

# The Tasmanian hybrid Compensation Scheme

By Emma White & John Green

In July 2011, the Productivity Commission delivered its inquiry report on disability care and support to the federal government. The Productivity Commission recommended the establishment of two schemes, the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS). It was proposed that the NDIS would cover those requiring long-term care from birth, or acquired through accident or health conditions. The NIIS would cover those injured through catastrophic injuries, irrespective of how those injuries occurred. The NIIS would also include those catastrophically injured through motor vehicle accidents. The proposed NIIS carries with it the recommendation that common law damages associated with lifetime care and support be abolished, but is silent as to an injured person's right to compensation for loss of earning capacity and general damages. Perhaps the well-established hybrid scheme in Tasmania could serve as a working model for the NIIS and possibly the NDIS?

**THE TASMANIAN SCHEME**

The premium for passenger motor vehicles is \$344 per annum and for a pensioner it is only \$275. These premiums are cheaper than those in all states and territories apart from Queensland and Western Australia. But there is no access to common law rights in WA and the benefits in QLD are severely limited.

The Tasmanian scheme is efficient and economical because it has abolished half a dozen competing insurance companies, each with their own administration costs, thus eliminating wasteful duplication.

Persons injured in motor vehicle accidents in Tasmania have immediate access to a no-fault benefits scheme in addition to common law rights. The no-fault scheme is operated by the Motor Accident Insurance Board (MAIB), set up under the *Motor Accidents (Liabilities and Compensation) Act 1973 (Tas)* (the Act). Provided that they do not fall into one of the exclusion categories listed in s24,<sup>1</sup> persons injured are entitled to statutory payments for medical and disability benefits up to a maximum of \$500,000, in the aggregate.<sup>2</sup> Under s27 of the Act, where an individual is entitled to common law damages, the scheduled benefits paid are taken to be a payment in or towards the discharge of the MAIB's liability, with the amount of damages reduced accordingly.<sup>3</sup>

Statutory compensation is paid according to the *Motor Accidents (Liabilities and Compensation) Regulations 2010 (Tas)*<sup>4</sup> (the Regulations). Those injured have access to reasonable and necessary medical expenses, a disability allowance, and disability benefits.

**Reasonable and necessary medical expenses**

- Medical or surgical treatment;
- Therapeutic treatment by a physiotherapist, osteopath, naturopath, masseur or chiropractor;
- Psychological services;
- Dental treatment;
- Examination, analysis or tests;
- Hospital and associated fees;
- Road accident rescue and ambulance services;
- Nursing care, rehabilitation services and medical supplies; and
- Travelling expenses.<sup>5</sup>

**Disability allowance<sup>6</sup>**

A disability allowance is not payable for the first seven days following the motor vehicle accident. In addition, the person must be wholly disabled<sup>7</sup> from engaging in their usual employment or ordinary household duties within 20 days of the accident.

Three forms of disability allowance are payable:

**1. An employed person's allowance**

This is payable to a person employed for remuneration or profit at the time of the motor vehicle accident, or engaged in employment for a total period of not less than 26 weeks in the 12 months preceding the accident, or actively seeking employment.

If the person was earning in excess of \$400 a week, the allowance is paid at either 80 per cent of the

person's average weekly earnings or three times the adult average weekly earnings, whichever is less.

If their earnings were less than \$400 per week, the allowance is \$320 or their average weekly earnings, whichever is less.

The allowance is payable for two years, if the person is unable to resume their usual employment for this length of time. It is also payable for a further year, should they remain 'disabled for employment' for which they would otherwise be reasonably suited by education, training, experience or ability.

**2. A self-employed person's allowance**

This is payable to a person carrying on a business for profit who is disabled from conducting that business, and arrangements are made for another person to receive remuneration, gratuity or reward to conduct the business.


The allowance payable is 80 per cent of the remuneration, gratuity or reward paid to another to carry on the business, or three times the adult average weekly earnings, whichever is less.

The allowance is payable for two years if the person's inability to conduct their business lasts this long. The period can be extended for a further year, should they remain 'disabled for employment' for which they would otherwise be reasonably suited by education, training, experience or ability.

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3. *A housekeeping allowance*

This allowance is payable to those who normally carry out household duties.

The allowance is ordinarily payable to a person for 26 weeks, but is increased to 39 weeks for those who are hospitalised for four or more days following the motor vehicle accident.

The allowance is paid at \$250 per week or at reasonable commercial cost, whichever is less.

**Disability benefits<sup>8</sup>**

The Regulations also provide further benefits, including the following:

- Artificial limbs or other prostheses;
- Medical or surgical aids or other aids;
- Appliances or equipment of a domestic nature deemed appropriate;
- Alterations to a motor vehicle;<sup>9</sup>
- Alterations to a building in which an individual resides or proposes to reside;<sup>10</sup>
- Attendant care; and
- Daily care.<sup>11</sup>

**DAILY CARE**

Importantly, s27A of the Act ensures that severely injured plaintiffs receive ongoing care for life: if the Supreme Court certifies that a person entitled to damages requires daily care, then the MAIB remains liable to pay for that care as and when the relevant expense is incurred, for as long as it is needed.<sup>12</sup> In order to receive ongoing daily care under s27A, a person must require, or be likely to require, at least two hours of care per day for an indefinite period, and this care must have been required during the 12 months following the motor vehicle accident. In cases where the Court certifies that daily care is required, it may still be necessary to include those expenses that fall outside the ambit of s27A in a claim.<sup>13</sup>

If the Court certifies that daily care is required, then the person is taken to need that care and settlement of the common law claim cannot include future medical expenses. Similarly, if an accepted offer of compromise includes ongoing daily care, then no further claim for future medical and disability benefits can be made, and it is accepted that the person requires daily care. Similarly, if an offer of compromise includes future medical expenses, then no further medical or disability benefits are payable by the MAIB.

For those requiring daily care, the limit on statutory benefits does not apply; however, the total daily or weekly expenses of attendant care and domestic services and total amount payable cannot exceed the total daily or weekly expenses payable if the individual was being provided with care in a purpose-built group accommodation.<sup>14</sup>

**LOOKING TO THE FUTURE**

Although the Productivity Commission Inquiry report recommended that the MAIB expand the current scheme to include catastrophic injury under the NIIS, the MAIB expressed particular concern with this suggestion on the basis that it could risk the financial position of the scheme currently in place.<sup>15</sup> While the issue of funding the proposed schemes will undoubtedly remain a live issue going forward, especially in light of the lack of funding displayed in the 2012 Mid-Year Economic Fiscal Outlook or 'mini-budget' delivered by the federal government, there is no good reason why a similar hybrid scheme, whether operated by the MAIB or perhaps by an independent body, with the proper funding allocated, would not work on a larger scale. The MAIB, in its submission to the Productivity Commission, alluded to the success of the Tasmanian scheme:

*'The scheme compares most favourably with other Australian state and territory schemes. Its capacity to deliver no-fault benefits, including unrestricted no-fault benefits to the catastrophically injured, ... while retaining largely unfettered rights to sue for damages where another party is at fault, is unparalleled in Australia.'*<sup>16</sup>

The Tasmanian scheme enables those who are injured in motor vehicle accidents to receive immediate medical assistance, as well as providing financial support when it is needed most. In addition, those with the ability to do so can pursue their common law rights to obtain settlement for damages above and beyond the no-fault scheme, with the assistance of daily care being paid for those who meet the test.

Even as a hybrid scheme, it still appears to look healthy.<sup>17</sup> In

2010/2011, the operating result after tax was \$51.8 million, with the total accumulated operating result after tax for the last five years being \$202.5 million. By way of key performance indicators, although the forecasted solvency level was estimated at 27 per cent, the result actually achieved was 25.7 per cent. The net assets as at 30 June 2011 were \$288.7 million, and this makes for an allowance of \$766 million for future claims. In addition, the state government received a dividend income of \$34.6 million. It further appears that a generous level of benefits has had little effect on the premium paid. Aaron Cutter,<sup>18</sup> in his paper presented to the Institute of Actuaries of Australia, demonstrates that even with the hybrid scheme, the premium rates have remained stable and in line with the premiums paid across other Australian jurisdictions.

There is no doubt that having a no-fault scheme in place for all catastrophic injuries for lifetime care would be invaluable for those presently injured in Tasmania outside of the motor vehicle setting. However, those injured should still retain the right to bring common law action

Those injured in Tasmanian MVAs have immediate access to a no-fault benefits scheme in addition to common law rights.

should they wish to do so. Even without considering general damages for pain and suffering, if the proposed schemes abolish common law rights, then injured persons will continue to be significantly out of pocket given the restrictions likely to be put on payments similar to a disability allowance outlined above (that is, under the scheduled benefits scheme, a person will generally receive 80 per cent of their wage, and are therefore still 20 per cent out of pocket).

Using a hybrid scheme, any common law right will still involve an assessment of each case on its merits. It is well known to the wider community that with any legal action comes uncertainty – both financially and medically. It can be high risk, high cost and then there is the matter of discount rates and contingencies and trying to predict the future. But those injured should be given the right to choose whether they wish to continue to receive lifetime support, or take the plunge with legal action. The hybrid Tasmanian model as it currently stands allows for both.

If the MAIB scheme were to be adopted as a working model for all catastrophic injuries across Australia, then obviously it is unlikely to alter the landscape of motor vehicle accident claims in Tasmania, but would mean big changes in most other states and territories. Would it increase the likelihood of other common law claims? Overall, that outcome is unlikely. While those severely injured at work may have an increased ability to pursue common law damages, medical negligence and public liability claims may decrease. These claims will continue to be high-risk litigation and, with access to much-needed statutory benefits that include care as needed, potential litigants may think twice.

Every Australian should have the right to choose the option that best suits their future needs after receiving considered legal advice. However, being able to make this decision while receiving quality care should hopefully lead to consistently better outcomes for individuals across Australia. ■

**Notes:** **1** The exclusions include, but are not limited to, intentional causing or attempting to cause personal injury; racing; the use of trail bikes, farm bikes or beach buggies where the premium was not paid and the injured person was the owner; if the motor vehicle was involved in the commission of an offence of dishonesty or violence and if the person was convicted of manslaughter, causing death by dangerous driving; causing grievous bodily harm by dangerous driving; reckless driving; driving while under the influence of alcohol or drugs; or does not hold a driver's licence. **2** If the person was an in-patient of a hospital for a continuous period of more than four days commencing on the date of the accident, then there is a maximum of \$500,000, in the aggregate. If they were not, then the maximum is \$400,000 (in the aggregate). **3** Where there is a finding of contributory negligence, the scheduled benefits paid become part of the calculation. **4** Disputes are determined by the Motor Accidents Compensation Tribunal. **5** Motor Accidents (Liabilities and Compensation) Regulations 2010, Part 2. **6** *Ibid*, Part 6. **7** 'Wholly disabled from engaging in his usual employment or occupation' is not defined, but the issue has been before the Motor Accidents Compensation Tribunal. **8** Motor Accidents (Liabilities and Compensation) Regulations 2010, Part 6. **9** These are payable once every five years. **10** These are payable once every 15 years. **11** Section 28C of the *Civil Liability Act 2002* abolished awards for gratuitous services. **12** There is also the possibility of a structured settlement under s8 of the *Civil Liability Act 2002* (Tas). **13** For example, additional alterations to premises may need to occur more than once every 15 years. **14** There is little case law on s27A, and even less literature on whether those who do require daily care choose attendant and domestic care over that of purpose-built group accommodation, and the quality of this care. Although there is very little published information on this, it appears that those who meet the daily care requirement do choose to take the option of continuous paid care over an award of future medical and associated expenses and do find themselves in group accommodation. **15** [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0015/109311/subdr0687.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0015/109311/subdr0687.pdf). **16** [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0015/109311/subdr0687.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0015/109311/subdr0687.pdf). **17** According to the MAIB 2010-2011 Annual report. **18** Aaron Cutter, *Comparison Across CTP Schemes In Australasia*, April 2007.

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