persons to whom the notices are required to be given.

(3) The Motor Accident Guidelines may require the claimant to do any one or more of the following:

(a) furnish a certificate of a treating medical practitioner relating to the claim,

(b) authorise the insurer to obtain information and documents relevant to the claim from persons specified in the authorisation,

(c) authorise the insurer to provide information and documents so obtained by the insurer to persons specified in the authorisation.

(4) The Motor Accident Guidelines may excuse non-compliance with this section in

specified circumstances.

- (5) If this section has not been complied with, a claim for damages cannot be referred for assessment under Division 7.6 unless:
  - (a) the insurer has lost the right to reject the claim for that non-compliance, or
  - (b) the Dispute Resolution Service has determined that the non-compliance is technical and of no significance, or
  - (c) the claim is referred only for a certificate of exemption from assessment under Division 7.6.
- (6) The insurer loses the right to reject a claim for damages for non-compliance with this section if, within 2 months after receiving the claim, the insurer does not reject the claim for the non-compliance.
- (7) The insurer may apply to the court in which proceedings on a claim for damages are commenced to have the proceedings dismissed on the ground of non-compliance with this section if:
  - (a) the application to have the proceedings dismissed is made not more than 2 months after the statement of claim is served on the defendant and received by the insurer, and
  - (b) the insurer has not lost the right to reject the claim on the ground of non-compliance with this section.

The court must dismiss the proceedings unless satisfied that the claimant has a full and satisfactory explanation for the non-compliance.

- (8) In this section, **insurer** includes the person against whom a claim for damages is made.

**6.16 Insured not to admit liability or act in respect of claim** (cf s 77 MACA)

- (1) A person may not, without the consent in writing of the person's insurer:
  - (a) enter upon, or incur any expense in, any litigation, or
  - (b) make any offer or promise of payment or settlement, or
  - (c) make any payment or settlement, or
  - (d) make any admission of liability,

in respect of a claim so as to prejudice or otherwise interfere with the exercise of any power of the insurer under section 6.17. However, this section does not prevent any person from truthfully answering any question reasonably asked of the person by a

police officer.

(2) An offer, promise or admission made in contravention of this section is of no effect.

**6.17 Power of insurer to act for insured** (cf s 78 MACA)

(1) When a claim is made against a person, the person's insurer may:

- (a) conduct and control negotiations in respect of the claim, and
- (b) conduct, or take over the conduct of, any legal proceedings in respect of the claim and may conduct those proceedings in the name and on behalf of the person, and
- (c) at any stage of those negotiations or proceedings, compromise or settle the claim, and
- (d) exercise any function conferred by this Act on the person in respect of the claim.

(2) The person against whom the claim is made is required to sign all such warrants, authorities and other documents as may be necessary to give effect to this section.

(3) If the person fails to do so or is absent or cannot be found, the insurer may sign the warrants, authorities or other documents on behalf of the person.

(4) Nothing said or done by an insurer under this section in connection with the settlement of a claim or the conduct of proceedings in respect of a claim is to be regarded as an admission of liability in respect of or in any way prejudice any other claim, action or proceeding arising out of the same occurrence.

**6.18 Power of insurer to intervene in legal proceedings** (cf s 79 MACA)

An insurer may apply to the court to be joined as a party to legal proceedings brought against a defendant who is insured under a third-party policy with the insurer in order to argue that in the circumstances of the case it has no obligation under the policy to indemnify the defendant.

## **Division 6.4 Dealing with claims**

**6.19 Acceptance of liability for claim for statutory benefits**

(1) An insurer must, within 4 weeks after a claimant makes a claim for statutory benefits, give the claimant notice in accordance with the Motor Accident Guidelines stating whether or not the insurer accepts liability for the payment of statutory benefits during the first 26 weeks after the time of the motor accident concerned.

(2) An insurer must, within 3 months after a claimant makes a claim for statutory benefits, give the claimant notice in accordance with the Motor Accident Guidelines stating whether or not the insurer accepts liability for the payment of statutory benefits after the first 26 weeks after the time of the motor accident concerned.

- (3) The regulations may amend this section to alter the period of 4 weeks specified in subsection (1) or the period of 3 months specified in subsection (2).
- (4) If the insurer fails to notify the claimant in accordance with this section, the insurer is taken to have accepted liability for the statutory benefits concerned.
- (5) An insurer is not prevented from accepting liability for statutory benefits after having denied that liability and the acceptance of liability does not prevent the subsequent denial of liability.
- (6) An insurer who has accepted (or is deemed to have accepted) liability for statutory benefits must commence payment of statutory benefits without delay. An insurer cannot recover statutory benefits paid on the basis of the acceptance of liability for statutory benefits if the insurer subsequently denies liability.
- (7) An insurer may commence payment of statutory benefits before determining whether the insurer accepts liability for those statutory benefits.
- (8) It is a condition of an insurer's licence under this Act that the insurer must comply with this section.

**6.20 Duty of insurer with respect to admission or denial of liability in claim for damages** (cf s 81 MACA)

- (1) When a claim for damages is made, the insurer must as expeditiously as possible give notice to the claimant in accordance with the Motor Accident Guidelines as to whether the insurer admits or denies liability for the claim. The insurer must in any event give that notice within 3 months after the claim is made.
- (2) If the insurer admits liability for only part of the claim, the notice is to include details sufficient to ascertain the extent to which liability is admitted.
- (3) If an insurer admits fault in respect of a claim but fails to admit any other element of liability, the insurer is not considered to have admitted liability for the claim.
- (4) If the insurer fails to comply with this section, the insurer is taken to have given notice to the claimant wholly denying liability for the claim.
- (5) Nothing in this section prevents an insurer from admitting liability after having given notice denying liability or after having failed to comply with this section.
- (6) It is a condition of an insurer's licence under this Act that the insurer must comply with this section.

**6.21 Costs penalty for unreasonable denial of liability**

- (1) If an insurer denies liability (whether for part or all of a claim), the claims assessor may, in assessing costs on the claim, impose a costs penalty under this section if the

claims assessor is of the opinion that there was no reasonable basis for the denial of liability.

- (2) There is considered to be a reasonable basis for a denial of liability only if the denial was based on provable facts and a reasonably arguable view of the law.
- (3) The costs penalty that may be imposed on an insurer under this section is a penalty of up to 25% (imposed by increasing the costs to be awarded against the insurer, or decreasing the costs to be awarded in favour of the insurer, by up to 25%).
- (4) In this section, **costs** means costs for the provision of legal services (including disbursements).

**6.22 Duty of insurer to make offer of settlement on claim for damages** (cf s 82 MACA)

- (1) It is the duty of an insurer to make a reasonable offer of settlement to the claimant on a claim for damages as soon as practicable unless the insurer wholly denies liability for the claim.
- (2) An offer of settlement is to specify an amount of damages or a manner of determining an amount of damages.
- (3) If an offer of settlement is made on the basis that the insurer admits only part of the liability for the claim, the offer is to include details sufficient to ascertain the extent to which liability is admitted.
- (4) This section does not apply to:
  - (a) a claim made in respect of the death of a person, or
  - (b) a claim in respect of which a medical assessor has declined to make an assessment under Division 7.5 of the degree of permanent impairment of the injured person because the impairment caused by the injury has not become permanent.
- (5) The insurer is not entitled to delay the making of an offer of settlement under this section on the ground that any particulars about the claim are insufficient unless the insurer requested further relevant particulars within 2 weeks after the claimant provided particulars.

**Note—**

A dispute about whether particulars about a claim are sufficient may be referred to the Dispute Resolution Service.

- (6) It is a condition of an insurer's licence under this Act that the insurer must comply with this section.

### **6.23 Restrictions on settlement of claim for damages**

- (1) A claim for damages by an injured person cannot be settled within 2 years after the motor accident unless the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10%.
- (2) A claim for damages cannot be settled unless:
  - (a) the claimant is represented in respect of the claim by an Australian legal practitioner, or
  - (b) the proposed settlement is approved by the Dispute Resolution Service.
- (3) The Dispute Resolution Service is not to approve the settlement of a claim unless satisfied that the settlement complies with any applicable requirements of or made under this Act or the Motor Accident Guidelines.

### **6.24 Duty of claimant to co-operate with other party** (cf s 85 MACA)

- (1) A claimant must co-operate fully in respect of the claim with the other party to the claim (being the insurer on the claim or, if there is no insurer, the person against whom the claim is made) for the purpose of giving the other party sufficient information:
  - (a) to be satisfied as to the validity of the claim and, in particular, to assess whether the claim or any part of the claim, may be fraudulent, and
  - (b) to be able to make an early assessment of liability, and
  - (c) to be able to make an informed offer of settlement in the case of a claim for damages.
- (2) In particular, the claimant must comply with any reasonable request by the other party:
  - (a) to furnish specified information (in addition to the information furnished in the claim) or to produce specified documents or records, or
  - (b) to provide a photograph of and evidence as to the identity of the claimant.
- (3) The reasonableness of a request may be assessed having regard to criteria including the following:
  - (a) the amount of time the claimant needs to comply with the request,
  - (b) whether the information sought is cogent and relevant to a determination of liability or quantum of loss, having regard to the nature of the claim,
  - (c) the amount of information which has already been supplied to or is available to an insurer to enable liability and quantum of loss to be assessed and an offer of



settlement made,

- (d) how onerous it will be for the claimant to comply with the request,
- (e) whether the information is privileged,
- (f) whether the information sought is sufficiently specified,
- (g) the time of the request and whether the claimant will be delayed in commencing proceedings for damages by complying with the request.

- (4) A duty under this section in respect of a claim for damages applies only until court proceedings are commenced in respect of the claim but if the claimant fails without reasonable excuse to comply with this section, court proceedings cannot be commenced in respect of the claim while the failure continues.

**6.25 Duty of claimant to provide relevant particulars of claim for damages** (cf s 85A MACA)

- (1) A claim for damages must provide the insurer of the person against whom the claim is made with all relevant particulars about the claim as expeditiously as possible after the claim is made.
- (2) For the purposes of this section, **relevant particulars** about a claim are full details of:
  - (a) the motor accident concerned, and
  - (b) the injuries sustained by the claimant in the motor accident, and
  - (c) all disabilities and impairments arising from those injuries, and
  - (d) any economic losses and other losses that are being claimed as damages,sufficient to enable the insurer, as far as practicable, to make a proper assessment of the claimant's full entitlement to damages.

**6.26 Consequences of failure to provide relevant particulars of claim for damages** (cf s 85B MACA)

- (1) If after a period of 2 years and 6 months since the motor accident concerned a claimant for damages has failed without reasonable excuse to provide the insurer with all relevant particulars about the claim (as required by section 6.25), the insurer may by a written direction given to the claimant within 2 months after the end of that period require the claimant to provide those particulars.
- (2) The insurer's direction must be given in accordance with the Motor Accident Guidelines.
- (3) If the claimant does not comply with the direction within 3 months after it is given, the

claimant is taken to have withdrawn the claim.

- (4) The claimant may make an application for reinstatement of the claim:
  - (a) to the Authority for a claim that is not exempt from assessment under Division 7.6, or
  - (b) to a court of competent jurisdiction for a claim that is exempt from assessment under Division 7.6.
- (5) An application for reinstatement made to the Authority is to be referred to the Dispute Resolution Service for determination.
- (6) If the application for reinstatement is made less than 3 years after the date of the motor accident, the claim is to be reinstated if the court or Dispute Resolution Service is satisfied that the claimant has a full and satisfactory explanation for the failure to provide the required particulars.
- (7) If the application for reinstatement is made 3 years or more after the date of the motor accident, the claim is to be reinstated if the court or the Dispute Resolution Service is satisfied that:
  - (a) the claimant has a full and satisfactory explanation for the failure to provide the required particulars, and
  - (b) the total damages of all kinds likely to be awarded to the claimant if the claim succeeds are not less than 25% of the maximum amount that may be awarded for non-economic loss under section 4.13 as at the date of the motor accident.
- (8) This section does not apply to a claim that, as at 2 years and 6 months since the motor accident concerned, is the subject of a determination by a medical assessor declining to make an assessment under Division 7.5 of the degree of permanent impairment of the injured person because the impairment caused by the injury has not become permanent.

**6.27 Medical and other examination of claimant** (cf s 86 MACA)

- (1) A claimant must comply with any request by the insurer:
  - (a) to undergo a medical or other health related examination by one or more health practitioners nominated by the insurer, or
  - (b) to undergo a rehabilitation assessment or an assessment to determine attendant care needs by a qualified person nominated by the insurer, or
  - (c) to undergo an assessment to determine functional and vocational capacity (including pre-accident or post-accident earning capacity) by a qualified person nominated by the insurer, or

- (d) to undergo an assessment in accordance with the Motor Accident Guidelines, not being, in any such case, an examination or assessment that is unreasonable, unnecessarily repetitious or dangerous.
- (2) Any such examination or assessment is at the cost of the insurer. The claimant may decline to undergo the examination or assessment unless the insurer pays the claimant a reasonable sum to meet the reasonable and necessary costs and expenses incurred by the claimant in connection with the examination or assessment.
- (3) A claimant must comply with any request by the Dispute Resolution Service to undergo a medical or other health related examination or an assessment by a medical assessor for the purposes of Division 7.5.
- (4) If the claimant fails without reasonable excuse to comply with a request under this section:
- (a) the claim cannot be referred for assessment under Division 7.6 and any such assessment cannot be continued while the failure continues, and
  - (b) weekly payments of statutory benefits under Division 3.3 are suspended for any period during which the failure continues, and
  - (c) court proceedings cannot be commenced or continued in respect of the claim while the failure continues.
- (5) The regulations may prescribe a rate at which the cost of travel by any specified mode of transport is to be calculated for the purposes of the payment of travel costs under this section.
- (6) This section extends to an examination or assessment for the purposes of determining whether an injured person is eligible to be a participant in the Scheme under the [Motor Accidents \(Lifetime Care and Support\) Act 2006](#).

**6.28 Duty of owner and driver to co-operate with insurer** (cf s 87 MACA)

- (1) A person who at the time of the motor accident to which a claim relates was the owner or driver of the motor vehicle concerned must co-operate fully with the vehicle owner's insurer and the relevant insurer in respect of the claim.
- (2) The owner or driver of a motor vehicle at the time of the motor accident to which a claim relates must furnish to the vehicle owner's insurer or the relevant insurer in respect of the claim such information as the insurer may reasonably request in connection with the claim.

Maximum penalty (subsection (2)): 20 penalty units.

## **Division 6.5 Court proceedings on claims for damages**

### **6.29 Application**

This Division applies to court proceedings on a claim for damages.

### **6.30 Forum for court proceedings** (cf s 107 MACA)

Proceedings in respect of a claim may be taken in any court of competent jurisdiction.

### **6.31 Claims assessment or exemption pre-condition for commencement of court proceedings** (cf s 108 MACA)

- (1) A claimant is not entitled to commence court proceedings against another person in respect of a claim unless:
  - (a) the Principal Claims Assessor has issued a certificate in respect of the claim under section 7.34 (Claims exempt from assessment), or
  - (b) a claims assessor has issued a certificate in respect of the claim under section 7.36 (Assessment of claims).
- (2) The provisions of this section are in addition to those of section 6.32 (Time limitations on commencement of court proceedings). Accordingly, both sections are capable of applying to a claim.

### **6.32 Time limitations on commencement of court proceedings** (cf s 109 MACA)

- (1) A claimant is not entitled to commence proceedings in respect of a claim more than 3 years after:
  - (a) the date of the motor accident to which the claim relates, or
  - (b) if the claim is made in respect of the death of a person—the date of death, except with the leave of the court in which the proceedings are to be taken.
- (2) Time does not run for the purposes of this section from the time that a claim has been referred to the Dispute Resolution Service for assessment of damages and until 2 months after a certificate as to the assessment or exemption from assessment is issued.
- (3) The leave of the court must not be granted unless:
  - (a) the claimant provides a full and satisfactory explanation to the court for the delay, and
  - (b) the total damages of all kinds likely to be awarded to the claimant if the claim succeeds are not less than 25% of the maximum amount that may be awarded for non-economic loss under section 4.13 as at the date of the relevant motor

accident.

- (4) Subsection (3) (b) does not apply to a claimant who is legally incapacitated because of the claimant's age or mental capacity.
- (5) The *Limitation Act 1969* does not apply to or in respect of proceedings in respect of a claim.

**6.33 Insurer may require claimant to commence court proceedings** (cf s 110 MACA)

- (1) The insurer of a person against whom a claim is made may give the claimant notice requiring the claimant to commence court proceedings in respect of the claim if the claimant has been entitled to commence the proceedings for a period of at least 6 months.
- (2) The claimant must comply with the notice within 3 months after its receipt.
- (3) If the claimant does not comply with the notice as required by this section, the claimant is taken to have withdrawn the claim.
- (4) A claimant whose claim is taken to have been withdrawn by the operation of this section may apply to a court of competent jurisdiction for reinstatement of the claim.
- (5) The court may reinstate the claim if the court is satisfied that the claimant has a full and satisfactory explanation for the failure to comply with the notice.

**6.34 Matter to be remitted for further claims assessment where significant new evidence produced in court proceedings** (cf s 111 MACA)

- (1) This section applies to court proceedings in respect of a claim for which a claims assessor has issued a certificate under section 7.36.
- (2) If significant evidence is adduced in the court proceedings that was not made available to the claims assessor, the court is required to adjourn the proceedings until:
  - (a) the party who has adduced the evidence has referred the matter for further assessment under Division 7.6, and
  - (b) a claims assessor has issued a further certificate under section 7.36 in respect of the claim.
- (3) For the purposes of this section, significant evidence is evidence that the court considers may have materially affected the assessment made by the claims assessor if it had been made available to the claims assessor when the initial assessment was made (whether or not it was available at that time).

**6.35 Presumption of agency** (cf s 112 MACA)

- (1) For the purposes of:

- (a) any proceedings against the owner of a motor vehicle, whether severally or jointly with the driver of the vehicle, for the recovery of damages for liability in respect of the death of or injury to a person caused by the fault of the driver of the vehicle in the use or operation of the vehicle, and
  - (b) the third-party policy, if the vehicle concerned is an insured motor vehicle, any person (other than the owner) who was, at the time of the occurrence out of which the proceedings arose, the driver of the vehicle (whether with or without the authority of the owner) is taken to be the agent of the owner acting within the scope of the agent's authority in relation to the vehicle.
- (2) Nothing in this section is to be taken to imply any ratification by the owner of the motor vehicle of the acts of the person driving the motor vehicle.
- (3) The presumption of agency under this section is applicable not only with respect to proceedings taken against the owner of the motor vehicle, whether severally or jointly with the driver, but also:
- (a) where the owner or driver is dead, with respect to proceedings against the owner's or driver's estate pursuant to Part 2 of the *Law Reform (Miscellaneous Provisions) Act 1944*, and
  - (b) where the owner or driver is dead or cannot be served with process, with respect to:
    - (i) proceedings against the person's insurer under section 6.36 or the Nominal Defendant, and
    - (ii) proceedings in which the owner or driver, the owner's or driver's estate, the insurer or the Nominal Defendant, as the case may be, is involved as alternative defendant or as a person on whom notice in writing has been served pursuant to Part 2 of the *Law Reform (Miscellaneous Provisions) Act 1946*, or as a party to proceedings for recovery of contribution by or against a joint tortfeasor pursuant to Part 3 of that Act.

**6.36 Proceedings against insurer if insured dead or unable to be served** (cf s 113 MACA)

- (1) If a person against whom a claim can be made is dead or cannot be served with process, the claimant and a person claiming contribution or indemnity between joint tortfeasors may:
- (a) take proceedings in respect of the claim against the person's insurer, and
  - (b) recover in those proceedings an amount for which the claimant or the person claiming contribution or indemnity could have obtained a judgment against the insured person.

- (2) The fact that a person cannot be served with process is not to be regarded as having been proved unless it is established that all reasonable inquiries have been made in an effort to effect service.

**6.37 Proof of inability to serve process and give notice** (cf s 114 MACA)

The fact that a person cannot be served with process or given notice of a claim may be proved orally or by the affidavit of the person who endeavoured to effect service.

**6.38 Disclosure of offers or assessment by Dispute Resolution Service** (cf s 115 MACA)

- (1) This section applies to:
- (a) the amount of an offer of settlement under section 6.22 in connection with a claim, or
  - (b) the amount of an assessment of damages by a claims assessor under Division 7.6.
- (2) Except as prescribed by the regulations, any such amount is not to be specified in any pleading, affidavit or other document filed in or in connection with court proceedings, and is not to be disclosed to or taken into account by the court, before the court's determination of the amount of damages in the proceedings.

## **Division 6.6 Fraud in relation to claims**

**6.39 Licensed insurers to deter fraudulent claims** (cf s 116 MACA)

A licensed insurer must take all such steps as may be reasonable to deter and prevent the making of fraudulent claims.

**6.40 False or misleading claims** (cf s 117 MACA)

A person who makes a statement knowing that it is false or misleading in a material particular:

- (a) in a notice of a claim given to a person or an insurer under this Act, or
- (b) in the course of a review or assessment under Part 7 in relation to a claim, or
- (c) when otherwise furnishing information to any person concerning a motor accident or any claim relating to a motor accident,

is guilty of an offence.

Maximum penalty: 500 penalty units or imprisonment for 2 years, or both.

**6.41 Fraud on motor accidents injuries scheme**

- (1) A person who by deception obtains, or attempts to obtain, for himself or herself any financial advantage in connection with the motor accidents injuries scheme under this

Act is guilty of an offence if the person knows or has reason to believe that the person is not eligible to receive that financial advantage.

Maximum penalty: 500 penalty units or imprisonment for 2 years, or both.

- (2) A person who by deception obtains, or attempts to obtain, for another person any financial advantage in connection with the motor accidents injuries scheme under this Act is guilty of an offence if the person knows or has reason to believe that the other person is not eligible to receive that financial advantage.

Maximum penalty: 500 penalty units or imprisonment for 2 years, or both.

- (3) A person is not liable to be convicted of an offence against this section and any other provision of this Act as a result of the same conduct.

- (4) In this section:

**deception** means any deception, by words or other conduct, as to fact or as to law, including the making of a statement or the production of a document that is false or misleading.

**financial advantage** includes a financial advantage for an injured person (or a person who claims to be an injured person), an insurer or a medical or other service provider.

#### **6.42 Remedy available where claim fraudulent** (cf s 118 MACA)

- (1) This section applies to a claimant or insurer if it is established that, for the purpose of obtaining a financial benefit, the claimant or insurer did or omitted to do anything (including the making of a statement) concerning a motor accident or any claim relating to a motor accident with knowledge that the doing of the thing or the omission to do the thing was false or misleading.

- (2) If this section applies to a claimant:

(a) a person who has a liability in respect of a payment, settlement, compromise or judgment relating to the claim is relieved from that liability to the extent of the financial benefit so obtained by the claimant, and

(b) a person who has paid an amount to the claimant in connection with the claim (whether under a settlement, compromise or judgment, or otherwise) is entitled to recover from the claimant the amount of the financial benefit so obtained by the claimant and any costs incurred in connection with the claim.

- (3) If this section applies to an insurer, the claimant is entitled to recover from the insurer as a debt the amount of the financial benefit so obtained by the insurer and any costs incurred by the claimant in connection with the claim.



**6.43 Joinder of insurer where false claim alleged** (cf s 119 MACA)

(1) If:

- (a) court proceedings have been commenced against a person in respect of a claim, and
- (b) the person's insurer has given the plaintiff particulars alleging that the claim has not been made in good faith,

the insurer may apply to the court to be joined as a party to the proceedings.

(2) If the court gives the insurer leave to be joined as a party, the insurer may call as a witness any person able to give evidence relating to the occurrence out of which the claim arose or evidence of other matters relating to the claim, including a person who was, at the time of the occurrence, the owner or the driver of the motor vehicle.

(3) The insurer may examine the witness as to the occurrence out of which the claim arose and may also, with the leave of the court, examine the witness as to:

- (a) any other claim in which the witness was involved either as a claimant, a witness or an owner or driver of the motor vehicle, and
- (b) the credibility of the witness.

(4) If the court gives leave to do so, the insurer may:

- (a) cross-examine the witness, and
- (b) lead other evidence to refute the evidence given by the witness,

as to any or all of the matters as to which the insurer might have examined the witness under subsection (3).

(5) Any right to examine or cross-examine a witness arising under this section is additional to and not in diminution of any right to examine or cross-examine the person arising under any other law.

(6) This section applies despite anything to the contrary in section 38 of the [Evidence Act 1995](#).

(7) Subsections (3)–(6) apply to a licensed insurer as defendant in relation to any claim in the same way as those subsections apply to a licensed insurer who is granted leave to be joined as a party.

## Part 7 Dispute resolution

### Division 7.1 Preliminary

#### 7.1 Definitions

In this Part:

**claims assessor** means a person appointed under Division 7.2 as a claims assessor.

**decision-maker** means a merit reviewer, claims assessor or medical assessor.

**internal review** means a review of a decision by the insurer under section 7.9 (Internal review of insurer's decisions).

**medical assessment matter** means a matter declared by Schedule 2 to be a medical assessment matter for the purposes of this Part.

**medical assessor** means a person appointed under Division 7.2 as a medical assessor.

**merit review matter** means a matter declared by Schedule 2 to be a merit review matter for the purposes of this Part.

**merit reviewer** means a person appointed under Division 7.2 as a merit reviewer.

**miscellaneous claims assessment matter** means a matter declared by Schedule 2 to be a miscellaneous claims assessment matter for the purposes of this Part.

### Division 7.2 Dispute Resolution Service

#### 7.2 Dispute Resolution Service

- (1) The Authority is to establish, in association with its operations, a unit to be known as the Dispute Resolution Service.
- (2) The Service is to consist of merit reviewers, medical assessors, claims assessors and such staff of the Authority as the Authority determines.
- (3) If a provision of this Act confers on the Dispute Resolution Service a function in relation to any matter other than a dispute about the assessment of a claim under Division 7.6, a merit review matter, a medical assessment matter or a miscellaneous claims assessment matter, that function is to be exercised in accordance with the Motor Accident Guidelines by a decision-maker designated by the Dispute Resolution Service.

#### 7.3 Objects of Dispute Resolution Service

The objects of the Dispute Resolution Service in dealing with claims and disputes are as follows:

- (a) to provide a timely, independent, fair and cost effective system for the resolution of disputes that is accessible, transparent and professional,
- (b) to assess claims and disputes fairly and according to the substantial merits of the matter with as little formality and technicality as is practicable and to minimise the cost to the parties,
- (c) to ensure the quality and consistency of decision making by decision-makers,
- (d) to make appropriate use of the knowledge and experience of decision-makers,
- (e) to establish and maintain effective communication and liaison with stakeholders concerning the role of the Service,
- (f) to publicise and disseminate information concerning the dispute resolution system and the role of the Service.

#### **7.4 Appointment of merit reviewers, medical assessors and claims assessors**

- (1) The Authority may appoint any person who, in the opinion of the Authority, is suitably qualified for the purpose to be a merit reviewer, medical assessor or claims assessor for the purposes of this Act.
- (2) A person appointed as a merit reviewer, medical assessor or claims assessor may be a member of staff of the Authority.
- (3) A decision-maker has the functions that are conferred on the decision-maker by or under this Act.
- (4) The terms of appointment of a medical assessor may restrict a medical assessor to disputes of a specified kind.
- (5) The Authority is to ensure that, as far as reasonably practicable, there are medical assessors appointed in the regional areas of the State.
- (6) The Authority may remove a merit reviewer, medical assessor or claims assessor from office at any time.
- (7) A decision-maker who is not a member of staff of the Authority is entitled to be paid the remuneration (including travelling and subsistence allowances) that the Authority may from time to time determine.
- (8) Nothing in this Part prevents a person being appointed as a decision-maker of more than one class.

#### **7.5 Principal Claims Assessor**

- (1) The Minister is to appoint a person who is an Australian lawyer as Principal Claims Assessor.

- (2) The Principal Claims Assessor has and may exercise all the functions of a claims assessor under this Act.
- (3) The Principal Claims Assessor is, in the exercise of his or her functions, subject to the general direction and control of the chief executive of the Authority. However, section 7.6 applies to the Principal Claims Assessor in the same way as it applies to a claims assessor.
- (4) The Principal Claims Assessor can delegate to any claims assessor any of the Principal Claims Assessor's functions under this Act, except this power of delegation.
- (5) Schedule 3 contains provisions relating to the Principal Claims Assessor.

#### **7.6 Control and direction of decision-makers**

- (1) A claims assessor is, in the exercise of his or her functions, subject to the general control and direction of the Principal Claims Assessor.
- (2) A decision-maker (including a claims assessor) is not subject to control and direction by the Principal Claims Assessor, the Authority or any Public Service employee with regard to any of the decisions of the decision-maker that affect the interests of the parties to the merit review, medical assessment or claims assessment concerned. The Principal Claims Assessor, the Authority or any Public Service employee may not overrule or interfere with any such decision in respect of any such assessment or review.
- (3) This section does not affect the exercise of the functions of the chief executive of the Authority under the *Government Sector Employment Act 2013* with respect to decision-makers who are members of staff of the Authority.

#### **7.7 Provision of training and information**

The Authority may make arrangements for the provision of training and information to decision-makers to promote accurate and consistent decisions by decision-makers.

#### **7.8 Protection of decision-makers**

- (1) A matter or thing done or omitted to be done by a decision-maker in the exercise of the decision-maker's functions does not, if the matter or thing was done or omitted in good faith, subject the decision-maker personally to any action, liability, claim or demand.
- (2) Any such liability attaches instead to the Crown.
- (3) A decision-maker is, in any legal proceedings, competent but not compellable to give evidence or produce documents in respect of any matter in which he or she was involved in the course of the exercise of his or her functions as a decision-maker.

## Division 7.3 Internal review

### 7.9 Internal review of insurer's decisions

- (1) A claimant may request an insurer to review any of the following decisions of the insurer made in connection with a claim made by the claimant (an **internal review**):
  - (a) a decision about a merit review matter,
  - (b) a decision about a medical assessment matter,
  - (c) a decision about a miscellaneous claims assessment matter.
- (2) The claimant must provide the insurer with such information as the insurer may reasonably require and request for the purposes of an internal review.
- (3) The Motor Accident Guidelines may make provision for or with respect to the following:
  - (a) the making of a request for an internal review,
  - (b) the time within which a request for an internal review is to be made,
  - (c) the individuals who may or may not conduct an internal review,
  - (d) the way in which an internal review is to be conducted (including requiring the giving of reasons for and supporting documentation in relation to an insurer's decision on an internal review).
- (4) The insurer is to conduct an internal review in accordance with the Motor Accident Guidelines and is to complete and notify the claimant of the results of the review within 14 days after the request for the review is received by the insurer.
- (5) The Motor Accident Guidelines may provide for particular circumstances in which an insurer has a longer period to complete and notify the results of an internal review.
- (6) An internal review can consider information that was not provided before the decision being reviewed was made.
- (7) An internal review of a decision does not operate to stay the decision or otherwise prevent the taking of action based on the decision.

## Division 7.4 Merit review

### 7.10 Definitions

In this Division:

**insurer**, in relation to a review under this Division, means the insurer whose decision is the subject of the review.

**internal review** means a review of a reviewable decision by the insurer under section 7.9 (Internal review of insurer's decisions).

**merit review** means a review of a reviewable decision by a merit reviewer under section 7.13 (Determination of merit review application).

**merit review application** means an application for merit review of a reviewable decision.

**parties** to a review under this Division, means the claimant and the insurer in respect of the claim that is the subject of the review.

**proper officer of the Authority** means the member of staff of the Authority who is designated by the Authority for the purpose of determining applications under sections 7.15, 7.24 and 7.26.

**reviewable decision** means a decision of an insurer about a merit review matter.

#### **7.11 Internal review required before making merit review application**

- (1) A merit review application may not be made in relation to a reviewable decision until the decision has been the subject of an internal review by the insurer under Division 7.3.
- (2) A merit review application can be made without an internal review of the reviewable decision by the insurer if the insurer has failed to complete an internal review and notify the claimant of the decision on the internal review as and when required to do so, or has declined to conduct a review.
- (3) This section does not apply to a reviewable decision about a merit review matter of a kind prescribed by the regulations.

#### **7.12 Application for merit review**

- (1) A claimant may apply to the Dispute Resolution Service in accordance with the Motor Accident Guidelines for a review of a reviewable decision under this Division (a **merit review**).
- (2) The Dispute Resolution Service is to arrange for the merit review application to be dealt with by a merit reviewer.
- (3) As soon as practicable after making a merit review application, the claimant is to give notice of the application in writing to the insurer whose reviewable decision is the subject of the application.
- (4) The Motor Accident Guidelines may make provision for requiring the insurer to provide to the claimant and the merit reviewer a statement of reasons (together with any supporting documentation) for a reviewable decision that is the subject of a merit

review application.

- (5) The claimant and the insurer must provide to the merit reviewer such information as the reviewer may reasonably require for the purposes of the merit review.
- (6) It is a condition of an insurer's licence under this Act that the insurer must comply with subsection (5).
- (7) The merit reviewer may decline to review the reviewable decision if the claimant or the insurer has failed to provide any such information required by the reviewer.
- (8) A merit review application does not operate to stay the decision that is the subject of the application or otherwise prevent the taking of action based on the decision.
- (9) The Motor Accident Guidelines may make provision for limiting the time within which a merit review application may be made after the reviewable decision is made or reviewed by an insurer.

### **7.13 Determination of merit review application**

- (1) In determining a merit review application, the merit reviewer is to decide what the correct and preferable decision is having regard to the material then before the reviewer, including the following:
  - (a) any relevant factual material,
  - (b) any applicable written or unwritten law.
- (2) For that purpose, the merit reviewer may exercise all of the functions that are conferred or imposed by or under this or any other Act on the insurer.
- (3) In determining a merit review application, the merit reviewer may decide:
  - (a) to affirm the reviewable decision, or
  - (b) to vary the reviewable decision, or
  - (c) to set aside the reviewable decision and make a decision in substitution for the reviewable decision the merit reviewer set aside, or
  - (d) to set aside the reviewable decision and remit the matter for reconsideration by the insurer in accordance with any directions of the merit reviewer.
- (4) The merit reviewer is to issue the parties to the review with a certificate as to the reviewer's determination and is to attach a brief statement to the certificate setting out the reviewer's reasons for the determination.
- (5) A merit review application is to be determined within 28 days after it is made or within such other period as may be allowed by the Motor Accident Guidelines. However, a

determination is not invalid because it is made after the expiration of that period.

- (6) If a merit reviewer is satisfied that a certificate under this section contains an obvious error, the merit reviewer may issue a replacement certificate to correct the error.

#### **7.14 Effect of merit review decision**

- (1) A decision determining a merit review application takes effect on the date on which it is given or such later date as may be specified in the decision.
- (2) If any such decision varies, or is made in substitution for, an insurer's decision, the decision of the merit reviewer is taken:
  - (a) to be the decision of the insurer (other than for the purposes of a review under this Division), and
  - (b) to have had effect as the decision of the insurer on and from the date of the insurer's actual initial decision, unless the merit reviewer directs otherwise.
- (3) A decision determining a merit review application is, subject to section 7.15 (Review of merit review decision by review panel), binding on the parties to the review.
- (4) If the decision results in an increase in the amount of any weekly payments of statutory benefits payable to a claimant, the insurer must commence payment of the statutory benefits in accordance with the decision within 7 days after the issue of the certificate as to the merit reviewer's determination.
- (5) It is a condition of an insurer's licence under this Act that the insurer must comply with this section.

#### **7.15 Review of merit review decision by review panel**

- (1) A claimant or an insurer may apply to the proper officer of the Authority to refer a decision of a single merit reviewer determining a merit review application to a review panel of merit reviewers for review.
- (2) An application for the referral of a decision to a review panel may only be made on the grounds that the decision was incorrect in a material respect.
- (3) The proper officer of the Authority is to refer the application to a panel of at least 2 merit reviewers, but only if the proper officer is satisfied that there is reasonable cause to suspect that the decision determining the review was incorrect in a material respect having regard to the particulars set out in the application.
- (4) The review panel may confirm the decision of the single merit reviewer, or set aside the decision and make a decision in substitution for the decision the review panel set aside.
- (5) Section 7.14 (Effect of merit review decision) applies to any new decision made by a



review panel under this section.

- (6) The Motor Accident Guidelines may limit the time within which an application under this section may be made.

### **7.16 Regulations**

The regulations may make provision for or with respect to the following matters:

- (a) requiring the giving of reasons for and supporting documentation in relation to an insurer's claim decision and the notification to claimants of the right to request an internal review or apply for a merit review,
- (b) the procedures to be followed by the parties to a claim in connection with an internal review or a merit review.

## **Division 7.5 Medical assessment**

### **7.17 Definitions** (cf s 57 MACA)

In this Part:

**medical assessment** means an assessment of a medical assessment matter under this Division.

**medical dispute** means:

- (a) a dispute between a claimant and an insurer about a medical assessment matter, or
- (b) an issue arising about a medical assessment matter in proceedings before a court for damages or in connection with the assessment of a claim by a claims assessor.

### **7.18 Application of Division to treatment and care needs covered by Lifetime Care and Support Scheme** (cf s 43A MACA)

- (1) This Division does not apply in respect of any treatment and care needs of a person who is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006*, or any excluded treatment and care needs, that relate to the motor accident injury in respect of which the person is a participant in the Scheme and that arise during the period in which the person is a participant in the Scheme.
- (2) This section applies:
- (a) whether or not the treatment and care needs are assessed treatment and care needs under the *Motor Accidents (Lifetime Care and Support) Act 2006*, and
- (b) whether or not the Lifetime Care and Support Authority is required to make a payment in respect of the treatment and care needs concerned, and
- (c) whether or not the treatment, care, support or service (provided in connection

with treatment and care needs) is provided on a gratuitous basis.

- (3) In this section, **treatment and care needs** and **excluded treatment and care needs** have the same meanings as they have in the *Motor Accidents (Lifetime Care and Support) Act 2006*.

#### **7.19 Internal review required before medical assessment**

- (1) A medical dispute about a decision of an insurer may not be referred by a claimant for assessment under this Division until the decision has been the subject of an internal review by the insurer under Division 7.3.
- (2) A medical dispute about a decision of an insurer may be referred for assessment under this Division without an internal review of the decision by the insurer if the insurer has failed to complete an internal review and notify the claimant of the decision on the internal review as and when required to do so, or has declined to conduct a review.
- (3) This section does not apply to a medical dispute about a decision of an insurer relating to a medical assessment matter of a kind prescribed by the regulations.

#### **7.20 Medical assessment procedures** (cf s 60 MACA)

- (1) A medical dispute about a claim may be referred to the Dispute Resolution Service for assessment under this Division by either party to the dispute or by a merit reviewer, a claims assessor or a court.
- (2) The Dispute Resolution Service is to arrange for the dispute to be dealt with by one or more medical assessors.
- (3) The Dispute Resolution Service can refuse to accept the referral by a party to a claim of a dispute about the degree of permanent impairment if the party has provided insufficient evidence in support of the degree of permanent impairment asserted by the party.
- (4) The claimant and the insurer must provide to the medical assessor such information as the assessor may reasonably require for the purposes of the medical assessment.
- (5) It is a condition of an insurer's licence under this Act that the insurer must comply with subsection (4).
- (6) The medical assessor may decline to make a medical assessment if the claimant or the insurer has failed to provide any such information required by the assessor.

#### **7.21 Assessment of degree of permanent impairment**

- (1) The assessment of the degree of permanent impairment of an injured person for the purposes of this Act is to be made in accordance with the Motor Accident Guidelines.

The assessed degree of permanent impairment is to be expressed as a percentage.

- (2) Impairments that result from more than one injury arising out of the same motor accident are to be assessed together to assess the degree of permanent impairment of the injured person.
- (3) In assessing the degree of permanent impairment, regard must not be had to any psychiatric or psychological injury, impairment or symptoms, unless the assessment of the degree of permanent impairment is made solely with respect to the result of a psychiatric or psychological injury.
- (4) A medical assessor may decline to make an assessment of the degree of permanent impairment of an injured person until the assessor is satisfied that the impairment caused by the injury has become permanent.

### **7.22 Interim assessment of permanent impairment**

- (1) A medical assessor who declines to make an assessment of the degree of permanent impairment of an injured person until satisfied that impairment has become permanent must make an interim assessment of permanent impairment if the assessment is for the purpose of determining entitlement to statutory benefits under Division 3.3 (Weekly payments of statutory benefits to injured persons) or 3.4 (Statutory benefits for treatment and care).
- (2) An interim assessment of permanent impairment is an assessment that it is probable that the injured person will have a degree of permanent impairment of greater than a particular percentage (the ***minimum degree of permanent impairment***).
- (3) The degree of permanent impairment of the injured person is deemed to be greater than the minimum degree of permanent impairment that is assessed on an interim assessment, but only for the purposes of the statutory benefits payable to the injured person under Division 3.3 or 3.4.
- (4) An interim assessment operates only until a final assessment is made.
- (5) An interim assessment does not constitute an assessment of the degree of permanent impairment for the purposes of a claim for damages.
- (6) A payment of statutory benefits under Part 3 made to an injured person before a final assessment of permanent impairment is made and that the injured person would not have been entitled to had the final assessment been made before the payment was made cannot be recovered by the insurer.

### **7.23 Status of medical assessments** (cf s 61 MACA)

- (1) The medical assessor or assessors to whom a medical dispute is referred is or are to give a certificate as to the matters referred for assessment.

- (2) The certificate is, in any court proceedings or in any proceedings in connection with a merit review under Division 7.4 or a claims assessment under Division 7.6:
  - (a) prima facie evidence of any matter certified as to the degree of impairment of earning capacity of the injured person as a result of the injury concerned, and
  - (b) conclusive evidence of any other matter certified.
- (3) In any court proceedings, the court may (despite anything to the contrary in this section) reject a certificate as to all or any of the matters certified in it, on the grounds of denial of procedural fairness to a party to the proceedings in connection with the issue of the certificate, but only if the court is satisfied that admission of the certificate as to the matter or matters concerned would cause substantial injustice to that party.
- (4) If a certificate as to any matter is rejected under subsection (3), the court is to refer that matter again for assessment under this Division and adjourn the proceedings until a further certificate is given and admitted in evidence in the proceedings.
- (5) A court may not substitute its own determination as to any medical assessment matter.
- (6) This section:
  - (a) does not prevent a court from referring a matter again for assessment under this Division (as provided for by section 7.24 (Further medical assessment after initial medical assessment)), and
  - (b) does not require a court to refer a matter again for assessment under this Division if the matter is not a medical assessment matter.
- (7) A certificate is to set out the reasons for any finding by the medical assessor or assessors as to any matter certified in the certificate in respect of which the certificate is conclusive evidence.
- (8) The following procedure is to apply if the assessment of more than one medical assessor is required to assess whether the degree of permanent impairment of the injured person is greater than a particular percentage (not being an assessment of the degree of permanent impairment resulting from psychiatric or psychological injury):
  - (a) each medical assessor is to give a certificate as to the degree of permanent impairment of the injured person resulting from the particular injury or injuries with which the medical assessor's assessment is concerned,
  - (b) based on the matters certified in each such certificate a medical assessor nominated by the Authority for the purpose is to make an assessment of the total degree of permanent impairment resulting from all the injuries with which those certificates are concerned and is to give a certificate (a **combined certificate**) as

to that total degree of permanent impairment,

(c) the combined certificate is conclusive evidence as to the degree of permanent impairment of the injured person and this section applies to the combined certificate accordingly.

(9) If a medical assessor is satisfied that a certificate under this section contains an obvious error, the medical assessor may issue a replacement certificate to correct the error.

#### **7.24 Further medical assessment after initial medical assessment** (cf s 62 MACA)

- (1) A medical dispute referred for assessment under this Division may be referred again for assessment under this Division at any time by a court, a merit reviewer or a claims assessor.
- (2) A medical dispute referred for assessment under this Division may be referred again for assessment under this Division by the claimant or the insurer, but only on the grounds prescribed by the regulations (if any) in relation to the medical assessment matter to which the dispute relates.
- (3) A medical dispute may not be referred again for assessment by the claimant or the insurer on more than one occasion.
- (4) Referral of a medical dispute under this section by a claimant or an insurer is to be by application to the proper officer of the Authority.
- (5) The proper officer of the Authority is to arrange for the medical dispute to which the application relates to be referred to one or more medical assessors for a further medical assessment, but only if the proper officer is satisfied that the application meets the requirements for referral under subsection (2).
- (6) This section does not affect the final assessment of the degree of permanent impairment of an injured person after an interim assessment of permanent impairment.

#### **7.25 Agreement between parties as to matters in dispute—further assessments and reviews**

The assessment of a medical dispute by way of a further medical assessment or review of a medical assessment under this Division can be made on the basis of any agreement by the parties as to the following matters (without those matters having to be the subject of assessment):

- (a) the degree of permanent impairment of an injured person that has resulted from a particular injury,
- (b) whether a particular injury was caused by a motor accident.

### **7.26 Review of medical assessment by review panel** (cf s 63 MACA)

- (1) A claimant or an insurer may apply to the proper officer of the Authority to refer a medical assessment under this Division by a single medical assessor to a review panel of medical assessors for review.
- (2) An application for the referral of a medical assessment to a review panel may be made only on the grounds that the assessment was incorrect in a material respect.
- (3) A medical assessment may not be referred for review under this section on more than one occasion.
- (4) If a medical assessment under this Division is based on the assessments of 2 or more single medical assessors (resulting in a combined certificate as to the total degree of permanent impairment) (a **combined certificate assessment**), the combined certificate assessment cannot be the subject of review under this section except by way of the review of any of the assessments of the single medical assessors on which the combined certificate assessment is based.
- (5) The proper officer of the Authority is to arrange for the medical assessment to be referred to a panel of at least 2 medical assessors for review, but only if the proper officer is satisfied that there is reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application.
- (6) The review of a medical assessment is not limited to a review of only that aspect of the assessment that is alleged to be incorrect and is to be by way of a new assessment of all the matters with which the medical assessment is concerned.
- (7) The review panel may confirm the certificate of assessment of the single medical assessor, or revoke that certificate and issue a new certificate as to the matters concerned.
- (8) If on the review of a medical assessment of a single medical assessor on which a combined certificate assessment is based a new certificate is issued by the review panel, the review panel is also to issue a new combined certificate to take account of the results of the review.
- (9) Section 7.23 (Status of medical assessments) applies to any new certificate or new combined certificate issued under this section.
- (10) The Motor Accident Guidelines may limit the time within which an application under this section may be made.

### **7.27 Non-binding opinion of medical assessor**

- (1) A merit reviewer or claims assessor may refer a medical assessment matter to the

Dispute Resolution Service for assessment for the purposes of the provision of a non-binding opinion by a medical assessor for the assistance of the merit reviewer or claims assessor.

- (2) The Dispute Resolution Service is to refer the matter to a medical assessor for assessment for that purpose.
- (3) The opinion provided by the medical assessor on such an assessment is not binding on the merit reviewer or claims assessor or on the parties to a claim.

**7.28 Costs of medical assessment** (cf s 64 MACA)

- (1) The costs of medical assessments under this Division are payable by the insurer, except as otherwise provided by the regulations.
- (2) The Authority may, for the purposes of meeting those costs, impose fees for the carrying out of medical assessments or make other arrangements for meeting those costs.
- (3) The costs of medical assessments under this Division are as follows:
  - (a) the remuneration of medical assessors,
  - (b) the reasonable and necessary costs and expenses incurred by the injured person, and by a parent or other carer of the injured person in order to accompany the injured person, in attending the medical assessor or assessors for the purposes of the assessment,
  - (c) any costs incurred by the Authority in connection with medical assessments under this Division,
  - (d) such other costs in connection with medical assessments under this Division as may be prescribed by the regulations.
- (4) A reference in this section to medical assessment includes a reference to the review of medical assessments and an assessment for the purposes of the provision of a non-binding opinion under section 7.27 (Non-binding opinion of medical assessor).
- (5) The regulations may prescribe a rate at which the cost of travel by any specified mode of transport is to be calculated for the purposes of the payment of travel costs under this section.

**7.29 Application of Motor Accident Guidelines** (cf s 65 MACA)

Medical assessments under this Division are subject to the provisions of the Motor Accident Guidelines relating to the procedures for the referral of disputes for assessment or review of assessments and the procedure for assessment.

## Division 7.6 Claims assessment

### Subdivision 1 Preliminary

#### 7.30 Definitions (cf s 88 MACA)

(1) In this Division:

**claims assessment** means an assessment of a claim under this Division.

**party** to an assessment under this Division means the claimant or the insurer in respect of the claim referred for assessment.

**specify** an amount of damages or benefits includes specify a manner of determining the amount of damages or benefits.

(2) A reference in this Division to referring a claim for assessment under this Division includes a reference to referring a claim for a certificate of exemption from assessment under this Division.

(3) A reference in this Division to an assessment of a claim includes a reference to the result of the assessment.

#### 7.31 Application (cf s 89 MACA)

(1) This Division applies to a claim whether or not the insurer admits or denies liability.

(2) Nothing in this Division prevents a claim for damages from being settled at any time.

**Note—**

Section 6.31 (Claims assessment or exemption pre-condition for commencement of court proceedings) provides that a person cannot commence court proceedings in respect of a claim for damages unless it has been referred for assessment under this Division and a certificate as to the exclusion of the claim from assessment or as to the results of assessment has been issued.

### Subdivision 2 Assessment of claims for damages

#### 7.32 Reference of claim (cf s 90 MACA)

(1) A claim for damages may be referred to the Dispute Resolution Service by the claimant or the insurer, or both, for assessment under this Division.

(2) The Dispute Resolution Service is to arrange for the claim to be referred to a claims assessor.

(3) Parties to a claim must use their best endeavours to settle the claim before referring it for assessment under this Division.



**7.33 Time limits for referring claims and making assessment** (cf s 91 MACA)

A party to a claim cannot refer a claim for assessment under this Division more than 3 years after the motor accident concerned unless the party provides a full and satisfactory explanation for the delay to the Dispute Resolution Service and a claims assessor grants leave for the claim to be referred for assessment in accordance with the Motor Accident Guidelines.

**7.34 Claims exempt from assessment** (cf s 92 MACA)

- (1) A claim is exempt from assessment under this Division if:
  - (a) the claim is of a kind specified in the regulations as a claim that is exempt from assessment under this Division, or
  - (b) a claims assessor has made a preliminary assessment of the claim and has determined (with the approval of the Principal Claims Assessor) that the claim is not suitable for assessment under this Division.
- (2) If a claim is exempt from assessment under this Division, the Principal Claims Assessor must, as soon as practicable, arrange for the issue to the insurer and the claimant of a certificate to that effect (enabling court proceedings to be commenced in respect of the claim concerned).

**7.35 Arrangements for assessment** (cf s 93 MACA)

The Principal Claims Assessor is responsible for determining the claims assessors who may assess any particular class of claims that are not exempt from assessment.

**7.36 Assessment of claims** (cf s 94 MACA)

- (1) The claims assessor is, in respect of a claim referred to the assessor for assessment, to make an assessment of:
  - (a) the issue of liability for the claim (unless the insurer has admitted liability), and
  - (b) the amount of damages for that liability (being the amount of damages that a court would be likely to award).
- (2) Such an assessment is to be made having regard to such information as is conveniently available to the claims assessor, even if one or more of the parties to the assessment does not co-operate or ceases to co-operate.
- (3) The assessment is to specify an amount of damages.
- (4) The claims assessor must, as soon as practicable after an assessment, issue the insurer and claimant with a certificate as to the assessment.
- (5) The claims assessor is to attach a brief statement to the certificate, setting out the

assessor's reasons for the assessment.

- (6) If the Principal Claims Assessor is satisfied that a certificate as to an assessment or a statement attached to the certificate contains an obvious error, the Principal Claims Assessor may issue, or approve of the claims assessor issuing, a replacement certificate or statement to correct the error.

**7.37 Claims assessor may assess costs** (cf s 94A MACA)

- (1) In making an assessment and specifying damages in respect of a claim, a claims assessor may include in the assessment an assessment of the claimant's costs (including costs for legal services and fees for medico-legal services) in the matter.
- (2) An assessment of those costs may also be made (whether or not an assessment has been made under subsection (1)) if a court does not determine a matter after the issue of a certificate as to an assessment but remits the matter for further assessment under this Division.
- (3) In making an assessment under this section, a claims assessor:
  - (a) may have regard to the amount of any written offer of settlement made by either party to the matter, and
  - (b) must give effect to any requirement of the regulations under Part 8 (Costs and fees) as to costs that may be included in an assessment or award of damages or fixing maximum fees and costs, and
  - (c) must have regard to the principles and matters referred to in section 200 of the [Legal Profession Uniform Law \(NSW\)](#).
- (4) A claimant or an insurer (or an Australian legal practitioner acting for a claimant or an insurer in respect of the relevant claim) has the same right of appeal against an assessment made under this section as the claimant, insurer or legal practitioner would have under section 89 of the [Legal Profession Uniform Law Application Act 2014](#) if the assessment were a decision of a costs assessor under Part 7 of that Act in respect of a bill of costs.

**7.38 Status of assessments** (cf s 95 MACA)

- (1) An assessment under this Division of the issue of liability for a claim is not binding on any party to the assessment.
- (2) An assessment under this Division of the amount of damages for liability under a claim for damages is binding on the insurer, and the insurer must pay to the claimant the amount of damages specified in the certificate as to the assessment if:
  - (a) the insurer admits that liability under the claim, and

(b) the claimant accepts that amount of damages in settlement of the claim within 21 days after the certificate of assessment is issued.

(3) The amount of damages payable by an insurer (including any costs assessed as payable by the insurer) must be paid within such period as may be prescribed by the regulations and the regulations may require the payment of interest on so much of the amount payable as is from time to time unpaid after the end of that period. The rate of interest may be set by reference to the rate of interest prescribed for the purposes of section 101 of the *Civil Procedure Act 2005* but may not exceed that rate.

(4) It is a condition of an insurer's licence under this Act that the insurer complies with this section.

### **7.39 Motor Accident Guidelines** (cf s 97 MACA)

The Motor Accident Guidelines may make provision for or with respect to any aspect of procedures to be followed under this Division, including provision for or with respect to:

- (a) the manner of referring claims or disputes for assessment, and
- (b) the documentation that is to accompany such a reference of a claim or dispute for assessment, and
- (c) the manner of presenting documents and information to a claims assessor by the parties, including time limits for the presentation of the documents and information, and
- (d) the making of assessments, and
- (e) the manner of specifying an amount of damages, and
- (f) the extension or abridgment of any period referred to in this Division.

## **Subdivision 3 Miscellaneous claims assessments**

### **7.40 Definitions**

In this Subdivision:

**dispute** means a dispute between a claimant and an insurer about a miscellaneous claims assessment matter.

### **7.41 Internal review required before miscellaneous claims assessment**

- (1) A dispute about a decision of an insurer may not be referred by a claimant for assessment under this Division until the decision has been the subject of an internal review by the insurer under Division 7.3.

- (2) A dispute about a decision of an insurer may be referred for assessment under this Division without an internal review of the decision by the insurer if:
  - (a) the Motor Accident Guidelines provide that an internal review is not required for decisions about the miscellaneous claims assessment matter to which the insurer's decision relates, or
  - (b) the insurer has failed to complete an internal review and notify the claimant of the decision on the internal review as and when required to do so, or has declined to conduct a review.
- (3) This section does not apply to a dispute about a miscellaneous claims assessment matter of a kind prescribed by the regulations.

#### **7.42 Assessment of miscellaneous disputes in connection with claims**

- (1) A dispute may be referred at any time to the Dispute Resolution Service by any party to the dispute for assessment under this Division.
- (2) Subdivision 2 applies to the assessment of a dispute in the same way as it applies to the assessment of a claim for damages, subject to subsection (3) and such other modifications as may be prescribed by the regulations.
- (3) An assessment of a dispute about a miscellaneous claims assessment matter relating to a claim for statutory benefits is binding on the parties to the dispute.

### **Subdivision 4 Claims assessors**

#### **7.43 Power of claims assessor to require information** (cf s 100 MACA)

- (1) A claims assessor may give a direction in writing to a party to proceedings before the claims assessor requiring the party:
  - (a) to produce to the assessor, at a time and place specified in the direction, specified documents in the possession of the party, being documents that the assessor considers relevant to the proceedings, or
  - (b) to furnish specified information to the assessor within a time specified in the direction, being information that the assessor considers relevant to the proceedings, or
  - (c) to give within a time specified in the direction any specified consent, authority or direction that the assessor considers necessary or desirable for the purpose of facilitating the provision by another person of documents or information pursuant to a direction under subsection (2).
- (2) A claims assessor may give a direction in writing to a person who is not a party to proceedings before the claims assessor requiring the person:

- (a) to produce to the assessor, at a time and place specified in the direction, specified documents in the possession of the person, being documents that the assessor considers relevant to the proceedings, or
  - (b) to furnish specified information to the assessor within a time specified in the direction, being information that the assessor considers relevant to the proceedings.
- (3) The Authority must pay the reasonable costs incurred by a person in complying with a direction under subsection (2).
- (4) A person who fails without reasonable excuse to comply with a direction given to the person under this section is guilty of an offence.
- Maximum penalty: 50 penalty units.
- (5) It is a condition of an insurer's licence under this Act that the insurer must comply with a direction given to the insurer under this section.
- (6) If a party to proceedings on a claims assessment fails without reasonable excuse to produce a document or furnish information in compliance with a direction given to the person under this section, the person cannot as a party to proceedings before a court in respect of the claim have the document or information admitted in the proceedings unless the court otherwise orders in the special circumstances of the case.
- (7) The regulations may make provision for or with respect to any of the following matters:
- (a) exempting specified kinds of documents or information from the operation of this section,
  - (b) specifying cases and circumstances in which a claims assessor is required to exercise the assessor's powers under this section.

**7.44 Power of claims assessor to provide documents and information to a party** (cf s 101 MACA)

- (1) When documents or information are produced or furnished to a claims assessor by a party to proceedings (whether or not pursuant to a requirement under this Act), the assessor may produce or furnish the documents or information to any other party to the proceedings.
- (2) When documents or information are produced or furnished to a claims assessor by a person who is not a party to the proceedings (pursuant to a direction under this Division), the assessor may produce or furnish the documents or information to any party to the proceedings.
- (3) The regulations may make provision for or with respect to any of the following

matters:

- (a) exempting specified kinds of documents or information from the operation of this section,
- (b) specifying cases and circumstances in which a claims assessor is required to exercise the assessor's powers under this section,
- (c) specifying circumstances in which documents or information produced or furnished to a claims assessor may not be produced or furnished by the assessor to a party to the proceedings.

#### **7.45 Summons to appear at assessment conference**

- (1) The Principal Claims Assessor may issue a summons requiring the attendance of a party to an assessment at proceedings (as referred to in section 7.46) on the assessment of a claim if the Principal Claims Assessor is satisfied that the party has failed without reasonable excuse to comply with a request by a claims assessor to attend an assessment conference on the assessment.
- (2) A person must not fail without reasonable excuse to comply with a summons served on the person under this section.

Maximum penalty: 50 penalty units.

#### **7.46 Proceedings before claims assessors** (cf s 104 MACA)

- (1) In this section:

***proceedings*** means any conference or other proceeding held with or before a claims assessor, and includes any such proceedings at which the parties (or some of them) participate by telephone, closed-circuit television or other means.

- (2) A person who is a party to proceedings is entitled to be represented by an Australian legal practitioner or by an agent. The claims assessor may however refuse to permit a party to be represented by an agent if of the opinion that the agent does not have sufficient authority to make binding decisions on behalf of the party.
- (3) A party to proceedings is entitled to such representation or assistance (for example, the assistance of an interpreter) as may be necessary to enable the party to communicate adequately at the proceedings.
- (4) A claims assessor must take into account any written submission prepared by an Australian legal practitioner acting for a party to a claim and submitted by or on behalf of the party (whether or not the party is represented by an Australian legal practitioner at proceedings on the claim).
- (5) A claims assessor may, subject to any general directions of the Principal Claims

Assessor, conduct proceedings with all relevant parties in attendance and with relevant experts in attendance, or separate proceedings in private with any of them.

- (6) If the claims assessor is satisfied that sufficient information has been supplied to him or her in connection with a claim, the assessor may exercise functions under this Act without holding any formal hearing.
- (7) In proceedings before a court with respect to a claim for damages (other than proceedings under Division 6.6), evidence of a statement made in proceedings before a claims assessor is not admissible unless the person who made the statement agrees to the evidence being admitted.

**Note—**

See also section 6.38 (Disclosure of offers or assessment by Dispute Resolution Service) with respect to disclosure of result of assessment.

## **Division 7.7 Miscellaneous**

### **7.47 Persons under legal incapacity**

- (1) A claimant who is a person under legal incapacity in relation to proceedings under this Part may not make any application or refer any matter to the Dispute Resolution Service, or carry on proceedings, under this Part except by his or her appointed representative in accordance with the Motor Accident Guidelines.

- (2) In this section:

***appointed representative***, in relation to a person under legal incapacity, means a person appointed to represent the person under legal incapacity (whether by a claims assessor or otherwise) in accordance with the Motor Accident Guidelines.

***person under legal incapacity*** includes:

- (a) a child under the age of 18 years, and
- (b) an involuntary patient or forensic patient within the meaning of the [Mental Health Act 2007](#), and
- (c) a person under guardianship within the meaning of the [Guardianship Act 1987](#), and
- (d) a protected person within the meaning of the [NSW Trustee and Guardian Act 2009](#), and
- (e) an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs.

#### **7.48 Effect of decisions under this Part**

- (1) This section applies where a decision is made in accordance with this Part by an insurer on an internal review or by a decision-maker on a merit review, medical assessment or assessment of a dispute about a miscellaneous claims assessment matter.
- (2) If the decision results in an increase in the amount of payments of statutory benefits payable to a claimant, the claimant is entitled to the increase in payments from the date of the original decision that is the subject of the review or assessment concerned.
- (3) If the decision results in the discontinuation of or a further reduction in any payments of statutory benefits payable to a claimant, and is less favourable to the claimant than the decision that is the subject of the review or assessment, the requirements of Division 3.3 (Weekly payments of statutory benefits to injured persons) as to the giving of notice before discontinuing or reducing weekly payments of statutory benefits extend to the discontinuation or further reduction that results from the decision on the review or assessment concerned.
- (4) This section extends to any new decision made by a review panel under section 7.15 (Review of merit review decision by review panel) or 7.26 (Review of medical assessment by review panel).

#### **7.49 Advisory service**

The Authority is to establish in association with its operations an advisory service to assist claimants in connection with their claims for statutory benefits and claims for damages and with the dispute resolution procedures under this Part.

#### **7.50 Publication of decisions under this Part**

The Authority may cause details of the decisions of merit reviewers and claims assessors under this Act to be published in accordance with the Motor Accident Guidelines.

#### **7.51 Amendment of Schedule 2**

The regulations may amend or replace Schedule 2.

#### **7.52 Restriction on health practitioners who may give evidence in court and other dispute resolution proceedings**

- (1) In any proceedings before a court for damages or in connection with a merit review under Division 7.4, a medical assessment under Division 7.5 or the assessment of a claim under Division 7.6, evidence given by a health practitioner in relation to a medical matter concerning an injured person is not admissible unless:
  - (a) the practitioner is a treating health practitioner of the injured person, or



(b) the practitioner is authorised by the Motor Accident Guidelines to give evidence in the proceedings.

(2) The Motor Accident Guidelines may make provision for or with respect to the appointment of relevant practitioners (whether by agreement between the parties, appointment by the Authority or otherwise) for the purposes of subsection (1).

(3) This section has effect despite anything to the contrary in the rules of court or the [Evidence Act 1995](#).

(4) In this section:

**health practitioner** has the same meaning as in the Health Practitioner Regulation National Law.

**medical matter** means:

(a) the degree of permanent impairment of an injured person that has resulted from an injury caused by a motor accident, or

(b) any medical assessment matter of a kind prescribed by the regulations for the purposes of this section.

## Part 8 Costs and fees

### 8.1 Definitions (cf s 147 MACA)

(1) In this Part:

**court** includes a court arbitrator or arbitrators.

**medical report** includes any medical certificate or opinion.

(2) Except as provided by this Part, expressions used in this Part have the same meaning as they have when used in relation to legal costs in the legal profession legislation (as defined in section 3A of the [Legal Profession Uniform Law Application Act 2014](#)).

**Note—**

Under the [Legal Profession Uniform Law \(NSW\)](#), the expression **legal costs** includes amounts payable to a law practice for legal services as well as other items that may be charged (such as disbursements) but does not include interest.

### 8.2 Application to legal costs (cf s 148 MACA)

This Part applies to and in respect of legal costs payable on a party and party basis, on a solicitor and client basis or on any other basis, unless this Part otherwise provides.

### 8.3 Regulations fixing maximum costs etc recoverable by Australian legal practitioners (cf s 149 MACA)

(1) The regulations may make provision for or with respect to the following:

- (a) fixing maximum costs for legal services provided to a claimant or to an insurer in any motor accidents matter,
  - (b) fixing maximum costs for matters that are not legal services but are related to proceedings in any motor accidents matter (for example, expenses for investigations, for witnesses or for medical reports),
  - (c) declaring that no costs are payable for any such legal services or other matters of a kind specified in the regulations.
- (2) Without limiting subsection (1), the regulations may fix maximum costs for legal services provided to a claimant by reference to the amount recovered by the claimant.
- (3) An Australian legal practitioner is not entitled to be paid or recover for a legal service or other matter an amount that exceeds any maximum costs fixed for the service or matter by the regulations under this section. An Australian legal practitioner is not entitled to be paid or recover any amount for a legal service or other matter of a particular kind if the regulations declare that no costs are payable for a service or other matter of that kind.
- (4) An Australian legal practitioner is not entitled to be paid or recover legal costs for any legal services provided to a party to a claim for statutory benefits (whether the claimant or the insurer) in connection with the claim unless payment of those legal costs is permitted by the regulations or the Dispute Resolution Service.
- (5) This section does not entitle an Australian legal practitioner to recover costs for a legal service or matter that a court or costs assessor determines were unreasonably incurred.
- (6) This section and any regulations under this section prevail to the extent of any inconsistency with the legal costs legislation (as defined in section 3A of the [Legal Profession Uniform Law Application Act 2014](#)). An assessment under that legislation of any costs in respect of which provision is made by a regulation under this section is to be made so as to give effect to that regulation.
- (7) The Minister is to consult the Councils of the Bar Association and the Law Society about any proposed regulation under this section. The validity of a regulation is not affected by a contravention of this subsection.

**8.4 Maximum fees recoverable by health practitioners for medico-legal services** (cf s 150 MACA)

- (1) The regulations may make provision for or with respect to fixing maximum fees for the provision by health practitioners of the following services:
- (a) provision of any medical report for use in court proceedings in connection with a claim,

- (b) provision of any medical report for use in the assessment of a claim under Division 7.6, in a medical assessment by a medical assessor under Division 7.5 or in a merit review under Division 7.4,
  - (c) appearance as a witness in court proceedings, or in Dispute Resolution Service proceedings, in connection with a claim.
- (2) A health practitioner is not entitled to be paid or recover any fee for providing a service that exceeds any maximum fee fixed under this section for the provision of the service.
  - (3) In determining any matter to be prescribed under this section, the Minister is to consult with the Australian Medical Association and other appropriate bodies. The validity of a regulation is not affected by a contravention of this subsection.

**8.5 Costs where court proceedings and no claims assessment** (cf s 152 MACA)

- (1) This section applies where a claim is determined by court proceedings (including court arbitration) and an assessment has not been made under Division 7.6 of the amount of damages for liability under the claim.
- (2) The rules of court concerning offers of compromise apply to any such offer in those proceedings.
- (3) The costs payable on a party and party basis are, subject to the rules of court, to follow the event, and are to include the court fees prescribed under section 8.7.

**8.6 Other matters relating to costs** (cf s 153 MACA)

- (1) Any order of a court as to costs is to be made consistently with the relevant provisions of or made under this Act. However, the court may make an order that departs from those provisions in an exceptional case and for the avoidance of substantial injustice.
- (2) Subject to the regulations and rules of court where relevant, if costs are awarded to a claimant by reference to the amount recovered by the claimant, that amount is to be taken to be the amount recovered as qualified, or after making any deduction or reduction, in accordance with or by reference to Part 4.
- (3) Regulations under this Part may fix maximum costs and fees by reference to costs and fees fixed by regulations under the [Legal Profession Uniform Law Application Act 2014](#).
- (4) The regulations may make provision for or with respect to the assessment or taxation of costs and any associated matters, and may do so by reference to the provisions of any Act.

### **8.7 Court fees** (cf s 154 MACA)

(1) In this section:

**court fees** means court fees payable in respect of a claim determined by a court which was not the subject of an assessment of the amount of damages under Division 7.6.

(2) The regulations may make provision for or with respect to court fees payable under this Part.

(3) In particular, the regulations may specify any such fee or the method by which the fee is to be calculated, and may specify by whom and in what circumstances the fee is payable.

(4) Court fees are payable into the Consolidated Fund.

### **8.8 Claims assessment fees** (cf s 155 MACA)

(1) In this section:

**claims assessment fees** means fees payable in connection with an assessment of a claim under Division 7.6.

(2) The regulations may make provision for or with respect to claims assessment fees payable under this Part.

(3) In particular, the regulations may specify any such fee or the method by which the fee is to be calculated, and may specify by whom and in what circumstances the fee is payable.

(4) Claims assessment fees are payable into the Motor Accidents Operational Fund under Division 10.4.

### **8.9 Maximum fees payable by insurers for treatment and care not provided at hospitals or provided at private hospitals** (cf s 56 MACA)

(1) The regulations may make provision for or with respect to fixing the maximum amount for which an insurer is liable in respect of any claim for:

(a) the fee payable for any treatment and care of an injured person to the provider of that treatment and care (other than treatment and care that is provided to in-patients or out-patients at a hospital and for which any payment is required to be made to the hospital and not to the provider of that treatment and care), or

(b) the fee payable for any treatment and care of an injured person to a private hospital for treatment and care at the private hospital.

(2) Any such fees may (but need not) be fixed by reference to fees recommended by the

Australian Medical Association or other professional association or by reference to any schedule of fees.

- (3) A payment by an insurer of statutory benefits for treatment and care, or assessed by the Dispute Resolution Service, is to be made consistently with any regulations under this section.
- (4) This section does not prevent the inclusion in Motor Accident Guidelines of provision as to the appropriate allowance for fees to which this section applies and which are not fixed by regulations under this section.
- (5) This section does not apply in respect of any treatment and care needs of a person who is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006*, or any excluded treatment and care needs, that relate to the motor accident injury in respect of which the person is a participant in the Scheme and that arise during the period in which the person is a participant in the Scheme.

#### **8.10 Recovery of costs and expenses in relation to claims for statutory benefits**

- (1) A claimant for statutory benefits is (subject to this section) entitled to recover from the insurer against whom the claim is made the reasonable and necessary legal costs, and other costs and expenses, incurred by the claimant in connection with the claim. Other costs and expenses include the cost of medical and other tests and reports.
- (2) The regulations may make provision for or with respect to fixing the maximum costs and expenses recoverable by a claimant under this section (including any matters for which no costs and expenses are recoverable from the insurer).
- (3) A claimant for statutory benefits is only entitled to recover from the insurer against whom the claim is made reasonable and necessary legal costs incurred by the claimant if payment of those costs is permitted by the regulations or the Dispute Resolution Service.
- (4) The Dispute Resolution Service can permit payment of legal costs incurred by a claimant but only if satisfied that:
  - (a) the claimant is under a legal disability, or
  - (b) exceptional circumstances exist that justify payment of legal costs incurred by the claimant.
- (5) An insurer is not entitled to recover from a claimant for statutory benefits any legal costs, or other costs and expenses, of the insurer in relation to the claim.

#### **8.11 Exclusion of matters from this Part** (cf s 156 MACA)

The regulations may make provision for or with respect to excluding any class of matters from any or all of the provisions of this Part.

## **Part 9 Insurers**

### **Division 9.1 Licensing of insurers**

#### **9.1 Offence—unlicensed insurers** (cf s 157 MACA)

- (1) A person must not issue or purport to issue a certificate of insurance under section 2.5 unless the person is a licensed insurer.

Maximum penalty: 1,000 penalty units.

- (2) If a person contravenes this section, or any condition to which a licence under this Division is subject, the certificate remains a valid certificate of insurance and the contravention does not annul or affect the third-party policy that is taken by this Act to have been issued on the issue of the certificate.

#### **9.2 Applications for licences** (cf s 158 MACA)

- (1) An application for a licence under this Division may be made to the Authority by any corporation authorised under the *Insurance Act 1973* of the Commonwealth to carry on insurance business.

- (2) A corporation is not competent to make an application unless it is a party to the Insurance Industry Deed.

- (3) An application is to be made in such manner, and accompanied by such documents, as may be determined by the Authority.

- (4) Without affecting the generality of subsection (3), an applicant for a licence may be required to furnish the following particulars and documents:

- (a) particulars of the shareholders, directors and other managers of the applicant,
- (b) previous returns and accounts under the *Corporations Law*, the *Corporations Act 2001* of the Commonwealth and the *Insurance Act 1973* of the Commonwealth,
- (c) particulars of re-insurance arrangements to which the applicant is a party,
- (d) a draft business plan under section 9.18.

- (5) A person who, in or in connection with an application for a licence, makes a statement knowing that it is false or misleading in a material particular is guilty of an offence.

Maximum penalty: 500 penalty units or imprisonment for 2 years, or both.

#### **9.3 Determination of application for licence** (cf s 159 MACA)

- (1) The Authority is to consider each application for a licence under this Division and may:
  - (a) grant a licence to the applicant, or

- (b) refuse the application.
- (2) The Authority may, in determining an application for a licence, take into consideration:
- (a) the suitability of the applicant, and
  - (b) the paid-up share capital and reserves of the applicant, and
  - (c) the constitution of the applicant (if any), and
  - (d) the re-insurance arrangements of the applicant, and
  - (e) the efficiency of the motor accidents scheme under this Act generally, and
  - (f) such other matters as the Authority thinks fit.
- (3) Despite subsection (1), the Authority must refuse an application for a licence from a corporation that does not comply with such requirements as are prescribed by the regulations for the purposes of this Division.
- (4) A licence must not be granted under this Division unless the applicant has paid (or has made arrangements acceptable to the Authority for the payment of) the fee determined by the Authority, with the approval of the Minister, for the grant of the licence.
- (5) When the Authority proposes to grant a licence to a corporation, it must give 14 days notice of the proposal to all licensed insurers specifying the name of the corporation.

#### **9.4 Duration of licences** (cf s 160 MACA)

A licence granted under this Division continues in force until it is cancelled under this Division.

#### **9.5 Conditions of licences** (cf s 161 MACA)

- (1) A licence granted under this Division is subject to:
- (a) such conditions as may be prescribed by this Act or the regulations, and
  - (b) such conditions (not inconsistent with this Act or the regulations) as may be imposed by the Authority:
    - (i) on the granting of the licence, or
    - (ii) at any time during the currency of the licence.
- (2) The Authority may, by notice served on a licensed insurer, impose conditions (or further conditions) to which the licence is to be subject or revoke or vary any condition imposed on the licence by the Authority.

(3) A condition to which a licence is subject has effect whether or not it is endorsed on the licence.

(4) A licensed insurer who contravenes, whether by act or omission, any condition to which the licence is subject is guilty of an offence.

Maximum penalty: 1,000 penalty units.

(5) An insurer (not being a licensed insurer) who contravenes, whether by act or omission, any obligation imposed by this Act on the insurer in connection with a motor accident, being an obligation that is declared by this Act to be a condition of a licence under this Division, is guilty of an offence.

Maximum penalty: 1,000 penalty units.

(6) A licensed insurer cannot be convicted of an offence under subsection (4) and required to pay civil penalty under section 9.10 in respect of the same act or omission.

#### **9.6 Matters that may be regulated by conditions of licences** (cf s 162 MACA)

(1) Without limiting the generality of section 9.5, the conditions to which a licence under this Division may be subject include conditions:

(a) for the purpose of ensuring compliance with the obligations of the licensed insurer, or

(b) for the purpose of ensuring that insurance premiums for third-party policies are available to meet claims, or

(c) for the purpose of requiring the licensed insurer to achieve early resolution of claims, and early payment, at particular levels, or

(d) for the purpose of the efficiency of the motor accidents scheme under this Act generally, or

(e) relating to the provision of information concerning claims and profits.

(2) A licensed insurer does not contravene a condition of a kind referred to in subsection (1) (c) if the insurer establishes that the insurer furnished a report to the Authority within a reasonable period and that the report sets out reasonable grounds for justifying the contravention.

#### **9.7 Matters not subject to conditions of licences** (cf s 163 MACA)

(1) A condition of a licence under this Division must not be prescribed by the regulations or imposed, revoked or varied by the Authority if this would give or be likely to give a competitive advantage to the licensed insurer over other licensed insurers.

(2) A condition of a licence under this Division that requires or has the effect of requiring



a licensed insurer to obtain a share of the insurance market specified in or determined in accordance with the terms of the condition is of no effect.

- (3) This section extends, in the case of a licence in force on the commencement of this Act, to conditions imposed or otherwise applicable before that commencement.
- (4) This section has effect despite anything to the contrary in sections 9.5 and 9.6.
- (5) This section does not prevent the imposition as a condition of a licence under this Division of a condition that limits the kinds of third-party policy that can be issued by the insurer, for example a condition that limits the insurer to issuing third-party policies for particular classes of motor vehicle or to particular classes of owner.

#### **9.8 Assignment of licences** (cf s 164 MAA)

- (1) A licensed insurer may, with the approval of the Authority, assign its licence to another licensed insurer or to a corporation to whom the Authority proposes to grant a licence.
- (2) The Authority must not approve the assignment of a licence unless the Authority is satisfied that the proposed assignee is able to meet the past, present and future liabilities of the assignor:
  - (a) under any third-party policy in respect of which the assignor is the insurer, and
  - (b) to the Motor Accidents Operational Fund under Division 10.4, and
  - (c) to any other licensed insurer.

#### **9.9 Suspension of licences** (cf s 165 MACA)

- (1) The Authority may, by notice served on a licensed insurer, suspend the insurer's licence and the insurer is thereby prohibited from issuing any third-party policies after such date as is specified in the notice for the purpose.
- (2) A licensed insurer who contravenes, whether by act or omission, the terms of any such notice is guilty of an offence.

Maximum penalty: 1,000 penalty units.

- (3) A suspension may be effected only if:
  - (a) subject to subsection (4), a licensed insurer has contravened its licence or this Act or the regulations or the Insurance Industry Deed, or
  - (b) the insurer ceases to be an insurer authorised to carry on business under the *Insurance Act 1973* of the Commonwealth, or
  - (c) a provisional liquidator, liquidator or official liquidator, or a receiver, receiver and

- manager, official manager or trustee, is appointed over all or any part of the assets or undertaking of the insurer, or
- (d) the insurer is given a direction under Part IX of the *Insurance Act 1973* of the Commonwealth or an inspector is appointed to investigate the affairs of the insurer under Part V of that Act, or
  - (e) after receiving a report under section 9.22, the Authority is of the opinion that the insurer is, or is likely to become, unable to meet its liabilities under this Act or under third-party policies taken to have been issued by it, or
  - (f) there is any default by the insurer in the payment of principal or interest in excess of \$100,000 under any debenture, or series of debentures, issued by the insurer (except where the default occurs because the insurer genuinely disputes its liability to make the payment), or
  - (g) the insurer enters into, or resolves to enter into, any arrangement, composition or compromise with its creditors or any assignment for the benefit of its creditors, or proceedings are commenced to sanction any such arrangement, composition, compromise or assignment (except for the purposes of a reconstruction or amalgamation, on terms which have been approved by the Authority), or
  - (h) an application (other than a frivolous or vexatious application) or an order is made for the winding up or dissolution of the insurer or a resolution is passed for the winding up or dissolution of the insurer (except for the purposes of a reconstruction or amalgamation, on terms which have been approved by the Authority), or
  - (i) there is a change in the effective control of the insurer or the insurer becomes a subsidiary of a company of which it was not a subsidiary at the date of the issue of its licence, or
  - (j) the Authority is of the opinion that the insurer has failed to comply at any time with a condition imposed on its authority to carry on insurance business under the *Insurance Act 1973* of the Commonwealth, or
  - (k) a person claiming to be a creditor by assignment or otherwise of the insurer for a sum exceeding \$100,000 then due has served on the insurer, by leaving at its registered office, a demand requiring the insurer to pay the sum so claimed to be due, and the insurer has for 3 weeks thereafter failed to pay the sum or to secure or compound for it to the satisfaction of the person claiming to be a creditor, or
  - (l) there is returned unsatisfied, in whole or part, any execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the insurer and the amount unsatisfied exceeds \$100,000, or
  - (m) the insurer has agreed to the suspension.

- (4) If the contravention by a licensed insurer of its licence or this Act or the regulations or the Insurance Industry Deed is capable, in the opinion of the Authority, of being remedied within 21 days after the contravention occurred (or such longer period as the Authority, having regard to the nature of the contravention and the need to protect the interests of policy holders and other persons, may reasonably allow), the Authority must not suspend the licence during that period.
- (5) The Authority may, by notice served on the licensed insurer, terminate the suspension of the insurer's licence if the Authority is satisfied that the licensed insurer is able to comply with the requirements that would be imposed on the licensed insurer if it were then to be granted a licence for the first time.

**9.10 Imposition of civil penalty on or censure of licensed insurer** (cf s 166 MACA)

- (1) If the Authority is satisfied that a licensed insurer has contravened its licence or this Act or the regulations or the Insurance Industry Deed, the Authority may, instead of suspending the insurer's licence:
  - (a) impose a civil penalty on the insurer not exceeding \$110,000, or
  - (b) issue a letter of censure to the insurer.
- (2) Before imposing a civil penalty, the Authority is required to refer the matter to a special committee for advice and to consider any advice provided by the committee.
- (3) Any such special committee:
  - (a) is to comprise the Chairperson of the Board of the Authority, a nominee of the Insurance Council of Australia Limited and another member nominated jointly by the Authority and that Council, and
  - (b) is required to give the licensed insurer concerned an opportunity to make written submissions with respect to the alleged contravention, but is not required to conduct a hearing into the matter.

If that Council fails to make a nomination for the purposes of constituting any such special committee within the time required by the Authority, the Minister may make that nomination on its behalf.

- (4) A civil penalty that has been imposed under this section may be recovered by the Authority in a court of competent jurisdiction as a debt due to the Authority.
- (5) A civil penalty that is paid or recovered is payable into the Motor Accidents Operational Fund.

**9.11 Cancellation of licences** (cf s 167 MACA)

- (1) The Authority may, by notice served on the licensed insurer, cancel a licence granted

under this Division.

- (2) The Authority may cancel a licence for any reason it thinks fit, but must give the reasons for its decision.
- (3) Without affecting the generality of subsection (2), the Authority may cancel a licence for reasons that relate to the motor accidents scheme under this Act generally, whether or not the reasons relate to the efficiency and conduct of the licensed insurer.
- (4) The Authority must, as far as practicable, give a licensed insurer whose licence it proposes to cancel an opportunity to make representations on the matter.
- (5) A licence surrendered by a licensed insurer is not cancelled until the Authority approves of the surrender.
- (6) The Authority must not cancel a licence unless the Authority is satisfied that the licensed insurer has discharged all of its past, present and future liabilities:
  - (a) under any third-party policy in respect of which it is the insurer, and
  - (b) to the Motor Accidents Operational Fund under Division 10.4, and
  - (c) to any other licensed insurer,or that the insurer has provided security or entered into other arrangements satisfactory to the Authority in respect of those liabilities.
- (7) If the Authority is unable to cancel a licence because of any such liabilities, the Authority may, instead, impose a condition on the licence that prohibits the insurer from issuing any further third-party policies.

**9.12 Assignment of policies following cancellation of licence and in other cases** (cf s 168 MACA)

- (1) In this section:

***insurer*** means a licensed insurer, and includes a person whose licence has been cancelled or has otherwise ceased to be in force.

- (2) The Authority may assign the third-party policies of an insurer to another insurer if:
  - (a) the licence of the insurer is cancelled or otherwise ceases to be in force, or
  - (b) the Authority is satisfied that it is necessary to do so to ensure compliance with any conditions to which a licence is subject.
- (3) Policies may be assigned under this section by notice served by the Authority on the insurers concerned.
- (4) On the service of any such notice:

- (a) the policies of insurance to which it relates are cancelled as from the date and time specified in the notice, and
  - (b) the insurer to whom those policies are assigned is taken (as from the time and date of cancellation) to have issued third-party policies on the same terms as, and for the balance of the periods of, those policies.
- (5) On the cancellation of a third-party policy under subsection (4) (a), the insurer whose policy is cancelled must pay to the insurer to whom the policy is assigned:
- (a) the same proportion of the premium paid or to be paid in respect of the policy as the balance of the indemnity period of the policy bears to the whole indemnity period of the policy, and
  - (b) such additional amount as the Authority directs relating to the income from investment and the management fee with respect to the premium.
- (6) Any amount payable under subsection (5) to an insurer may be recovered by the insurer as a debt in a court of competent jurisdiction.
- (7) The effect of the cancellation of a third-party policy under this section is to terminate the indemnity period of the policy but, subject to this section, without affecting any right, obligation or liability acquired, accrued or incurred under the policy in respect of that period before its termination.

**9.13 Records and evidence relating to licences** (cf s 169 MACA)

- (1) The Authority must keep records in relation to all licences granted by the Authority under this Division, including particulars of:
- (a) the granting, refusal, conditions, suspension and cancellation of licences, the assignment of licences and notices served under section 9.9, and
  - (b) such other matters relating to licences as the Authority thinks fit.
- (2) A certificate purporting to be signed by the chief executive of the Authority and certifying that on any date or during any period specified in the certificate the particulars set forth in the certificate as to any of the matters referred to in subsection (1) did or did not appear on or from the records is (without the production of any record or document on which the certificate is founded) admissible in any proceedings and is evidence of the particulars certified in and by the certificate.

**9.14 Administrative reviews of licensing decisions by Civil and Administrative Tribunal** (cf s 170 MACA)

- (1) A person may apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of any of the following decisions of the Authority under this Division:

- (a) a decision to refuse the person's application for a licence,
  - (b) a decision to impose a condition on the person's licence,
  - (c) a decision to vary any condition imposed on the person's licence,
  - (d) a decision to refuse to grant approval to the person to assign a licence,
  - (e) a decision to suspend the person's licence,
  - (f) a decision to impose a fine on the person,
  - (g) a decision to cancel the person's licence.
- (2) Despite the provisions of Division 2 of Part 3 of Chapter 3 of the *Administrative Decisions Review Act 1997*, the Tribunal may not order that a decision referred to in subsection (1) be stayed pending the determination of an application for its administrative review.

#### **9.15 Publication of information about insurers**

- (1) The Authority may from time to time publish any of the following information about licensed insurers under this Act:
- (a) information about the level of compliance by licensed insurers with the requirements of and duties imposed under this Act and the regulations, the Motor Accident Guidelines under this Act, the conditions of licences under this Act or the Insurance Industry Deed,
  - (b) information about the pricing by licensed insurers of premiums for third-party policies,
  - (c) information about the profitability of the insurance operations of licensed insurers,
  - (d) information that compares the performance of licensed insurers in connection with claims under this Act (for example, by reference to timeliness, outcomes, customer service or complaints),
  - (e) any other information about licensed insurers that the Authority considers should be made public in the public interest.
- (2) The form and type of information published under this section is required to be approved by the Board of the Authority.
- (3) Information published under this section can identify individual insurers.
- (4) Confidential commercial information relating to an identified insurer is not to be published under this section if:
- (a) the insurer has advised the Authority that the publication of the information would

reveal a trade secret of the insurer that is not known by other insurers, and

(b) the Authority is satisfied that, having regard to its knowledge of the business practices of insurers, that the publication of the information would reveal such a trade secret.

(5) No liability (including liability in defamation) is incurred for publishing in good faith information under this section or a fair report or summary of such a publication.

## **Division 9.2 Supervision of licensed insurers**

### **9.16 Authority guidelines for market practice** (cf s 171 MACA)

The Motor Accident Guidelines may deal with the issue of third-party policies by licensed insurers.

### **9.17 Determination of market share of each insurer** (cf s 172 MACA)

- (1) A licensed insurer must, within such time after the end of each quarter and each year as is determined by the Authority, notify the Authority of the amount of insurance premiums received by it in relation to all third-party policies taken to have been issued by it during that quarter or year.
- (2) The Authority must, after notifications have been received from all licensed insurers in respect of a quarter or year, determine, in relation to each insurer, the proportion that the insurance premiums for third-party policies received by the insurer for the quarter or year bears to the aggregate amount of insurance premiums for third-party policies received by all licensed insurers for the quarter or year.
- (3) The Authority may round a proportion determined under this section to one-tenth of a percent.
- (4) After determining the proportion for each licensed insurer, the Authority must inform all licensed insurers of the proportions so determined.
- (5) In this section:

**quarter** means a quarter ending on the last day of September, December, March and June in each year.

**year** means a year commencing on 1 July.

### **9.18 Business plans of licensed insurers** (cf s 173 MACA)

- (1) A licensed insurer must prepare and deliver to the Authority a business plan for its third-party insurance business as soon as practicable after it is requested to do so by the Authority.
- (2) The licensed insurer must revise its business plan:

- (a) whenever it departs significantly from its business plan, and
  - (b) at such intervals of not less than 12 months as the Authority directs.
- (3) The licensed insurer must, as far as practicable, conduct its third-party insurance business in accordance with its current business plan, but if it departs significantly from that plan the insurer must notify the Authority accordingly.
- (4) A business plan must be prepared in accordance with the Motor Accident Guidelines.
- (5) A business plan must describe the manner in which the insurer's third-party insurance business is to be conducted (including claims handling, management, expenses and systems).
- (6) It is a condition of a licence granted under this Act that the licensed insurer must comply with this section.
- (7) In this section, a reference to the third-party insurance business of a licensed insurer is a reference to any business associated with third-party policies.

**9.19 Re-insurance arrangements of licensed insurers** (cf s 174 MACA)

It is a condition of a licence granted under this Act that the licensed insurer must notify the Authority of:

- (a) particulars of arrangements made or proposed to be made for re-insurance in respect of liabilities under third-party policies issued by the licensed insurer, and
- (b) the terms of any approval of the Australian Prudential Regulation Authority under the [Insurance Act 1973](#) of the Commonwealth in respect of any such re-insurance.

**9.20 Investment of funds of licensed insurer** (cf s 175 MACA)

- (1) It is a condition of a licence granted under this Act that the licensed insurer, if required to do so by the Authority, must provide the Authority with details of the way in which its third-party funds and other funds are invested.
- (2) The third-party funds of a licensed insurer are the funds of the insurer derived from the payment of insurance premiums for third-party policies and from their investment.

**9.21 Accounts, returns and other records of licensed insurer** (cf s 176 MACA)

- (1) A licensed insurer must keep such accounting and other records in relation to the business or financial position of the insurer:
  - (a) as may be prescribed by the regulations, and
  - (b) subject to the regulations, as may be directed by the Authority by notice served on the insurer.



- (2) The regulations may prescribe the manner in which financial transactions are to be accounted for in any such records.
- (3) A licensed insurer must lodge with the Authority returns in relation to the business or financial position of the insurer in such form, containing such particulars and accompanied by such documents:
  - (a) as may be prescribed by the regulations, and
  - (b) subject to the regulations, as may be directed by the Authority by notice served on the insurer.
- (4) Returns must be lodged:
  - (a) subject to paragraph (b), within 6 weeks after each 31 March, 30 June, 30 September and 31 December, or
  - (b) at such other times as the Authority, by notice served on the insurer, directs.
- (5) The regulations may require returns, and documents accompanying returns, to be certified by an auditor or by an actuary.
- (6) A licensed insurer who contravenes any requirement imposed on the insurer by or under this section is guilty of an offence.  
Maximum penalty: 500 penalty units.
- (7) The Authority may make publicly available a copy of any return, and any documents accompanying a return, under this section.
- (8) In this section:

**accounting records** include invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry, and also include such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up.

#### **9.22 Audit of accounting and other records and performance audit** (cf s 177 MACA)

- (1) The Authority may appoint an appropriately qualified person to audit or inspect, and report to the Authority on, the accounting and other records relating to the business or financial position of a licensed insurer, including accounting and other records relating to:
  - (a) the manner in which its third-party funds and other funds are invested, or
  - (b) compliance with this Act (including any guideline under this Act).
- (2) A person so appointed is (if directed to do so by the Authority) to report to the Authority on whether the licensed insurer is carrying out its third-party insurance

business effectively, economically and efficiently.

- (3) A person so appointed is, for the purpose of exercising any functions under this section, entitled to inspect the accounting and other records of the licensed insurer.
- (4) A licensed insurer must provide all reasonable assistance to enable the exercise of those functions.
- (5) A person must not wilfully obstruct or delay a person exercising a function under this section.
- (6) A person exercising functions under this section has qualified privilege in proceedings for defamation in respect of any statement that the person makes orally or in writing in the course of the exercise of those functions.
- (7) A licensed insurer or another person who contravenes any requirement imposed on the insurer or other person by or under this section is guilty of an offence.

Maximum penalty: 500 penalty units.

- (8) The Authority may from time to time carry out an audit to determine the profitability of a licensed insurer and for that purpose may exercise the functions of a person appointed under subsection (1). The Authority is to report on any such audit to the Board of the Authority and to the Minister, on a confidential basis.
- (9) In this section, **accounting records** has the same meaning as in section 9.21.

### **9.23 Information and documents as to business and finances to be supplied to Authority by insurers and former insurers** (cf s 178 MAA)

- (1) In this section:

**documents** includes returns and accounts furnished under the [Corporations Law](#), the [Corporations Act 2001](#) of the Commonwealth and the [Insurance Act 1973](#) of the Commonwealth.

**insurer** means a licensed insurer or a former licensed insurer.

- (2) The Authority may require an insurer:
  - (a) to disclose to the Authority specified information relating to the business and financial position of the insurer or of any corporation which is a related body corporate (within the meaning of the [Corporations Act 2001](#) of the Commonwealth), or
  - (b) to forward to the Authority, or make available for inspection, specified documents, or copies of or extracts from specified documents, kept by the insurer or by any corporation which is such a related body corporate.

(3) Subsection (2) extends to requiring:

- (a) financial information that is or may be relevant to the consideration by the Authority of insurance premiums filed by the insurer under this Act, and
- (b) information about the cost of claims handling incurred by the insurer and about the settlement of claims by the insurer, and
- (c) information about other matters concerning the insurer.

This subsection does not affect the generality of subsection (2), or any other provision of this Act regarding the obtaining of information by the Authority, and does not limit any other manner in which the Authority may obtain information.

(4) A requirement under this section:

- (a) must be made in writing and served on the insurer, and
- (b) must specify the manner in which and the time within which the requirement is to be complied with.

(5) The manner in which a requirement is to be complied with may include the supply to the Authority of a certificate by a registered tax agent, a registered company auditor (within the meaning of the [Corporations Act 2001](#) of the Commonwealth) or an actuary approved by the Authority as to the correctness of any specified information or specified documents (or copies of or extracts from specified documents).

(6) Unless the insurer satisfies the court that it is not within its power to comply with the requirement, an insurer that fails to comply with a requirement under this section is guilty of an offence.

Maximum penalty: 1,000 penalty units.

#### **9.24 Reports about insurers** (cf s 179 MACA)

(1) The Authority may from time to time forward to the Minister reports relating to:

- (a) the level of compliance by insurers with:
  - (i) any requirements of this Act, and
  - (ii) any conditions of licences under this Act (including any relevant Motor Accident Guidelines), and
- (b) complaints made about insurers, and any other matters relating to insurers, in connection with any matters to which this Act relates.

(2) A report may relate to insurers generally, or to any class of insurers, or to any particular insurers.

- (3) A report may identify particular insurers.
- (4) A report may include such observations and recommendations as the Authority thinks fit.
- (5) The Minister may make a report public and may lay a report or cause it to be laid before both or either of the Houses of Parliament.
- (6) Nothing in this section affects reports that may be made apart from this section.

**9.25 Power of Supreme Court to deal with insurers unable to meet liabilities** (cf s 180 MACA)

- (1) The Supreme Court may, on the application of the Authority, make such orders as the Supreme Court considers necessary or desirable for the purpose of protecting the interests of the holders of third-party policies taken to have been issued by a licensed insurer or a former licensed insurer.
- (2) The Supreme Court may make such an order if it is satisfied that the licensed insurer or former licensed insurer:
  - (a) is not able to meet the insurer's liabilities under the third-party policies or may not be able to do so, or
  - (b) has acted or may act in a manner that is prejudicial to the interests of the holders of the third-party policies.
- (3) Without limiting the generality of subsection (1), the Supreme Court may make the following orders:
  - (a) an order regulating the administration and payment of claims under the third-party policies,
  - (b) an order prohibiting or regulating the transfer or disposal of, or other dealing in, the assets of the licensed insurer or former licensed insurer,
  - (c) an order requiring the licensed insurer or former licensed insurer to discharge its liabilities under the third-party policies out of its assets and the assets of any related body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth),
  - (d) an order appointing a receiver or receiver and manager, having such powers as the Supreme Court orders, of the property or part of the property of the licensed insurer or former licensed insurer or of any such related body corporate.
- (4) If an application is made to the Supreme Court for an order under subsection (1), the Supreme Court may, if in its opinion it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is

expressed to have effect pending the determination of the application.

- (5) If an application is made to the Supreme Court for an order under subsection (1), the Supreme Court is not to require the Authority, as a condition of granting an interim order, to give any undertaking as to damages.
- (6) The Authority is to give the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission notice of its intention to apply for an order under this section.
- (7) The Australian Prudential Regulation Authority and the Australian Securities and Investments Commission each has a right to appear and be heard in proceedings for an order under this section.
- (8) If the Supreme Court has made an order under this section, the Supreme Court may, on application by the Authority or by any person affected by the order, make a further order rescinding or varying the first mentioned order.
- (9) A person who contravenes, whether by act or omission, an order made by the Supreme Court under this section that is applicable to the person is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 6 months, or both.

- (10) The Supreme Court is not to exercise its powers under this section in respect of a corporation which is in the course of being wound up.
- (11) The powers of the Supreme Court under this section are in addition to any other powers of the Supreme Court.

#### **9.26 Notification to Authority of certain defaults in relation to insurers** (cf s 181 MACA)

- (1) A licensed insurer and a former licensed insurer must notify the Authority in writing of the occurrence of any of the events or things referred to in section 9.9 (3) (paragraphs (a), (e), (j) and (m) excepted) within 21 days after the event or thing happens (whether within or outside the State).
- (2) A licensed insurer must notify the Authority in writing of:
  - (a) a decrease or proposed decrease in the issued capital of the insurer within 21 days after the decrease or proposal to effect the decrease, and
  - (b) the receipt by the insurer of any bidder's statement or target's statement within the meaning of the *Corporations Act 2001* of the Commonwealth.

Maximum penalty: 100 penalty units.

### **9.27 Proceedings for failure to comply with licence** (cf s 183 MACA)

No proceedings may be taken against a licensed insurer for failure to comply with the terms of the licensed insurer's licence or this Act or the regulations, except by the Authority.

## **Division 9.3 Self-insurance for government bodies**

### **9.28 Definitions**

In this Division:

**government body** means any of the following:

- (a) a Public Service agency,
- (b) a State owned corporation,
- (c) a public authority or instrumentality of the State, the Commonwealth, another State or a Territory,
- (d) a local council,
- (e) a controlled entity of one or more public bodies.

**self-insurer** means a government body that is approved as a self-insurer under this Division.

### **9.29 Government bodies may be approved as self-insurers**

- (1) The Authority may, with the approval of the Minister, grant approval for a government body to be a self-insurer for the purposes of this Act.
- (2) The Authority may withdraw a government body's approval as a self-insurer at any time by giving not less than 3 months notice in writing to the government body.

### **9.30 Self-insurers deemed to be licensed insurers**

A self-insurer is deemed to be a licensed insurer for the purpose of:

- (a) issuing third-party policies in respect of motor vehicles of which the self-insurer is the owner, or
- (b) issuing third-party policies in respect of motor vehicles of which another government body is the owner.

### **9.31 Application of relevant Acts to self-insurers and self-insurer policies**

- (1) Division 2.3 (Insurance premiums) does not apply in respect of a third-party policy (**self-insurer policies**) issued by a self-insurer.

- (2) The regulations may make provision for or with respect to the application of relevant provisions of this Act to self-insurers as licensed insurers or to self-insurer policies.
- (3) In particular, the regulations can:
  - (a) exempt self-insurers or self-insurer policies from the operation of relevant provisions of this Act, or
  - (b) modify or adapt the operation of relevant provisions of this Act in their application to self-insurers as licensed insurers or to self-insurer policies.
- (4) In this section:

**relevant provisions** of this Act means the provisions of Divisions 2.2, 9.1, 9.2 and 10.4.

### 9.32 SICorp as self-insurer

If the NSW Self Insurance Corporation is approved as a self-insurer under this Division, the Corporation has and may exercise the functions of a self-insurer under this Division.

## Division 9.4 Insolvent insurers

### 9.33 Interpretation (cf s 184 MACA)

- (1) In this Division:

**insolvent insurer** means an insurer to whom:

- (a) an order of the Treasurer in force under section 16A of the *Insurance Protection Tax Act 2001* relates, or
- (b) an order of the Minister in force under section 9.34 relates.

**insurer** means a licensed insurer or a former licensed insurer, but does not include an insolvent insurer.

**liquidator** includes a provisional liquidator.

**third-party policy issued by an insolvent insurer** means:

- (a) a third-party policy issued by an insolvent insurer, whether before or after the insurer became an insolvent insurer, or
- (b) a third-party policy, issued by a person other than an insolvent insurer, in respect of which an insolvent insurer has (whether before or after becoming an insolvent insurer) entered into a contract or an arrangement whereby the insolvent insurer is (or would but for its dissolution be) liable to indemnify the person against liability of the person under the policy.

- (2) In this Division, a reference to a liquidator or to a provisional liquidator includes a reference to a liquidator or a provisional liquidator appointed outside New South Wales.
- (3) So far as the legislative power of Parliament permits, the liquidator of an insolvent insurer has outside New South Wales the functions conferred or imposed on the liquidator by this Division, in addition to having those functions within New South Wales.
- (4) In this Division, a reference to a third-party policy, a licensed insurer and a former licensed insurer includes a reference to a third-party policy, a licensed insurer and a former licensed insurer within the meaning of the *Motor Accidents Act 1988* (as in force immediately before the commencement of the *Motor Accidents Compensation Act 1999*), respectively or within the meaning of the *Motor Accidents Compensation Act 1999* (as in force immediately before the commencement of this Act), respectively.
- (5) This Division has effect despite any provisions of the *Corporations (New South Wales) Act 1990* or of the applicable provisions (as defined in that Act) of the State.

#### **9.34 Insolvent insurers** (cf s 185 MACA)

- (1) If the Minister is satisfied that a liquidator or provisional liquidator has been appointed in respect of an insurer, or that an insurer has been dissolved, the Minister may with the approval of the Treasurer, by order published in the Gazette, declare that the insurer is an insolvent insurer for the purposes of this Division.
- (2) The Minister is to consult with the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission before making an order under this section.

#### **Note—**

**Declared insolvent insurers** under the *Insurance Protection Tax Act 2001* are also insolvent insurers for the purposes of this Division. See the definition of **insolvent insurer** in section 9.33 of this Act.

#### **9.35 Liquidator to notify Nominal Defendant of claims** (cf s 186 MACA)

The liquidator of an insolvent insurer must, on receiving any claim relating to any third-party policy issued by the insolvent insurer, forward the claim to the Nominal Defendant.

Maximum penalty: 20 penalty units.

#### **9.36 Delivery of documents to Nominal Defendant** (cf s 187 MACA)

The liquidator of an insolvent insurer must, whenever requested to do so by the Nominal Defendant:

- (a) deliver to the Nominal Defendant all documents relating to third-party policies issued by the insolvent insurer and all claims or judgments made in respect of any such



policies in the liquidator's possession, and

- (b) supply to the Nominal Defendant all information in the liquidator's possession relating to any such policies or any such claims or judgments.

Maximum penalty: 100 penalty units.

**9.37 Appointment of Nominal Defendant as agent and attorney of insured** (cf s 188 MACA)

- (1) The Nominal Defendant is by this section appointed as the agent and attorney of the person insured under a third-party policy issued by an insolvent insurer.
- (2) As agent and attorney of such a person, the Nominal Defendant may exercise the rights and discharge the obligations of the person:
  - (a) for the purpose of dealing with and finalising any claim against which the person is indemnified under the third-party policy, and
  - (b) for the purpose of satisfying any such claim or any judgment against which the person is indemnified under the third-party policy, and
  - (c) for any other purpose prescribed by the regulations.
- (3) As agent and attorney of such a person, the Nominal Defendant may exercise the rights of the person in connection with the third-party policy:
  - (a) for the purpose of proving in the winding-up of the insolvent insurer and receiving any dividends or other money payable to the person in the winding-up, and
  - (b) for the purpose of recovering any money which the person is entitled under the third-party policy to recover from the person who issued the policy, being a policy referred to in paragraph (b) of the definition of **third-party policy issued by an insolvent insurer** in section 9.33, and
  - (c) for any other purpose prescribed by the regulations.
- (4) The Nominal Defendant may exercise rights and discharge obligations as agent in the name of the person concerned, or in its own name.
- (5) All rights vested in an insurer and all obligations imposed on an insurer, being rights or obligations:
  - (a) arising from or relating to a third-party policy issued by an insolvent insurer to a person, and
  - (b) which may or must be exercised or discharged for the purpose of:
    - (i) dealing with and finalising any claim, or
    - (ii) satisfying any claim or judgment, against which the person is indemnified

under the policy,

are vested in or imposed on the person.

- (6) Subsection (5) is not to be construed so as to vest in or impose on a person, or to affect in any other way:
  - (a) a right of an insurer to be indemnified by a re-insurer or an obligation of an insurer to indemnify a person, or
  - (b) any other prescribed right or obligation.
- (7) If the Nominal Defendant is, under this section, empowered to exercise any rights, or to discharge any obligations, of a person as agent and attorney, the person is not entitled, without the consent of the Nominal Defendant, to exercise those rights or discharge those obligations.
- (8) The appointment effected by this section may be revoked only by an Act.
- (9) If the Nominal Defendant is the agent and attorney of a person insured under a third-party policy issued by an insolvent insurer, the Nominal Defendant is also the agent and attorney for the purposes of this Division of any person who is authorised by this Act to take proceedings for damages against the insolvent insurer under the third-party policy.

**9.38 Payments to insured or liquidator** (cf s 189 MACA)

- (1) Where a person insured under a third-party policy issued by an insolvent insurer has satisfied (whether before or after the insurer became an insolvent insurer for the purposes of this Division) any claim or judgment in respect of which the person has not been indemnified under that policy, the Nominal Defendant may pay from the Nominal Defendant's Fund to the person an amount equal to the whole or any part of the amount paid by the person in satisfaction of the claim or judgment.
- (2) Where the liquidator of an insolvent insurer has satisfied (whether before or after the insurer became an insolvent insurer for the purposes of this Division) any claim or judgment in respect of which a person is entitled to be indemnified under a third-party policy issued by the insolvent insurer, the Nominal Defendant may pay from the Nominal Defendant's Fund to the liquidator an amount equal to the whole or any part of the amount paid by the liquidator in satisfaction of the claim or judgment.
- (3) Where:
  - (a) a payment is made under subsection (1) to a person in respect of a claim or judgment, the Nominal Defendant is taken, to the extent of the payment, to have satisfied the claim or judgment as agent and attorney of the person, or
  - (b) a payment is made under subsection (2) to the liquidator of an insolvent insurer in

respect of a claim by or on behalf of any person or a judgment for the benefit of any person, the Nominal Defendant is taken, to the extent of the payment, to have satisfied the claim or judgment as agent and attorney of the person in respect of whom the payment is made.

- (4) The powers conferred by subsections (1) and (2) are exercisable at the absolute discretion of the Nominal Defendant and neither of those subsections operates nor the exercise of any of those powers operates so as to confer, directly or indirectly, any right on any person to whom a payment is or may be made under those subsections or on any other person.

**9.39 Application of Nominal Defendant's Fund** (cf s 190 MACA)

- (1) Out of the Nominal Defendant's Fund, the Nominal Defendant:
- (a) is to pay the amount of any claim or judgment arising from or relating to any third-party policy issued by an insolvent insurer, being a claim or judgment that it proposes to satisfy as agent and attorney of a person, and any other amounts required by this Division to be paid from that Fund, and
  - (b) is entitled to be indemnified against all payments made by it and all costs and expenses that it may incur in or in connection with the exercise of its functions under this Division.
- (2) Where a payment is made by the Nominal Defendant as agent and attorney of a person, being a payment authorised by this Division, the Nominal Defendant is not entitled to recover the amount of that payment from the person.

**9.40 Recovery of amounts under contracts or arrangements for re-insurance** (cf s 191 MACA)

To the extent that any amounts are paid out of the Nominal Defendant's Fund in respect of a claim or judgment pursuant to section 9.39 the Nominal Defendant is, where an insolvent insurer (if it had provided indemnity to that extent under a third-party policy) would have been entitled to recover any sum under a contract or arrangement for re-insurance, entitled to the benefit of and may exercise the rights and powers of the insolvent insurer under that contract or arrangement so as to enable the Nominal Defendant to recover from the re-insurer and pay into the Nominal Defendant's Fund the amount due under that contract or arrangement.

**9.41 Payments of compensation when insolvent insurer dissolved** (cf s 192 MACA)

- (1) When an insolvent insurer has been dissolved, the payments under judgments relating to third-party policies issued by the insolvent insurer which would, but for the dissolution taking place, be payable by the insolvent insurer are to continue and are to be paid out of the Nominal Defendant's Fund by the Nominal Defendant.

- (2) When an insolvent insurer has been dissolved, a person who would have had, but for the dissolution of the insolvent insurer, an entitlement to payment of any amount arising from or relating to any third-party policy issued by the insolvent insurer (being a policy in respect of which the insolvent insurer is the insurer) is entitled to payment of that amount out of the Nominal Defendant's Fund.
- (3) A person referred to in subsection (2) may make a claim against the Nominal Defendant in respect of an entitlement to payment of an amount under that subsection.
- (4) The Nominal Defendant is entitled to deal with and finalise a claim made under subsection (3) in relation to a third-party policy issued by an insolvent insurer to the same extent as it would have been entitled to do so if the insolvent insurer had not been dissolved.

**9.42 Borrowings for the purposes of the Nominal Defendant's Fund** (cf s 193 MACA)

The Nominal Defendant may from time to time borrow such amounts as the Nominal Defendant considers are necessary to satisfy claims and judgments arising from or pertaining to third-party policies issued by an insolvent insurer which would otherwise be unable to be met from the money in the Nominal Defendant's Fund.

**9.43 Inspection of documents by person authorised by Minister** (cf s 194 MACA)

The liquidator of an insolvent insurer must, whenever requested to do so by a person authorised by the Minister, make any documents relating to third-party policies issued by the insolvent insurer and any claims or judgments made in respect of any such policies in the liquidator's possession available for inspection by that person.

Maximum penalty: 100 penalty units.

**9.44 Nominal Defendant may take certain legal proceedings** (cf s 195 MACA)

- (1) If:
  - (a) the liquidator of an insolvent insurer applies to any court for directions in relation to any particular matter arising under the winding-up, or
  - (b) the exercise by the liquidator of an insolvent insurer of any of the liquidator's functions, whether under this Division or not, is challenged, reviewed or called into question in proceedings before any court, or
  - (c) any other matter that concerns or may affect the operation of this Division is raised in proceedings before any court,

the Nominal Defendant may intervene at any stage of the proceedings before that court, by an Australian legal practitioner or an agent, and the Nominal Defendant thereupon becomes a party to, and has all the rights of a party to, those proceedings

before that court, including the right to appeal against any order, judgment or direction of the court.

- (2) In any case in which the Attorney General might take proceedings on the relation or on behalf of or for the benefit of a person who is (or who would but for the dissolution of the insolvent insurer be) entitled, under a third-party policy issued by an insolvent insurer, to be indemnified against a claim or judgment arising from or relating to the policy, being proceedings for or with respect to enforcing or securing the observance of any provision made by or under this Division, any Act or any rule of law, the Nominal Defendant is taken to represent sufficiently the interests of the public and may take the proceedings in its own name.
- (3) The Nominal Defendant is entitled to be paid, out of the Nominal Defendant's Fund, all the costs and expenses incurred by the Nominal Defendant in exercising the powers conferred by this section.

#### **9.45 Insurers or other persons may act for Nominal Defendant** (cf s 196 MACA)

The Nominal Defendant may appoint a licensed insurer or other person as its agent for the purposes of exercising its functions under this Division.

#### **9.46 Regulations** (cf s 197 MACA)

The regulations may make provision for or with respect to the application, with such modifications as may be provided by the regulations, of any of the provisions of this Act in relation to the dealing with or finalising of claims, or the satisfying of judgments, by the Nominal Defendant as agent and attorney of a person under this Division.

## **Part 10 Administration**

### **Division 10.1 Functions of Authority**

#### **10.1 Functions of the Authority** (cf s 206 MACA)

- (1) In addition to its other functions under this or any other Act, the Authority has the following functions:
  - (a) to monitor the operation of the motor accidents scheme under this Act, and in particular to conduct (or arrange for other persons to conduct) research into and to collect statistics or other information on the level of statutory benefits and damages paid by insurers, the level of damages assessed by claims assessors and awarded by the courts, the handling of claims by insurers and other matters relating to that scheme,
  - (b) to advise the Minister as to the administration, efficiency and effectiveness of that scheme,
  - (c) to publicise and disseminate information concerning that scheme,

- (d) to investigate and respond to complaints about premiums for third-party policies, the market practices of licensed insurers and claims handling practices of insurers,
  - (e) to monitor compliance by insurers with this Act and relevant Motor Accident Guidelines,
  - (f) to investigate claims to detect and prosecute fraudulent claims,
  - (g) to issue and keep under review the Motor Accident Guidelines under Division 10.2,
  - (h) to establish the Dispute Resolution Service and appoint merit reviewers, medical assessors or claims assessors in accordance with Part 7,
  - (i) to provide an advisory service to assist claimants in connection with claims for statutory benefits and claims for damages, and with dispute resolution under Part 7,
  - (j) to provide funding for:
    - (i) measures for preventing or minimising injuries from motor accidents, and
    - (ii) safety education.
- (2) The Authority has the following functions in relation to the provision of acute care, treatment, rehabilitation, long term support and other services for persons injured in motor accidents:
- (a) to monitor those services,
  - (b) to provide support and funding for programs that will assist effective injury management,
  - (c) to provide support and funding for research and education in connection with those services that will assist effective injury management,
  - (d) to develop and support education programs in connection with effective injury management.

## **Division 10.2 Motor Accident Guidelines**

### **10.2 Motor Accident Guidelines of Authority** (cf s 68 MACA)

- (1) The Authority may issue Motor Accident Guidelines with respect to any matter that is authorised or required by or under this Act to be provided for by Motor Accident Guidelines.
- (2) The Authority may (wholly or partly) amend, revoke or replace Motor Accident Guidelines.

- (3) Motor Accident Guidelines may adopt the provisions of other publications, whether with or without modification or addition and whether in force at a particular time or from time to time.

**10.3 Special provision relating to insurance premiums matters in Guidelines** (cf s 24 (4) MACA)

- (1) Provisions of Motor Accident Guidelines relating to insurance premiums matters may be included, changed or omitted only with the approval of the Board of the Authority.
- (2) The Board of the Authority may appoint a committee of up to 4 members with expertise in insurance, finance, actuarial science, economics or price regulation to review proposed provisions of Motor Accident Guidelines relating to insurance premiums matters and to advise on their reasonableness and adequacy.
- (3) For the purposes of this section, **insurance premiums matters** are the matters relating to the determination of insurance premiums for third-party policies.

**10.4 Special provision relating to medical matters in Guidelines** (cf s 44 (5) and (6) MACA)

- (1) The provisions of the Motor Accident Guidelines relating to medical matters:
  - (a) are not to be construed as requiring medical treatment to be carried out in accordance with the Guidelines, and
  - (b) are to be consistent with a high standard of medical care, dental care, rehabilitation, aftercare and continuing care as exists in the community at that time.
- (2) The Authority may, in developing provisions of Motor Accident Guidelines relating to medical matters, consult relevant medical colleges, health professional associations and other bodies.
- (3) For the purposes of this section, **medical matters** are matters relating to the appropriate treatment of injured persons, to the appropriate procedures with respect to the provision of rehabilitation services or attendant care services for injured persons and to the assessment of the degree of permanent impairment of injured persons.

**10.5 Consultation with insurance and legal stakeholders on Guidelines** (cf ss 68 and 69 MACA)

The Authority may consult the following about any proposed Motor Accident Guidelines:

- (a) Insurance Council of Australia Limited,
- (b) licensed insurers,
- (c) Council of the Bar Association,

- (d) Council of the Law Society,
- (e) the Lifetime Care and Support Authority of New South Wales.

**10.6 Publication and Parliamentary scrutiny of Guidelines** (cf s 69 MACA)

- (1) Motor Accident Guidelines are to be published on the NSW legislation website and take effect on the day of that publication or, if a later day is specified in the Guidelines for that purpose, on the day so specified.
- (2) Sections 40 (Notice of statutory rules to be tabled) and 41 (Disallowance of statutory rules) of the *Interpretation Act 1987* apply to Motor Accident Guidelines in the same way as those sections apply to statutory rules.

**10.7 Compliance with Guidelines condition of insurer's licence** (cf s 68 MACA)

It is a condition of an insurer's licence under this Act that the insurer comply with relevant provisions of Motor Accident Guidelines.

**10.8 Regulations relating to Guidelines**

- (1) The regulations may make provision with respect to the issue of Motor Accident Guidelines.
- (2) The regulations may make provision with respect to any matter for which Motor Accident Guidelines may be issued. In that case, the regulations prevail to the extent of any inconsistency with the Motor Accident Guidelines and a reference in this Act to those Guidelines includes a reference to those regulations.

**Division 10.3 Bulk billing arrangements**

**10.9 Bulk billing arrangements for hospital, ambulance and other expenses** (cf s 54 MACA)

- (1) Bulk billing arrangements may be entered into by the Authority with respect to:
  - (a) the payment of expenses incurred in connection with the treatment and care of injured persons at hospitals, or
  - (b) the payment of expenses incurred in conveying injured persons by ambulance, or
  - (c) the payment of other treatment and care expenses incurred by injured persons.
- (2) A bulk billing arrangement is an arrangement made with the Minister for Health, service providers or others acting on their behalf for the payment by the Authority of any such expenses of injured persons at the rate provided by the arrangement.
- (3) A bulk billing arrangement may provide for the payments due by the Authority under the arrangement to be paid by means of lump sum payments to cover the payments due in respect of expenses incurred during a specified period.



- (4) For the purposes of this section, the treatment and care or conveyance of injured persons includes the treatment and care or conveyance of persons classified as injured persons in accordance with a bulk billing arrangement.

**10.10 Application of Division to treatment and care needs covered by Lifetime Care and Support Scheme** (cf s 43A MACA)

- (1) This Division does not apply in respect of any treatment and care needs of a person who is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006*, or any excluded treatment and care needs, that relate to the motor accident injury in respect of which the person is a participant in the Scheme and that arise during the period in which the person is a participant in the Scheme.
- (2) This section applies:
- (a) whether or not the treatment and care needs are assessed treatment and care needs under the *Motor Accidents (Lifetime Care and Support) Act 2006*, and
  - (b) whether or not the Lifetime Care and Support Authority is required to make a payment in respect of the treatment and care needs concerned, and
  - (c) whether or not the treatment, care, support or service (provided in connection with treatment and care needs) is provided on a gratuitous basis.
- (3) In this section, **treatment and care needs** and **excluded treatment and care needs** have the same meanings as they have in the *Motor Accidents (Lifetime Care and Support) Act 2006*.

## Division 10.4 Financial provisions

**10.11 Definitions** (cf s 211 MACA)

In this Division:

**financial year** means a year commencing on 1 July.

**LCSA General Fund** means Lifetime Care and Support Authority Fund established under the *Motor Accidents (Lifetime Care and Support) Act 2006*.

**MAITC Benefits Fund** means the Motor Accident Injuries Treatment and Care Benefits Fund established under this Division.

**relevant period** means a financial year or such other period as the Authority determines from time to time to be a relevant period for the purposes of Fund levy contributions under this Division. Relevant periods can be determined so as to overlap but there must be no gap between successive relevant periods and each relevant period must not be longer than 12 months.

**SIRA Fund** means the Motor Accidents Operational Fund established under this Division.

**10.12 Motor Accidents Operational Fund (the SIRA Fund)** (cf s 212 MAA)

- (1) There is established a Motor Accidents Operational Fund, belonging to and vested in the Authority.
- (2) The following is to be paid into the SIRA Fund:
  - (a) the appropriate proportion of the money contributed by third-party policy holders under this Division in respect of a relevant period (being the proportion that is the required contribution to the SIRA Fund determined under section 10.13 (d) in respect of that relevant period),
  - (b) the interest from time to time accruing from the investment of the SIRA Fund,
  - (c) money required to be paid into the SIRA Fund by or under this or any other Act,
  - (d) all other money received by the Authority in connection with the motor accidents scheme under this Act, and not otherwise appropriated.
- (3) The following is to be paid from the SIRA Fund:
  - (a) the remuneration, allowances, office accommodation and other associated costs of the Board of the Authority and the members of staff of the Authority to the extent that those costs relate to the administration of this Act,
  - (b) expenditure incurred by the Authority in the provision of services by the Dispute Resolution Service,
  - (c) expenditure incurred by the Authority in the provision of services by the advisory service established under section 7.49,
  - (d) expenditure incurred by the Authority in the provision of vocational and return to work support under section 3.41,
  - (e) expenditure incurred by the Authority pursuant to any bulk billing arrangement under Division 10.3,
  - (f) expenditure incurred by the Authority pursuant to any arrangements under section 10.21 (Payment of workers compensation indemnity on behalf of insurers),
  - (g) expenditure incurred by the Authority to fund the detection of fraud in connection with the motor accidents scheme under this Act and the prosecution of persons who commit offences against this Act or the regulations,
  - (h) grants to the LCSA General Fund or the MAITC Benefits Fund pursuant to a direction under subsection (4),
  - (i) all payments required to meet expenditure incurred in relation to the functions of the Authority in connection with the motor accidents scheme under this Act, where

money is not otherwise provided for that purpose,

(j) all other money required by or under this or any other Act to be paid from the SIRA Fund.

(4) The Authority may direct the payment from the SIRA Fund of any surplus that may arise in the SIRA Fund as a grant to the LCSA General Fund or the MAITC Benefits Fund.

(5) The Authority may invest money in the SIRA Fund which is not immediately required for the purposes of the SIRA Fund:

(a) in such manner as may be authorised by the *Public Authorities (Financial Arrangements) Act 1987*, or

(b) if that Act does not confer power on the Authority to invest money in the SIRA Fund—in any other manner approved by the Minister with the concurrence of the Treasurer.

#### **10.13 Assessment by Authority of amount to be contributed to SIRA Fund** (cf s 213 MACA)

The Authority is required, as soon as practicable in respect of each relevant period:

(a) to make an estimate of the total of the amounts to be paid from the SIRA Fund during that relevant period, and

(b) to determine what amounts, if any, are to be set aside as provisions to meet expenditure from the SIRA Fund in future periods, and specify for what purpose each such amount is being set aside, and

(c) to make an estimate of the total amounts (including the amounts already received) to be received into the SIRA Fund during that relevant period otherwise than by way of contributions in respect of that relevant period under this Division from persons to whom third-party policies are issued, and

(d) to determine the total amount to be contributed to the SIRA Fund under this Division in respect of that relevant period by persons to whom third-party policies are issued after having regard to the amounts likely to be standing to the credit of the SIRA Fund at the beginning of the period, including any amounts set aside in earlier periods as provisions to meet expenditure in later periods, and the amounts estimated under paragraph (c) to be received into the SIRA Fund during the relevant period, and

(e) to specify in writing the estimates, provisions and amounts to be contributed to the SIRA Fund by persons to whom third-party policies are issued.

#### **10.14 Motor Accident Injuries Treatment and Care Benefits Fund (the MAITC Benefits**

**Fund)**

- (1) There is established a Motor Accident Injuries Treatment and Care Benefits Fund, belonging to and vested in the Lifetime Care and Support Authority.
- (2) The following is to be paid into the MAITC Benefits Fund:
  - (a) the appropriate proportion of the money contributed by third-party policy holders under this Division in respect of a relevant period (being the proportion that is the required contribution to the MAITC Benefits Fund determined under section 10.15 (d) in respect of that relevant period),
  - (b) money paid to the Lifetime Care and Support Authority by an insurer who enters into an agreement with that Authority under section 3.45,
  - (c) the interest from time to time accruing from the investment of the MAITC Benefits Fund,
  - (d) money required to be paid into the MAITC Benefits Fund by or under this or any other Act.
- (3) The following is to be paid from the MAITC Benefits Fund:
  - (a) the payments of statutory benefits for treatment and care that the Lifetime Care and Support Authority is required to make under Division 3.4 as the relevant insurer,
  - (b) the costs of the Lifetime Care and Support Authority to the extent that those costs relate to the administration of this Act in relation to statutory benefits for treatment and care,
  - (c) all other money required by or under this or any other Act to be paid from the MAITC Benefits Fund.
- (4) The Lifetime Care and Support Authority may invest money in the MAITC Benefits Fund which is not immediately required for the purposes of the MAITC Benefits Fund:
  - (a) in such manner as may be authorised by the *Public Authorities (Financial Arrangements) Act 1987*, or
  - (b) if that Act does not confer power on the Authority to invest money in the MAITC Benefits Fund—in any other manner approved by the Minister with the concurrence of the Treasurer.

**10.15 Assessment by Lifetime Care and Support Authority of amount to be contributed to MAITC Benefits Fund**

The Lifetime Care and Support Authority is required, as soon as practicable in respect of each relevant period:

- (a) to make an estimate of the total of the amounts to be paid from the MAITC Benefits Fund during that relevant period, and
- (b) to determine what amounts, if any, are to be set aside as provisions to meet expenditure from the MAITC Benefits Fund in future periods, and specify for what purpose each such amount is being set aside, and
- (c) to make an estimate of the total amounts (including the amounts already received) to be received into the MAITC Benefits Fund during that relevant period otherwise than by way of contributions in respect of that relevant period under this Division from persons to whom third-party policies are issued, and
- (d) to determine the total amount to be contributed to the MAITC Benefits Fund under this Division in respect of that relevant period by persons to whom third-party policies are issued after having regard to the amounts likely to be standing to the credit of the MAITC Benefits Fund at the beginning of the period, including any amounts set aside in earlier periods as provisions to meet expenditure in later periods, and the amounts estimated under paragraph (c) to be received into the MAITC Benefits Fund during the relevant period, and
- (e) to specify in writing the estimates, provisions and amounts to be contributed to the MAITC Benefits Fund by persons to whom third-party policies are issued.

**10.16 Fund levy contribution by persons to whom third-party policies issued** (cf s 214 MACA)

- (1) The total of the following amounts is to be contributed by the payment to the Authority of a levy (the **Fund levy**) by persons to whom third-party policies are issued during a relevant period:
  - (a) the amount of the required fund contribution to the SIRA Fund determined under section 10.13 (d) in respect of the relevant period,
  - (b) the amount of the required fund contribution to the MAITC Benefits Fund determined under section 10.15 (d) in respect of the relevant period,
  - (c) the amount of the required fund contribution to the LCSA General Fund determined under section 49 of the *Motor Accidents (Lifetime Care and Support) Act 2006* in respect of the relevant period.
- (2) The Fund levy is to be an amount determined by the Authority. The Fund levy can be determined as a fixed amount or as a percentage of the premium payable for a third-party policy, or as a combination of a fixed amount and percentage of premium.
- (3) A Fund levy can be determined to differ according to any criteria that the Authority considers appropriate.
- (4) The Authority is to notify each licensed insurer of the Fund levy determined for a

relevant period.

**10.17 Payment and collection of Fund levy** (cf s 214A MACA)

- (1) The Fund levy for a relevant period is payable to the Authority by each person to whom a third-party policy is issued during the relevant period and is to be collected, in conjunction with the payment of the premium for the policy, on behalf of the Authority by the insurer who issues the policy.
- (2) A licensed insurer is not to issue a third-party policy to a person unless the Fund levy payable by the person has been paid. Section 2.8 (Cancellation of third-party policies) applies in respect of the Fund levy payable in connection with the issue of a third-party policy in the same way as it applies in respect of the premium payable for the policy.
- (3) Fund levies collected by a licensed insurer are to be paid to the Authority at the times and in accordance with such arrangements as the Authority may notify to the insurer from time to time.
- (4) If a payment required to be made by a licensed insurer has not been paid as and when required under those arrangements:
  - (a) the insurer is guilty of an offence and liable to a penalty not exceeding 100 penalty units, and
  - (b) the amount of the required payment together with interest calculated at the rate of 15% per annum compounded quarterly (or, where another rate is prescribed by the regulations, that other rate) may be recovered from the insurer as a debt due to the Authority.
- (5) A certificate purporting to be signed by the chief executive of the Authority as to the amount of a payment required to be made under this section by a licensed insurer specified in the certificate and the due date for payment is admissible in proceedings under this section and is evidence of the matters specified in the certificate.
- (6) The obligation of a licensed insurer to make a payment under this section in respect of any period during which the person was a licensed insurer does not cease merely because the person subsequently ceases to be a licensed insurer.
- (7) For the purposes of the application of this section to a self-insurer under Division 9.3, the premium payable for a third-party policy deemed to have been issued by a self-insurer is the amount determined for that purpose in accordance with the relevant Motor Accident Guidelines.

**10.18 Refund of Fund levy** (cf s 214AA MACA)

- (1) The Fund levy is to be refunded, on a pro rata basis, to any person to whom a third-party policy was issued if the policy is cancelled on the cancellation of the registration

of the motor vehicle to which it relates (except where the registration is cancelled under Division 3 of Part 4 of the *Fines Act 1996*).

- (2) The Authority may refund a part of a Fund levy paid by a person to whom a third-party policy is issued during or after the period for which the policy is issued by reference to digital information recorded about the safe driving of the motor vehicle during that period or to other factors.
- (3) The Motor Accident Guidelines may make provision with respect to the administrative arrangements of licensed insurers for payment of refunds under this section.

**10.19 Records relating to collection of Fund levies** (cf s 214B MACA)

- (1) A licensed insurer must keep such accounting and other records in relation to Fund levies collected by the insurer under this Division:
  - (a) as may be prescribed by the regulations, and
  - (b) subject to the regulations, as may be directed by the Authority by notice served on the insurer.
- (2) The regulations may prescribe the manner in which collection of Fund levies is to be accounted for in any such records.
- (3) A licensed insurer must lodge with the Authority returns in relation to Fund levies collected by the insurer under this Division in such form, containing such particulars and accompanied by such documents:
  - (a) as may be prescribed by the regulations, and
  - (b) subject to the regulations, as may be directed by the Authority by notice served on the insurer.
- (4) Returns must be lodged at such other times as may be prescribed by the regulations or, subject to the regulations, at such times as the Authority, by notice served on the insurer, directs.
- (5) The Authority may require returns, and documents accompanying returns, to be certified by an auditor or by an actuary.
- (6) A licensed insurer who contravenes any requirement imposed on the insurer by or under this section is guilty of an offence.

Maximum penalty: 100 penalty units.

- (7) The Authority may make publicly available a copy of any return, and any documents accompanying a return, under this section.

**10.20 Audit of Fund levy records** (cf s 214C MACA)

- (1) The Authority may appoint an appropriately qualified person to audit or inspect, and report to the Authority on, the accounting and other records of a licensed insurer relating to Fund levies collected by the insurer under this Division.
- (2) A person so appointed is, for the purpose of exercising any functions under this section, entitled to inspect relevant accounting and other records of the licensed insurer.
- (3) A licensed insurer must provide all reasonable assistance to enable the exercise of those functions.
- (4) A person must not wilfully obstruct or delay a person exercising a function under this section.
- (5) A person exercising functions under this section has qualified privilege in proceedings for defamation in respect of any statement that the person makes orally or in writing in the course of the exercise of those functions.
- (6) A licensed insurer or another person who contravenes any requirement imposed on the insurer or other person by or under this section is guilty of an offence.

Maximum penalty: 100 penalty units.

**10.21 Payment of workers compensation indemnity on behalf of insurers** (cf s 215A MACA)

The Authority may enter into arrangements with one or more licensed insurers under the [Workers Compensation Act 1987](#) for the payment by the Authority on behalf of licensed insurers under this Act (**motor accident insurers**) of amounts required to be paid by motor accident insurers by way of indemnity referred to in section 151Z of that Act.

## **Division 10.5 Information collection and sharing**

**10.22 Definitions**

In this Division:

**data** means any facts, statistics, instructions, concepts or other information in a form that is capable of being communicated, analysed or processed (whether by an individual or by a computer or other automated means).

**insurer** means a licensed insurer or a former licensed insurer (including any insurance broker or commission agent engaged in third-party insurance business).

**relevant insurance or compensation authority** means a relevant authority for the purposes of section 10 of the [State Insurance and Care Governance Act 2015](#), and includes authorities of the Commonwealth, the other States and Territories that administer insurance or compensation schemes.



**this Act** includes the [Motor Accidents Act 1988](#) and the [Motor Accidents Compensation Act 1999](#).

**10.23 General data gathering, exchange, etc, by Authority, licensed insurers and relevant insurance or compensation authorities**

- (1) The Authority may collect, use and disclose data relating to any of the following:
  - (a) third-party policies,
  - (b) claims for statutory benefits or for damages,
  - (c) the functions, activities and performance of insurers,
  - (d) the provision of health, legal and other services to injured persons.
- (2) For that purpose, the Authority may obtain data from insurers, from relevant insurance or compensation authorities, from hospitals, from government agencies and from any other source.
- (3) Data concerning third-party policies, claims and other related matters under this Act and policies, claims and other related matters under other insurance or compensation schemes is authorised to be exchanged between different parts of the Authority.
- (4) The Authority, the Lifetime Care and Support Authority and licensed insurers are authorised to exchange data concerning third-party policies, claims and other related matters under this Act.
- (5) The Authority and relevant insurance or compensation authorities are authorised to exchange data concerning third-party policies, claims and other related matters under this Act and policies, claims and other related matters under other insurance or compensation schemes administered by those authorities.
- (6) This section applies in respect of data that is personal information or health information about an individual despite anything to the contrary in the [Privacy and Personal Information Protection Act 1998](#) or the [Health Records and Information Privacy Act 2002](#).

**10.24 Data required to be supplied to Authority by insurers** (cf s 178 MACA)

- (1) The Authority may require an insurer to disclose to the Authority (within the time and manner specified by the Authority) data relating to third-party policies, claims and other related matters under this Act.
- (2) Subsection (1) extends to requiring:
  - (a) data relating to any aspect of the third-party insurance scheme under this Act (including relating to the setting of premiums, the underwriting profit of insurers, the handling of claims, the cost of providing health, legal and other services to

injured persons and the detection and prosecution of fraudulent claims), and

(b) data relating to policies or claims generally or to particular policies or claims.

This subsection does not affect the generality of subsection (1) or any other provision of this Act regarding the obtaining of data by the Authority.

- (3) An insurer may be required to disclose data to the Authority under this section that is personal information or health information about an individual despite anything to the contrary in the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.
- (4) Unless the insurer satisfies the court that it is not within its power to comply with a requirement under this section, an insurer that fails to comply with a requirement under this section is guilty of an offence.

Maximum penalty: 100 penalty units.

#### **10.25 Claims register** (cf s 120 MACA)

- (1) The Authority is to maintain a claims register comprising the following:
- (a) details of claims notified by insurers under this Act,
  - (b) details of claims made on the Nominal Defendant,
  - (c) details of claims under the Workers Compensation Acts of which the Authority is informed under this Act,
  - (d) details of which the Authority is informed under this Act of payments made to or on behalf of participants in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006* and of the treatment and care needs of those participants,
  - (e) such additional details as the Authority considers appropriate for inclusion in the register.
- (2) The claims register may be accessed only by the Authority, by licensed insurers and by such other persons or bodies as may be approved by the Authority.
- (3) Without limiting this Division, licensed insurers are authorised to exchange data concerning claims notified by them under this Act.

## **Division 10.6 Investigative powers**

### **10.26 Definitions**

In this Division:

***insurer*** means a licensed insurer or a former licensed insurer, and includes any insurance broker or commission agent engaged in third-party insurance business.

**investigation officer** means a person duly appointed as an investigation officer under this Division.

**premises** includes any structure, building, aircraft, vehicle, vessel and place (whether built on or not).

#### **10.27 Appointment of investigation officers**

- (1) The Authority may appoint a member of staff of the Authority, or other person, as an investigation officer for the purposes of this Division.
- (2) A person's appointment as an investigation officer may be made generally, or made subject to conditions or restrictions or only for limited purposes.
- (3) Every investigation officer is to be provided by the Authority with an identification card as an investigation officer.
- (4) In the course of exercising the functions of an investigation officer under this Division, the officer must, if requested to do so by any person affected by the exercise of any such function, produce to the person the officer's identification card issued under this section.

#### **10.28 Powers of entry and inspection by investigation officers** (cf s 182 MACA)

- (1) An investigation officer may do any or all of the following:
  - (a) enter at any reasonable hour any premises used, or that the investigation officer reasonably suspects to be used, by an insurer for conduct of the insurer's business or the storage or custody of any document,
  - (b) remain in or on those premises while exercising any power conferred by this section,
  - (c) require an insurer or any other person in or on those premises to produce any such document that is in his or her possession or under his or her control and is capable of being produced,
  - (d) require an insurer or any other person having possession or control of any such document that is not written, or is not written in the English language, or is not decipherable on sight, to produce a statement, written in the English language and decipherable on sight, of the information contained in the document,
  - (e) inspect, or make copies of or take extracts from, a document produced pursuant to paragraph (c) or a statement produced pursuant to paragraph (d), or retain such a statement,
  - (f) require an insurer or any other person in or on those premises to answer questions relating to:

- (i) the business or financial position of an insurer, or
  - (ii) the observance of this Act or the regulations,
- (g) seize anything that the investigation officer has reasonable grounds for believing is connected with an offence against this Act or the regulations.

(2) The power to seize anything connected with an offence includes a power to seize:

- (a) a thing with respect to which the offence has been committed, and
- (b) a thing that will afford evidence of the commission of the offence, and
- (c) a thing that was used for the purpose of committing the offence.

A reference to any such offence includes a reference to an offence that there are reasonable grounds for believing has been committed.

(3) A person must not:

- (a) refuse or fail to allow an investigation officer to enter premises under this section, or
- (b) wilfully obstruct or delay an investigation officer when exercising any powers under this section, or
- (c) unreasonably refuse or fail to produce a document or statement to an investigation officer under this section, or
- (d) if an investigation officer informs a person that by virtue of this Act the person is obliged to answer questions relating to any matter referred to in subsection (1) (f):
  - (i) refuse or fail to answer such a question, or
  - (ii) give an answer to such a question that the person knows is false or misleading in a material particular.

Maximum penalty: 100 penalty units.

(4) The powers of entry conferred by this section are not exercisable in relation to any part of premises used only for residential purposes except:

- (a) with the permission of the occupier of the premises, or
- (b) under the authority conferred by a search warrant.

### **10.29 Search warrant**

(1) An investigation officer may apply to an authorised officer within the meaning of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) for a search warrant if the

investigation officer has reasonable grounds for believing that a provision of this Act, the regulations or the Motor Accident Guidelines has been or is being or is about to be contravened in or about any premises.

- (2) An authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* to whom an application is made under this section may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising the investigation officer named in the warrant:
  - (a) to enter the premises, and
  - (b) to search the premises for evidence of a contravention of this Act, the regulations or the Motor Accident Guidelines, and
  - (c) to exercise in the premises any powers conferred on the investigation officer under this Division.
- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.

### **10.30 Power to obtain information, documents and evidence**

- (1) An investigation officer may, by notice in writing served on a person who is, on reasonable grounds, believed by the officer to be capable of giving information, producing documents or giving evidence in relation to a possible contravention of this Act, the regulations or the Motor Accident Guidelines require the person to do any one or more of the following things:
  - (a) to give an investigation officer, by writing signed by the person (or, in the case of a body corporate, by a competent officer of the body corporate) and within the time and in the manner specified in the notice, any such information of which the person has knowledge,
  - (b) to produce to an investigation officer, in accordance with the notice, any such documents,
  - (c) to appear before an investigation officer at a time and place specified in the notice and give either orally or in writing any such evidence and produce any such documents.
- (2) A notice under this section must contain a warning that a failure to comply with the notice is an offence.
- (3) An investigation officer may inspect a document produced in response to a notice under this section and may make copies of, or take extracts from, the document.
- (4) An investigation officer may take possession and retain possession for as long as is necessary for the purposes of this Act, of a document produced in response to a notice

under this section if the person otherwise entitled to possession of the document is supplied, as soon as practicable, with a copy certified by an investigation officer to be a true copy.

- (5) A certified copy provided under subsection (4) is receivable in all courts as if it were the original.
- (6) Until a certified copy of a document is provided under subsection (4), the investigation officer who has possession of the document must, at such times and places as the officer thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorised by that person, to inspect the document and make copies of, or take extracts from, the document.
- (7) A person must not:
  - (a) without reasonable excuse, refuse or fail to comply with a requirement under this section, or
  - (b) in purported compliance with a requirement under this section, give information or evidence or produce a document knowing it to be false or misleading in a material particular.

Maximum penalty: 100 penalty units.

### **10.31 Protection from incrimination**

- (1) **Self-incrimination not an excuse** A person is not excused from a requirement under this Division to produce a document or statement, to give information or evidence or to answer a question on the ground that the document, statement, information, evidence or answer might incriminate the person or make the person liable to a penalty.
- (2) **Answer, information or evidence not admissible if objection made** However, any answer, information or evidence given by a natural person in compliance with a requirement under this Division is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence under this Division) if:
  - (a) the person objected at the time to doing so on the ground that it might incriminate the person, or
  - (b) the person was not warned at an appropriate time that the person may object to giving the answer, information or evidence on the ground that it might incriminate the person.
- (3) **Appropriate time for giving warning about incrimination** An ***appropriate time*** for warning a person is any of the following times:
  - (a) the time when the requirement to give the answer, information or evidence is made,

(b) in the case of evidence required to be given when appearing before an investigation officer, any time after the start of the appearance before the officer,

(c) at or about the time immediately before the person gives the answer, information or evidence.

(4) **Documents or statements admissible** Any document or statement produced by a person in compliance with a requirement under this Division is not inadmissible in evidence against the person in criminal proceedings on the ground that the document or statement might incriminate the person.

(5) **Further information** Further information obtained as a result of a document or statement produced or information, evidence or answer given in compliance with a requirement under this Division is not inadmissible on the ground:

(a) that the document, statement, information, evidence or answer had to be produced or given, or

(b) that the document, statement, information, evidence or answer might incriminate the person.

### **10.32 Investigation officer may request assistance**

(1) A police officer may accompany and take all reasonable steps to assist an investigation officer in the exercise of the investigation officer's functions under this Division:

(a) in executing a search warrant issued under this Division, or

(b) if the investigation officer reasonably believes that he or she may be obstructed in the exercise of those functions.

(2) Any person whom an investigation officer believes to be capable of providing assistance in the exercise of the officer's functions under this Division may accompany the officer and take all reasonable steps to assist the officer in the exercise of the officer's functions.

(3) Nothing in subsection (1) is to be taken to limit the generality of section 71 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#).

## **Part 11 Miscellaneous**

### **11.1 No contracting out of Act** (cf s 216 MACA)

This Act applies despite any contract to the contrary.

### **11.2 Secrecy of information obtained from or relating to insurers or proposed insurers**

**etc** (cf s 217 MACA)

- (1) A person who acquires protected information in the exercise of functions under this Act must not, directly or indirectly, make a record of the information or divulge the information to another person if the person is aware that it is protected information, except in the exercise of functions under this Act.

Maximum penalty: 50 penalty units.

- (2) Despite subsection (1), protected information may be divulged:

- (a) to a particular person or persons, if the Authority certifies that it is necessary in the public interest that the information be divulged to the person or persons, or
- (b) to a prescribed person or prescribed authority, or
- (c) to a person who is expressly or impliedly authorised to obtain it by the person to whom the information relates, or
- (d) to the Minister, or
- (e) to the Australian Prudential Regulation Authority.

- (3) A person cannot be required:

- (a) to produce in any court any document or other thing that contains protected information and that has come into the person's possession, custody or control by reason of, or in the course of, the exercise of the person's functions under this Act, or
- (b) to divulge to any court any protected information that has come to the person's notice in the exercise of the person's functions under this Act.

- (4) Despite subsection (3), a person may be required to produce such a document or other thing in a court or to divulge protected information to a court if:

- (a) the Authority certifies that it is necessary in the public interest to do so, or
- (b) a person to whom the information relates (or to whom the information contained in the document or thing relates) has expressly authorised it to be divulged to or produced in the court.

- (5) An authority or person to whom protected information is divulged under subsection (2), and a person or employee under the control of that authority or person, are, in respect of that information, subject to the same rights, privileges and duties under this section as they would be if that authority, person or employee were a person exercising functions under this Act and had acquired the information in the exercise of those functions.



- (6) This section does not limit or affect section 9.15 (Publication of information about insurers) or section 9.24 (Reports about insurers).
- (7) This section does not apply to the divulging of information to, or the production of any document or other thing to:
- (a) any law enforcement agency, or
  - (b) any person or body prescribed for the purposes of this subsection.
- (8) In this section:

**court** includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

**functions under this Act** includes functions under the regulations, Motor Accident Guidelines or other instruments under this Act.

**produce** includes permit access to.

**protected information** means:

- (a) information concerning the business, commercial, professional or financial affairs of an applicant for a licence under this Act or of a licensed insurer, or
- (b) information obtained in the course of an investigation of an application for such a licence, or
- (c) information that was obtained by the Authority under this Act from a licensed insurer and that is the subject of an unrevoked declaration by the licensed insurer to the effect that the information is confidential, or
- (d) information concerning the business, commercial, professional or financial affairs of the provider of a passenger service or a booking service or the holder of a taxi licence under the [Point to Point Transport \(Taxis and Hire Vehicles\) Act 2016](#), not being information that is publicly available.

### **11.3 Act to bind Crown** (cf s 218 MACA)

This Act binds the Crown, not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

### **11.4 Certificate evidence** (cf s 221 MACA)

- (1) A certificate issued by the Authority or a person authorised by the Authority as to the name of a licensed insurer by whom a third-party policy has been issued for a particular period for:
- (a) a particular motor vehicle, or

(b) motor vehicles to which a particular trader's plate is fixed,

is admissible in any proceedings and is evidence of the matters certified by the certificate.

(2) A certificate issued by the Authority or a person authorised by the Authority stating that a third-party policy was not in force on a particular date or during a particular period in relation to:

(a) a particular motor vehicle, or

(b) motor vehicles to which a particular trader's plate was fixed,

is admissible in any proceedings and is evidence of the matters certified by the certificate.

### **11.5 Service of documents generally** (cf s 222 MACA)

(1) A document that is authorised or required by this Act or the regulations to be served on any person may be served by any of the following methods:

(a) in the case of an individual—by personal delivery to the person,

(b) by post to the address specified by the person for the service of documents of that kind,

(c) in the case of an individual who has not specified such an address—by post to the residential or business address of the person last known to the person serving the document,

(d) in the case of a corporation—by post to the registered office or any other office of the corporation or by leaving it at any such office with a person apparently over the age of 16 years,

(e) by email to an email address specified by the person for the service of documents of that kind,

(f) by any other method authorised by the regulations for the service of documents of that kind.

(2) A document is sufficiently served on a person in connection with a claim for damages made by the person if it is served on an Australian legal practitioner acting for the person in connection with the claim.

(3) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on a person by any other method.

(4) In this section, **serve** includes give or send.

**11.6 Service of documents on Authority** (cf s 223 MACA)

- (1) A document may be served on the Authority by any of the following methods:
  - (a) by post to the address specified by the Authority for the service of documents of that kind,
  - (b) by post to an office of the Authority or by leaving it at any such office with a person apparently over the age of 16 years,
  - (c) by email to an email address specified by the Authority for the service of documents of that kind,
  - (d) by any other method authorised by the regulations for the service of documents of that kind.
- (2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on the Authority by any other method.
- (3) This section does not apply to the service of documents on the Authority as the Nominal Defendant.
- (4) In this section, **serve** includes give or send.

**11.7 Service of documents on Nominal Defendant** (cf s 224 MACA)

- (1) A document may be served on the Nominal Defendant by any of the following methods:
  - (a) by post to the address specified by the Authority for the service of documents on the Nominal Defendant,
  - (b) if no such address is specified—by post to the head office of the Authority or by leaving it at any such office with a person apparently over the age of 16 years,
  - (c) by any other method authorised by the regulations for the service of documents of that kind.
- (2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on the Nominal Defendant by any other method.
- (3) In this section, **serve** includes give or send.

**11.8 Offences by corporations** (cf s 226 MAA)

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or a regulation, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if

the person knowingly authorised or permitted the contravention.

- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations.

#### **11.9 Proceedings for offences** (cf s 227 MACA)

- (1) Proceedings for an offence against this Act or the regulations are to be dealt with summarily before the Local Court.
- (2) Proceedings for an offence under this Act or the regulations may be commenced:
  - (a) in the case of a prescribed offence—within 2 years after the date on which evidence of the alleged offence first came to the attention of the Authority, or
  - (b) in any other case—within 12 months after the date of the alleged commission of the offence.

#### **Note—**

Proceedings for a camera record offence for driving an uninsured vehicle in contravention of section 2.1 of this Act may also only be commenced within 12 months of the offence—see section 201 of the [Road Transport Act 2013](#).

- (3) If subsection (2) (a) is relied on for the purpose of commencing proceedings for an offence, the court attendance notice or application must contain particulars of the date on which evidence of the offence first came to the attention of the Authority and need not contain particulars of the date on which the offence was committed. The date on which evidence first came to the attention of the Authority is the date specified in the court attendance notice or application, unless the contrary is established.
- (4) This section applies despite anything in the [Criminal Procedure Act 1986](#) or any other Act.
- (5) In this section:

**evidence** of an offence means evidence of any act or omission constituting the offence.

**prescribed offence** means:

- (a) an offence against any provision of Part 3, 6 or 9, and
- (b) an offence against this Act or the regulations that is declared by the regulations to be a prescribed offence for the purposes of this section.

### 11.10 Penalty notices

- (1) An authorised officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence.
- (2) A penalty notice offence is an offence against this Act or the regulations (other than an offence against section 2.1) that is prescribed by the regulations as a penalty notice offence.

**Note—**

See section 195 of the *Road Transport Act 2013* for the issue of penalty notices for an offence against section 2.1 of this Act of driving an uninsured vehicle on a road.

- (3) The *Fines Act 1996* applies to a penalty notice issued under this section.

**Note—**

The *Fines Act 1996* provides that, if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.

- (4) The amount payable under a penalty notice issued under this section is the amount prescribed for the alleged offence by the regulations (not exceeding the maximum amount of penalty that could be imposed for the offence by a court).
- (5) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (6) In this section, **authorised officer** means a member of staff of the Authority, or of any other Public Service agency, designated by the Authority as an authorised officer for the purposes of this section.

### 11.11 Regulation of advertising and other marketing of services (cf s 121 MACA)

- (1) The regulations may make provision for or with respect to regulating (including prohibiting) conduct by any person (including advertising) that relates to:
  - (a) the marketing of services to be provided by an Australian legal practitioner or an agent in connection with claims under this Act, or
  - (b) the use of the expression “green slip” in connection with any commercial services (whether in connection with claims under this Act or the issue of third-party policies under this Act), other than services provided by or on behalf of the Authority or licensed insurers.
- (2) A regulation may not be made under subsection (1) (a) except with the concurrence of the Minister administering the *Legal Profession Uniform Law Application Act 2014*.
- (3) A regulation under this section may impose a penalty not exceeding 200 penalty units for any contravention of the regulation.

- (4) Nothing in this section prevents advertising by a bona fide consumer or community advocacy or advice body.

#### **11.12 Regulations generally** (cf s 228 MACA)

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation may adopt the provisions of other publications, whether with or without modification or addition and whether in force at a particular time or from time to time.
- (3) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units.

#### **11.13 Review of Act**

- (1) The Minister is to review this Act (and the regulations and guidelines under this Act) to determine whether the policy objectives of the Act remain valid and whether the terms of the Act (and those regulations and guidelines) remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as practicable after the period of 3 years from the commencement of this Act and a report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of that period of 3 years.
- (3) The review is to consider all aspects of the scheme established by this Act, including the following matters:
  - (a) the effectiveness of the scheme ensuring insurers are receiving a fair but not excessive profit margin,
  - (b) the general performance of insurers in the scheme,
  - (c) the timeliness of the provision of benefits to injured persons,
  - (d) the proportion of each dollar of premiums collected that directly benefits injured persons,
  - (e) whether further changes are needed to the scheme.

### **Schedule 1 Definitions relating to earnings for purposes of weekly payments of statutory benefits under Division 3.3**

(Section 3.5 (2))

#### **1 Application**

The words and expressions defined in this Schedule apply for the purposes of Division 3.3.

## 2 Meaning of “earner”

A person who is injured as a result of a motor accident is an **earner** if the person is at least 15 years of age and who:

- (a) was employed or self-employed (whether or not full-time):
  - (i) at any time during the 8 weeks immediately preceding the motor accident, or
  - (ii) during a period or periods equal to at least 13 weeks during the year immediately preceding the motor accident, or
  - (iii) during a period or periods equal to at least 26 weeks during the 2 years immediately preceding the motor accident,and, at the date of the motor accident, had not retired permanently from all employment, or
- (b) before the motor accident, had entered into an arrangement (whether or not an enforceable contract):
  - (i) with an employer or other person to undertake employment, or
  - (ii) to commence business as a self-employed person, at a particular time and place, or
- (c) was, immediately before the motor accident, receiving a weekly payment or other payment in respect of loss of earnings under this Act or the [Workers Compensation Act 1987](#).

## 3 Meaning of “loss of earnings”

- (1) **Loss of earnings** means a loss incurred or likely to be incurred in a person’s income from personal exertion.
- (2) A person’s **income from personal exertion** is:
  - (a) the amount that is the income of the person consisting of earnings, salaries, wages, commissions, fees, bonuses, pensions, retiring allowances and retiring gratuities, allowances and gratuities received in the capacity of employee or in relation to any services rendered, and
  - (b) the proceeds of any business carried on by the person either alone or in partnership with any other person, and
  - (c) any amount received as bounty or subsidy in carrying on a business.
- (3) A person’s **income from personal exertion** does not include:

- (a) interest, unless the person's principal business consists of the lending of money, or unless the interest is received in respect of a debt due to the person for goods supplied or services rendered by the person in the course of the person's business, or
- (b) rents or dividends, or
- (c) any employer superannuation contributions.

#### 4 Meaning of "pre-accident weekly earnings"—general

- (1) **Pre-accident weekly earnings**, in relation to an earner who is injured as a result of a motor accident, means the weekly average of the gross earnings received by the earner as an earner during the 12 months immediately before the day on which the motor accident occurred, unless subclause (2) applies.
- (2) In the following cases, **pre-accident weekly earnings**, in relation to an earner (other than a self-employed person) who is injured as a result of a motor accident, means:
  - (a) if, on the day of the motor accident, the earner was earning continuously, but had not been earning continuously for at least 12 months—the weekly average of the gross earnings received by the earner as an earner during the period from when the earner started to earn continuously to immediately before the day of the motor accident,
    - (a1) if the earner was employed or self-employed during a period or periods equal to at least 26 weeks during the first year of the pre-accident period, but was not obtaining earnings from any source at any other time during the pre-accident period—the average weekly gross earnings received by the earner as an earner during the first year of the pre-accident period,
    - (b) if subclause (3) applies—the weekly average of the gross earnings received by the earner as an earner during the period from when the change of circumstance referred to in that subclause occurred to immediately before the day of the motor accident,
    - (c) if the earner is an earner by reason of having entered into an arrangement with an employer or other person to undertake employment or to commence business as a self-employed person—the average weekly gross earnings that the earner could reasonably have been expected to earn, but for the injury, in employment under that arrangement.
- (2A) The **pre-accident period**, in relation to a motor accident, is the period of 2 years immediately preceding the motor accident.
- (3) This subclause applies if, during the 12 months immediately before the day of the



motor accident, there was, as a result of any action taken by the earner, a significant change in his or her earnings circumstances that resulted in the earner regularly earning, or becoming entitled to earn, more on a weekly basis than he or she was earning before the change occurred.

**Note—**

Examples of a change of circumstances to which this subclause would apply include a change of job, a promotion, a move from part-time to full-time employment, or a pay increase arising from the achievement of performance standards.

- (4) For the purposes of this clause, an earner earns continuously if he or she obtains earnings from permanent employment or from a source that, on the day of the motor accident, was likely to continue for a period of at least 6 months to provide earnings to the earner on the same, or a similar, basis to the basis on which the earnings were being provided as at that day.

**5 Pre-accident weekly earnings of students**

- (1) If a person injured as a result of a motor accident was at the time of the accident a full-time student:
- (a) the person is taken to be an earner on and from the time the person would have completed the course of studies in which the person was a full-time student and has attained the age of at least 15 years, and
  - (b) the person's pre-accident weekly earnings from that time are to be calculated on the basis of the weekly earnings that the person would have received upon being employed on the completion of the course of studies in which the person was a full-time student.
- (2) For the purposes of this clause, if at the time of the motor accident the person is a full-time student at a secondary school, the weekly earnings that the person would have received upon being employed on the completion of the course of studies are to be calculated on the basis that the person will successfully complete the final year of secondary school.
- (3) The Motor Accident Guidelines may make provision for the matters to be taken into account for the purposes of determining the weekly earnings that the person would have received upon being employed on the completion of the course of studies in which the person was a full-time student.

**6 Pre-accident weekly earnings of apprentices, trainees and young people**

- (1) This clause applies if, at the time an earner was injured in a motor accident, he or she was:
- (a) under the age of 21 years, or

(b) an apprentice, or

(c) employed under a contract of service under which he or she was expressly required to undergo any training, instruction or examination for the purpose of becoming qualified for the occupation to which the contract of service related,

and, under the terms of his or her employment, he or she was entitled to increments in earnings as the employment continued.

- (2) In respect of any week after the motor accident in which the earner is entitled to a weekly payment under Division 3.3 the calculation of which depends on the amount of the earner's pre-accident weekly earnings, the payment is to be calculated on the basis that the earner's pre-accident weekly earnings are the weekly earnings that it is likely that he or she would have been entitled to in that week had the accident not occurred and had he or she continued in the employment.
- (3) The Motor Accident Guidelines may make provision for the matters to be taken into account for the purposes of determining the weekly earnings that it is likely that an earner would have been entitled to in a week had the accident not occurred and had he or she continued in the employment concerned.

#### **7 Meaning of "pre-accident earning capacity"**

- (1) **Pre-accident earning capacity** of an injured person means the weekly amount a person had the capacity to earn before the motor accident concerned in employment reasonably available to the person in view of the person's training, skills and experience.
- (2) If the amount of an injured person's pre-accident earning capacity cannot be determined, the amount is deemed to be the amount that is equal to 80% of the average weekly total earnings of adults in full-time employment in New South Wales last published by the Australian Statistician.

#### **8 Meaning of "post-accident earning capacity"**

- (1) **Post-accident earning capacity** of an injured person means:
- (a) for the first and second entitlement periods—the weekly amount that the person has the capacity to earn in the employment in which the person was engaged immediately before the motor accident, determined on the basis of the person's fitness for work in that employment, or
- (b) for any period after the second entitlement period—the weekly amount the person has the capacity to earn in any employment reasonably available to the person, determined on the basis of the person's fitness for work in any such employment.
- (2) A person's fitness for work during the first and second entitlement periods is to be determined having regard to the following:

- (a) the nature of the injury and the likely process of recovery,
  - (b) treatment and rehabilitation needs, including the likelihood that treatment or rehabilitation will enhance earning capacity and any temporary incapacity that may result from treatment,
  - (c) any earnings of the person in any employment engaged in by the person after the motor accident,
  - (d) any medical certificate provided by the injured person as to the person's fitness for work.
- (3) A person's fitness for work after the second entitlement period is to be determined having regard to the following:
- (a) the nature of the injury and the likely process of recovery,
  - (b) treatment provided and rehabilitation undertaken and the potential for further treatment and rehabilitation,
  - (c) the person's training, skills and experience,
  - (d) the age of the person,
  - (e) any medical certificate provided by the injured person as to the person's fitness for work.
- (4) The Motor Accident Guidelines may make provision for the matters to be taken into account for the purposes of determining the employment reasonably available to a person in any period after the second entitlement period.

## Schedule 2 Jurisdiction of Dispute Resolution Service

(Section 7.1)

### Note—

This Schedule sets out the jurisdiction of the Dispute Resolution Service with respect to merit review matters, medical assessment matters and miscellaneous claims assessment matters. Jurisdiction with respect to the assessment of claims is conferred by Division 7.6.

See section 7.2 for the exercise of other miscellaneous functions not included in this Schedule by decision-makers designated by the Dispute Resolution Service.

### 1 Merit review matters

The following matters are declared to be merit review matters for the purposes of Part 7:

- (a) the amount of statutory benefits that is payable under section 3.4 (Statutory benefits for funeral expenses) or under Division 3.3 (Weekly payments of statutory benefits to injured persons),

- (b) whether for the purposes of section 3.12 (Cessation of weekly payments to other injured persons after maximum weekly payments period) an injured person's injury is the subject of a pending claim for damages,
- (c) whether for the purposes of section 3.13 (Termination of weekly payments on retiring age) a motor accident that has caused a person's injury has happened before the person has reached retirement age,
- (d) the suspension of weekly payments of statutory benefits under section 3.14 (Obligations to provide authorisations and medical evidence), 3.15 (Requirements for evidence as to fitness for work) or 3.17 (Treatment, rehabilitation and vocational training),
- (e) whether the insurer has given the required period of notice under section 3.19 (Notice required before discontinuing or reducing weekly payments) before discontinuing or reducing weekly payments of statutory benefits,
- (f) whether an amount of statutory benefits is recoverable by the injured person under section 3.19 (3) (Notice required before discontinuing or reducing weekly payments), and the amount of statutory benefits so recoverable,
- (g) whether for the purposes of section 3.21 (Weekly statutory benefits to persons residing outside Australia) an injured person is or has been residing outside Australia,
- (h) whether the insurer is required to vary an amount of a weekly payment of statutory benefits in accordance with section 3.22 (Indexation of weekly statutory benefits),
- (i) whether the cost of treatment and care provided to the claimant is reasonable for the purposes of section 3.24 (1) (a) (Entitlement to statutory benefits for treatment and care),
- (j) whether statutory benefits are payable under section 3.26 (Statutory benefits for loss of capacity to provide gratuitous domestic services), and the amount of statutory benefits so payable,
- (k) whether expenses have been properly verified for the purposes of section 3.27 (Verification of expenses),
- (l) whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) treatment and care expenses have been incurred after the expiration of the period during which statutory benefits are payable,
- (m) whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) treatment or care is authorised by the Motor Accident Guidelines (except in circumstances referred to in clause 2 (c)),

- (n) whether treatment and care expenses have been paid or recovered for the purposes of section 3.29 (No statutory benefits for expenses already compensated),
- (o) (Repealed)
- (p) whether the cost of treatment and care exceeds any limit imposed by the Motor Accident Guidelines for the purposes of section 3.31 (Limits under Guidelines on statutory benefits for particular treatment and care),
- (q) whether treatment and care provided to the injured person is treatment and care needs or excluded treatment and care needs to which section 3.32 (No treatment and care statutory benefits for treatment and care needs covered by Lifetime Care and Support Scheme) applies,
- (r) whether for the purposes of section 3.33 (Treatment and care provided while persons residing outside Australia) treatment and care provided to an injured person has been provided while the person is residing outside Australia,
- (s) whether the insurer is entitled to refuse payment of statutory benefits in accordance with section 3.34 (Effect of death on entitlement to statutory benefits), 3.35 (No statutory benefits if workers compensation payable) or 3.36 (No statutory benefits for at-fault driver or owner if vehicle uninsured) the vehicle was an uninsured vehicle at the time of the motor accident,
- (t) whether the insurer is entitled to refuse payment of statutory benefits in accordance with Part 3 of the *Civil Liability Act 2002* (as applied by section 3.39 (Limitation on statutory benefits in relation to certain mental harm)) or 3.40 (Effect of recovery of damages on statutory benefits),
- (u), (v) (Repealed)
- (w) whether the insurer is entitled to delay the making of an offer of settlement under section 6.22 (Duty of insurer to make offer of settlement on claim for damages),
- (x) whether for the purposes of section 6.24 (Duty of claimant to co-operate with other party) a request made of the claimant is reasonable or whether the claimant has a reasonable excuse for failing to comply,
- (y) whether the claimant has provided the insurer with all relevant particulars about a claim in accordance with section 6.25 (Duty of claimant to provide relevant particulars of claim for damages),
- (z) whether the insurer is entitled to give a direction to the claimant under section 6.26 (Consequences of failure to provide relevant particulars of claim for damages),
- (za) whether the insurer is entitled to suspend weekly payments of statutory benefits under section 6.5 (Duty of claimants to minimise loss) of the Act,

- (aa) whether for the purposes of section 8.10 (Recovery of costs and expenses in relation to claims for statutory benefits) the costs and expenses incurred by the claimant are reasonable and necessary.

## **2 Medical assessment matters**

The following matters are declared to be medical assessment matters for the purposes of Part 7:

- (a) the degree of permanent impairment of an injured person that has resulted from an injury caused by a motor accident (including whether the degree of permanent impairment is greater than a particular percentage),
- (b) whether any treatment and care provided to an injured person is reasonable and necessary in the circumstances or relates to an injury caused by a motor accident for the purposes of section 3.24 (Entitlement to statutory benefits for treatment and care),
- (c) whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) treatment or care provided to an injured person will improve the recovery of the injured person,
- (d) the degree of impairment of the earning capacity of an injured person that has resulted from an injury caused by a motor accident,
- (e) whether an injury is a minor injury for the purposes of the Act.

## **3 Miscellaneous claims assessment matters**

The following matters are declared to be miscellaneous claims assessment matters for the purposes of Part 7:

- (a) whether for the purposes of section 2.30 (Claim against Nominal Defendant where vehicle not identified) there has been due inquiry and search to establish the identity of a motor vehicle,
- (aa) whether the Nominal Defendant has lost the right to reject a claim under section 2.31 (Rejection of claim for failure to make due inquiry and search to establish identity of vehicle) of the Act for failure to make due inquiry and search to establish the identity of a vehicle,
- (b) whether for the purposes of section 3.1 (Statutory benefits payable in respect of death or injury resulting from motor accident) the death of or injury to a person has resulted from a motor accident in this State,
- (c) which insurer is the insurer of the at-fault motor vehicle for the purposes of section 3.3 (Determination of relevant insurer),

- (d) whether for the purposes of section 3.11 (Cessation of weekly payments to injured persons most at fault or with minor injuries after 26 weeks) the motor accident concerned was caused by the fault of another person,
- (e) whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) or 3.36 (No statutory benefits for at-fault driver or owner if vehicle uninsured) the motor accident was caused mostly by the fault of the injured person,
- (f) whether the insurer is entitled to refuse payment of statutory benefits in accordance with section 3.37 (No statutory benefits payable to injured person who commits serious driving offence),
- (g) whether the insurer is entitled to reduce the statutory benefits payable in respect of the motor accident in accordance with section 3.38 (Reduction of weekly statutory benefits after 6 months for contributory negligence),
- (h) whether for the purposes of Part 6 (Motor accident claims) the claimant has given a full and satisfactory explanation for non-compliance with a duty or for delay,
- (i) whether for the purposes of section 6.9 (Compliance with verification requirements—claim for statutory benefits) or 6.10 (Compliance with verification requirements—claim for damages) the motor accident verification requirements have been complied with,
- (j) whether notice of a claim has been given in accordance with section 6.12 (Notice of claims for statutory benefits or damages),
- (k) whether the insurer is entitled to refuse payment of weekly payments of statutory benefits in accordance with section 6.13 (Time for making of claims for statutory benefits),
- (l) whether a late claim may be made in accordance with section 6.14 (Time for making of claims for damages),
- (m) whether a claim may be rejected for non-compliance with section 6.15 (How notice of claims given).

### **Schedule 3 Provisions relating to Principal Claims Assessor**

(Section 7.5)

#### **1 Term of office**

- (1) The Principal Claims Assessor holds office for the period, not exceeding 7 years, specified in his or her instrument of appointment.
- (2) A person is eligible for re-appointment as Principal Claims Assessor.

## **2 Remuneration and allowances**

The Principal Claims Assessor is entitled to be paid:

- (a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and
- (b) such travelling and subsistence allowances as the Minister may from time to time determine.

## **3 Acting Principal Claims Assessor**

- (1) The Minister may, from time to time, appoint a person to act in the office of the Principal Claims Assessor during the illness or absence of the Principal Claims Assessor (or during a vacancy in the office of Principal Claims Assessor) and a person, while so acting, has all the functions of the Principal Claims Assessor.
- (2) The Minister may, at any time, remove a person from the office of acting Principal Claims Assessor.
- (3) The acting Principal Claims Assessor is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

## **4 Vacancy in office**

- (1) The office of Principal Claims Assessor becomes vacant if the person:
  - (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) resigns the office by instrument in writing addressed to the Minister, or
  - (d) is removed from office by the Minister under this clause or by the Governor under Part 6 of the *Government Sector Employment Act 2013*, or
  - (e) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (f) becomes a mentally incapacitated person, or
  - (g) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence which, if committed in New South Wales, would be an offence so punishable, or
  - (h) engages in any paid employment outside the duties of the office of Principal



Claims Assessor, except with the consent of the Minister.

- (2) The Minister may remove a person from the office of Principal Claims Assessor at any time.

## **5 Filling of vacancy in office**

If the office of Principal Claims Assessor becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

## **6 Leave**

- (1) The entitlement of the Principal Claims Assessor to annual and other leave is to be as stated in the Principal Claims Assessor's instrument of appointment.
- (2) The Principal Claims Assessor may be granted leave by the chief executive of the Authority.

## **7 Effect of certain other Acts**

The office of Principal Claims Assessor is a statutory office and the provisions of the [Government Sector Employment Act 2013](#) relating to the employment of Public Service employees do not apply to that office.

# **Schedule 4 Savings, transitional and other provisions**

## **Part 1 Savings and transitional regulations**

### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.
- (2) Any such provision has effect despite anything to the contrary in this Schedule. The regulations may make separate savings and transitional provisions or amend this Schedule to consolidate the savings and transitional provisions.
- (3) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (4) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the

State) in respect of anything done or omitted to be done before the date of its publication.

## Part 2 Provisions consequent on enactment of this Act

### 2 Special provisions for premiums during transition period

- (1) This clause applies to the transition period that starts on the commencement of this clause and ends on the date prescribed by the regulations.
- (2) The Authority is to review the operation of this clause at the end of 3 years after the commencement of this Act and advise the Minister on the making of a regulation to terminate the transition period.
- (3) The following special arrangements are to apply in relation to the premiums payable for third-party policies issued during the transition period:
  - (a) the Motor Accident Guidelines are to make provision for the adjustment of premiums to ensure that unearned premium surplus attributable to policies in force immediately before the start of the transition period is refunded to the policy holders or is applied for the purposes of an appropriate reduction in premiums payable for policies issued during the transition period,
  - (aa) the Authority may direct insurers to make payments to the Authority Fund corresponding to the costs incurred by the Authority in connection with the administration of the refund of unearned premium surplus,
  - (ab) the Authority may direct insurers to make payments from any residual amount of unearned premium surplus (not otherwise paid to the Authority Fund or refunded to policy holders) to any fund or person for purposes relating to the administration of, or the promotion of the efficiency and effectiveness of, the motor accidents scheme under this Act,
  - (b) the Motor Accident Guidelines are to make provision for the adjustment of premiums to avoid transitional excess profits and transitional excess losses,
  - (c) the Authority may determine the range of premiums that are appropriate for third-party policies issued during the transition period (**transitional policies**) and any such determination must be made on the basis of independent actuarial advice and taking into account the likely effect of this Act on the cost of claims,
  - (d) the grounds on which the Authority may, under this Act (or the [Motor Accidents Compensation Act 1999](#)), reject premiums filed for transitional policies include that the premiums will not fall within the range of premiums determined by the Authority under this clause to be appropriate for transitional policies.
- (3A) Without limiting subclause (3) (a), the Motor Accident Guidelines may make

provision for or with respect to the following matters in connection with the refund of unearned premium surplus and the reduction in premiums:

- (a) the administration by the Authority of the refund of unearned premium surplus to policy holders,
  - (b) arrangements for the use of the services of any staff of Service NSW or any other person or body for the purposes of or in connection with the administration of the refund,
  - (d) limiting the entitlement to refund payments to the holders of policies in respect of which the unearned premium surplus attributable to the policy exceeds (after deducting administration costs) the minimum amount of \$10 (the **minimum refund entitlement threshold**),
  - (e) the application of amounts below the minimum refund entitlement threshold for the purposes of a reduction in Authority Fund levies payable for policies issued during the transition period.
- (4) The following special arrangements are to apply in relation to Authority Fund levies payable in connection with third-party policies issued during the transition period:
- (a) the Motor Accident Guidelines may make provision for the adjustment of those Fund levies to avoid transitional excess profits and transitional excess losses,
  - (b) the Authority may, following any such adjustment, direct insurers to make payments to the Authority Fund corresponding to any reduction in Authority Fund levies otherwise payable or direct payments from the Authority Fund to insurers corresponding to any increase in Authority Fund levies otherwise payable.

An amount payable to or from the Authority Fund under this subclause is not recoverable from or payable to policy holders.

- (5) The Motor Accident Guidelines may make provision for the following:
- (a) determining the likely cost of claims for claims arising after the start of the transition period,
  - (b) determining (or establishing a methodology for determining) the amount of unearned premium surplus, transitional excess profit and transitional excess loss,
  - (c) giving effect to an adjustment of premiums or Authority Fund levies under this clause.
- (6) The Motor Accident Guidelines may provide for an adjustment under this clause to be made in relation to previous, current or future periods.
- (7) Until the commencement of this Act, the *Motor Accidents Compensation Act 1999* has

effect subject to this clause.

- (8) It is a condition of a licence granted under this Act (and under the [Motor Accidents Compensation Act 1999](#)) that the licensed insurer must comply with the requirements of any special arrangement under this clause.
- (9) In this clause:

**Authority Fund** means the Motor Accidents Operational Fund under Division 10.4 of this Act or, in respect of any period before the commencement of this Act, under Part 8.4 of the [Motor Accidents Compensation Act 1999](#).

**Authority Fund levies** means Fund levies under Division 10.4 of this Act or, in respect of any period before the commencement of this Act, under Part 8.4 of the [Motor Accidents Compensation Act 1999](#).

**Motor Accident Guidelines** includes (during so much of the transition period as occurs before the commencement of this Act) the Motor Accidents Premiums Determination Guidelines under the [Motor Accidents Compensation Act 1999](#).

**reasonable profit** means underwriting profit determined in accordance with the Motor Accident Guidelines to represent an adequate return on invested capital.

**transitional excess loss** means a shortfall in underwriting profit below a reasonable profit to the extent that the shortfall is attributable to an overestimation of the reduction in cost of claims to result from this Act.

**transitional excess profit** means underwriting profit in excess of a reasonable profit to the extent that the excess is attributable to an underestimation of the reduction in cost of claims to result from this Act.

**unearned premium surplus** means an increase in underwriting profit that results from a reduction in the cost of claims after the commencement of the transition period to the extent that the reduction is attributable to this Act.

### 3 Third-party policies—references to unregistered vehicle permits

A policy does not cease to be a third-party policy under this Act merely because the policy refers to an unregistered vehicle permit under the [Road Transport \(Vehicle Registration\) Act 1997](#) instead of an unregistered vehicle permit under the [Road Transport Act 2013](#) (as specified in the policy set out in Division 2.1).

### 4 Continuation of fund

- (1) The Motor Accidents Operational Fund is a continuation of the Motor Accidents Operational Fund established under the [Motor Accidents Compensation Act 1999](#) as in force immediately before the commencement of this clause.

- (2) The Nominal Defendant's Fund is a continuation of the Nominal Defendant's Fund established under the *Motor Accidents Compensation Act 1999* as in force immediately before the commencement of this clause.

## **5 References to superseded Acts**

A reference to the *Motor Accidents Compensation Act 1999* or the *Motor Accidents Act 1988* in any Act (other than in this Act), in any instrument made under any such Act or in any document is to be read as including a reference to this Act, unless the regulations or the context otherwise requires.

## **6 Transitional arrangements for Fund levies under Motor Accidents (Lifetime Care and Support) Act 2006**

Part 7 (Funding of the Scheme) of the *Motor Accidents (Lifetime Care and Support) Act 2006* continues to apply to and in respect of a Fund levy determined for a relevant period that commences before the amendment of that Part by this Act as if that Part had not been amended by this Act.

## **7 Determination of premiums for taxis and hire vehicles**

- (1) This clause applies in respect of Motor Accident Guidelines that:
- (a) relate to the determination of insurance premiums for third-party policies for taxis or hire vehicles (within the meaning of section 2.26 (Special provisions relating to taxis and hire vehicles and other vehicles)), and
  - (b) provide for the premium, or part of the premium, to be paid on the basis of the distance travelled by the vehicles.
- (2) This clause applies only in respect of Motor Accident Guidelines issued during the period of 3 years starting on the commencement of this Act.
- (3) In determining the guidelines for insurance premiums for third-party policies for taxis and hire vehicles, the Authority is to ensure that similar insurance premiums are to be paid for taxis and hire vehicles having regard to relevant factors of comparison, such as the class of the vehicles, the distance travelled by the vehicles and the activities in which the vehicles are engaged.
- (4) However, the methodology used to determine the distance travelled may differ according to the class of vehicle.
- (5) Subclause (3) does not apply to the determination of guidelines under section 2.26 (Special provisions relating to taxis and hire vehicles and other vehicles) to the extent that the determination relates only to that part of the premium to be paid before the issue of a third-party policy.
- (6) The Motor Accident Guidelines may provide for the refund of part of the premium paid

for a third-party policy after the period for which the policy is issued by reference to digital information recorded about the distance travelled by the motor vehicle.

- (7) The Motor Accident Guidelines may exclude any class of vehicles from the operation of this provision.

### **Schedule 5 (Repealed)**