



National Injury Insurance Scheme Workplace Accidents

Ensuring sustainability and consumer choice

Submission to Department of Treasury, Consultation Regulation Impact
Statement, NIIS - Workplace Accidents

12 April 2015

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WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

OUR STANDING TO COMMENT

The ALA is well placed to provide commentary to the Committee. Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another.

Our members advise clients of their rights under current state based and federal schemes, including motor accident legislation, workers compensation schemes and Comcare. Our members also advise in cases of medical negligence, product liability and other areas of tort.

We therefore have expert knowledge of compensation schemes across the country, and of the specific ways in which individuals' rights are violated or supported by different Scheme models. Moreover, we have deep knowledge of which models are sustainable, or not.

We are well aware of existing methods of compensation reimbursement across the country, in order for individuals to gain access to care, as they deal with intersecting Schemes.

The ALA has commented on NDIS and NIIS issues since the ideas were first conceived.

Our members also often contribute to law reform in a range of host jurisdictions in relation to compensation, existing schemes and their practical impact on our clients. Many of our members are also legal specialists in their field. We are happy to provide further comment on a range of topics for the Committee.

INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Department of Treasury regarding the *Consultation Regulation Impact Statement on the National Injury Insurance Scheme – Workplace Accidents*.

This submission is divided into four Parts:

- Part 1 will address the nature of the problem;
- Part 2 will address the options within the RIS;
- Part 3 will address impact analysis.

The Australian Lawyers Alliance is strongly of the view that the common law rights of people who have been catastrophically injured in workplace accidents should be preserved. This includes the option to commute what might otherwise be an income stream into a lump sum. Common law rights are fundamental to fairness. Schemes which maintain meaningful common law access are demonstrably sustainable, and provide consumer choice.

We submit that the NIIS is inappropriate for people who have been catastrophically injured in workplace accidents, and that the NIIS reform should be limited to motor vehicle accidents.

The RIS reiterates numerous assertions made by the Productivity Commission ("PC") in its 2011 NDIS/NIIS report, *Disability Care and Support*. Whilst the ALA remains a strong supporter of the bipartisanship on NDIS, it believes that the NDIS already demonstrates substantial risks for sustainability. Further, the ALA does not accept the PC's conception of a second scheme, the NIIS. The *Disability Care and Support* report contains, in Chapter 17, a flawed and factually incorrect attack on the common law. Some of the assertions in that report are unfortunately repeated in the RIS to which this document responds.

Arrangements for workplace injury in Australia already largely cater for people with catastrophic injury. Some of the schemes have common law alternatives available to claimants, while some do not.

We support the base case as an appropriate and feasible option for injured workers, with some additional changes necessary to improve the quality of service provision within existing schemes.

The number of people who are catastrophically injured in the workplace is small. This number decreases again in terms of those people who are unable to find redress under existing mechanisms.

We also believe that injured workers will not be able to 'top up' payments from the NDIS, as per the NDIS Act, NDIS Rules and decisions from the AAT. Generally, exclusions and preclusion periods analogous to Centrelink arrangements will apply.

We further submit that the minimum benchmarks expressly exclude some individuals that otherwise would have received coverage under state-based compensation schemes. With the minimum benchmarks forming a blueprint for what is acceptable for workers compensation schemes to fund (including at lower levels of injury) the benchmarks have the potential to shift a number of people who were previously covered under existing workers compensation laws to the NDIS.

We believe that some alternative changes to workers' compensation schemes would assist in promoting access and quality of care to workers, which would have benefits across the scale of injury, leading to better outcomes for workers who are catastrophically and non-catastrophically injured.

We note that the RIS asserts:

- Lump sum commutations will run out;
- The running out of lump sums will lead workers to 'top up' or 'double compensation' from the NDIS;
- Mitigating the number of injured workers in the NDIS is a concern for state and territory governments;
- Cost-shifting between the Commonwealth and states and territories is a concern;
- Caps on attendant care are leading to inadequate support.

We believe that there are errors in these key assumptions, which we will address in detail in Part 3 of this submission.

PART 1 – THE NATURE OF THE PROBLEM

This Part addresses Question 1: *Is Chapter 3 a correct statement of the problem?*

We believe that Chapter 3 does not provide a correct statement of the problem. Firstly, there is a need for greater certainty regarding statistics of catastrophic injury. Secondly, the appraisal of workers' compensation schemes is infused with the flawed views of common law apparent in the PC report. Thirdly, we believe that catastrophically injured workers will not be able to access the NDIS for support for injuries which have been accepted for a workers' compensation claim.

Number of catastrophic workplace accidents

Understanding the number of people that may be covered by a scheme is essential in considerations about financial sustainability.

We note that the estimates regarding the number of people who are catastrophically injured are now 10 years old.² Estimates compiled by PriceWaterhouseCoopers in 2005 have been relied upon within the Productivity Commission inquiry into Disability Care and Support, and the Department of Treasury's previous RIS on motor vehicle accidents.

Outside the realm of injuries in motor vehicle incidents (accounting for around 60% of all catastrophic injuries) the PC's report was based on profoundly inadequate data on the incidence of catastrophic injuries. To the extent that the RIS adopts the PC's views in respect of incidence, the RIS is likewise flawed.

The scope of the perceived problem needs far greater measurement and clarity. If change of changes of the type hypothesised by the RIS are to be considered, the incidence of catastrophic injury in each of:

1. Workplace incidents,
2. Medical negligence,
3. "General" accidents (occupiers, criminal assaults, boating incidents etc);

all require high-level, detailed measurement and analysis.

This should occur before any further agreement to minimum benchmarks is sought.

This work is fundamental to future policy development. Rather than unsubstantiated broad assertions about the incidence of those with inadequate coverage "falling through the gaps", the research would enable government to clearly identify the extent of the gaps, and the costs associated with remediation of the gaps.

This would include the development of strong evidence-based policy of the appropriateness of exclusions from coverage, and would be relevant to considerations of financial sustainability, certainty of supports and access to justice.

Workers' compensation schemes

The RIS notes that 'the low prevalence of catastrophic workplace injuries means that workers' compensation schemes are generally not equipped to support these lifelong needs'.³ There is a low incidence of catastrophic injuries from workplace incidents. However, it does not follow that workers' compensations schemes are generally ill-equipped to provide sustainable support in such cases.

We believe that workers compensation schemes have generally been well-equipped to adequately deal with catastrophically injured workers. However amendments to various schemes, including the diminution or exclusion of common law rights, have diminished the efficacy of supports to the catastrophically injured in some jurisdictions.

There are several architectural fundamentals which form the basis of fair and sustainable workers' compensations schemes:

1. Reasonable chronological restrictions upon the duration of receipt of weekly payments of compensation. "Long-tail" schemes such as NZ's ACC scheme, and the recently-euthanased SA workers' compensations scheme are the worst of both worlds: fundamentally unfair, and unsustainable,
2. A strong focus on and financial investment in rehabilitation and return to work throughout the currency of the statutory phase of the claim
3. Reasonable limits upon the type and durations of medical and like expenses. Similar considerations to 1., above, apply.
4. Meaningful access to common law. The common law has long been a resilient and flexible vehicle for the delivery of fair outcomes for those injured at work and elsewhere. Those schemes which maintain meaningful access to common law are sustainable and financially successful. The deterrent effect upon unsafe behaviours by employers is consistent with community notions of fairness. The finality of common law is consistent with self-determination and dignity so crucial for those with serious and catastrophic injuries, and their families.
5. Meaningful and fair statutory lump sums for those injured at work without access to common law. It has long been accepted that those lump sums are usually less than those available for common law. These lump sums allow a measure of self-determination.
6. Low rates of disputes. This is not best achieved by legislative interference in rights of review. Rather, scheme architecture engenders behaviours designed to bring matters to finality as soon as practicable. The incentives to engage in disputes is low in a short-tail environment.
7. Constraints upon the size of the bureaucratic infrastructure required to administer the scheme. Likewise with the previous element, this is a consequence of scheme design. Long-tail schemes which preclude or substantially diminish common law rights always spawn an expensive and unsustainable bureaucracy. The NZ and SA examples are clear cases in point. Moreover, the imminent attempt by the current federal minister for industrial relations to dramatically limit rights under the Comcare scheme, is in part a response to the flaws in long-tail models.

One other crucial matter arises with respect to the relations between States and the Commonwealth. Workers' compensations schemes ought to, and do generally, operate upon commercial insurance principles and protocols. Solvency, funding ratios, risk rating, incentivising safer behaviours and responding to unsafe behaviours. These measures allow the vast majority of claimants to be funded by the State scheme. Repayments and preclusion period arrangements in respect of Medicare and Centrelink return funds to the Commonwealth, and restrict the future drain on Commonwealth resources.

However, if existing State arrangements were to change by, for example the imposition of long-tail requirements, and/or the diminution of common law entitlements; the benefits to the Commonwealth would diminish. For every person deprived of rights under a State scheme, there is a high likelihood of that person being eligible to receive a Commonwealth benefit in some form. The shifting of the cost burden from State schemes administered according to insurance principles, across to the Commonwealth is anathema to sustainability, and choice.

The RIS also states that 'other workers compensation schemes allow workers to commute existing and future rights into a lump payment by the insurer'.⁴

This is a reflection of a broader proposition permeating the earlier PC report, and thus to some degree the RIS: that lumps sums are problematic. The ALA does not accept that proposition. They, generally, are far preferable on both fairness and economic grounds than the multifaceted problems of long-tail, drip-feed, bureaucracy-heavy designs such as the NZ and SA disasters. The paternalism which underpins the PC's flawed views is unfortunate. In the deep experience of the ALA membership, the vast majority of claimants, not only in a workers' compensation context, use their lump sums wisely for the benefit of themselves and their families. The common law provides mechanisms by which vulnerable claimants are protected, such as court sanction of settlements.

The paternalism referred to above has another disturbing aspect: promulgating the view that the disabled are inherently less capable of good choices than the non-disabled.

ALA members have daily experience with the disabled and their families, and we can distil their views, put in their words, as:

1. The lump sum is some recognition of what occurred to me. A drip-feed isn't.
2. Why should the government pay for me? It was work that caused this, so my work's insurance should pay.
3. I want choice and control. The lump sum helps me and my family get to that.

4. I was on workers compensation for quite a while. The very last thing we want is to be back in a scheme where I have to go with a begging bowl to some government crew, and have a fight with them when they don't recognise my needs. The dignity I have left will be screwed by having to deal with those people. I just want to get on with my life.
5. I know that my lump sum is precious. That's why I'm getting financial advice.
6. I understand the need to have a private trustee help with the management of my child or brain damaged spouse's lump sum. I want to choose who will help and guide us.
7. I know that it is possible that my lump sum might run out one day, but I will do my best to manage it for as long as possible, because I don't want to go begging to government again. I know I'm personally responsible for it. It is my money, after all.
8. The lump sum will enable me to retrain and do some education now that my body doesn't work as it used to. I want to work, and I will if I can get some more skills. I don't want to be stuck in a pension arrangement.

It follows from the above that the ALA strongly supports the expansion of the bases upon which periodic workers compensation payments in long-tail schemes, can be commuted or capitalised into lump sums, at the option of the claimant; provided that appropriate safeguards are applied. There are clear sustainability and choice benefits from such arrangements.

Interaction with the NDIS

We believe that the interaction of compensation schemes with the NDIS, as described by the RIS, does not provide an assessment reflective of the true position.

The RIS states that:

'If a worker is catastrophically injured in a workplace accident, they are likely to fulfil NDIS eligibility criteria if they live within a trial site and are of eligible age.'⁵

The RIS also states that:

'The NDIS could be expected to provide top up care and support to individuals catastrophically injured in a workplace accident. However, on such occasions, individuals eligible for the NDIS would be required to navigate two schemes.'⁶

The RIS also states that:

‘Individuals aged over 65 at the time of their accident will not be eligible for the NDIS and may consequently receive reduced entitlements in comparison to individuals aged under 65.’⁷

The first proposition is misleading. The NDIS legislation contains mechanisms by which recipients of State-based compensation have that compensation taken into account in determining the extent of possible coverage by the NDIS. Those arrangements are expected to operate broadly similarly to Centrelink preclusion period arrangements. We expand on those arrangements below.

As a consequence, there are likely to be many, perhaps most, workers’ compensation claimants who may notionally be entitled to NDIS benefits, but because a State lump sum was sufficient to meet their needs, they will not become a NDIS participant. It is certain that claimants from those States with meaningful access to common law will be far less likely to enter NDIS than those from States where common law entitlements have been removed.

This is entirely consistent with the NDIS being a safety-net, and also recognises the problems posed by double-dipping.

As to those aged 65 and over, they have coverage under workers’ compensations schemes.

The *Intergovernmental Agreement on the NDIS Launch* signed December 2012, provides that:

‘Noting that a new Agreement will be agreed with all jurisdictions for the NDIS full scheme, the Commonwealth’s position is that on commencement of the NDIS full scheme, individual jurisdictions will be 100 per cent responsible for the cost of participants in the NDIS who are in the NDIS *because they are not covered by an existing or new injury insurance scheme that meets the minimum benchmarks* for motor vehicle accidents, workplace accidents, medical accidents, and criminal and general accidents (occurring in the home or community).’⁸

The Intergovernmental Agreement does not appear to encourage ‘top up’ of support – instead, it appears that people who are in the NDIS *because they are not covered by an existing scheme* will be funded by the relevant jurisdiction.

Section 34 of the *NDIS Act 2014* (Cth) provides the qualifiers for the provision of reasonable and necessary support: that in a statement of participant supports, for the provision of general supports, and funding of reasonable and

necessary supports, the CEO must be satisfied of all of a number of criteria in relation to the funding or provision of each such support, including:

*'... (f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered...'*⁹

In the case of *Young and National Disability Insurance Agency* [2014] AATA 401 (20 June 2014), it was held that an individual with diabetes and emphysema condition could have his supports more appropriately met by the public health system and the supports would not be met by the NDIS. This was the case even though funding was *not available* for the supports required (an oxygen concentrator and insulin pump) from the general health system.

Senior Members Jill Toohey and John Handley held that:

'Whether or not funding is available through other general systems is not the test of whether it is most appropriately funded or provided through the NDIS.

*The fact that the health system does not fund entirely, or even at all, what is essentially clinical treatment, or some other form of support that is more appropriately funded through the health system, does not make it the responsibility of the NDIS. In our view, s 34(1)(f) reflects the statement of the Productivity Commission, which we have referred to above, that **the purpose of the NDIS is not to respond to any shortfalls in mainstream services** (nor does it purport to impose any obligations on another service system to fund or provide particular supports: cl 7.3 of sch 1).'*¹⁰

It is likely that this would also apply to individuals who are receiving supports under the relevant workers' compensation scheme. (Although, there is the potential for an amendment to the legislation in order to make this even clearer.)

The *NDIS Rules* also operate to provide further clarity regarding access to supports, and how compensation amounts will be treated. Rules of particular relevance are the *NDIS (Supports for Participants – Accounting for Compensation) Rules 2014* (Cth) ("Compensation Rules") and the *NDIS (Supports for Participants) Rules 2013* (Cth) ("Supports Rules").

The Compensation Rules are aimed at 'ensuring that where individuals receive compensation payments, the NDIS does not duplicate the funding for supports already provided for by these payments.'¹¹

The Supports Rules specify that ‘the [NDIS] Act limits the supports that can be provided or funded under the NDIS to supports that are not more appropriately funded or provided through other service systems.’¹²

Compensation is defined in s11 of the NDIS Act to include both lump sum commutation and periodic payments.

Furthermore, the approach of the NDIS Act towards compensation, as evidenced in s104 to s 115, ensures a regulated approach without restricting common law rights, and adjusts its sights regarding recovery appropriately.

The need for consistency and sustainability

Given the unprecedented scale of the NDIS, it is important to seek to ensure its sustainability.

It is important that as many people as possible are eligible to duly access adequate support under workers’ compensation. An influx of unexpected, unfunded scheme participants driven by poor Scheme design at a State level and/or diminution of rights forcing people to the Commonwealth government’s doors, would add to existing sustainability pressures upon the NDIS canvassed in other reviews of the scheme.

It follow from the above that if a worker is not successful in their workers’ compensation claim and is able to satisfy all relevant eligibility requirements for the NDIS, they will (and should) be able to access support under the NDIS.

An individual navigating two schemes

Another future consideration is: what options are available to make the process easier for individuals who end up being participants in both the NDIS and workers’ compensation schemes for different disabilities/injuries. For example, an individual with a psychiatric disability, who subsequently incurs a significant physical injury at work and has their workers’ compensation claim accepted – will the person have to navigate two schemes for the rest of their working-age life? For people who fall into this category, navigating two schemes could be prejudicial to getting them back into the workforce following an injury.

This type of situation is likely to increase, given that the NDIS is assisting people towards greater social participation, including workforce participation. So too, the *Intergenerational Report 2015* has indicated that there is likely to be an increase in the number of people over 65 working.

In light of this context, maintaining lump sum commutation so that people who are likely to become participants in more than one scheme due to pre-existing disability,

will mean that an individual spends less time in navigating schemes, and more time to have relative freedom in their life and decision-making.

This issue can receive more detailed consideration as the lessons from the trial sites are considered and adjustments to the NDIS are contemplated in the context of the imperative of sustainability.

Relevance of the National Minimum Benchmarks for Motor Vehicle Accidents Compensation Schemes

The RIS states that the minimum benchmarks for motor vehicle accidents (MVA) aim to ensure that people who suffer a catastrophic injury in a motor vehicle accident are able to receive a 'minimum standard of lifetime care and support, no matter the circumstances or location of their accident'.¹³

It is important to question the number of additional people have been able to access lifetime care and support following the introduction of the NIIS for motor vehicle accidents, and to what extent the 'gaps' that were apparent prior to the NIIS have decreased, or simply continued. With the SA and ACT changes only recently adopted and yet to be evaluated; and WA and Qld yet to finalise their proposed response; there are likely to be lessons yet to be learned on:

- (a) the efficacy of the minimum benchmark in the CTP context; and
- (b) the interface between the CTP minimum benchmarks and the NDIS.

The RIS states that:

'workers who are catastrophically injured in workplace accidents are not entitled to a minimum level of coverage because jurisdictions have not agreed to minimum benchmarks for the provision of lifetime care and support'.¹⁴

Accordingly, whilst some States and Territories meet the workers' compensation minimum benchmarks, to the extent that the minimum benchmarks would if adopted engender suboptimal scheme design, the ALA disagrees with the minimum benchmarks.

And as stated earlier, the paucity of non-CTP data on the incidence of catastrophic injuries means that caution is needed in committing to any change in policy until further evaluation is undertaken. States and Territories ought not therefore, to commit to workers' compensation "minimum benchmarks" for the time being.

The importance of choice

The importance of choice for people with disability was made clear in the *UN Convention on the Rights of Persons with Disability*. The Preamble relevantly

recognises ‘the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices...’¹⁵

Article 3, which outlines the general principles of the Convention, recognises the importance of choice in the first principle:

‘The principles of the present Convention shall be:

Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons...’¹⁶

The *NDIS Act 2013* (Cth) also outlines the importance of choice in providing support to people with disability.

In the objects of the Act in section 3, the NDIS aims to:

‘(c) *support the independence and social and economic participation of people with disability; and...*

‘(e) *enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports...*’

The general guiding principles of the Act also outline in section 4 the importance of certainty, choice and control:

‘(3) *People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.*

‘(4) *People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports.*

‘(7) *People with disability have the same right as other members of Australian society to pursue any grievance.*

‘(8) *People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.*’

More on lump sum compensation and choice

A core principle within the RIS is that lump sum compensation cannot meet the minimum benchmarks. The ALA reiterates opposition to that view. Lump sums are

one of the most powerful methods of empowerment and choice, two concepts central to the improvement of the safety-net at NDIS level

Lump sums provide individuals and their families with the power to manage their own affairs, and freedom from bureaucracy in their decision-making.

When an injured worker receives a lump sum, they retain choice both over their financial management and the management of their care.

Financially, injured workers retain the choice to invest the amount with the private sector or the public sector (with State based public trustees). Injured workers can also sometimes buy a residential property providing financial security for their lifetime.

Given that it is their money, it is the experience of our members that claimants are inclined to be very careful with it and often seek independent advice on how to make the most of the amount to improve their lifetime quality of life.

At a care level, when a worker receives a lump sum, they retain the freedom to select the carers they wish to hire and fire; and every decision about their ongoing care is their own decision, made in conjunction with their medical professionals and with their family. The profound problems with workforce infrastructure planning being experienced at NDIS level will be seriously exacerbated by the imposition of any new State arrangements of a similar type to the NSW LTCSS being imposed upon States and Territories not currently meeting the hypothesised WC minimum benchmarks.

For those individuals who do not retain legal capacity following their injury, the provision of a lump sum payment is a relief to families, who no longer have to make arduous applications to a scheme or scheme agents in order to obtain necessary approvals. Instead, the family also regains the time previously spent in lodging forms and applications, to instead make long-term choices for the benefit of their loved one, without needing to consider a scheme's permission.

It is incongruous that minimum benchmarks impose a requirement for jurisdictions to remove access to lump sum commutation, against a context where the importance of choice has been emphasised in the decision-making of people living with a disability.

PART 2 - OPTIONS

This Part addresses Question 3: *Do you agree with the description of the base case?* and Question 4: *Are the minimum benchmarks and harmonisation options reasonable and appropriate? Are there further options that should be considered?*

Base case

We do not agree with the description of the base case, as noted in our addressing 'The nature of the problem' in Part 1. We provide further analysis below.

The adequacy of cover

The RIS describes that under the base case, 'jurisdictions would not make changes to their workers' compensation schemes, and schemes would continue to provide cover on a no-fault basis for workers catastrophically injured.'¹⁷

For reasons already stated, the ALA supports the base case: no minimum benchmarks in workers' compensation for the time being. Further, to the extent that minimum workers' compensation benchmarks are considered at an appropriate time, and with more factual material. It is the ALA's view that such benchmarks must not involve any aspect which is counter to proven optimal scheme design, nor any aspect which involves diminution of common law rights.

Why do some lump sum payments run out?

The RIS also cites that 'there are occasions where these schemes fall short of the minimum benchmarks for the provision of lifetime care and support, mainly around lump sum payments and caps on services'.¹⁸

The reason for that is that common law claims have been inappropriately capped and limited by legislation so that true assessment of loss cannot occur. It would be easier to take away those restrictions and assessments than to create a new scheme (e.g. reduce discount rate and attendant care costs limits).

Lump sum payments running out

The RIS describes lump sum payments as not meeting the minimum benchmarks:

'[In the ACT], access to a lump sum, even at the election of the worker, does not meet the minimum benchmarks.'¹⁹

'[In Queensland], injured workers who assessed degree of permanent impairment is greater than 5 per cent retain the right to seek damages under the common law for care and support. This allow workers to be paid a lump sum, rather than lifetime care and support and is why Queensland does not meet the minimum benchmarks.'²⁰

'[In WA], a worker may agree to receive a lump sum rather than the ongoing payment of expenses, including medical expenses. Accepting this lump sum extinguishes future rights, essentially buying the worker out of the scheme. The choice to exercise this mechanism to convert payments to a lump sum

is left to the worker. Even though this is the choice of the worker, they are left to bear the risk of the adequacy of that lump sum payment, which does not meet the minimum benchmarks.²¹

The problem is not lump sums, *per se*. Lump sums are a big part of the solution, not the problem. The application of the discount rate, capping, the imposition of thresholds upon access to common law remedies and other legislative measures have reduced the adequacy of payments for injured people.

(We will address the inadequacy of the discount rate, a point which we will address later in Part 2 under 'Further Options'.)

Question 4: Are the minimum benchmarks and harmonisation options reasonable and appropriate? Are there further options that should be considered?

Minimum benchmarks

We do not believe that the minimum benchmarks are reasonable and appropriate, and we believe that there are further options that should be considered that will increase access to support for Australians injured at work across the injury spectrum.

Under this option, jurisdictions agree minimum benchmarks and then make any necessary changes to ensure that their schemes align with the minimum benchmarks.²² Under this option, existing jurisdictional workers' compensation schemes would be reformed so that a minimum agreed level of support is offered by each scheme on a no-fault basis. This ought only to occur:

1. in the context of further research; and
2. once the lessons are apparent from the adoption and implementation of CTP NIS benchmarks.

Jurisdictions that meet the benchmarks

Jurisdictions which are held to comply with the minimum benchmarks for workplace accidents (New South Wales, Victoria, the Northern Territory and South Australia)²³ are deficient in a number of other ways that result in both cost-shifting to the Commonwealth, and inadequate coverage for workers.

The deficiencies in these models should not become templates for other jurisdictions.

In June 2012, the NSW government passed the *Workers' Compensation Legislation Amendment Act 2012* (NSW). The reforms 'controversially revised access to compensation for journey claims, restricted the thresholds for entitlements and

strengthened return to work obligations for injured workers'.²⁴ Imposing a new 10 per cent whole person impairment threshold, meant that thousands of workers are now ineligible to claim. The changes were further made retrospective through the decision in *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 (16 May 2014).

In 2014, researchers from the Centre for Workforce Futures at Macquarie University conducted a review of the 2012 changes, and found that:

'The costs of injuries are increasingly shifting from the workers' compensation scheme to the workers and their families. Consequently, the risks associated with working are felt more acutely by workers. The financial burden of workplace injuries also transfers to federal tax-payer funded safety nets such as Medicare and Centrelink benefits.'²⁵

South Australia's *Return to Work Act 2014 (SA)*, which will come into effect on 1 July 2015 and is held to already satisfy the benchmarks, will also have a negative effect on workers and their ability to claim for injury. Over 95% of people injured in unsafe workplaces in SA will have the right to pursue a damages claim precluded.

This new SA Act will allow injured workers only 2 years of income maintenance after the injury occurs (not incapacity, is to be noted), unless they fulfil criteria that they are 30 per cent whole person impaired (WPI), a level that few will achieve.

In addition, an inadequate (for most) economic lump sum is created, but clearly illustrates how legislative action undermines actuarial assessment when conducted at common law without capping and restrictions. After the two years, many will seek common law's assistance, or in some cases, NDIS support.

In Queensland, the former Newman government legislated in October 2013 to reduce the right to pursue a common law damages claim. As a consequence, over 60% of people injured in unsafe workplaces were precluded from bringing a damages claim. The large scale shifting of the cost-burden of negligent conduct to the Commonwealth is, and will occur in both Qld and SA. The new Qld government has pledged to restore the pre-October 2013 structure. It will be by that process that better coverage for the catastrophically injured will occur.

Exclusions to the minimum benchmarks

The range of exclusions in the minimum benchmarks has greater significance than simply this RIS; but also has relevance to workers' compensation across the scale of injury, providing markers as to what is acceptable and unacceptable for workplace insurers to fund.

We note that while the RIS aims at consistency across state and territory borders, the level to which states and territories adopt the exclusions is their prerogative.²⁶

Journeys to work and offsite recess breaks

For example, the RIS cites that work-related travel and onsite recess breaks will be included in NIIS coverage, but that journeys to work and offsite recess breaks will not.²⁷ (Jurisdictions may provide a broader scope if they desire.)

In NSW, journeys to work claims were controversially removed from coverage in 2012. At a federal level, the *Safety, Rehabilitation and Compensation Amendment Bill 2014* (Cth) attempted (albeit unsuccessfully) to remove offsite recess breaks from coverage.

We note that although journey coverage is now the exception rather than rule in a workers' compensation context, the CTP minimum benchmarks provide such coverage.

Serious or wilful misconduct

The RIS proposes that the minimum benchmark will not require the NIIS to provide coverage where a person is catastrophically injured while engaging in serious or wilful misconduct.

Section 6 of the *Workers Compensation Act 1958* (VIC), states that if a worker's injury is attributable to serious and wilful misconduct:

'any compensation claimed in respect of that injury shall, **unless the injury results in death or serious and permanent disablement**, be disallowed and if it is proved that the injury to a worker was deliberately self-inflicted no compensation shall be payable under [the] Act'. (emphasis added)

This provision has similar iterations in other State workers' compensation legislation, supplemented by common law on the meaning of serious and wilful misconduct.

Catastrophic injury would clearly constitute serious and permanent disablement.

The benchmark should protect against, rather than exclude coverage for, catastrophic injuries even where an allegation of misconduct is capable of being made.

Identity of workers

There is a wealth of common law addressing the sometimes blurred line between employees on the one hand and contractors on the other. Likewise, most State legislation has similar definitional provisions to address the issue.

The ALA urges that when benchmarks are formed, if they are to address this issue, that any benchmarks reinforce the need to counter sham-contractor arrangements as a means of circumventing the obligation to pay workers' compensation premiums.

Harmonisation

We do not believe harmonisation is appropriate. This option, canvassed briefly in the RIS, is for jurisdictions to negotiate and agree a fully harmonised model of lifetime care and support to be provided in the event of a catastrophic workplace accident.

This could incorporate contracting out lifetime care arrangements to another scheme, such as the ACT has done in relation to MVA claims. The viability of other jurisdictions engaging in such contracting could prove effective in remote areas bordering another jurisdiction.

Significantly, harmonisation could involve securing a national commitment to reduce the discount rate, and to nationally introduce a mechanism supporting lump sum commutation – options we explore further below.

Question 4(b) – Are there further options that should be considered?

Further options

Discount rate

Another significant way in which lump sum payments could be made more efficient in the long term would be to reduce the nationally-variable discount rate, such as 3.5 per cent, as proposed by the High Court in *Todorovic v Waller* [1981] HCA 72.

The High Court, with the benefit of long term actuarial evidence, considered a 3% discount rate appropriate at a time when interest rates were approximately 12 – 15%.²⁸

Plaintiffs are now in the situation where discount rates are 5% or more, yet cash rates have for a long time been at historic low levels. This is significantly adversely impacting injured people.

Reducing the discount rate, and ensuring it is nationally consistent, would ensure that injured Australians are more adequately compensated and face a more level playing field in determining the choice between lump sum commutation and lifetime care.

PART 3 – IMPACT ANALYSIS

BASE CASE

Question 6: Do you agree with the identified impact of the base case on workers?

Risk

The RIS states that the provision of a lump sum effectively transfers risk from the workers' compensation scheme to the injured person. The RIS raises longevity risk, as well as workers must also take on the risk in managing their funds.²⁹

There are many private financial management services that now specifically provide services for individuals who have been significantly injured and subsequently received a compensation payment. These specialised services assist individuals to manage their assets more effectively, promoting a higher return to clients.

Further, the 'dignity of risk' is a concept that has been discussed at great length during the development of the NDIS.

As part of the *NDIS Strategic Plan 2013-2016*, goals and outcomes specifies dignity of risk as a deliverable of outcomes. Outcome B aims to 'promote the independence and social and economic participation of all people with disability but especially those who are vulnerable or marginalised.'³⁰ The three deliverables include:

- People with disability should be supported to contribute to social and economic life to the extent of their ability.
- People with disability, their families and carers will have certainty of the care and support that is needed over a lifetime.
- *Ensure the decisions and preferences of people with disability are respected and are afforded the dignity of risk where it is their choice.*³¹

Further, the National Commission of Audit recognised in 2015 that:

'Unsustainable fiscal policies pursued by governments represent a substantial risk for any country and its citizens. Equally, well managed finances and responsible, disciplined fiscal policy reduce risks. In dealing with risks in society, governments should acknowledge eliminating all risk is

both unattainable and undesirable. The community should not expect a risk-free life.¹³²

It is not appropriate for the NIS to attempt to control risk that should rest with an individual and their choice.

As is stated elsewhere in this submission, it is the experience of ALA's members that lump sums are a key driver of self-determination, effective rehabilitation and return to meaningful work and activity. They deliver dignity, finality and lack of bureaucracy for workers and employers. They also deliver smaller bureaucratic structures, and they minimise the cost-transfer to the Commonwealth.

NDIS

As stated earlier, we do not believe that most individuals will be entitled to access the NDIS for 'top up'. The maintenance and enhancement of common law and lump sum rights will serve to minimise numbers entering the NDIS and the scope of supports claimable when they do.

Inconsistency

The RIS notes that under the base case, there would be inconsistencies between treatment of workers who are catastrophically injured - between jurisdictions and in a motor vehicle accident.

Standardisation leads to both the reduction of current rights in some jurisdictions in order to meet the 'lowest common denominator' but also has an impact on lesser injuries on the scale.

The ALA supports, in principle, harmonisation. However, the history of such endeavours has been of a race to the bottom: harmonisation being the stated basis upon which a diminution of rights has occurred. The ALA supports the principle of harmonisation only on a levelling up basis.

MINIMUM BENCHMARKS

Question 12: Do you agree with the identified impact of the minimum benchmarks on workers?

Impacts on workers

The RIS states that under the minimum benchmarks options, insurers will no longer be entitled to make commutation offers to workers and caps on services will be removed.³³ For reasons already stated, this is a misconceived proposal.



We believe that an impact of this will be that workers may seek to be assessed below the 'catastrophic' level of injury so as to avoid the pitfalls of participation in a scheme in which they have no real control.

So too, we believe that workers will face increased disputes with insurers who may seek to have cases classed as 'catastrophic' in order that the care and support of these individuals would fall to the NIS instead. This has often been the case within the NSW Lifetime Care and Support Scheme, where people will seek to have their injury assessed at below a catastrophic rate so that they may continue to exercise choice and control over their care, support, and life.

Subsequent impacts on significantly injured people

Another impact of the minimum benchmarks that has not been highlighted by the RIS, is the subsequent impacts on workers suffering a less severe injury.

The funding model pursued by each jurisdiction towards securing lifetime care for people who are catastrophically injured, has the scope to have a significant impact on access to benefits and eligibility for workers compensation scheme coverage for other workers in that jurisdiction.

An indirect consequence of establishing a minimum standard of lifetime care and support for people catastrophically injured in motor vehicle accidents, has been the reduction in access to benefits for people who have been injured at a lesser scale.

For example, in South Australia, which implemented its CTP reforms in 2013 in order to comply with the *Intergovernmental Agreement on the NDIS Launch*, injured people have been left bearing the burden of the changes. The SA legislation used thresholds to remove common law rights. In some cases, the ability of motor vehicle accident victims to sue at-fault drivers has been entirely extinguished via the introduction of a draconian threshold.

The Australian Lawyers Alliance estimated that in excess of 80 per cent of claimants at that time would have their entitlements reduced to a claim for medical expenses, and payment for any time off work that is directly related to the injuries (but only after the first week).³⁴

Damages for future economic loss are available only if the ISV exceeds 7 points and non-economic loss 10 points, which is now assessed on a 0 to 100 scale (replacing the 0 to 60 scale) and based on the ISV.³⁵

Rather than fairness and consistency, supposedly sought, the amendments are unfair, arbitrary, and make many previous viable claims unviable.

Under amendments introduced by the *Civil Liability (Motor Vehicle Accident – Third Party Insurance) Amendment Bill 2012 (SA)*, all damages for motor vehicle accidents which are awarded for any form of economic loss after applying a discount rate and ‘any other principle arising under the Act or at common law’ are now to be discounted by a further 20 per cent,³⁶ a provision having no rational basis for existence, apart from cost saving.

Further, while the RIS identifies that there are inadequate caps on attendant care, the SA reforms further reduced damages available for gratuitous services – now payable only where the Injury Scale Value (ISV) is greater than 15 points and where they are required for a minimum of six hours per week for six consecutive months.³⁷

So too, the introduction of the *Return to Work Act 2014 (SA)*, which was introduced prior to the release of the RIS, but yet will be held to satisfy the minimum benchmarks, will lead to injured workers both not having the benefit of lump sums and also exiting the Scheme earlier. Many will then look to Commonwealth programs for support.

One must also question what incentive to rehabilitate will exist within the SA workers compensation scheme, where after 2 years, injured people become someone else’s problem.

Impact on governments

Question 14: Do you agree with the identified impact of the minimum benchmarks on governments?

This issue has been canvassed elsewhere in this submission.

However, the ALA wishes to reiterate the view that scheme design which provides meaningful access to common law claims is a key to:

1. Fairness
2. Choice
3. Dignity and self-determination
4. Sustainability
5. Diminution of numbers of people looking for Commonwealth support at a time where due to the tsunami of baby-boomers washing into our health and aged-care sectors, the Commonwealth would be better left without such imposts.

Impacts on private sector

Question 16: Do you agree with the identified impact of the minimum benchmarks on the private sector?



The RIS states that a potential risk could be that ‘private insurers could move away from the workers’ compensation market if the demands placed on them by these governments are too great’.³⁸

We submit that this is utterly implausible. This statement sits at odds with the history of this reform, evidence to date and recent publications released by insurers.

The NIIS reform has actually facilitated greater participation of insurers in compensation schemes.

Only two states (South Australia and Victoria) have both the workers’ compensation and CTP schemes publicly underwritten.³⁹

Since the advent of the NIIS, South Australia has reformed both its CTP and workers’ compensation schemes to comply with minimum benchmarks. In July 2016, South Australia’s CTP scheme will be opened up to private insurers, which Suncorp described as a ‘watershed moment’ for the personal injury insurance industry.⁴⁰

In November 2014, Suncorp engaged PriceWaterhouseCoopers to assess the ‘potential productivity and economic impact of having publicly-underwritten personal injury schemes transition to private-sector underwriting’.⁴¹

Submissions by insurers to the federal government’s Competition Policy Review also continue to press for privatisation of state-run schemes.⁴²

However, we submit that there may be increased disputes between insurers and workers regarding an individual’s level of injury, with insurers pushing for injuries to be classed as ‘catastrophic’ in order that an individual will be covered by the NIIS.

CONCLUSION: THE NEED FOR ANALYSIS, MORE DATA AND CAUTION

The ALA is a vociferous supporter of the rights of people with disabilities. It has a deep understanding of the needs of that group, and remains a strong supporter of the levelling-up principle behind the NDIS. The ALA also understands the economic frameworks which work sustainably, and has much knowledge of failed schemes.

The common law continues to act as a bulwark protecting both individuals’ rights and providing a mechanism whereby individuals have some measure of control, empowerment and choice in their life, following an injury that has sometimes changed their lives forever.

The economic benefits of the common law have not been appropriately analysed by, or acknowledged in the RIS. The RIS is tainted to an unfortunate degree by the earlier PC report, which envisions for Australia, the economic and fairness disaster which is the ACC in New Zealand. It continues to attack the common law, a mechanism which has worked mostly fairly, sustainably and long-term in Australia, the UK and Canada.

The NIIS is even more early in its development than the NDIS. The NDIS has early, and extremely serious sustainability issues. They need addressing. The NIIS's first foray into legislation is in the CTP sector. The legislation has yet to derive measurable economic outcomes: it is far too early for that. Insofar as the NIIS CTP legislative response is a levelling up (ACT, and likely in WA), the ALA commends this, with the caveat that a close eye needs to remain on both sustainability and fairness. Insofar as the CTP-NIIS legislation attack rights (SA), the ALA condemns the levelling down model as it is both unfair and drives unsustainability.

Hence, in a workers' compensation context, there should be no minimum benchmarks for the time being: we dispute the benchmarks, and the premises upon which many of them were conceived. The preferable approach is a cautious one, one which acknowledges that there will be many lessons yet to be learned from the CTP rollout of the NIIS, one which acknowledges the need for more and better data, and that in the meantime many States do meet the benchmarks (even if they are flawed), and those which don't commonly have other features to commend them when viewed through both the consumer choice and sustainability prisms.

REFERENCES

¹ Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>

² National Injury Insurance Scheme – Workplace Accidents, Consultation Regulation Impact Statement (RIS), at 4. Note, the PwC estimates were also relied upon in the RIS on motor vehicle accidents.

³ RIS at 5

⁴ RIS at 5

⁵ RIS at 5

⁶ RIS at 6.

⁷ RIS at 6.

⁸ Part 11, cl 115, *Intergovernmental Agreement on the NDIS Launch*.

⁹ NDIS Act 2014 (Cth) s34(f)

¹⁰ *Young and National Disability Insurance Agency* [2014] AATA 401 (20 June 2014) at [41].

¹¹ *NDIS (Supports for Participants – Accounting for Compensation) Rules 2013* (Cth), Part 1.1.

¹² *NDIS (Supports for Participants) Rules 2013* (Cth), Schedule 1, cl 7.1.

¹³ RIS at 6

¹⁴ RIS at 6

¹⁵ UN Convention on the Rights of Persons with Disabilities (“CRPD”), Preamble (n).

¹⁶ Article 3, CRPD

¹⁷ RIS at 6

¹⁸ RIS at 6

¹⁹ RIS at 8

²⁰ RIS at 9

²¹ RIS at 10

²² RIS at 7

²³ RIS at 7

²⁴ Professor Ray Markey, Dr Sasha Holley, Dr Sharron O’Neil, Dr Louise Thornthwaite, Macquarie University, Centre for Workforce Futures, *The impact on injured workers of changes to NSW workers’ compensation: June 2012 legislative amendments, Report No. 1 for Unions NSW* (December 2013), at 1. Accessed at http://www.businessandeconomics.mq.edu.au/research/centre_for_workforce_futures/current_and_proposed_research_projects/research_projects/impact_NSW_workers_compensation_legislation_2012

²⁵ Professor Ray Markey, Dr Sasha Holley, Dr Sharron O’Neil, Dr Louise Thornthwaite, Macquarie University, Centre for Workforce Futures, *The impact on injured workers of changes to NSW workers’ compensation: June 2012 legislative amendments, Report No. 1 for Unions NSW* (December 2013), at vi. Accessed at http://www.businessandeconomics.mq.edu.au/research/centre_for_workforce_futures/current_and_proposed_research_projects/research_projects/impact_NSW_workers_compensation_legislation_2012

²⁶ See RIS at 16

²⁷ RIS at 23

²⁸ RBA Bank accepted Bills 90 Days

²⁹ RIS at 12

³⁰ NDIS, NDIS Strategic Plan 2013 – 2016 (draft), at 5. Accessed at http://www.ndis.gov.au/sites/default/files/documents/strategic_plan_0.docx

³¹ NDIS, NDIS Strategic Plan 2013 – 2016 (draft), at 5. Accessed at http://www.ndis.gov.au/sites/default/files/documents/strategic_plan_0.docx

³² National Commission of Audit, at 16.

³³ RIS at 16

³⁴ See Patrick Boylen, ‘The effect of CTP changes on injured people – Lessons from South Australia,’ (2014) 125 *Precedent* at 26

³⁵ See Patrick Boylen, ‘The effect of CTP changes on injured people – Lessons from South Australia,’ (2014) 125 *Precedent* at 26

³⁶ See Patrick Boylen, ‘The effect of CTP changes on injured people – Lessons from South Australia,’ (2014) 125 *Precedent* at 26

³⁷ See Patrick Boylen, ‘The effect of CTP changes on injured people – Lessons from South Australia,’ (2014) 125 *Precedent* at 26.

³⁸ RIS at 17

³⁹ Chris McHugh, Suncorp, *Insurance Insights – States in the injury business: The impact of privatising personal injury insurance schemes*, November 2014, at 3. Accessed at <http://www.vero.com.au/vero/sites/default/files/States%20in%20the%20injury%20business%20-%20Suncorp%20white%20paper%20Nov%202014.pdf>

⁴⁰ 'CTP reform is watershed moment for industry,' *Insurance Business Online* 30 June 2014, at <http://www.insurancebusinessonline.com.au/news/ctp-reform-is-watershed-moment-for-industry-189229.aspx>

⁴¹ See 4

⁴² Ruth Liew, 'Suncorp pushes for state insurance privatisation,' *Australian Financial Review*, 26 November 2014. Accessed at <http://www.afr.com/business/insurance/suncorp-pushes-for-state-insurance-privatisation-20141125-11ty7v>