

# NSW Motor Accidents Amendment Act 1998

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The 1995 amendments, which drastically reduced damages for non-economic loss for injuries less than 30% of a most extreme case were supposed to result in lower Green Slips premiums.

When that didn't occur, despite the reduction in damages and new claims, the Government sought to reduce legal and transaction costs. Hence, the *Motor Accidents Amendment Act 1998*.

The Act's objective is to facilitate settlements on an *unlitigated* basis where liability has been admitted and the claimant's injuries have stabilised by providing for compulsory exchanges of offers of settlement and conciliation before litigation.

## Procedural Changes

Section 44C requires the claimant to provide the insurer with a detailed Statement of Particulars, with supporting documentation, medical reports, etc. *plus an offer of settlement*, within 12 months of the date of accident (extension to 18 months possible).

Thereafter the insurer has 3 months to accept the offer or submit a counter offer.

The claimant then has 4 weeks to accept the counter offer or reject it.

If the offer is rejected the claim is referred to the Motor Accidents Claims Assessment Unit ("the Unit") to determine whether the claim is suitable for conciliation.

If it is, a conciliator is appointed to review the material, to call the parties together in a conciliation conference, to confer with doctors etc., to encourage a settlement and if necessary to make an assessment of damages.

The conciliation conference must be held within 4 weeks from the date the dispute is assessed as being suitable.

If the conciliator has to make an assessment of damages, the assessment must specify the amount of damages and reasons.

The parties have 2 weeks to accept or reject the assessment. If rejected the claim will proceed to litigation. Such claims will not be referred for arbitration.

## Costs Implications

If the conciliator's assessment is greater than the insurer's counter offer the insurer pays the claimant's legal costs up to and including the conciliation and the conciliation fee.

If, on the other hand, the conciliator's assessment is equal to or less than the insurer's counter offer, each party bears his/her own costs up to and including the conciliation and half the conciliation fee. The cost orders will apply, regardless of what ultimately happens in court.

## Extension of Time

Where the claimant's injuries have not stabilised within 12 months, the claimant may prepare and serve an interim Notice after 9 months. This Notice must contain whatever particulars are available at the time, including an estimate of the future medical condition of the claimant.

The interim Notice will extend the time for service of the 44C Statement and the offer of settlement to 18 months from the date of the accident. Thereafter the same procedure will apply as discussed above.

## What after 18 months?

If, after 18 months from the date of the accident, the claimant's injuries have not sufficiently stabilised for the claim to be assessed the claimant may apply to the Unit for a certificate (44G Certificate) to allow proceedings to be commenced without conciliation or an exchange of offers.

## Exceptions

Even where liability has been admitted the parties, or one or both of them, can apply to the Unit for a 44G Certificate, enabling court proceedings to be com-

menced, in special circumstances, including the fact that the claimant's injuries have not and obviously will not stabilise within 18 months from the date of the accident.

## Non-compliance with Section 44C

If the insurer considers the particulars set out in the 44C Statement are insufficient it has one month to object and refer the objection to the Unit for assessment by a conciliator who will make a determination as to whether or not there has been sufficient compliance. If the decision is that there has not been sufficient compliance the conciliator will give notice to the claimant as to the deficiencies in the 44C Statement who will have 3 months to comply. Failure to do so within 3 months will result in the claim being withdrawn. If the claimant seeks to have the claim reinstated in such circumstances, it will be necessary to apply to the court which will only reinstate the claim if it is satisfied that -

- there was good reason for the claimant's failure to comply, and
- the total damages of all claims likely to be awarded to the claimant, if the claim succeeds, will be at least 10% of the Section 79 maximum as at the date of the accident.

If the claimant fails to provide a 44C Statement at all the insurer may, after 18 months of the date of the accident, give notice to the claimant requiring the claimant to provide a 44C Statement or, if the injuries or any of them have not yet stabilised, to apply for 44G Certificate.

Again if the claimant does not comply with the notice within 3 months the claim will be withdrawn. It can only be reinstated in the circumstances set out above.

## Insurer's ability to take the initiative

If 18 months have elapsed since the accident the insurer may give the claimant



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a notice requiring the commencement of court proceedings. If the claimant does not comply with the notice within 3 months the claim is taken to have been withdrawn. The same provisions in relation to re-statement apply as above.

#### What doesn't change?

It will still be necessary for the claimant to comply with Section 42 (Report to the Police), 43 (Notice within 6 months), 48 (furnish further and better particulars), 49 (medical examinations) and 52 (commencement of court proceedings within 3 years).

Where liability is denied and/or the claimant's injuries have not stabilised within 18 months of the date accident it will be necessary for the claimant to provide the insurer with a Section 50A Statement rather than a Section 44C Statement.

Section 50A has been amended so that it is no longer necessary to provide a prognosis for future recovery. Rather what is required is an estimate of the future medical condition of the plaintiff in respect of the injuries which haven't stabilised which can be made at the time the details are given.

#### Other amendments

##### Liability

Liability is now the key to whether the new procedures apply.

Section 44H requires the insurer to give written notice to the claimant as expeditiously as possible within 6 months after having received the Notice of Claim as to whether or not liability is admitted, wholly or partially.

If partially, the Notice must give details sufficient for the claimant to ascertain the extent to which liability is admitted.

If no written notice is given liability is deemed to have been denied totally.

##### Section 45

Section 45 will include the payment of care provided to a seriously injured claimant who is in need of constant care over a long term, if the services are provided by a person with the appropriate training, ie. commercial care. Services provided by a relative or on a voluntary basis are excluded, although an insurer

may agree to pay for such services.

##### Section 45 Disputes

As a result of *Stubbs v NRMA Insurance Limited* (1997) 42NSW LR550 (NSW.CA) which held that the insurer's obligation under Section 45 is unenforceable by a court, a dispute resolution mechanism has been created (45A).

Where a dispute arises as to whether or not an insurer ought to pay an expense pursuant to Section 45 either party may refer the matter to the Authority which will evaluate the claim and make a recommendation as to whether or not the insurer ought to pay.

The Authority may refer the dispute to arbitration, which will be binding on both parties. The Authority may require the claimant to undergo a medical examination and request particulars.

##### Regulation of Legal Costs

The Government has been given the power to regulate legal costs and CTP claims, by capping or fixing costs available to both plaintiffs' or defendants' lawyers.

##### Commencement Date of Amendments

It is expected the amendments will apply for claims made on or after 1 July 1999, although the Amendment Act has not yet been proclaimed.

##### Conclusions

In claims where liability has been admitted and the injuries are likely to stabilise within 18 months of the date of the accident, court proceedings cannot commence until the parties have exchanged offers and a conciliation has been held.

Where liability is denied and/or it is likely that the injuries will not have stabilised sufficiently within 18 months before a proper assessment of damages can be made, the parties will be encouraged to litigate the claim. In such cases the normal procedure will apply, including the requirement of the claimant to provide the insurer with a Section 50A Statement prior to litigation. ■

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## Australia Unfair

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receiving fair compensation for any injury suffered as a result of reckless or negligent behaviour in these areas is remote.

We can illustrate that government, despite rhetoric to the contrary, prefers to maintain and create barriers to justice because it fears the invigoration of the populace armed with the keys to the courthouse and the greater level of accountability which results.

We can say that employers in the main have no incentive to avoid reckless work practices as the person suffering the greatest financial penalty from a unsafe workplaces is the worker.

We can demonstrate that successive governments have preferred to have lower insurance premiums for business and overly profitable insurance companies rather than schemes that fairly protect workers and consumers for the true cost of tragedies.

We can reveal government being frightened to legislate and protect citizens for fear of distressing those to whom they are beholden.

We can show that "mateship" can mean nepotism and advantages to the privileged at the expense of the feeble.

Just as immense as the politicians' deceit of the public is the public's need for any new constitution to state unequivocally our priorities and goals - to enshrine the basic individual freedoms which Australians are entitled to take for granted. A Bill of Rights.

But we can not expect this to be offered by any political party as that would draw attention to their role in the destruction and signal the arrival of a nation whose citizens are in control of their future rather than executive government as is the case today.

As at the time of our first constitution, lawyers must play an important role in these historic events which will define the nation's personality, our place in the world and our hopes for the future.



**Peter Carter**, President