LEGISLATIVE COUNCIL

STANDING COMMITTEE ON LAW AND JUSTICE

Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council

First Report

Ordered to be printed 20 June 2000

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Provisions of the *Motor Accidents Compensation Act 1999* relating to the role of the Parliamentary Committee

Part 8.3 Supervision of Authority and Motor Accidents Council

210 Appointment of Parliamentary Committee

(1) As soon as practicable after the commencement of this Part and the commencement of the first session of each Parliament, a committee of the Legislative Council is to be designated by resolution of the Legislative Council as the designated committee for the purposes of this Part.

(2) The resolution of the Legislative Council is to specify the terms of reference of the committee so designated which are to relate to the supervision of the exercise of the functions of the Authority and the Motor Accidents Council under this Act.

28 Insurers to disclose profit margins

(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 present a report on that assessment annually to the Parliamentary Committee.

Terms of Reference

(1) That, in accordance with the provisions of section 210 of the Motor Accidents Compensation act 1999, which commenced on 5 October 1999, the Standing Committee on Law and Justice be designated as the Legislative Council Committee to supervise the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council under the Act.

(2) That the terms of reference of the committee in relation to these functions be:

(a) to monitor and review the exercise by the Authority and the Commission on their functions;

(b) to report to the House, with such comments as it thinks fit, on any matter appertaining to the Authority or Commission or connected with the exercise of their functions to which, in the opinion of the Committee, the attention of the House should be directed;

(c) to examine each annual or other report of the Authority and Commission and report to the House on any matter appearing in, or arising out of, any such report;

(d) to examine trends and changes in motor accidents compensation, and report to the House any changes that the Committee thinks desirable to the functions and procedures of the Authority or Commission;

(e) to inquire into any question in connection with the Committee's functions which is referred to it by the House, and report to the House on that question.

(3) That the Committee is required to report to the House in relation to the exercise of its functions under this resolution at least once each year.

(4) That nothing in this resolution authorises the Standing Committee on Law and Justice to investigate a particular compensation claim under the Motor Accidents Compensation Act.[1]

1 Motion moved by the Hon J Della Bosca MLC, Special Minister of State, and agreed to by the Legislative Council, Minutes of Proceedings, No 28, 30 November 1999, p 296.

Committee Membership

- The Hon Ron Dyer MLC, Chair (Australian Labor Party)
- The Hon John Ryan MLC, Deputy Chair (Liberal Party)
- The Hon Peter Breen MLC, (Reform the Legal System)
- The Hon John Hatzistergos MLC, (Australian Labor Party)
- The Hon Janelle Saffin MLC, (Australian Labor Party)

Table of Contents

Chair's Foreword

This is the first report of the Committee in relation to its role in supervising the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC).

Section 210 of the *Motor Accidents Compensation Act 1999* provides that a Committee of the Legislative Council is to be charged with the responsibility of supervising the exercise of the functions of the MAA and MAC. In November 1999, the Legislative Council appointed the Standing Committee on Law and Justice to undertake this task.

The Committee has determined to exercise its responsibilities in relation to the MAA and MAC, initially at least, by conducting a public hearing with the Chair of the MAC and the General Manager of the MAA once every six months. The hearing held on 8 May 2000 was the first such hearing. The next such hearing, which will include a particular focus on the MAA's 1999/2000 annual report, will be held in November or December.

This report consists of the transcript of the hearing held on 8 May 2000, together with written answers to questions on notice provided by the MAA. Clearly, the new Motor Accidents Compensation Scheme is still in its very early days, the effectiveness of the new scheme will not be known for some time and it would be premature for the Committee to express any firm views about the operation of the new scheme at this stage. However, the Committee trusts that this report will serve a useful role in informing the Legislative Council, Members of Parliament generally, and others with an interest in the Motor Accidents Compensation Scheme, about current issues in relation to the new scheme and the way in which the MAC and MAA are exercising their functions.

Prior to the hearing on 8 May 2000, I wrote to a range a of organisations and individuals inviting them to nominate issues or questions they would like the Committee to raise at the hearing. A number of detailed responses were received. On behalf of the Committee I would like to thank all those individuals and organisations who responded to the Committee's request.

Finally, I would like to thank the Chair of the MAC, Mr Richard Grellman, and the General Manager of the MAA, Mr David Bowen, and their staff for their co-operation and assistance with the hearing and the provision of detailed written answers to the Committee's questions.

Hon Ron Dyer MLC

Chair

Chapter 1 – Opening Statement by Chair of the Motor Accidents Council

CHAIR: Mr Grellman, I now invite you to make a brief opening submission to the Committee.

Mr GRELLMAN: It will be brief. The General Manager and I are obviously very pleased to be here. It is the first opportunity to interface with the Upper House on this new piece of legislation. The legislation came into effect, as you all know, on 5th October last year. I have been quite pleased with the way in which the Board and the Council and the various stakeholders and interested parties have engaged in very fulsome dialogue over the last seven or eight months. The Board meets quite regularly, every month or two, and the Motor Accidents Council meets equally regularly.

In terms of trying to monitor the progress of the scheme, the concept of having a Motor Accidents Council in existence gives us an opportunity to have the widest variety of interested parties represented to help with the process of discussing and analysing developments as they unfold, with a view to determining whether or not the legislation is working as we would like it to work and you would like it to work. The purpose of the Council is really to provide us with sectoral representation – interested parties, service providers – to give them a seat at the table and to have their concerns and thinking communicated through the Board to the Minister. Supporting the Motor Accidents Council, other than quite a few dedicated Motor Accidents Authority personnel, are a number of specialist reference groups, which are themselves made up of very eminent practitioners from a wide variety of professions, who are all combining to give a very good and broad overview of the legislation as enacted.

This is obviously very young legislation. The CTP scheme provides benefits which are quite long tail in nature. The timing of this hearing is quite appropriate. It is worthy to note at this opening point that quite a few of the developments within the legislation and in a practical sense, the practical out-working of the legislation, are still coming through. The trends that might become evident as a result of the new Act are still developing, and in some cases we are not yet in a clear position to be able to determine how well aspects of the scheme are in fact operating.

That is an issue that we must continue to monitor and I know this Committee will also be monitoring. At this early stage I think we will find – and it would be evidenced from our written submission – that there are still developing trends which preclude us from making any definitive judgments about a variety of issues within the legislation at this point in time.

Having said that, we are watching carefully, we are monitoring actively and we are determined as an authority to be quite aggressive in looking for developments which might be inconsistent with the philosophy of the legislation or, indeed, if we think that there are trends developing that might have inappropriate consequences, be they developing inequity on behalf of a section of the claimant population or developing trends that might give rise to a shift in premiums, particularly an upward shift.

My final comment is that because the legislation is so new, whilst we are aggressively monitoring unfolding events we would be inclined to suggest to the Minister that care is taken before there is too much amendment to the legislation. With a new Act like this our view would be that it would be appropriate to give the legislation time to settle, all parties and service providers to become familiar with the important and different aspects of the scheme and then after careful thought and experience, unless a crisis emerges where we really feel that we have to move earlier, we would be inclined to suggest to the Minister that we hasten slowly in regard to confronting the legislation, until clear trends have developed. That covers what I wanted to say by way of opening comment.

Chapter 2 – Issues arising from the inquiry into the Motor Accidents Scheme conducted by the former Law and Justice Committee

2.1 MAA's Answers to Questions on Notice

Question: Structured settlements

It is understood that the MAA supported a submission to the Commonwealth Government in June 1999 for a change to taxation legislation to encourage the use of structured settlements by making structured settlement payments of compensation tax-free. What has been the outcome of this submission and what steps has the MAA been taking to assist in persuading the Commonwealth Government of the benefits of structured settlements?

Answer: Structured settlements

The Motor Accidents Authority is a long standing supporter of structured settlements, primarily because of the financial security that structured settlements offer seriously injured accident victims with life long care needs.

During 1997 the MAA prepared a comprehensive submission advocating tax law reform to enable the use of structured settlements in Australia. Early in 1998 the Premier of NSW forwarded the submission to the Prime Minister indicating his support. Despite subsequent representations by the Premier, the submission was rejected late in 1998.

Early in 1999 the Prime Minister's Office indicated it was prepared to reconsider its position. A further submission was sought. The MAA, working with other interested parties forwarded an additional submission to put before the Prime Minister in June 1999.

This second submission is the subject of the question received on notice.
In November 1999 advice was received that the Federal Government's Treasury Finance and Public Administration Committee recommended the proposed amendment as outlined in the submission.

The merits of the proposed tax reform are currently under consideration by the Department of Treasury, with a view to making the amendment in the May 2000 budget.
The MAA is awaiting the budget announcement to ascertain whether the efforts to motivate tax reform to encourage the use of structured settlements have been successful.

Question: Long term care of the very seriously injured

Please outline any initiative of the MAA in relation to the long term care of very seriously injured motor accidents victims. What action has been taken in relation to further examination of the proposal for a no fault long term care scheme?

Answer: ***Long term care of the very seriously injured***

A preliminary proposal for a no-fault long term care scheme for the very seriously injured has been developed with the involvement of the serious injury groups. The main impediment to the introduction of such a scheme is the funding. The cost of providing long term care for the lifetime of all people seriously injured in a motor vehicle accident in any one year would be $275 million. Currently $146 million is spent on long term care within the scheme, leaving a shortfall of $129 million. The MAA is examining options for funding of long term care such as reallocation of funds within the existing scheme, a levy or an insurance product. One option is the reallocation of the money currently being spent on non-economic loss to a long term care fund.

The MAA plans to:

- Reconvene the Long Term Care working party in the second half of this year.
- Look at the savings to government if such an initiative was established, eg savings to NSW Health and the Ageing and Disability Department.
- Continue with its work on developing an assessment tool to estimate the lifetime cost of care for an injured person.
- Continue with its work on funding models.
- Update its work on the costs of the provision of long term care and examine the impact of the GST.

2.2 Evidence 8 May 2000

CHAIR: In embarking on the questions, I indicate to the witnesses that either or both of you may respond as you choose to any question that might be asked. The second thing I should say is that in an endeavour to maintain some sort of structure to the hearing it is my intention, if possible, to work through the three documents the Motor Accidents Authority has provided in response to the material we forwarded to it from various interested groups. That might help us to keep the questioning in a structured form.

I start by referring to the first document the MAA provided, "Answers to Questions on Notice". There are some issues that arose from the inquiry into the motor accidents scheme conducted by the former Standing Committee on Law and Justice that existed prior to the last State election. Regarding structured settlements, is it your belief, or is it at least possible, that in tomorrow's Federal Budget a favourable announcement might be made about structured settlements?

Mr GRELLMAN: I have no idea. I do not know whether Mr Bowen has any insight into that.

Mr BOWEN: It is my belief that the issue has well and truly been put before the Federal Government. I have been chairing a group called the Structured Settlements Group, which has been lobbying for tax changes on this issue. Up until recently the key expert in this area, Ms Jane Ferguson, has been engaged by the Motor Accidents Authority to promote that lobbying on behalf of the group. The group is very diverse. We have represented on it the Law Council of Australia, the Insurance Council, Plaintiff Lawyers, the Australian Medical Association, Medical Defence Union NSW, Brain Injury Association and Injuries Australia. All of those groups, collectively and individually, have put submission to the Federal Government. Ms Ferguson has spoken before the key Treasurer's committee from the coalition, and she felt that they were quite receptive to it. But it is very difficult to predict whether or not it will be accepted by the Federal Government and announced as part of the Budget. Certainly all of the submissions that have been put forward to the Federal Government have been promoting it as a change to be adopted in the Budget. We would hope that there will be a decision one way or another.

Chapter 3 – Performance Indicators

3.1 MAA's Answers to Questions on Notice

Question: Performance Indicators

Please outline the current status of work underway to develop performance indicators for the new scheme. What performance indicators are likely to be used and where will this performance information be reported? Will information covering the areas suggested by Injuries Australia, in its letter to the Committee of 16 April 2000, be reported?

Answer: Performance Indicators

The development of performance indicators for the new scheme is well underway. The process of determining suitable performance indicators requires consideration firstly of the objectives of the scheme and the criteria against which the scheme is to be evaluated. The MAA has identified four main criteria on which it believes the scheme should be evaluated. These are:

Affordability: This is a measure of the cost of premiums, to ensure that the objective of affordable premiums remains a primary objective of the scheme.

Effectiveness: This is a measure of the effectiveness of the scheme. It will include consideration of claim numbers, claim costs and whether or not the new structures are working in the way that is intended and remain cost effective.

Efficiency: An objective of the scheme should be to ensure that as much of the premium dollar as possible is returned by way of compensation to injured persons. This puts the focus on containing transaction costs rather than limiting benefits.

Fairness: The system should operate fairly and equitably as between claimants consistent with the objective of ensuring that those who are most seriously injured receive maximum compensation.

Against these criteria, the Authority has identified performance indicators which will assist in the evaluation of the scheme. These performance indicators are reflected in the MAA's Corporate Plan, a copy of which is attached. The Corporate Plan, once approved by the Board will be available from the MAA Web site.

Examples of useful performance indicators include:

1. Premiums and Market Practice

- Insurers' compliance with the Premium Determination Guidelines (MAA Audit)

- Insurers' compliance with the Market Practice Guidelines (MAA Audit)
- Complaints (Insurer reports and MAA Compliance Branch)

2. Scheme Costs

   - Number and size of claims
   - Transaction costs including commission (MAA)
   - Insurers' profits (MAA)
   - Legal and Medico-legal costs (external audits)
   - Medical costs (external audits)
   - Benefit levels and distribution (external audit)

3. Claims handling:

   - Monitoring of complaints (through insurer reports, IEC and MAA compliance Branch)
   - Insurers' compliance with the claims handling guidelines (by external audit)
   - Claimants' satisfaction with the system (feedback forms and external survey)
   - Litigation/settlement trends

4. Assessments

   - Consistency of assessments (MAA and external audit)
   - Acceptance (level of appeals and stakeholder comments)
   - Compliance with medical assessment guidelines (external audit)
   - Insurers' and legal practitioners' views on the system (external survey)
   - The evaluation and performance information on the scheme will be reported in the Annual Report and in the MAA's annual publication *CTP Statistics.*

The submission by Injuries Australia has identified statistical and other information that it considers should be available either publicly in the MAA Annual Report or to the MAA Board and the Legislative Council Standing Committee. The matters raised by Injuries Australia are sensible and have largely been taken up already by the MAA.

In particular the MAA publishes an Annual Report on CTP Statistics which is sent out to a large number of interested parties, is available on request from the MAA and is on the MAA web-site.

The June '99 CTP Statistics contained the following information:

- Gross Premium Income broken down by year and insurer p29
- Total insurer payments broken down by accident year and payment year p15
- Total number of claims received each year by accident year p7
- The number of finalised claims broken down by accident year p10
- Average incurred cost by injury severity and accident year p20

3.2 Evidence 8 May 2000

CHAIR: At page 3 of the MAA's "Answers to Questions on Notice" there is reference to the matter of performance indicators. I note that two of the proposed performance indicators for the new scheme are transaction costs and benefit levels. Is the MAA currently able to estimate the percentage of premiums collected that is consumed in transaction costs and the percentage that is paid out in benefits to injured persons under either the new or the old scheme?

Mr BOWEN: I certainly can indicate that under the old scheme the amount of the premium returned by way of benefits could vary from accident year to accident year, but it was round about 52 to 55 per cent. The need to increase that is reflected in what we have called our efficiency measure, which is about the amount of the premium returned by way of benefits. I have no information at this stage on the new scheme. There are not sufficient claims in to make any estimate of that at this stage.

CHAIR: I suppose one of the difficulties we are facing in this hearing is that the experience is of such short duration that in some respects it is not lengthy enough to give definitive responses.

Mr BOWEN: No. It may assist the Committee if I indicated that the MAA's costing on the new scheme would suggest that we need to achieve an efficiency measure of round about 60 per cent, and over time we would certainly like to see that increase. By way of comparison with other schemes around the world, they seem to fall within a range of between 50 and 75 per cent; 75 per cent is more often than not achieved in no-fault or defined benefits schemes. The involvement of common law tends to increase the transaction costs. But even so, the New South Wales scheme has been at the very lower end of that range. I would certainly like to see that increased.

Chapter 4 – Reporting on insurer profit margins

4.1 MAA's Answers to Questions on Notice

Question: Reporting on insurer profit margins
Section 28 of the Motor Accidents Compensation Act 1999 requires that licensed insurers disclose to the MAA the profit margins on which premiums are based, and the actuarial basis for calculating that profit margin, and that the MAA assess the profit margin and present a report on that assessment annually to this Committee. Please outline the current status of work underway to develop a methodology by which insurer profit margins are to be calculated and disclosed to the MAA. How does the MAA propose to assess those profit margins and report on that assessment to this Committee?

Answer: Reporting on insurer profit margins
The MAA will be in a position to report to the Committee by October 2000, on its action plan for implementing the 1999 Act requirements on NSW CTP profitability and thereafter provide a report in October each year on its analysis of industry profit.

The MAA is currently finalising two Issue Papers on Insurer Profits.

These Issues Papers are the first step in the process of determining the method to be used to assess profitability and the information that insurers will be required to provide to enable this to occur. As indicated previously, the MAA will have finalised this process by October 2000.

4.2 Evidence 8 May 2000

Mr RYAN: I want to ask you a couple of questions about insurer profit margins. We have noted that in your response to questions on notice you have made reference to the fact that two papers are being prepared in relation to insurer profits. Are you prepared to make copies of those papers available to the Committee as soon as they are released?

Mr BOWEN: Absolutely. I am expecting to get the publication mock-up later this week to check, and I would anticipate that they will be available for release within, I will say three weeks, to allow for any errors that might occur in publication.

Mr RYAN: Whilst I accept that it will take some time to get a complete trend, given that one of your roles is to ensure that the scheme is prudentially sound, I imagine that I am virtually flying blind, but do you have some impression as to whether or not the scheme is operating satisfactorily in that regard?

Mr BOWEN: The MAA's Prudential monitoring is based upon returns that the insurers provide us, which are duplicates of their returns to the Australian Prudential Regulatory Authority. The problem for assessing costs and profit in any one line is that the return to APRA is not separated like that into different lines of business, and even when it may be possible to derive information on lines of business from the APRA returns, it is then not separated into the different States.

So for the CTP insurers in New South Wales that also operate in Queensland, we can get from the APRA information some indication of how they are performing with that aspect of their line of business, but for Australia really what we have identified in these papers is the need for additional information to be provided to the MAA to allow us to report on the companies in relation to the CTP business in New South Wales.

Mr RYAN: That was one the of the rocks we ran into the last time this Committee examined this question, and we do note that there is some resistance from the insurance industry to disclose profit margins experienced for this line of business in this State.
What arrangements are you making with the insurance companies to ensure that you will be in a position to accurately assess profits from the current scheme, given that reluctance? Because that level of reporting is not going to be sufficient to give you that information, is it?

Mr BOWEN: No, there is going to need to be additional information obtained by the Motor Accidents Authority. One of the historical problems in this area has been determining the amount of capital allocated to the CTP component of the insurer's portfolio.

We are perhaps at a reasonable point in time in that the internal allocation of capital is something the insurance companies are now looking at, which they have not previously, and we

also have the benefit of a number of overseas jurisdictions which have, in the context of what might be called adversarial regulatory conditions, put in place requirements for reporting on allocation of capital return to the business.

The proposals we are putting forward will not be without controversy within the industry, I think that is fair to say, and we need to achieve a balance between obtaining sufficient information to report properly to the Committee, to Parliament, and more generally to the community on profit, but at the same time recognising that the position that companies take in the market place will reflect different approaches, different decisions as to the risk, and that will also impact upon the allocation of capital.

So it is not a "one size fits all" type of equation. You have to recognise different approaches to the market place.

Mr RYAN: That might be the case generally, but are you able to give the Committee some sort of more specific idea as to what information will be required from the insurance companies?

Mr BOWEN: The proposal that we are looking at will require insurers to report on the allocation of capital to the CTP business, and there are a number of leading factors to that. That will then allow us to make some comparisons between the insurers.

We need that for the purpose of assessing premiums, because there is a statutory obligation to ensure that the premiums are not excessive, but in doing that we have to make allowance for - I believe the legislation says "an adequate return on capital". So both the allocation of capital, and then assessing the return on capital, and then assessing what is adequate, is the first leg of our paper.

Secondly, and as a result of the legislative changes, there is an obligation now to report to this Committee on what have been the actual profit results. The first one is looking at profit prospectively, at the time the premiums evolve, and the second one is looking at what have been the actual results in terms of profitability of the industry. For that we looking at requesting additional information to the APRA returns, so it will allow the MAA to report.

There is quite a bit of detail in the paper, and I do not want to go into too much more detail on it for fear of misleading the Committee by trying to recall it off the top of my head rather than waiting for the papers to be available to provide to you.

Mr RYAN: I guess finally, are you proposing to draw a line under the old scheme? There was a fairly significant amount of funds, I recall, being classified as being claims incurred but not yet reported, and so on, and it was basically said whether or not this was going to be a reasonable amount of premium to have collected, and the old scheme would require later experience to be compared against what had been anticipated by the actuaries. Are you people going to continue to monitor the results of the old scheme, at least for the purpose of informing yourself as to what happens under the new one?

Mr BOWEN: The answer is yes, absolutely.

Mr GRELLMAN: Perhaps I could just make an additional comment about the position of the underwriters on the relationship that they will have with the MAA going forward.

One of the fundamental changes in this legislation was to increase the powers that the Authority has in terms of the way it interfaces with the underwriting community. As Mr Bowen has already said, the discussion paper on profitability will no doubt extract a bit of debate, but my impression is that the underwriters do understand that there is a more intrusive MAA now with which they are going to be interfacing, and early indications are that they are showing every inclination to co-operate and provide information.

We will again have to live with this to see how the information unfolds and what it is telling us, but it is very important for us to ensure that our relationship with the underwriters is open, and there is full and free access and information. We need to be conscious that they are competing with each other, so there is some market sensitive information, but I am confident that we can tread that fine line in getting the information we need, you need, Parliament needs and the community needs, without interfering too much with the market place that they are operating in.

Chapter 5 – MAA's *Impairment Assessment Guidelines*, Medical Assessments and related issues

5.1 MAA's General Response on *Impairment Assessment Guidelines* and Medical Assessments

Impairment Assessment Guidelines

The project of developing the MAA's impairment guidelines and an implementation plan for the recruitment and training of impairment assessors was put to tender and awarded to a consortium led by Dr Jim Stewart. A working party was formed to advise the project management team and the MAA on the development of the impairment guidelines. The role of the advisory committee is to advise the MAA of their respective stakeholder perspective's and issues on the development and implementation of the impairment guidelines. The Advisory Committee met with the project management team and MAA on 3 occasions.

Project Management Team

Dr Jim Stewart, Team Leader
A/Prof Ian Cameron (Rehabilitation Medicine, Sydney University)
Dr Dwight Dowda, Medical Adviser to the project, (Occupational Physician)
Prof Peter Disler (Rehabilitation Medicine, Melbourne University)
A/Prof Malcolm Sims (Dept of Epidemiology and Preventative Medicine, Monash University)

Advisory Committee
Geraldine Daley (Law Society)
Dr John Firth (College of GPs)
Tom Goudkamp (APLA)
Mary Hawkins (WorkCover)
Ross Letherbarrow (Bar Association)
Robyn Norman (QBE)
Dr Kathy McCarthy (Rehabilitation Physician)
Shayne O'Reilly (NRMA)
Brendon Sydes (APLA)
Dr Conrad Winer (AMA)

MAA Members
David Bowen, MAA
Belinda Cassidy, MAA
Kathy Hayes, MAA
Suzanne Lulham, MAA
Sue Freeman, MAA

The MAA Impairment Guidelines have been based on (with a few significant departures) the 4th edition of the American Medical Association's "Guide to the Evaluation of Permanent Impairment". The MAA Impairment Guidelines will need to be read in conjunction with the AMA's Guides.

The American Medical Association Impairment Guides are considered the most comprehensive available. ComCare, Veteran Affairs and Social Services also have guides but they are not as

comprehensive and they are mainly based on earlier editions of the AMA Guides and use measures that are not considered appropriate in the context of the Motor Accidents Scheme.

Reference groups of NSW clinicians were established to review the pertinent sections of the AMA Guides and advice on any modifications that would be required to adapt them to the NSW motor accidents jurisdiction. Clinicians from Victoria who had been involved in a similar process for the Transport Accidents Commission and the Victorian WorkCover Authority initially advised the NSW clinicians of the Victorian experience. The experience of Prof Peter Disler from Melbourne University and

A/Prof Malcolm Sims from Monash University was also utilised in the development of the MAA Guidelines and the training program for assessors.

Reference groups were established for:

- Musculo-skeletal – spine
- Musculo-skeletal – hand and upper limb
- Musculo-skeletal – lower extremity
- Nervous system
- Ear, nose and throat
- Skin and scarring
- Mental and behavioural disorders
- Other (includes urology, vision, gynaecology, respiratory and cardiology)

Psychiatric Impairment

The issue of psychiatric impairment is not well covered by the AMA Guides because of the difficulty of establishing objective measures of impairment and in particular permanent impairment in this area. The assessment of impairment in this area is quite different to physical impairment as it is difficult to predict the stability or permanence of mental and behavioural disorders and the role of treatment and medication in their management.

This is a area of particular concern to insurers as it is an area in which it may be possible for claimants to claimants to exaggerate their disability in order to be classified as > 10% impaired.

Accordingly, the Guidelines for the assessment of psychiatric permanent impairment have taken longer to prepare and were only finalised and incorporated into the guidelines in March this year. These psychiatric guidelines were developed by a working party of psychiatrists and other relevant specialists and involved consultation with the relevant medical colleges and with stakeholders and service providers of the Motor Accidents Scheme.

Medical Assessment
Overview

By introducing an independent medical assessment procedure, the Motor Accidents Scheme is ridding itself of the costly and wasteful 'adversarial medicine' process. That process meant that 'duelling doctors' were pitted against each other during the claims process and in court.

Judges have been heard to ask if the reports were dealing with the same person. Such a situation does not add to expertise or justice, but merely adds to the expense of a claim.

The new scheme replaces an expensive adversarial environment with an objective and simpler means of determining the effects of motor injuries.

Where there is a disagreement about medical issues they will be referred to a medical assessor appointed by the Motor Accidents Authority who will independently determine the dispute.

The medical assessor will determine issues such as whether:

- treatment is reasonable and necessary
- the treatment relates to the injury caused by the motor vehicle accident
- the injury has stabilised and
- the degree of permanent impairment caused by the motor accident
- the degree of impairment of the earning capacity of the injured person as a result of the injury caused by the motor accident.

The medical assessment will not be determined purely on a medical examination but will include perusal of all relevant information. The better the information provided to the medical assessor, the more informed and better the decision will be made.

This new procedure must be performed fairly and there are several safeguards in place to guarantee this.

Firstly, the MAA has developed a set of detailed procedures to ensure that the process is fair and transparent. All parties will be fully aware of the purpose of the assessment and their rights to review. Some assessments will be subject to review, in the sense that they are not conclusive findings, by an assessor or a court as of right. For example, assessments concerning whether treatment relates to the injury caused by the motor accident or the effect of the injury on earning capacity can be reviewed.

Secondly, even where a medical certificate is conclusive evidence, a court can reject it on the grounds of denial of procedural fairness if such a certificate would cause substantial injustice.

Thirdly, there may be a further additional referral for assessment if the injury has deteriorated or new evidence about the injury is available. Finally, either party to a medical dispute can apply for a review of an assessment by a single assessor or to a group of three assessors on the grounds that the original assessment was incorrect in a material respect.

The new medical assessment procedures are about improving the assessment of medical issues, making sure that as far as possible, they accurately reflect the claimants' medical condition, while at the same time putting in place plenty of safeguards to protect against unfairness.

Selection of assessors

There will be two panels of medical assessors. The first will deal with all the medical issues except stabilisation and permanent impairment and will be known as the Disputes Panel. The second panel will deal with disputes about stabilisation and permanent impairment.

Recruitment to Disputes Panel:
Applicants have been or will be sought from each of the required speciality areas via a mail-out to all members of the appropriate professional body or association, together with advertisements in the Sydney Morning Herald.

Successful applicants will form a network of over 100 specialist therapists and doctors who will assist in resolving disputes relating to reasonable and necessary treatment, causation of treatment and impairment of earning capacity.

Selection criteria were developed in consultation with relevant professional associations. For all disciplines, the selection criteria included:

- At least 5 years current, post-specialist qualification clinical experience in the specialist area(s) nominated by the applicant;
- Evidence of commitment to continuing professional development in relevant area(s);
- Demonstrable knowledge of current research, evidence-based principles and best practice in relevant area(s);
- Good written and verbal skills, including the capacity to write clear and understandable reports and provide reasons for decisions;
- Demonstrable impartiality
- Professional integrity and credibility within the profession
- Registered (where applicable) and eligible to practice in the nominated specialist area(s) in NSW.

Selection is via a four stage process. The first stage is undertaken by MAA staff and applications are checked against the selection criteria. The second stage is undertaken by a clinical selection committee. The relevant professional bodies are asked to suggest individuals who could sit on a clinical selection committee. This Committee assists in ensuring that only applicants with excellent credentials, relevant training and high credibility amongst their peers are recommended for appointment. The third stage is undertaken by a users group committee, consisting of two representatives from each of the Insurance Council of Australia, the Law Society and the Bar Association. The fourth stage is approval by the General Manager of the MAA.

In summary, applications are sought as widely as possible, culled against selection criteria developed in consultation with relevant professional associations, and then prioritised in terms of expertise, training and credibility with the assistance of esteemed members of the relevant profession. The comments and concerns of a committee of representatives of the insurers and legal professions are taken into account before final recommendations for appointment are submitted to the General Manager for approval.

Recruitment to Impairments Panel

Applications will be sought in early to mid -2001 from medical practitioners who have completed training in the use of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, and the MAA Guides.

This training is to be run by a team of consultants, led by Dr Dwight Dowda and Dr Ian Cameron, at Sydney University commencing in late 2000 and offered again throughout 2001.

Successful applicants will form a panel of less than 50 specialist assessors who will assist in resolving disputes relating to stabilisation of injuries and extent of permanent impairment. Each appointee will be appointed to conduct assessments for specified body systems. This will be a separate panel to the Disputes Panel discussed above.

Selection criteria will be developed in consultation with relevant professional associations and the consultants running the Impairment Assessment Training.

Selection will again be undertaken with the assistance of a Clinical Selection Committee and those running the Impairment Assessment training. The comments of the MAS Users Group will be taken into account before recommendations for appointment are submitted to the General Manager.

Until this process is complete, an Interim Panel of Impairment Assessors has been convened, with the agreement of the MAS Users Group. This panel comprises all NSW members of the reference groups convened to assist in developing the MAA Guides for Assessment of Impairment. They are therefore thoroughly familiar with the AMA and MAA Guides. The "core module" of training will be provided to this interim panel prior to any assessments being undertaken.

5.2 MAA's Answers to Questions raised by Stakeholders

5.2.1 The Law Society of New South Wales

(1) Impairment Assessment Guidelines in general

Question 1.1(a)
Concern about the narrow time frame to develop guidelines.

Answer 1.1(a)
Initially the MAA anticipated it would have 12 to 18 months to develop impairment guidelines. However the timeframe that was imposed in the legislation meant that the MAA did not have the luxury of developing its own guidelines, but would have to adapt existing guidelines to its needs. The AMA 4, despite their acknowledged problems, are the most widely used and authoritative guidelines available.

Question 1.1(b)
What method does the MAA intend to use to review the Impairment Assessment Guidelines' operation?

Answer 1.1(b)
The MAA is in the process of developing an implementation and evaluation plan for the MAA guidelines. It has not yet been finalised but will include:

- Oversight of the development and provision of the training program for medical practitioners in the MAA and AMA 4 guides to ensure consistency in the use of the guides.
- Evaluation of the training program by the completion of questionnaires by the participants in the training program.
- Monitoring of the impairment assessments done by MAA impairment assessors for consistency and accuracy. Every MAA assessment would probably be monitored until June 2002. A quality assurance type program will be developed.
- Monitoring of the consistency and reliability of the MAA guides. This is to ensure:
  - Claimants with similar injuries should be assessed as having similar impairments;
  - Claimants with similar injuries and impairments have a similar impairment rating when assessed by different assessors, and at different times by the same assessor.
- Immediate feedback from the MAA assessors on any problems they identify when conducting assessments, eg conditions not covered, ambiguity as to which tables should be used.
- Review of the Mental and Behavioural Disorders component of the MAA guides.

Question 1.1(c)
Is a complete overhaul of the guidelines' operation likely?

Answer 1.1(c)
The MAA is putting in place a system to continuously monitor the application of the MAA guides and make revisions in line with the experience gained in impairment assessment and as methods of impairment assessment improve.

Questions 1.2
What will the MAA and the MAC be doing to address the AMA 4 Guides perceived inequities?

Answer 1.2
The MAA has acknowledged that the AMA 4 Guides have limitations. The MAA has addressed these by developing its own Guides, which whilst reliant upon the AMA 4 Guides, modify and expand the AMA 4 Guides, and thereby addressing those limitations.

It should be noted that the assessment of entitlement to non-economic loss under the pre 1999 Act (which relied on an oral threshold test) was even more prone to the criticism of lack of consistency, validity etc. The MAA guides have attempted to address the issues of reliability, internal consistency and completeness and the MAA will continually monitor the application of the guides to address any issues in these areas as the arise. The consistency of assessments using the MAA guides will provide a more just and predictable system of assessment.

Question 1.3 (a)
Does the MAA and the MAC believe that the Guides will be able to produce more certain diagnostic outcomes that have been achieved in the compensation field in the past.

Answer 1.3 (a)
There are assumptions underlying the AMA Guides that are similar to the assumptions underlying medical practice generally. Specifically it is assumed that an experienced medical practitioner can reach a diagnosis reliably and with reasonable diagnostic certainty.

Use of the MAA Guidelines for assessment of permanent impairment will produce more consistent evaluation of impairment than has been the case previously in NSW. It will do this because a clearly defined system and methodology will be used. The MAA Guidelines have been formulated too clarify inconsistencies in the AMA Guides.

In addition there will be specific training provided for impairment assessors and their performance will be monitored.

Question 1.3 (b)
AMA Guides lack reliability, validity, internal consistency, completeness and justness.

Answer 1.3 (b)
Refer to the answer to Law Society Question 2(a).

Question 1.3 (c)
How can the MAA know whether the Guides will produce results which are consistent, equitable, or otherwise in harmony with the modified scheme's objectives?

Answer 1.3 (c)
Refer to the answer to Law Society Question 1.1(b)

Question 1.3 (d)
If the MAA guides produce unreliable outcomes what will the MAA do?

Answer 1.3 (d)
The MAA is confident that the MAA guides will enable more reliable outcomes in the determination of access to non-economic loss entitlement than the pre 1999 Act. A recent case study of old scheme claims by the MAA highlighted the extreme unpredictability of the previous system of determining NEL.

The MAA is determined that those with serious injuries will in no way be prejudiced by the new system. The MAA guides provide for a fairer assessment than AMA 4 of those with a brain injury. If the AMA 4 was used those suffering a psychiatric injury would not receive any NEL as their level of impairment could not be assessed. The MAA guides have therefore included a chapter on mental and behavioural disorders.

Question 1.4 (a)
What changes will the MAA be making to take greater account of both the primary and secondary effects of injuries in the impairment definitions? Will the guidelines be extended to measure impairment by reference to ability to participate in pre-accident activities of daily living or change to work capacity?

Answer 1.4 (a)
Impairment rather than disability or handicap has been used in the Motor Accidents Compensation Act 1999 as the threshold test for entitlement to non-economic loss. The Act provided that AMA 4 was to be used in the absence of the MAA developing guidelines within the stipulated time of three months of commencement of the Act. The MAA acknowledges that impairment does not take into account the effect of the injury on a person's lifestyle, but believes the legislation would need to be changed if disability was to be measured as part of the threshold test.

This is an issue which is being considered by the Motor Accidents Council.

Question 1.4 (b)

How can a system which focuses exclusively on the primary effects of injuries be used as a basis for determining compensation needs for the secondary effects of injuries?

Answer 1.4 (b)

Permanent impairment may be regarded as a 'primary effect of injuries'. It is used to determine whether a person is eligible for non-economic loss compensation. If the person is eligible then the amount of compensation they are entitled to is assessed according to common law principles which take account of the 'secondary effect' of injuries such as disability and handicap.

Entitlements to other heads of compensation are based upon the demonstration of loss or need, as is the case for treatment expense reimbursement.

Question 1.5(a)

Will the MAA be adapting the guidelines to make medical assessors take into account the possibility of future deterioration?

Answer 1.5(a)

The medical reference groups that developed the Impairment Guidelines believed that while a medical assessor may be able to predict the likelihood of deterioration for a *population* they are not able to objectively predict deterioration for an *individual* being assessed. They were of the view that any opinion about what an individual will be like later on is very subjective and a prediction of risk. The MAA Guidelines (like the AMA Guidelines) therefore do not take possible 'deterioration' into account.

The issue of future deterioration is being considered by the Motor Accidents Council and the MAA is arranging for some of the medical specialists involved in the impairment project to prepare a report on this for the Council.

Question 1.5(b)

Will certain injuries be deemed to be over 10%, eg frontal lobe damage?

Answer 1.5(b)

The deeming of injuries as over the 10% permanent whole person impairment will be continually reviewed. Most of the injuries that have been suggested for deeming are already over 10%. The MAA guides modify the AMA 4 so that it is easier to reach the threshold if the claimant has suffered a brain injury.

Question 1.6

The Society is concerned about whether a single medical assessor will be able to assess multiple injuries, some of which may not have been properly diagnosed during the acute phase following the trauma (eg frontal lobe brain damage, which requires the Assessor to have histories from relatives, employees,

employers, friends etc and generally requires psychometric testing and perhaps an MRI study of the brain)?

Answer 1.6

A single medical assessor can assess multiple injuries within their specialty (eg orthopaedic surgeon can assess multiple fractures)

Where different specialities are required, eg orthopaedic and neurological injuries, the assessment may be done by two different assessors and the impairment percentage arising from each combined as per the guidelines The guidelines do not allow for joint consultations so this would involve two separate assessments, with the report of the first assessor being made available to the second assessor, who issues a Certificate and completes a report showing the combined percentage impairment.

It is important to note that there will only be a need to conduct such assessments where there is a dispute between the parties as to whether the case is under or over the 10% threshold. There would only be a need to assess more than one of the injuries in cases where the major injury is not over the 10% threshold. Therefore, although there are many cases involving mutiple trauma, only a small minority would require more than one assessment to determine whether they are over the 10% threshold or not.

With regard to cases which have not been correctly diagnosed by treating doctors, the assessor(s) will base their conclusions on the material put before them, and their clinical assessment. Thus if there are MRI scans, testimonials and/or psychometric tests available in an alleged brain injury case, it would be up to the parties to ensure this material was submitted to the assessor.

Assessment of permanent impairment related to frontal lobe damage will be done in accordance with the "Nervous System" section of the AMA Guides, ie Chapter 4. This defines 8 categories of impairment which commonly arise following frontal brain injury, and allows for impairments in certain categories to be combined with others to provide an estimate of total cerebral impairment (see AMA Guides page 140). The MAA Guides confirm that the results of psychometric tests should be taken into account, as should the results of any available CT or MRI scans, initial Glasgow Coma Scale scores and duration of Post-Traumatic Amnesia.(see MAA Guides section 5.9) The MAA Guides also clarify the provisions for combining impairments in the various categories (see MAA Guides section 5.5), which have the effect of making it easier for mild brain injury cases which result in more than one of the defined types of impairment to exceed the 10% threshold.

Question 1.7

What is the purpose of the appointment of 'Super Assessors' will this impact upon allowances for costs?

Answer 1.7

There will be no impact on the allowances for costs as these are matters to which the costs regulations do not apply and were never intended to apply. The only impact on costs is that a major claim, which may have taken 3 years and many tens of thousands of dollars in legal fees to

resolve, may, with the consent of both parties proceed to resolution at CARS in one day for perhaps several thousand dollars.

Question 1.8

Section 61(6) of the Motor Accidents Compensation Act was the only section in the legislation which was not proclaimed, and its non-proclamation has had the effect of depriving the court of the power to substitute its own findings on permanent impairment. Does the Government intend to proclaim section 61(6) ?

Answer 1.8

S61(6) as presently drafted is ambiguous in its terms and open to an interpretation that thwarts the intention of the section.

S61(6) was intended to ensure that injured persons were afforded procedural fairness, as indicated by the Honourable Mrs Helen Sham Ho at the time she moved the amendment to the Motor Accidents Compensation Bill (Hansard Legislative Council 29 June 1999)

It is not the intention of this amendment to allow the court to have a substantive hearing as to the merits of the case. It is a procedural change to enable the court to have a further assessment where it thinks it is not inappropriate. My amendment will protect victims by enabling the Court to substitute a certificate as to the impairment percentage of the victim if there has been procedural unfairness in the issuing of the initial certificate.

It is plain that the power granted to a Court to substitute impairment findings was severely circumscribed.

In the discussions that surrounded the decision not to proclaim s61(6) it became apparent that the only consensus reached was that the meaning of the section was not immediately clear. Advice from the Crown Solicitor confirmed this view.

The Minister, therefore took the view that it was inappropriate to commence the section. Accordingly, Parliamentary Counsel was asked to re-draft s61 to ensure that it was clear in terms and unambiguous.

The *Motor Accidents Compensation Amendment (Medical Assessments) Bill 2000* was introduced into Parliament and was second read on 3 May 2000.

Question 1.9

Will the MAA issue a new set of guidelines following the publication of the 5th edition of the AMA guidelines?

Answer 1.9

The answer to this question must be deferred until AMA 5 is released and will be made after

comparison and consideration of the changes in AMA 5. The very preliminary information the MAA has is that AMA 5 will probably not be significantly different to AMA 4, eg they still do not assess psychiatric injuries.

(2) *Impairment Assessment Guidelines,* Chapter 7, Mental and Behavioural Disorders

Question 2.1
Has any reference been made to, or reliance placed on, DSM IV in the Mental and Behavioural Disorders Guidelines?

Answer 2.1
DSM IV is a psychiatric diagnosis tool. The Mental and the Behavioural guidelines require a psychiatrist to ensure that psychiatric impairment is consistent with a recognised psychiatric diagnosis. The psychiatrist however is not confined to DSM IV. There are a number of conditions that have been described since the publication of DSM IV in 1994, and have gained acceptance amongst clinicians.

Question 2.2
How have the Mental and Behavioural team been able to develop guidelines within months?

Answer 2.2
The psychiatric impairment reference group has developed a scale that aims to increase reliability between assessors. The reference group did not wish to see claimants with psychiatric injuries being excluded from the compensation system due to a lack of percentage impairment scales, or the compensation system being abused by persons exaggerating their symptoms. The psychiatric impairment reference group recognised that psychiatric impairment is multiaxial, and that a percentage figure is a simplistic concept. The percentage of impairment figure therefore takes into account six different areas of function, and focuses on criteria that can be observed independently.

Question 2.3
Will the use of the median scoring system produce an inequitable result?

Answer 2.3
The advice to the MAA from the reference group is that in clinical practice, there is convergence between extreme scores. In other words, it is unlikely that a person will score class 4 or 5, and yet be normal in the remaining areas of function.

Question 2.4
A: Does the MAA believe that there is an inconsistency between the operation of paragraphs 7.17 and 7.21?
B: How are clinicians to separate organic brain damage from psychiatric disorders?

Answer 2.4

A: The psychiatric assessor will determine impairment when it arises from psychiatric injury. In a significant number of accident victims, cognitive impairment gives rise to secondary psychiatric symptoms. Where cognitive impairment is determined by a neurologist to be less than 10%, a psychiatrist may be asked to determine whether secondary depression or anxiety causes an impairment greater than 10%. For example, many persons with minor head injuries develop cognitive impairment and realise they are no longer able to function at the pre-accident level. This can precipitate significant depression or anxiety.

B: The psychiatric assessor will need to satisfy himself or herself that cognitive impairment has occurred by taking into account various tests, and other relevant sources of information.

Question 2.5

How can a psychiatrist accurately work out how much of the impairment is due to problems a person was having before the accident? What information can a psychiatrist rely on to get that the estimate? What if premorbid functioning is characterised by a fluctuating psychiatric disorder?

Answer 2.5

The psychiatrist will rely on the history obtained during the assessment. The impairment assessor will also have available the medical and other relevant information sent from both parties. The same impairment criteria will be used to determine premorbid functioning. A fluctuating psychiatric disorder will clearly require flexibility. The clinician will need to decide whether in his or her opinion, the 10% threshold has been exceeded as a result of the accident. The clinician's decision, and rationale for making a determination, will need to be explained using the psychiatric impairment guidelines as a starting point.

Question 2.6

How many characteristics does a claimant have to have to fall within the psychiatric class?

Answer 2.6

It will be necessary for a claimant or injured person to exhibit all of the characteristics to fall within the class.

Question 2.7

Which recognised system of psychiatric diagnoses is to be used? Is it DSM IV? If it is, then how can a DSM IV's inclusion of organic brain disorders be reconciled with the apparent specific exclusion of organic brain disorders mentioned in question 2.5 above under the mental and behavioural guidelines?

Answer 2.7

The clinician will use DSM IV, and other diagnostic entities recognised since 1994. Organic brain disorders such as brain injuries resulting from motor vehicle accidents will however be

assessed by neurologists.

Question 2.8
The vagueness of this definition on concentration, persistence and pace has attracted criticism from some legal practitioners. Does the MAA have any plans to introduce a tauter definition for this term?

Answer 2.8
This term is further defined by descriptors in the classes 1-5.

(3) Regulation of Medical Fees in Motor Accidents Matters

Question 3.1
The Motor Accidents Compensation Regulation (No. 2) 1999 (the "Regulation"), made pursuant to the Motor Accidents Compensation Act 1999, was proclaimed and commenced on 17 December 1999. It regulates, among other things, medical fees for certain services.

Concern has been expressed that the level of fees allowed to doctors under the regulations is unsustainably low. It has further been suggested that the allowable fee level may jeopardise the ability of injured people to obtain proper medico-legal reports, and so to obtain proper investigations of highly important matter of future complications resulting from their injuries.

Does the MAA have any plans to modify these fee regulation provisions?

Answer 3.1
The MAA does plan to modify the regulation of medico-legal fees.

The regulation fixes maximum costs for witness fees for medical practitioners and for medico-legal reports from medical practitioners

These regulated fees were taken from a list of recommended fees and allowances agreed upon by the NSW Law Society and the Australian Medical Association and which was published in the NSW Law Society Journal of September 1999.

However, since the regulation was made insurers and lawyers have advised the MAA of the difficulties they will face in obtaining medico-legal reports for the regulated amounts. In fact the MAA is aware that some doctors have refused to provide reports for these regulated amounts.

The MAA is currently reviewing the regulation. While it may be necessary to deregulate fees for medico-legal reports from specialists in the short term, the MAA does, however, still have concerns about the cost of medico-legal reports and plans to have discussions with the medical profession about this, with a view to producing a table of market rates.

5.2.2 Australian Plaintiff Lawyers Association

General

Question 1
Is it proposed that section 61(6) be proclaimed? If so, when?
Answer 1
Refer to the Answer to Law Society question 1.8.

Impairment Assessments

Question 2
A. Is it proposed to amend the Guidelines to allow the Assessors to take into account future deterioration/complications, as foreshadowed by medical experts so the assessment of permanent impairment need not be delayed until the deterioration or complication has actually occurred?
B If not what is seen to be the practical outcome of claims being delayed, perhaps for many years, until the deterioration/complication actually occurs if the assessment of permanent impairment is not likely to be greater than 10% before those events occur.

Answer 2
A. Refer to the answer to Law Society question 1.5(a).
B. In some instances when an injured person's condition has not stabilised and the parties cannot reach an agreement as to whether the person is entitled to non-economic loss, there may be a delay in resolving the claim. However, under the new Scheme the great bulk of claims will resolve at an early stage.

Question 3
Will a single medical assessor be able to assess multiple injuries, some of which may not have been properly diagnosed during the acute phase following the trauma (eg. frontal lobe brain damage, which requires the Assessor to have histories from relatives, employees, employers, friends etc and generally requires psychometric testing and perhaps an MRI study of the brain)?

Answer 3
Refer to the answer to Law Society question 1.6.

Question 4
To what extent will the Medical Assessor be able to deal with the question of causation eg. aggravations of pre-existing conditions such as degenerative diseases and/or acceleration of latent diseases eg multiple sclerosis, pre-accident injuries, intervening accidents, further injuries which may have been caused by or assisted by weaknesses caused by the original injuries etc? (sic)

Answer 4
The Medical Assessor can deal fully with issues of causation where there is a dispute about the relevance of certain treatments to the injuries sustained in the accident (see s.58(1) (b)). This

covers situations where it may be alleged that the treatment would have been required regardless of the accident, or is required for conditions unrelated to the accident. In such cases the MAS assessor will determine whether the motor vehicle accident caused an injury or aggravation to which the treatment relates, and if relevant, any apportionment of treatment between the accident and other causes. (See Medical Assessment Guidelines clause 11.5). The decision of the MAS assessor is such cases is persuasive but not binding on CARS or court.
The Medical Assessor can also deal with issues of causation where they impact on the assessment of permanent impairment, if documentary evidence of the pre-existing or intervening condition is made available to the Assessor. Where there is no documentary evidence or documented history of pre-existing impairment, the Medical Assessor must assess the claimant as they present on the day.

The AMA Guides state that, where there is documentary evidence describing a condition or injury which predated the accident, such as medical reports, X-rays, etc the Assessor is required to estimate the extent of impairment which applied prior to the accident, then estimate the extent of current impairment and subtract that which existed before, to arrive at an estimate of impairment related to the accident.

Further confirmation of this is provided in the MAA Guides, which state "the capacity of an assessor to determine a change in impairment will depend on the reliability of clinical information in relation to the pre-existing condition..." (clause 1.20) and "If there is no objective evidence of a pre-existing symptomatic impairment then its possible presence should be ignored" (clause 1.21).

NOTE that there will only be a need to conduct such assessments where there is a dispute between the parties as to whether the impairment related to the accident is under or over the 10% threshold.

Question 5

In relation to the stated objective pursuant to s5(1)(e) will the gateway not exclude many accident victims who have suffered moderate to serious injuries ?

Answer 5

The non-economic loss impairment threshold detailed in s131 of the Act sets a threshold likely to be exceeded by the most seriously injured of claimants. It is estimated that the non-economic loss threshold will lead to 10% of claimants (that is the most seriously injured) receiving non-economic loss compensation.

The threshold as set, attempts to balance the varied and often competing interests of the primary stakeholders, motorists and injured persons, balancing priorities of affordable Greenslip premiums against full compensation for all claimants.

It is in that way meeting the objective of s5(1)(e),

> To keep premiums affordable, in particular, by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities.

Question 6
Is it intended to increase the limitation period where future deterioration is likely to allow claimants to delay the assessment of permanent impairment until such time as the complication occurs?

Answer 6
There is no intention at this stage to amend the limitation period. Both CARS and the Court have the option of deferring or delaying the assessment or hearing of a matter. Note that the limitation period does not run while a matter is at CARS.

CARS Assessment Procedure

Question 1
Is it proposed that major claims be excluded from CARS? If so, why have super Assessors (4 silk to date) been appointed?

Answer 1
The MAA proposes, as previously advised, to exclude major claims from CARS, although frequently the comment is "the bigger the claim, the easier it is." This view is held by both claimants' solicitors and insurers, it is realised that "major claims" should be afforded the opportunity of exploration at Court and it is for that reason clause 4.29 of the Claims Assessment Guidelines say that in determining whether a matter is suitable or not for assessment an assessor shall have regard to;

- whether the matter involves complex issues of quantum or complex issues in the assessment of the amount of the claim including but not limited to major or catastrophic spinal or brain injury cases (at clause 4.29.3)... and
- whether the claimant has been medically assessed and is entitled to non-economic loss pursuant to section 131 and the matter involves other issues of complexity (at clause 4.29).

Senior assessors have been appointed to deal with exempted or exemptible matters which *by consent* the parties wish to be dealt with at CARS. The costs regulations do not apply and the parties must firstly agree to come to CARS and secondly must agree to the assessor.

Question 2
Is it anticipated that the regulations in relation to party/party costs which apply only to cases which proceed to CARS will encourage or discourage parties to allow cases to proceed to CARS?
Answer 2
The regulations which regulate legal fees, but which do not apply to matters which are exempt from a CARS assessment, *may* provide an incentive for claimants' lawyers to seek an exemption from assessment.

On the other hand, there will also be incentives for claimants to have their claim assessed by CARS, including the earlier resolution of their claim in a more informal manner than court proceedings and the fact that where liability is admitted, the CARS assessment will be binding on the insurer but not the claimant.

Exemptions from a CARS assessment can only be granted in limited circumstances – see s92 of the *Motor Accidents Compensation Act 1999* and Chapter 4 of the Claims Assessment Guidelines. These Guidelines were drafted bearing in mind the possible incentive the legal costs regulations may provide for avoiding CARS assessments.

Medico-legal Fees

Question
The Regulations impose maximum rates for medico-legal fees by doctors who carry out medico-legal examination.

The fees are universally regarded as being too low and will make it extremely difficult for major claims involving serious injury to be properly prepared, quantified and presented.
Is it intended to abolish these regulations in the face of significant criticism from all sides as to the inappropriateness of the regulations?

Answer
Refer to the answer to Law Society question 3.1.

5.2.3 Injuries Australia

The submission by Injuries Australia has identified statistical and other information that it considers should be available either publicly in the MAA Annual Report or to the MAA Board and the Legislative Council Standing Committee.
Refer to the answer to the provided to the Standing Committee's Question on Performance Indicators.

5.2.4 John Walsh, PriceWaterhouseCoopers

Question
Feedback regarding the MAA's and government's intentions regarding long term care.
Answer
Refer to answer provided to the Standing Committee's Question on Notice that related to this issue.

5.2.5 Professor Nikolai Bogduk – Newcastle Bone and Joint Institute

Statement 1
"If it is believed and accepted that degeneration causes pain, assessors can simply argue, as they have done to date, that that the patient's present pain was due entirely to the pre-existing degenerative changes.." .. "The MAA Guidelines imply that an assessor will be able to determine from clinical assessment whether or not a patient's symptoms are due to spondylolysis…"
(page 4, dot points 2 & 3)

Refer to Answer to APLA question 4

Note that "if there is no objective evidence of a pre-existing symptomatic impairment then its possible presence should be ignored" (MAA Guides , clause 1.21).

Thus only where there is objective evidence of a pre-existing impairment (not just "pain") can the assessor take account of this by subtracting the estimated previous impairment from the current impairment. In other cases the patient will be assessed as they present on the day, thus any impairment found in areas where injuries were sustained will be attributed to the accident, in the absence of any evidence to the contrary.

Statement 2
"Independent medical assessors will be appointed to resolve disputes concerning management of patients. The adjudication of these assessors will be final, and not subject to appeal" (page 5, "Independent Medical assessors", para. 1)

The decision of a medical assessor on the MAS Disputes Panel may be referred for review to a panel of three assessors, where either party requests it and the Proper Officer is satisfied that there is reasonable cause to suspect that the assessment was incorrect in a material respect. (s. 63 (1) – (3)).

Furthermore, the court may reject a Certificate completed by a medical assessor, and refer the patient for a further MAS assessment, if the court believes that there was a denial of procedural fairness to a party in completing the assessment or the Certificate, and that the admission of the

Certificate would cause substantial injustice to that party. (s. 61(4) and (5)).

Furthermore, if circumstances change, such as improvement or deterioration of the claimant, or new relevant information becomes available, either party may request a further assessment by a MAS assessor, and such a subsequent assessment would prevail over the earlier assessment. (s. 62 (1) and (2))

Therefore the assessors decision on treatment issues is not necessarily final.

Statement 3

"... one would expect that some form of rigorous system of selection and appointment would be undertaken. There is no evidence that this is this case"... "How interested doctors will be selected has not been made public" (page 5, "Independent medical Assessors" para 2, also subsequent paragraphs)

Refer to MAA General Response on Medical Assessment.

The MAA has discussed this with Professor Bogduk, and this information is publicly available – it has been summarised in the MAA Newsletter and discussed in detail at a number of seminars run by the MAA.

The selection procedures for the Disputes Panel have been developed, in consultation with professional medical associations, to ensure that only those with relevant, extensive and current clinical experience, knowledge of evidence-based principles and best practice in their specified field(s), appropriate and current training, and credibility within their profession will be appointed. These assessors will be appointed to advise on disputes within their nominated field(s) of expertise and will not be asked to adjudicate on matters outside of these field(s).

In the case of the Impairments Panel, which is yet to be recruited, selection will be based in the first instance on a formal assessment of the competency of the applicant in the assessment of impairments in the specified body system(s) for which the applicant seeks appointment to the panel. Again, these assessors will be appointed to advise on impairment disputes within their nominated and tested field(s) of expertise and will not be asked to adjudicate on matters outside of these field(s).

Statement 4

"The so-called training may be no more than instruction in how to follow the AMA guides as amended by the MAA"..."Trainees will not be examined following their instruction" "The MAA will not be able to determine if their assessors are complying with what they were taught. There is no mechanism for review, appeal or accountability" (page 6)

Initial training for the Disputes Panel will include discipline-specific sessions convened by expert professionals from the relevant fields, also a Code of Conduct for Assessors, discussion as to appropriate measures of consistency, and information on the ongoing system of review,

assessment and continuing training, A proposed plan for the initial training session has been widely circulated and comments from professional groups incorporated.

For the Impairments Panel selection will be based on assessment of competency and there will again be an ongoing system of monitoring and review, using measures to be developed in consultation with the Impairment Training consultants.

Monitoring of the reliability and consistency of assessors will be a major role undertaken by MAS once the panels are appointed. All appointments to both panels are reviewed annually.

Question

What is difficult to determine from the Act is the extent to which patients with whiplash or back pain will be covered. If they are rated as having only trivial impairment, clearly they will not qualify for non-economic loss; but will they be covered for ongoing medical care? Will the Motor Accidents Compensation Act continue to cover medical care for chronic pain, or will it reject these patients? Will the patients be entitled to care under Medicare? Under previous regulations, an injured party seeking care under Medicare would have to tick the box that asks them if their condition was due to accident? If it was due to accident, Medicare expected the CTP scheme to cover patients; they were not eligible under Medicare. Under current arrangements, that box no longer obtains. Is it to be then, that patients rejected under the CTP scheme will automatically come under Medicare?

Answer

Under the *Motor Accidents Compensation Act* 1999 a person injured as a result of a motor vehicle accident caused by the fault of another driver or owner is entitled to compensation for all reasonable and necessary treatment expenses, amongst other possible entitlements. The entitlement to treatment, including rehabilitation, continues the regime that was established under the *Motor Accidents Act* 1988. The entitlement to Medicare benefits also remains unchanged.

Therefore a person who has a claim under the *Motor Accidents Compensation Act 1999*, suffering whiplash or back injury from the accident and requiring treatment will be entitled to have their expenses paid. This is in no way dependent on their degree of permanent impairment. Non-economic loss compensation is the only form of compensation that is affected by the person's degree of permanent impairment.

An injured person's entitlement to Medicare benefits remains unchanged. That is where a person suffers a compensable injury and receives a Medicare benefit; the Health Insurance Commission requires that the benefit be repaid from the monies received as compensation. Similarly, where a person suffers injuries from a motor vehicle accident but is not entitled to compensation Medicare benefits are not required to be reimbursed.

5.2.6 Australian Medical Association

Question 1

How does the MAA respond to the concern that the AMA guidelines do not accept use in the manner in which the MAA have determined?

Answer 1

The AMA guides are used in a number of jurisdictions in a compensation environment, both in Australia and overseas. The fact that they are used in other systems means that there is already useful data around to predict the effect of the guideline use in the NSW scheme. The AMA guides also form the basis of the other guidelines used in a compensation environment eg Comcare guides. The MAA acknowledges that the AMA guides have problems, but the MAA is unaware of any guidelines as comprehensive as the AMA 4.

The Motor Accidents Compensation Act 1999 specifically talks of impairment and impairment guidelines, not disability. The fact that AMA 4 was to be adopted if the MAA guides were not developed indicates the legislature specifically intended to introduce guidelines relating to impairment, not disability. The MAA acknowledges that impairment does not take into account the effect of the injury on a person's lifestyle, but believes the legislation would need to be changed if disability was to be measured. The aim was to introduce a less subjective threshold to NEL than that operating under the 1988 Act.

The impairment guidelines are used to determine the *eligibility* for non-economic loss compensation. For those persons with a greater than 10% impairment their non-economic loss compensation will be determined on common law principles.

Question 2

What are the intentions of the MAA to consider the issue of non-economic loss and why these has been such a determination to refuse to acknowledge the importance of non-economic loss in the quality of life and wellbeing of victims in NSW?

Answer 2

The intentions of the MAA are to ensure that the objectives of the Act are met, in particular the objective set out in s5(1)(e):

> "to keep premiums affordable, in particular, by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving the principles of full compensation for those with severe injuries involving ongoing impairment and disabilities."

5.3 Evidence 8 May 2000

5.3.1 Development of Impairment Assessment Guidelines

CHAIR: If I could turn to the document headed "MAA General Response in relation to Impairment Assessment Guidelines and Medical Assessments and answers to questions raised by stakeholders", could I refer initially to pages one and two of the MAA general response dealing with the development of impairment assessment guidelines?

Could I ask you to please outline the process of selection of the members of the advisory committee, and the reference groups which developed each chapter of the guidelines? Could I also ask you, was any attempt made to include on the advisory committee, or the reference groups, any leading specialists with sceptical views about the AMA guidelines, or unorthodox views about the assessment of impairment?

Mr BOWEN: I could answer first in relation to the advisory committee. The advisory committee was established on an ad hoc basis pending the appointment of members of the Motor Accidents Council, at a time just after the legislation has passed, and when we were working towards the preparation of the impairment guidelines within the statutory time frame of three months after commencement, and it was put together by request to the relevant associations or organisations that are mentioned, and they nominated their appointments.

The advisory committee brought a variety of different views as to the better, or other, approaches to impairment, but it did not act as a decision making body. It was there to ensure that the full range of views on the guidelines were canvassed, and I am confident from the membership of the committee, and my knowledge of how it operated, that it did do that.

There were sceptical views as to whether the American Medical Association Guidelines should be adopted, and there were a number of issues which were raised then, and continue to be raised, about the operation of the American Medical Association Guidelines, which were either addressed in developing the MAA guidelines, or which were acknowledged as issues which would need to be continued to be monitored.

So far as the membership of the reference groups are concerned, the reference groups and the details of the membership of those are in the MAA guidelines; they are listed as an appendix to the MAA guidelines. They were chosen by the Project Management team which the MAA engaged to prepare the guidelines, and essentially that team was putting together a group around Professor Ian Cameron, from the School of Rehabilitation Medicine at Sydney University, with Jim Stewart as a Project Manager, and with the input of a couple of experts on how these impairment guidelines operate in Victoria.

They went through the colleges, and sought their knowledge of who were the leading specialists in the field. We did not attempt to direct them as to who they should chose.

The charter for the Project Management team was to prepare guidelines in relation to whole body impairment, and they took an early view that the best way to do that was by taking the American Medical Association Guidelines and working through them, looking at different body systems, and addressing what they regarded as any deficiencies in it.

I cannot comment on the level to which the members of those reference groups were, if you like, pro or against. They came on board to do a job to try and make the best set of guidelines we could get in New South Wales. I suppose where I got some satisfaction that the process was reasonable is that when the advisory committee considered the people on the reference groups, there was an acknowledgment - given that the advisory group had quite different views on it - there was an acknowledgment by the members of the advisory group, who did seem to know that these were the top people in the field, that they were not bringing a particular bias to it.
So there was no selection in favour of a particular view in putting the reference groups together.

5.3.2 Use of the Medical Assessment Service

Mr BREEN: In what circumstances would it be either mandatory or optional for parties to use the MAA's Medical Assessment Service? In what circumstances will parties be able to elect to have a medical dispute resolved in an alternative forum, or by an alternative dispute resolution service? And finally, are there any implications of competition policies for the Medical Assessment Service and Claim Assessment Resolution Service?

Mr BOWEN: There are a few questions there; I will go through those individually. In terms of the mandatory use of the Medical Assessment Service, the Medical Assessment Service is there to be used in circumstances where there is a disagreement between the insurer and the claimant, so to the extent that the system is working well and there is no disagreements, there will not be any need to refer matters to the Assessment Service.

It has jurisdiction in relation to five different matters, which are listed in the Act itself, and I might just find the reference so I get that right for you.

The reference is at section 58 of the Act, and the five areas are: first, whether the treatment provided or to be provided is reasonable and necessary; second, whether the treatment relates to the injury caused; the third is whether the injury has stabilised; the fourth is the degree of permanent impairment; and the fifth is the degree of impairment to earning capacity. Where the legislation mandates the use of the Assessment Service is where there is a dispute over the degree of permanent impairment, because the decision of the Medical Assessment Service in those circumstances is final and binding on both CARS and the court. It is also the case that the decision of the Medical Assessment Service on past treatment is final and binding. All other decisions of the Medical Assessment Service are persuasive but not binding. However, it seems to me that there is no limitation upon an insurer and the party agreeing to appoint an independent assessor outside of the system and agreeing to be bound by that person┴ decision.

I suppose to try to achieve some consistency in the result, in outcome, it would be the Motor Accidents Authority's preference that that did not happen, but we would not seek to constrain parties from making that choice. That is perhaps the same answer that I would give in relation to question 2, which was about the use of alternative dispute resolution outside of the CARS process. There is nothing to prevent it; indeed, the MAA has had discussions with a number of mediation service providers and recognises that the parties may continue to make use of those services, particularly perhaps in those larger claims which might otherwise be exempt from the CARS process. There seems to me to be a continuing role there, but there is no limitation upon the parties except that any agreement is binding only so far as the parties agree it is binding, whereas CARS can introduce an element of conclusiveness in relation to its decisions.

Mr BREEN: Is that conclusiveness likely to alter as a result of this proposed amendment to section 61(6)?

Mr BOWEN: It does leave it open for a certificate from a Medical Assessment Service to be set aside by a court, but that is already there. That is the result of an earlier part of section 61. What the amendment will do is to allow the court to substitute its own decision when it has set aside the impairment certificate. But I think that it is unlikely to have a major effect, unless there are significant procedural problems in the way that medical assessments are undertaken, because the ground on which it can be set aside is that the original assessment was procedurally unfair. If that is the case, then that would point up some shortcoming in how the Assessment Service is undertaking those medical assessments. We hope that is not the case. If we do have any cases that fall into that category, we will need to look at how that Assessment Service operates.
I suppose it does add a little bit more uncertainty and I imagine that in the course of the development of this legislation there will be some testing out in the court, and maybe some direction from the court, as to what constitutes procedural fairness in the context of a medical examination.

Mr BREEN: There is a school of thought that there is no such thing as procedural fairness in the context of a medical examination.

Mr BOWEN: That might add a great deal of uncertainty to it. We have obtained Crown Solicitor's advice as to the general approach to procedural fairness. We will be making sure that that is a key element of the training for the medical assessors, so that they understand that – and I will not try to outline all of my understanding of the law of procedural fairness - the information upon which they are making decisions is clear and transparent; that the claimant has had an opportunity to comment on it and put submissions; that they are not taking into account extraneous material; and that they are providing reasons for their decisions which can be looked at on reviews and appeals.

Mr BREEN: Have you looked at the comparable legislation in Victoria in that context of medical assessments and appeals?

Mr BOWEN: It is some time since I did. I had a look at it at the time we were preparing the proposals for the legislation in New South Wales. There they have appeals going to their now renamed Administrative Appeals Tribunal. I am not sure of the current name of that tribunal in Victoria. They treat them as administrative decisions and appealable on that basis. I think there was further a question, which was about competition policy?

Mr BREEN: Yes.

Mr BOWEN: I must admit that I have not thought of that in this context. When I was at the Attorney General's Department I did chair the competition policy review of the then motor accidents scheme as it was at the beginning of 1998. It was not an issue that arose in that context. I would have thought there were no particular problems that arise in setting up a statutory adjudicative scheme. In that sense it is no different to many other similar schemes that are sanctioned by legislation throughout this State, notwithstanding that the assessment system is not a tribunal.

5.3.3 Selection of Assessors

Mr BREEN: I would like to ask some questions about the selection of assessors. What level of interest has been shown by medical practitioners for recruitment to the disputes panel? What incentive will exist for leading specialists to become members of the disputes panel or the impairments panel? What guarantee is there that the positions on these panels will be taken by leading specialists rather than the same practitioners who are providing medico-legal reports under the old scheme?

Mr BOWEN: The appointment of the medical assessors has been staged by way of discipline, so that we go through a selection process for each of the various health professional disciplines. We have already appointed physiotherapists and occupational therapists, and I believe we have completed the list of occupational surgeons. With the medical practitioner members the selection process has been to call for expressions of interest, to then do an internal review of those applications within the Motor Accidents Authority to see how a person best fits the selection criteria; to then discuss it with the relevant college, and we have the involvement of people at a very high level from within the various colleges; to make sure that the person is known and accepted and respected within their profession; and then to look at the formal appointment in conjunction with a variety of interested parties, including the legal profession and the insurers.

The end result of all of that is that we are finding that in most disciplines we are getting very experienced practitioners who are applying. We are getting people who do not fall into the pattern of being only medico-legal experts. Indeed, one of the critical selection criteria we have is that these people are clinical practitioners, that they have hands-on experience and deal with patients, as distinct from simply preparing reports. My recollection is – and certainly I would like to take an element of the question on notice because I can provide a more detailed answer

about where we are up to with all of that – that we are getting very good applicants who do not fit that traditional medico-legal mould.

Mr BREEN: Are you getting the people who were in the traditional medico-legal mould and who were quite renowned for their reports, with one group supporting one side of the argument and the other group supporting the other side? Are those people applying?

Mr BOWEN: In some cases they are, but they will be hard pressed to survive the selection process, particularly if they have been regarded as being partial in that they have been either plaintiffs' doctors or defendants' doctors and if they are not seen to be able to rise above that. Some are; some practitioners who have done quite a bit of work in this area and have done it primarily for one side or another are nevertheless highly regarded within their profession. People say that it does not matter that they have mostly done plaintiffs' work; this person will rise above that and give a fair and impartial estimate and assessment on each occasion. I have forgotten the second and third legs of your question.

Mr BREEN: What incentive will exist for leading specialists to become members of the disputes panels and what guarantee is there that the positions on these panels will be taken by leading specialists? It may be that you have covered that.

Mr BOWEN: It may be that I have. I just make one point. I have not been involved in the selection process, but the discussions I had with the colleges in round about October or November last year gave me the very clear impression that the specialists would much prefer to be in a position of being engaged to do an independent assessment in which they are making the decision than being engaged to prepare a report for use in an adversarial setting where they may find themselves at some later point in the witness box. That is something that most of them do not like, giving up a day of practice to go off to court. So there is a very strong view that they would much favour a system in which these medical decisions were being made by the medical specialists rather than by a judge where they are being presented in an adversarial setting...

CHAIR: I think you would be aware that at some times in the past judges have been known to comment that medical reports prepared regarding the same plaintiff or applicant, by the defence and the plaintiff, could not be regarded as relating to the same person. Do you think that under the assessors who are selected by the Motor Accidents Authority, that that will become less of a problem, that the medical assessments can be clearly discerned as relating to the applicant, from whomever they come?

Mr GRELLMAN: Well, I am sure that there will be the odd anomaly that causes a judge to scratch their head, but the beauty of the system conceptually is that the right person is going to be making the assessment. It is a very difficult situation for a judge, who is not medically qualified, usually, but clearly is legally qualified, when confronted with two eminent practitioners giving completely diametrically opposed views. So the judge has to make a determination, and they have often made the best determination in the circumstances. I think with this philosophy that the opportunity for more predictability in terms of assessment of outcome is quite high.

5.3.4 Future Deterioration

Mr BREEN: Could I move on to another area: future deterioration. I know that is being considered by the Motor Accidents Council. The general question is: what sort of changes to the Impairment Assessment Guidelines might arise from consideration of this issue? I ask that question in the context of a question that has been raised along the same lines by the Bar Association. Why do the Medical Assessment Guidelines make no allowance for the prospect of future degeneration in a currently stable position? It is appreciated that there is some degree of uncertainty in making such a prediction as to the likely development of a medical condition, but it is a prediction that medical practitioners and judicial officers are called upon to make daily. The fact that the assessment of the prospects of deterioration is not a scientific certainty is no reason, the Bar Association says, to avoid making allowance for it. The Bar Association says also that it is unjust that a person who currently has an 8 per cent whole body impairment but who is likely to experience substantial future degeneration that would carry them over the 10 per cent threshold for non-economic loss is denied compensation for non-economic loss. Do you have a comment on that?

Mr BOWEN: I might comment in opening that I agree it is a very difficult issue, and I suppose I have a lawyer's bias towards thinking that this is something that can be done, because courts have traditionally made these forms of assessments. However, it is something that the Project Team development the impairment guidelines, and indeed the reference groups, were quite averse to doing, and there are two responses to it.

Firstly, before an impairment assessment can be undertaken, the injury has to have stabilised, and so there has to be no prospect of any immediate deterioration. If that is the case, then the injury has not stabilised, and you wait until it has stabilised before the impairment assessment is undertaken.

Secondly, the medical practitioners say that they can make an estimate of deterioration for a population of people who have this injury. So they can say for a particular sort of knee injury, 30% of these people will end up with some arthritic pain, and 10% may need a knee reconstruction in ten year's time. But they cannot say that for any individual who presents before them, and as soon as they are asked to start to make that assessment they are moving away from something that they feel comfortable with, which is a clinical examination of the person and an assessment of their impairment as they present, into predicting what may or may not happen in the future. That is something that they have indicated they would feel uncomfortable with doing in the context of a clinical examination.

I agree, it is probably one of, if not the most critical and criticised component of the impairment guidelines at the moment, and that is why the Council has asked the experts group to go away

and have another look at it, and try to provide a further report on it.

Of course, if a person is over the 10% then the prospect of future deterioration is something that can be taken into account by the court in assessing the amount of their compensation, and certainly a person is able to be compensated for potential future medical costs and future treatment costs associated with the deterioration of an injury.

I might add, the converse is also true of course, in that a person is assessed as they present when their injury is stabilised, and if they are over, the prospect of some simple surgery or some technique that they may undertake in the future that would bring them under the 10% is not taken into account either.

CHAIR: Mr Bowen, on the matter that Mr Breen has just raised with you, the Bar Association's letter to me dated 4th May indicates that early this year the Motor Accident Council invited submissions from interested parties to allow further consideration of the Medical Assessment Guidelines. In relation to this issue of future degeneration in a currently stable condition, the Bar says that the Motor Accidents Council briefly discussed the submissions that had been received, and ultimately deferred any consideration of the submissions pending a further review of the scheme.

Do they correctly state the position there? The Council will be giving further consideration to the matter in due course?

Mr BOWEN: Indeed, the Council at the time it recommended the guidelines to the Board of the Authority specifically noted that it was recommending the content of the guidelines, but that there were outstanding issues as to the operation of the guidelines that would need continued attention.

It is not only on the issue of future deterioration, it is on a number of the other issues that have been raised in these submissions, and which were raised in submissions to the Council, such as whether the guidelines should take into account broader concepts of disability. That is the other major one which should be looked at.

The Council agreed they should be, but we needed to put these impairment guidelines in place, and they are in place but the Council has recognised its responsibility to continue to look at all of those issues.

Mr GRELLMAN: Mr Chairman, I think there is a very delicate balance required here. The guidelines are just guidelines, they are certainly not set in stone. They are what we are working with at the moment. We, as a Council and the Board, are taking a very clear view, and have taken a very clear view, that as we learn to live with them, as we watch experience under the guidelines, that there will inevitably be a need to change them, and the Council can and will play an active role in debating the nature of that change.

That desire for change though, in the interests of equity and fairness and affordability, etcetera, does have to be considered in light of the imperative to try to ensure that the scheme has a degree of stability. So on the one hand we are going to be hastening slowly in terms of review and change, but on the other hand, if we feel that there is a compelling case for change - and as Mr Bowen said, the area of degeneration is one area where there is a lot of thought and discussion - then we need to have a very careful think about that, and where we think that the case is compelling then that can be discussed and recommendations brought forward.

CHAIR: So you would say to the Bar Association, I take it, that they should not lose hope, that you are in fact giving continuing attention to this problem of assessing degeneration of a currently stable condition?

Mr GRELLMAN: Indeed, and as you would have noted, the Bar have a representative on the MAC, so they do have a seat at the table. There is therefore that very open and active dialogue that is possible on this issue with the Bar appropriately represented at the Council table.

5.3.5 Disability vs Impairment

Mr RYAN: I will come back to that, because there is a question about the Accident Notification Forms I wanted to ask you later. I want to ask a question with regard to the definition of disability and impairment, or how those two terms are used in the Medical Assessment Guidelines. I had the benefit of going to the seminar that was conducted down the road - I think you conducted a couple - and I have to say I was very impressed with how the guidelines are developing, but I could not help but notice that with regard to measuring behaviour disorders the impairment guidelines appear to be quite - or the way in which the assessment is carried out is more essentially concerned with disability rather than impairment, and a lot of the submissions we have had to us have been somewhat critical of using impairment rather than disability.

So what we wanted to ask you was, since it has been possible to develop guidelines along those lines for people with behaviour disorders, is it not possible to develop guidelines for the assessment of disability for other impairments that are currently dealt with under the MAA Impairment Guidelines?

You seem to be indicating that you might even be thinking of that yourselves, in answer to a question from the Law Society where you said, apparently, "The MAA acknowledges that impairment does not take into account the effect of injury on a person's lifestyle, but it believes the legislation would need to be changed if disability were to be measured as part of the threshold test. This is an issue which is being considered by the Motor Accident Council."

Mr BOWEN: Perhaps if I could comment first on the Mental and Behavioural Guidelines. The problem there that needed to be addressed was not only a matter of diagnosis of a mental or

behavioural disorder, but the need to be able to put a percentage impairment figure with the diagnosis in a way that was objectively measurable, and the group working on those guidelines felt that it could only do that by looking at the effects that that disorder had upon the person's day to day living. So that was the approach taken for those.

It certainly is possible to put together disability guidelines, but where they do operate, they operate in a different statutory environment, and the clearest example we have of that in Australia is perhaps the ComCare guidelines which are an amalgam of both an assessment of impairment and an assessment of disability, but the two guidelines are used jointly to provide a fixed benefit to the claimant.

That is not the context in which this scheme operates; this scheme operates by having impairment as a threshold test for whether or not a person is eligible for non-economic loss, and if they eligible they have their entitlement to compensation determined on common law grounds, which as far as I am aware would probably cover all of those issues of disability.

So I am not sure what benefit is gained, other than trying to look at it to answer some of these questions, by going down the track of developing a disability guide, unless there is some contemplation of moving towards a ComCare type scheme, where the assessment of disability with the assessment of impairment was used to determine compensation.

5.3.6 Deeming of Injuries as over 10% Threshold

CHAIR: Could I direct attention to page 6 of the MAA's answers to questions from the stakeholders? There is a reference to deeming injuries as being over the 10%. I note in particular that the Authority's answer to question 1.5(b), refers to the deeming of injuries as over the 10% permanent whole person impairment threshold. Can I ask you which injuries are currently deemed as being over the 10% threshold?

Mr BOWEN: It is probably preferable if I take that on notice so that I can give a comprehensive answer. The one that I recall, because it was raised in the context of debate on the bill, is loss of both breasts is deemed to be over. There are others that are deemed to be over and not coming immediately to my mind.

Mr RYAN: The Bar Association gave us a list of ones that they recommended. They said complete or partial quadriplegia, complete or partial paraplegia, loss of sight, loss of hearing, loss of an arm by amputation, loss of a hand above the wrist, loss of a leg by amputation above or below the knee including the complete loss of a foot, loss of sense of taste or smell, significant brain injury, significant permanent scarring or disfigurement of a substantial portion of the body, loss of sexual organs, loss of kidney, loss of the liver, neck or back injury requiring bone fusion of the spine. Does that sound like a more extensive list than you would have?

Mr BOWEN: There are two issues here, and we are working on both. One is: which of those are over and, if you like, manifestly over? One of the things the Authority is working on as an

aid to practitioners in this area is a list of injuries that are manifestly over the 10 per cent if a person sustained this sort of injury, and nearly all of them on that list are over 10 per cent and it really should not be a matter of argument for the great majority of claimants. Then there is a much smaller list of other injuries which, on application of the guides, would be below 10 per cent whole body impairment but which are deemed to be over. I now recall two from that list. One is the loss of breasts, which seems odd because the loss of sexual organs in a male is clearly over, and the second is total loss of smell and taste is deemed to be over as well, whereas according to the guidelines it would otherwise be just under.

We are looking at some other injuries still, such as loss of the smaller two fingers. At the moment loss of the thumb or the first two fingers is over 10 per cent but loss of the fourth and fifth fingers is not. We are now considering whether that should be deemed to be over. I am just trying to recall whether any of those others from the Bar's list are included. Loss of a kidney is not over. Indeed, it is probably not necessarily even a disability, provided your other kidney is functioning.

Mr RYAN: I recall there being some discussion about that one, in that you could lose the other one later in life and you could go back to the accident to say that was the reason the later accident in life was catastrophic.

Mr BOWEN: Yes, and for that reason we are continuing to look at that. I think the spleen falls into a similar category. Nearly all of the rest on that Bar list fall into the first group which are things that are manifestly over. We are proposing to produce a list of those as a guide to practitioners in the area.

Mr RYAN: Does your current list include the loss of an unborn child?

Mr BOWEN: This was a very difficult one. The loss of a foetus is included in the Victorian guides as stand-alone, although it is in the context of a statutory scheme there where they provide a statutory death benefit. If you lose a child, a born child, you get a statutory death benefit, which we do not have. So it was included in earlier versions of guides and it was then taken out and it is currently under continued review. It occupied quite a bit of discussion at the Council as well. We recognised that there was a prospect of creating an anomaly if you put in loss of a foetus as an impairment to the woman, which automatically meant the mother was compensated for non-economic loss, whereas loss of a child would not attract any automatic compensation unless it had an effect that got you over 10 per cent or a mental behavioural disorder.

Mr RYAN: Is it not reasonable to consider that both of those things should be deemed to be more than 10 per cent?

Mr BOWEN: There is a strong argument that way, and it has been put to the Authority and the

Council, and the discussions with the reference groups are ongoing and we will come back to that.

Mr HATZISTERGOS: It would if there was a psychological injury that brought it over 10 per cent.

Mr RYAN: The argument is that it would not necessarily do so, because the psychological injuries are assessed by means of disability rather than impairment. It is difficult for a parent who has lost a child to demonstrate a disability.

Mr BOWEN: Yes. There clearly will be occasions where a parent has lost a child and it has led to a significant disability which translates to a greater than 10 per cent impairment. There will be other cases where parents do get on with their lives, often because they have no option if there are other children and family members to look after, and on that sort of test they would not necessarily get over the 10 per cent mental and behavioural impairment. So it is an issue that needs to be looked at. It probably needs to be more broadly looked at in the context of statutory change to see whether a death benefit should be introduced rather than trying to fiddle with the impairment levels as a means of achieving that end in a roundabout sort of way.

5.3.7 Combination of Impairment from Mental and Behavioural Disorders with other Impairments

CHAIR: Could I ask you about mental and behavioural disorders. I refer to page 8 of the AMA answers to questions from stakeholders. This is a question about the combination of the two aspects relating to the impairment threshold. I attended one of your series of seminars, as Mr Ryan did, as he commented a short time ago. Is it the case that a person cannot meet the 10 per cent permanent whole person impairment threshold by combining scores in relation to mental and behavioural disorders, on the one hand, and other impairments on the other hand, while a person may combine scores from any of the other physical impairments to meet the threshold?

That is a matter that I understood to be stated at the Authority's seminar down at the Masonic Centre. If what I have just stated is correct, could you explain to the Committee the reasons for that approach of not being able to combine the mental and physical impairments to reach the threshold of 10 per cent?

Mr BOWEN: That is the case, but it is a result of the operation of the legislation, not the guidelines. I will just try to find that.

Mr RYAN: I attempted to move an amendment to the bill, but that was defeated.

Mr BOWEN: There was no shortage of amendments. I am very confident that it is a section in the legislation, but I cannot put my finger on it at the moment.

CHAIR: That is the answer to the question, that it is a legislative provision rather than a decision of the Authority?

Mr BOWEN: Yes.

5.3.8 Assessors Decisions on Treatment Issues

Mr HATZISTERGOS: The major function of the assessments to be undertaken by the MAA Medical Assessments Service is to resolve disputes as to whether or not a person meets the 10 per cent threshold for compensation for non-economic loss. The answer that you gave on page 18 to Professor Bogduk's question refers to the decisions of assessors in relation to the treatment and the management of patients. Are you able to explain the role that assessors play in relation to the treatment and management of patients?

CHAIR: Mr Hatzistergos is referring to a passage on page 18 of the Authority's answers to questions from the stakeholders.

Mr BOWEN: I just cannot find the reference.

Mr HATZISTERGOS: The answer that you give on page 18 of Statement 2 basically talks about referring people back after an assessment has been given, revising the assessment if necessary, and court rejection of the certificate in certain circumstances. The question I ask is what you see as the role that assessors can play in relation to the treatment and management of patients, bearing in mind that they can resolve disputes other than disputes about whether or not the person meets the threshold?

Mr BOWEN: Yes. I think perhaps in due course one of the key areas where the Assessment Service will provide some more general benefit than in relation to specific cases is to assist in identifying what is reasonable and necessary treatment, for both past treatment and future treatment, bearing in mind that definition of treatment under the Act is very wide. It includes not only specific medical interventions but issues particularly of care. Certainly disputes over care, appliances and assistance to people, either technical or human assistance to people, have been the main area of complaint to the MAA in relation to section 45 of the old Act, which placed the obligation upon insurers to provide rehabilitation services, and in fleshing out exactly what was encompassed by those services. That was the major area of complaint.

The MAA was very limited in the powers that it could exercise. It could treat it as a breach of licence, but it could not necessarily do anything to resolve an individual dispute, other than on an informal basis. I think this area of assessment lends itself to providing a much more accessible earlier decision so that the person can go ahead with either a course of treatment or engagement of care or purchase of appliance, paid for by the insurer, rather than leaving it all to the court at a later date and, as I mentioned, again setting some standards in this area as to what is reasonable and necessary. Does that answer the question?

Mr HATZISTERGOS: Yes, I think so.

Mr GRELLMAN: That is one of the reasons why in selecting the assessors themselves we are looking for clinicians who have some practical experience, and can bring that wisdom to bear on the issue, rather than make a straight determination as to the level of impairment...

Mr RYAN: In relation to Mr Bowen's answer which referred to the role of the Medical Assessment Service concerning reasonable and necessary treatment, why is it that s 61(6) of the Act as it currently stands, and will also remain as a result of the amending bill that is currently before the house, which only provides scope for this court to substitute its own determination in those limited circumstances where there has been procedural unfairness in the medical assessment, in respect of decisions about the 10% of whole person impairment threshold - in view of the controversy surrounding that case we talked a lot about in the last Parliament, the *Stubbs v. NRMA* case, would it not be reasonable for the court to have a capacity to substitute its own determination in those decisions as well?

Mr BOWEN: In fact the decision of the medical assessor on future treatment, which would include future care, is not binding upon the court. So if we had the *Stubbs* case or an equivalent come to medical assessment, then there would be the ability for an assessor to make a determination as to what is reasonable and necessary levels of care, but that would only bind both the parties insofar as it was care already provided prior to that assessment.

I would take the view that it be necessarily be persuasive, and in terms of the MAA's regulatory responsibilities over the insurers, if there was a circumstance in which an assessor made a determination on past care, I would expect the insurer to continue to meet that level of care into the future, unless there were good grounds to go back and appeal. But it would not be binding upon the court when the court came to determine the matter.

5.3.9 Modifications to AMA Guides: Chronic Pain

CHAIR: Can I turn to another matter? Can I ask you first of all about chronic pain? The MAA's Impairment Assessment Guidelines, I think I am correct in saying, are based on the American Medical Association's guide to the evaluation of permanent impairment. However, you would agree with me that there are significant departures from the AMA's guides.

Can I ask you, why is Chapter 15 of the AMA's guides, dealing with chronic pain, not used? Does not the development of Chapter 7 of the Authority's guides dealing with mental and behavioural disorders demonstrate that it is possible to develop guidelines for the assessment of disability arising from chronic pain? This was a matter, I think, that was mentioned during the Authority's seminar.

Mr BOWEN: The position taken by the Project Team developing the guidelines was that Chapter 15 on chronic pain would be used as a clinical and diagnostic tool to assist in assessing the person, but that it is not possible to put any impairment percentages against pain because it cannot be objectively measured. It is a matter of how the patient presents.

There are secondary indicators of when a pain is present, and those secondary indicators will go

towards assisting determination of a person's overall impairment, so it is more looking at what is causing the pain rather than the pain being allowed for in the impairment assessment.

CHAIR: I understand what you are saying; pain certainly is difficult to objectively assess. Is it any more difficult though than assessing a behavioural or psychiatric disorder?

Mr BOWEN: In terms of assessing it by the impact it has upon a person's life?

CHAIR: Yes.

Mr BOWEN: That's an approach. It starts to move these guidelines again away from the objective physical impairment into looking at issues of disability, because pain is quite clearly a factor that relates primarily to disability. It is for that reason perhaps better looked at in that context, rather than trying to extend the impairment scales.

I might add - this is a little bit off the point, but I think it is relevant to this - the MAA also has a responsibility to develop some treatment guidelines, and we are just about to complete and hopefully promulgate some guidelines in relation to whiplash treatment. We have identified the treatment of chronic pain as being the next area to address, and have had discussions with the Pain Clinic which is at Royal North Shore Hospital and associated with Sydney University, about getting into this, what is a fairly vexed area for the medical profession, not only in terms of assessment but in how to treat chronic pain.

We again would not be looking at developing prescriptive guidelines, but something that might assist practitioners in how they put a course of treatment together. That is a little bit of an aside, but I am hoping that that process may help us flesh out what the particular problems are with the diagnosis of pain and its relationship to both impairment and disability.

Mr RYAN: That is one of the areas though where the inability to add scores together for mental and behaviour disorders and physical injuries together, is going to have an impact, isn't it? Because a person might have a back injury which might qualify for 8% disability, but cannot add the difficult to measure pain threshold, the chronic pain they might suffer at the same time.

Mr BOWEN: Yes.

Mr RYAN: Both scores might be 8%, but because it is impossible to add them together they are not able to make a claim for non-economic loss?

Mr BOWEN: That's correct.

5.3.10 Modifications to AMA Guides: Range of Motion Assessments for Spinal Impairment

CHAIR: We will come back to whiplash in a moment. Can I ask you another matter relating to the AMA guidelines? Why does Chapter 4 of the MAA's guidelines specifically exclude the

use of range of motion assessments for spinal impairment, while these assessments are permissible under the AMA's guides?
Would you outline for us, if you can, the decision making processes of the reference group which developed Chapter 4 of the Authority's guidelines, and the MAA Impairment Guidelines advisory committee, in relation to the matter I am raising, that is the excluding of range of motion assessments for spinal impairment?

Mr BOWEN: The American Medical Association Guidelines provides two alternative means of measuring spinal impairment, being either diagnostic related estimates or range of motion. The view of the reference group that looked at the spine was that diagnosis related estimates was by far the preferable means of doing it, because it was more accurate than range of motion, given that there can be a whole host of other impairments that can limit movement in the spine.

Perhaps a more important question was whether the range of movement should have been maintained as a means to flesh out the diagnostic related estimate, and I know, and I think this was also well discussed at the Impairment Seminars, that that was looked at in some detail.

I am simply going to have to rely upon the judgment of the experts when they looked at this, that it was preferable to go down the path of relying entirely upon the DRE methodology rather than range of motion, in that while being aware that there is an issue as to whether range of motion should be used to augment the first assessment, I would not want to second guess the experts who took the opposite view.

They seem to also be suggesting that range of motion was perhaps more of an historic overhang, because up until this last set of guides it was a method used - it is still used in those compensation schemes in Australia which rely on earlier editions of the AMA - so they thought perhaps because of that had been retained in the AMA for tradition, but that was clearly on the way out as being inferior to the diagnostic estimates.

5.3.11 Certificates from Assessors

Mr HATZISTERGOS: In relation to medical impairments, I noticed when looking through the table that you are actually requiring the medical assessors to work out the impairments by a process of addition of various components. Do I take it that the certificates will indicate the precise amount of impairment assessed in accordance with these guidelines? Or is it anticipated that the certificates will simply indicate whether or not the person exceeds the 10 per cent, which is really the only statutory purpose of that assessment. Bear in mind in particular that Part 3.4 of the Act does not talk about a specific percentage but talks about whether a certificate indicates whether the degree of impairment or injury to a person is greater than 10 per cent. The reason I ask that question is because in my experience it has been demonstrated that sometimes if you assess specific percentages of impairment, that can affect a decision in relation to the amount of non-economic loss one would award, at least subconsciously.

Mr BOWEN: The intention is that the certificate will comply with the statutory requirement and indicate whether or not the person is above or below the 10 per cent. But the certificate will have attached to it a statement of reasons, and in that statement of reasons there will be a list or an accounting of all the information that the assessors had before them, an indication of the procedure that they have undertaken doing the assessment. That will, of necessity, include the results of the full assessment. Bear in mind though that a person may present with a number of injuries. The process of the Motor Accidents Assessment Service will be, in conjunction with that person and their treating doctors, to identify what is the most significant injury and send them to the appropriate assessor for that first. As soon as they are over 10 per cent, you will not proceed to send them around to a whole number of other specialists. As soon as they are over 10 per cent they will get a certificate to say they are over 10 per cent.

Mr HATZISTERGOS: What then needs to be tendered in court to prove the resolution of the dispute? Is it just the certificate?

Mr BOWEN: The certificate.

Mr HATZISTERGOS: The attachments do not get tendered?

Mr BOWEN: The statement of reasons would need to be provided if there was any suggestion that the certificate be overturned, was not procedurally fair or the like. Let me say that it is open to the court, of course, to require that the statement of reasons be tendered as well. We have had now a couple of discussions with the District Court Rules Committee about this, but recognise in the long run that it is the court's decision as to what information it wants. We are telling them what we are producing and making sure that the systems mesh as well as possible, but if the court requires a statement of reasons to be submitted by operation of their rules, then it will have to be so. But there needs to be some caution about relying upon the total impairment shown in a statement of reasons to assess the level of benefits, because it might be incomplete.

Mr HATZISTERGOS: What would be the relevance of the reasons?

Mr BOWEN: I do not think there is any relevance, but I thought you were suggesting that.

Mr HATZISTERGOS: No, I am just suggesting that in terms of the statute the only thing required is certification as to when it is over 10%.

Mr BOWEN: That is right.

Mr HATZISTERGOS: There is no dispute about the certificate; there is no point in handing out the reasons.

Mr BOWEN: I would agree with you, but if the court requires it we provide it.

Mr HATZISTERGOS: I am wondering what in fact is going to happen once the court gets it.

Chapter 6 – Whiplash Claims

6.1 Evidence 8 May 2000

Mr BREEN: One of the objectives of the legislation was to take these claims for whiplash injuries out of the schedule of injuries for the purposes of compensation. As a practitioner in the area my experience before this legislation was that if you had an accident in Queensland and it involved a whiplash injury, you might get $30,000; in New South Wales for the same injury you might get $15,000 and in Victoria you would get nothing. The object of the scheme, very broadly, was to take New South Wales closer to Victoria, rather than what was happening in Queensland. I am interested to know what has been the impact of the legislation in the context of whiplash injuries, given that there is no longer a claim for economic loss with whiplash injuries. Has that had any impact, or was that part of the $100 reduction that the Government says is the saving on premiums? Are whiplash injuries included in the calculation to determine that $100?

Mr BOWEN: The reduction in overall non-economic loss is included in that, and certainly one of the areas that was expected to be a reduction in payment was for non-economic loss for whiplash injuries, bearing in mind there is no reduction at all for economic loss. To assist in fleshing out these impairment guidelines the Motor Accident Authority has now completed round about 70, and we are on our way to completing 100, case studies of completed files where non-economic loss payments have been made. That would show that without something additional, straight forward whiplash will not get over 10 per cent whole body impairment, and therefore a person presenting with just that injury will not get non-economic loss. With some additional complications or another impairment they may get over.

The costings for the new scheme assume that round about 10 per cent of claimants, about 1,800 claimants per year, will get greater than 10 per cent whole body impairment. Given that whiplash constitutes 38 per cent or 40 per cent of motor accident vehicle injuries, certainly it is clearly the case that the great majority of people presenting just with whiplash will not be getting over the 10 per cent whole body impairment. The case studies bear that out. I might add that the case studies show also that under the pre-existing scheme there was a huge range in non-economic loss payments, sometimes to the point of being unexplainable, not even on factors that one would think would relate to disability, such as age or restriction on the person.

Mr BREEN: This is under the old scheme?

Mr BOWEN: Under the old scheme. Part of the purpose of doing these case studies was to provide a case book for people as to matters where a fairly typical range of injuries was round about the 10 per cent mark, and secondly it was allowing the MAA to make comparisons between what people were previously getting for non-economic loss, their entitlement under the new scheme and how much they might get in the future. It is suggesting to us that there was a huge range of non-economic loss payments which may have had more to do with the level of

representation a person had and their propensity to pursue litigation, rather than the level of impairment or disability they had.

Mr HATZISTERGOS: The level of preparation?

Mr BOWEN: Yes.

Mr BREEN: Can I conclude that line of argument with the question whether the $100 reduction in the premium is due to savings from whiplash injuries not being included, or is it due to the fact that lawyers' fees are no longer part of the payments? What specifically is the $100 and how has it been achieved?

Mr BOWEN: It is a combination of both of those, and other savings. In regard to the actual figures, I will have to take that on notice and get back to you, because I do not want to misestimate it. There is a significant component of it that comes from the reduction in overall non-economic loss. My recollection is that the new scheme seeks to reduce the total amount of non-economic loss payments by about $100 million, from about $280 million to about $180 million. I would wish to confirm those figures before they are relied upon by the Committee, but that is indicative.

The other savings come from reduction in transaction costs, including legal and medical costs, partly by simplifying the process for the finalisation of a claim so that for small claims people do not need to have a lawyer, or the amounts that they are spending on legal costs are significantly reduced; and then otherwise from trying to reduce some of the litigation in the system, including in the larger claims by having a range of what currently litigated matters such as assessment of future treatment and the like determined through an assessment process so that those issues can be finalised earlier and they can promote earlier settlement of matters. That is perhaps the harder area to assess savings and it really will not be until some years down the track that we will be able to say that the new scheme is or is not meeting those assumptions. Although there are certain milestones along the way, that will give good pointers to it, including informed feedback from both insurers and plaintiffs' lawyers as to what is happening with the claims.

Mr RYAN: I think you said that 38 per cent of the old scheme was made up of whiplash claims. Is there any possibility that $100 might be an underestimate as to what effect the new scheme might have on premiums?

Mr BOWEN: That $100 might be an underestimate?

Mr RYAN: Yes. In other words, is there likely to be any chance of even more savings, given that the new scheme may well have taken so many claims out of the scheme, in that whiplash is highly unlikely to make the grade and was 38 per cent of previous claims? That is a fairly significant chunk out of the old scheme that is no longer there?

Mr BOWEN: It was 38 per cent of total claims, and of total claims previously about 50 per cent were receiving non-economic loss. I am not sure how all that weighs up. Probably a great number of those whiplash claims were not previously receiving non-economic loss either. I would expect that to be the case, unless there was something that fitted into the previous statutory definition that took them beyond 12 months - it was a significant impairment; it had to be at least 15 per cent of the most serious case. You would think that a lot of simple whiplashes would not have passed that test either, and so would not have previously been getting non-economic loss.

Mr GRELLMAN: The new legislation actually continues the trend that was commenced with the 1995 amendments to move the compensation field more towards the more seriously injured, and that is not to dismiss or trivialise whiplash. At the end of the day it is a mathematical equation to determine how to achieve a significant reduction in premiums and what benefits or other costs you can take out of the scheme to achieve that reduction. Certainly whiplash and the smaller claims have been largely removed.

Mr BREEN: The point is that if the 1995 amendments took whiplash out of the range of claims and benefits and this new scheme does not include some significant reductions as a consequence of there being no whiplash claims, how do you achieve the $100 reduction? That question still remains outstanding.

Mr BOWEN: Undoubtedly people with whiplash were presenting with very different effects, and what they were being compensated for or not compensated for under the old scheme was the effect of the injury and the level of disability. One of our concerns also has been that the previous compensation scheme provided incentives towards disability, particularly with injuries such as whiplash, because if you could argue a more significant disability then you could pass the previous subjective thresholds and get awarded compensation. Because of that, we intend to undertake a study specifically on whiplash to see whether the changes to this scheme reduce the level and length of time for which people are proceeding with treatment for whiplash.

We are doing this because we have just received – and I will make it available to the Committee; I regret that I did not bring it today – a study undertaken in, and I cannot recall the jurisdiction but it was a study by one of the medical colleges which showed that when they moved from a fault-based to a no-fault system there was a massive reduction in the length of time for which people were receiving treatment for whiplash because there was no longer a compensation payment at the end; there was ongoing treatment and payments for treatment. The conclusion they drew from that was that the existence of compensation can have the effect of prolonging and entrenching the disability in people and that you need to tailor your compensation systems to avoid that. That is, I think, one of the areas we need to be alert to. I would like to do a similar sort of study in relation to whiplash injuries in New South Wales.

Mr RYAN: Just to clean up a couple of matters with regard to whiplash, what is the status of the MAA's draft guidelines for the management of whiplash?

Mr BOWEN: They have been sent out for final comment, and subject to any further issues that arise in that comment, I would expect we would be promulgating them in May.

Mr RYAN: If we go back to a couple of questions you answered earlier with regard to whiplash, where I think we suggested that whiplash is not likely to be an area of claim for non-economic loss, largely as a result of Chapter 4 of the MAA's impairment assessment, it is likely that claimants will no longer receive compensation for non-economic loss for whiplash.

What are the implications, if any, for compensation for claimants for future treatment, or economic loss for persons with whiplash arising from a motor accident?

Mr BOWEN: There should not be any implications at all. A person who has been injured in a motor accident, whatever their injury, should have their medical costs, including future treatment costs, met.

Chapter 7 – Role of the Medical Profession in the New Scheme

7.1 Evidence 8 May 2000

Mr RYAN: I will first of all just ask you one basic question, which I guess we will get into trouble if we have not asked. Can you tell us how many claims have been lodged since the new scheme commenced?

Mr BOWEN: I cannot at this point in time. We will have a return to the end of March shortly which will show that. It may assist you if I give an indication at this stage of what is only anecdotal evidence, and that is that the claim numbers are well down. To some extent that would be expected because a number of these claims, or a number of matters that previously would have been claims, will now be finalised in the context of the Accident Notification Forms. Indeed, it has been suggested to me that insurers are making an effort to resolve those which can be resolved at that level, even if it means payment in excess of the $500 statutory amount. My discussions with the plaintiff lawyers suggest that there are not as many people coming through their door, but they are not sure themselves at this stage whether that is an overall reduction in people who are intending making claims, or a reduction in the number of people who are making use of lawyers, or whether it is again a timing issue, because people are still going through that Accident Notification Form process.

It is something I hope to be in a position to give you a much clearer response by the anniversary date of the scheme, but even then, because of the normal lag in times to lodge claims, it will still be at a very preliminary stage.

Mr RYAN: The final question I want to ask you relates to the completion of the Accident Notification Form. This arises from correspondence to myself, not to the Committee, although I should pass it on to the Committee. Essentially what the suburban lawyer who wrote to me was saying was that they are not convinced that medical practitioners are giving appropriate advice to people who might come in with an injury, to ensure that they complete that form quickly enough. I understand it is critical that they complete it within a particular period of time, and if not they forfeit all opportunities to make a claim. The argument they put to me is that doctors feel that their job is to provide medical advice not legal advice. They are exerting some resistance on their part to raise that as an issue. What sort of training are you providing to medical practitioners and do you see that as a potential emerging problem?

Mr BOWEN: It has the potential to be a problem. We have been monitoring the use of the Accident Notification Form and have noted that there is a great range in the usage of it. By doing some sampling we have found that there is a great divergence of knowledge in the medical profession about the existence of this form, secondly how it is used, and thirdly what happens with it.

At the time the forms were initially sent out, and they were sent to each registered medical practitioner not to their surgeries, we provided some information. We supplemented that with articles in the various medical journals and with forms and training throughout New South Wales. We had what we called our first road show in late October, early November, which drew reasonable audiences. However, it would appear that some practitioners said that they got it in September, so it starts in October and they put it in the drawer and it has possibly remained there. So we are in the process of developing a further mail-out, this time to the surgeries as distinct from to practitioners, and we are going to supplement that with targeted visits to surgeries to make sure that the person at the desk or reception is aware of it. We have posters to put up in waiting rooms. We have submitted a further article to the journal. At the moment, during May, we are having a further round of training courses throughout the State where we have been in correspondence with the local, I think they are called, chapters of the AMA - I am not sure of that – as well as the regional law societies to try to get audiences to those.

It will be an ongoing issue to make sure that medical practitioners are aware of it. I have to say we suspected that we would have some problems in this area because we have had quite a bit of discussion with WorkCover. WorkCover has had a similar medical certificate in place for some years and they had even more teething problems than we have, because if was very new at that stage and we have had at least the WorkCover precedent as being one that practitioners were getting acquainted with and getting used to. It is ongoing.

In terms of what happens if there is a delay with the ANF, it is to be lodged within 28 days; if it is not, then the person simply has to lodge a claim form instead of the Accident Notification Form. Whilst we cannot require it, the Motor Accidents Authority has been encouraging insurers to accept the Accident Notification Forms even if they come in late. My understanding is that the majority of them have been doing that, for the very good reason that it is considerably cheaper for them if they can finalise the matter with the Accident Notification Form instead of a claim form. It is certainly considerably easier for the claimants if they have to fill in a 2-page ANF as distinct from a 10-page claim form.

Mr RYAN: Is there any usefulness in having the 28-day limit at all?

Mr BOWEN: A person who is going to be pursuing a claim needs to make that claim within six months. This is the existing scheme and we wanted to put in something earlier that triggers a very early notification, to allow the person to get that early treatment. The 28 days was arbitrary, but it seemed to be reasonable, in that most people who had suffered an injury would attend their doctor within that period. It would be unlikely that they would not. So long as the system is working properly, they go to the doctor and he asks, "Is this a motor accident matter?" He will say, "You will need this form. Fill it in, phone the call centre and find the insurer and send it straight in." If that system is working, the 28 days should be okay. I would say that is another area where you have to monitor. If we find out that it is not working, that there are a whole lot coming in just afterwards, then that is a good reason to have a look at that period.

Mr RYAN: Some people might feel too ill to fill out a form.
Mr BOWEN: Anyone who has had a serious injury and is hospitalised will not use the Accident Notification Form, because they might as well proceed straight to a claim form stage. Their hospital treatment is all paid for.

Mr RYAN: They might not be hospitalised, but they might feel generally malaised. The other final thing arising from that is whether there is not some value in communicating with motorists about the importance of this form, perhaps through the registration system?

Mr BOWEN: Yes. In fact, the new guide is going out with registrations. We already issue a guide that goes out with each of the recent renewals and with the registration certificate. It now has information on how to make a claim. The fact is that people do not ever think about what they will need to do if they get hurt in an accident, until they are hurt, and at that stage they do not necessarily think about going back to something they got with their registration papers.

Chapter 8 – Other issues

8.1 Evidence 8 May 2000

8.1.1 GST and Premiums

Mr HATZISTERGOS: Can I some questions about costs, Mr Chairman?

CHAIR: Yes, certainly.

Mr HATZISTERGOS: I wanted to ask some questions referrable to concerns which have been raised by the Bar Association, firstly as to the impact of the GST, and I understand that at the moment the Authority was waiting on some advice from Treasury, is that the case? Has that advise come? We are only two months away now.

Mr BOWEN: That advice has not come. The question put to the MAA was whether regulated fees are inclusive or exclusive of GST. Our advice is that the issue is somewhat open to interpretation, and in due course we will need to get a position, but quite clearly this is not the only area in government where there are regulated fees for service providers, and it is absolutely necessary that government take a consistent position, even in terms of legal fees.

As you know, worker's compensation fees are also regulated. It would be a nonsense if in the Motor Accidents Scheme the regulated fee was deemed to be exclusive of GST, and in another regime was deemed to be inclusive. So there is an issue of consistency across government, and then secondly in interpretation of the Commonwealth legislation, so that once the government position is taken the regulations, if they need to, can be adjusted. As soon as I have received Treasury's advice we will take that up further.

Mr HATZISTERGOS: The insurance companies, I take it, will be charging 10% on premiums?

Mr BOWEN: They have already started.

Mr HATZISTERGOS: So you will be collecting the tax revenue. In terms of the input costs to the insurers you will be entitled to claim a tax credit?

Mr BOWEN: The insurer will be, yes.

Mr HATZISTERGOS: The insurer will be, which will no doubt will be paid for out of the premiums that you collect, which include the 10%. Someone is going to end up having to pay the 10%, and it is either going to come off the regulated fee, therefore reducing the fees that

practitioners collect, in which case the insurers will be making a profit out of it, or you should change the fee structure so as to allow the 10% to be collected.

Mr BOWEN: Yes. I am not sure the insurers would make a profit. If there is no adjustment in that, they can only claim input tax credit for the fee actually paid. But certainly, if the view was taken that regulated fees were inclusive of GST, then that would represent a reduction in the amount paid to service providers. But that would be true across a whole range of regulated areas.

Mr HATZISTERGOS: In which case you would be making an extra income, wouldn't you? You would be able to claim a tax credit on the regulated fee, and that would come off when you have to pay the tax office?

Mr BOWEN: The insurer could only claim input tax credit on what they pay, and what they pay will either be the regulated fee or --

Mr HATZISTERGOS: Less 10%?

Mr BOWEN: Or the regulated fee plus 10%.

Mr HATZISTERGOS: That's right, you would pay the regulated fee less 10%, when you are claiming 10% on your policies?

Mr BOWEN: Yes.

Mr HATZISTERGOS: Then you are making more money than if you are paying the regulated fees plus the 10%. Isn't that the case?

Mr BOWEN: I am not sure I am able to provide any more advice on that.

Mr RYAN: In any event, you would think it would be reasonably urgent for the scheme to have a decision made about what is going to happen with the GST?

Mr BOWEN: Absolutely, but it is not only for this scheme, it is for a whole range of areas in government. My understanding is that much of the regulations to give effect to the GST are still in stages of development. I am not sure whether it is something like that that has led to the difficulty in interpretation, but certainly I am not the only person to have required this sort of advice, and there is no certainty in it at this stage.

8.1.2 Section 135 Motor Accidents Compensation Act 1999

Mr HATZISTERGOS: The other thing I want to ask you is about s 135 of the Act, "The Authority may publish information or promote the publication of information which is according to the terms the appropriate level of damages and non-economic loss as a result of motor accidents". You are accepting that non-economic loss would be assessed in accordance with common law principles.

The High Court has previously stated that in the determination of non-economic loss or general damages it is inappropriate for a court making that assessment to have regard to what may or may not have happened in other cases, as every case has to be looked at individually and on its merits, and the court should not be guided by assessments of non-economic loss in other cases.

Does s 135 in your view cut across that, and bearing in mind that this all going to be generated by the Authority, flowing on to my next question is, what information do you propose should be supplied pursuant to that section? Have you got a list at the moment? If you have not, what do you intend to put in the package, and how do you intend to distribute it?

Mr BOWEN: If I can answer the second question first, I think that the case books that we are preparing, and intend to keep preparing, go part of the way to meeting or complying with that requirement, or enabling provision to provide information, although those case books are being primarily prepared for the insurers and legal practitioners so they can avoid there being a dispute. What additional information --

Mr HATZISTERGOS: Sorry - case books of assessments in other cases?

Mr BOWEN: Case books of completed assessments that - we have done it in two parts. We have engaged a barrister to prepare a case summary. These are completed matters, but we are changing names and identities. So there is a summary of the circumstances of the case and presentation of the claimant, factors such as that. Then there is an assessment at this stage of the case, because they are done on completed files, that they will move to live matters in due course. The intention will be that they will provide some guidance, but clearly only guidance because of the points you make. Every injury can be quite individual, but nevertheless it can be some guidance as to - "Well for this sort of injury it is going to be around about this level of impairment", and what are these other factors that may bear upon the assessment of non-economic loss.

Mr HATZISTERGOS: Sorry, do these books then get quoted as some form of authority?

Mr BOWEN: They are produced by the Motor Accidents Authority. They will also provide or be a training tool in the process of training the assessors, so the assessors have some knowledge of this going into a new scheme. Otherwise we would be talking in theory and not in practice.

It is trying to also get more detail on the profile of motor accidents claims, particularly round about that 10% impaired, given that we accept that there will be a whole range of injuries which are manifestly over the 10%, and we would not expect them to be coming in for impairment assessment.

There will be a whole range of injuries where people recover and have no further impairment.

We do not expect them to present, but we would like to try and find a lot of information cases that will fall round about the 10%, sort of the 5% to 15% range, or maybe a little bit lighter.

CHAIR: Can I just break in? It seems to me that given the language used in s 135 of the Act, that the court does retain a very wide discretion, given that subsection 2 does provide that a court may have regard to any such information, that is information supplied by the Authority, but is not bound to act on it. So would I be correct in assuming that the intention of the legislation is that the Authority's information is to assist the court, but certainly is not definitive or binding?

Mr BOWEN: Yes, I certainly think that is the preferable interpretation, but I am conscious of the point that is being made, the direction by the High Court. It could be, notwithstanding that legislative provision, that if a judge was to say "Well, I have been informed by the Motor Accidents Guidelines on non-economic loss" that it would be a point of appeal.

So I would see the better use being made of these as perhaps a training tool, to just give acquaintance with motor vehicle injuries and the range of issues relevant to impairment assessment, and then the range of issues that flow from that into the assessment of the non-economic loss.

Mr HATZISTERGOS: I suppose I am troubled by the section, as to whether you expect practitioners to be quoting this material.

Mr BOWEN: I might mention it is a section that is a carry forward. The Authority has never produced guidelines in the past, but I think to the extent these case books go toward anything, they may go towards that section.

Mr HATZISTERGOS: Would you be able to supply us with any information that you have prepared yourself for that section?

Mr BOWEN: Certainly.

Mr HATZISTERGOS: I would just be interested if you could regularly inform us as to what information you are going to be supplying to the courts.

Mr BOWEN: By all means.

Mr HATZISTERGOS: Will it be publicly available information?

Mr BOWEN: Absolutely. The Board and the Council had some discussion about this, and have taken the view that everything that is produced, or that is even background information relevant to the preparation of the guidelines, should be available.

8.1.3 Maximum Amount of Non-Economic Loss

Mr RYAN: Right. The old scheme apparently provided for a maximum amount of non-economic loss of $273,000, and the new scheme apparently limits it at $260,000. Is there some reason as to why there are the two figures? Is it not appropriate that the old scheme and the new scheme should have the same figure?

Mr BOWEN: I think that I would accept that, and draw that to the Minister's attention. It is a more extreme difference than I think was taken into account, in that by coincidence the old figure was indexed each year on the 1st October, so at the time the legislation was presented it was working off the maximum that was less than the $273,000, it was about 4% less, so whatever it was. But I do not have an explanation as to why it is different, and I must say that I had not consciously noted that previously to the receipt of these submissions, and I will draw that to the Minister's attention.

8.1.4 Legal Costs

Mr RYAN: The Committee has been asked by means of correspondence from the Bar Association about the recovery of party/party costs when matters have been reheard, and essentially their concern is that if for example a claimant represented themselves, and wound up with a fairly modest CARS assessment of say $500, and then decided as a result of getting some more information from a legal practitioner they would go before a judge and get a substantially increased assessment, the difficulty is the Table B which sets out the regulations for legal fees is sufficiently modest, and it is likely that the claimant is going to spend - a lot of the money that they get in the redetermination of the matter is going to be eaten up by the legal fees.

It has been suggested to us that whilst there is provision in the Act for a penalty for a claimant who seeks a rehearing and fails to improve their position, there is no corresponding bonus or benefit provided with the scheme where the claimant does make a substantial improvement.

Are there some that ought to - I am not sure that I necessarily agree with the idea of an improvement, a bonus, but it seems to me that any legal costs a person incurred in having a matter reheard, and where they were successful, ought to be claimable at a reasonable rate?

Mr BOWEN: A couple of points in response to that, if I may. There is a live issue as to what matters, what level of matters, should go to CARS. There was a lot of discussion in the process of preparing the guidelines for it as to whether there should be any monetary jurisdictional limit. The view was taken by the MAA, not by the legal profession, that there should not be a limit on CARS because mere size of the claim did not necessarily reflect the degree of complexity of dealing with it.

So instead there was a provision put in there that provides that matters that have complex legal issues, or complex factual issues, should be excluded from CARS, and the consequence of that is that they are taken right outside of the legal costs regime. They do not have regulated costs if

they are exempted from CARS. The expectation is that the matters that come to CARS are reasonably simple, straightforward quantum matters, even though they may embrace rather large quantum matters.

So if a claimant is going to CARS unrepresented, and they then go and see a lawyer, the nature of the matter is such that the level of fees in Schedule B is sufficient to meet the costs of providing some advice to them as to whether or not their claim has merit to proceed, and if so, to provide some compensation for running that matter on to court, given that it should not be a case that has a lot of legal complexities in it.

There is a provision in the Act, however, in addition to that, for matters that go to court, that allows a court to override cost provisions where it thinks it is appropriate to do so. I am sure I will struggle to find it but I think it says "Having regard to the circumstances" and the like. In fact, the wording of the statutory provision is based upon the District Court Rules provision that allows it to set aside an offer of compromise or to allow it to override the normal operation of the offer of compromise.

Mr HATZISTERGOS: Section 153(1): "in order to avoid substantial injustice"?

Mr BOWEN: Yes. I am reasonably comfortable that the operation of those two sections in conjunction does not cause too much of a problem.

Mr HATZISTERGOS: It leaves it open to a situation where the claimant goes to CARS by himself and then engages a lawyer who supplies the initial information that was not supplied to CARS and could get caught up by the provisions and be liable to be sent back to CARS to present that information.

Mr BOWEN: I suppose there are two responses to that. Firstly, for unrepresented litigants at CARS the Motor Accidents Authority has its advisory service, and we see the operation of that service as being really critical to this component of the scheme. If there is an assumption, as there is in the costings, that there will be more unrepresented litigants, then there needs to be proper assistance to get them through the procedures, even though there will not be the provision of legal advice as to their level of entitlement. Secondly, the legislation has within it appropriate provisions to take matters further, but the real success of it will be having a proper assessment in the first place and not relying upon needing to go to court to get matters corrected. Again there, I think that the selection of the assessors, which has been completed, has left us with a group of very, very strong assessors who, I am comfortable, will find general acceptance from both plaintiffs and insurers that they are fair and just and will be providing proper impartial assessments at the appropriate level. Relying upon and having confidence in the assessors rather than putting all sorts of systems in place to overcome poor assessments is a better approach.

Mr HATZISTERGOS: What about the question that has been made by the Bar Association about the inability at present, under the regulations, to be able to collect additional disbursement such as court filing fees, witness' expenses and interpreter's fees?

Mr BOWEN: That is all agreed, and it is in a amended regulation that is currently being drafted. The regulation making power in relation to these fees picked up and applied definitions under the Legal Profession Act, whereby legal costs include all disbursements, so that it was necessary, when putting in place regulated fees, to identify what additional disbursements might be paid for outside of those fees.

I had undertaken to the Bar and the legal profession generally at the time the first regulation was made, that we would consult them about those additional matters. It was agreed at that time that interpreter's fees, court filing fees, would be paid in addition. It has now been agreed that --

Mr HATZISTERGOS: Are witness' expenses included in that?

Mr BOWEN: Witness expense fees, yes, those also. It has now also been agreed that accident investigation costs and accountant's fees should be paid in addition, in that. While they may be paid for by the solicitor, they are clearly not what a claimant would consider to be part of the legal costs. So they are all listed in the re-drafted regulation.

CHAIR: That is a regulation that is about to be made?

Mr BOWEN: I am only in a position where I can recommend it, of course, to the Minister, but yes.

Mr HATZISTERGOS: Will it be retroactive?

Mr BOWEN: It will in effect be, unless a solicitor has completed a matter and already submitted a bill of costs, which I think would be highly unlikely.

Chapter 9 – Questions taken on Notice by the Motor Accidents Authority

9.1 Evidence 8 May 2000

CHAIR: Mr Bowen, I would like to formally place on notice some questions posed to the Committee by the Bar Association. The questions are as follows, and I am not expecting you to respond on the spot because they do seek statistical information:

(a) How many staff does the Authority have employed monitoring insurers performance under the scheme? When does the Authority anticipate that the complaints unit will be fully staffed and operational?

(b) What statistical data is available regarding the performance of the scheme during the first six months, that is October 1999 to March 2000? For example:
   - (i) How many claims have been lodged during that period?
   - (ii) How many of those claims have been settled?
   - (iii) What premium revenue have the insurers collected during that period?
   - (iv) What has been the expenditure on claims under the new scheme in that period? What proportion of that expenditure is on legal costs?
   - (v) What profit levels have insurers experienced during those six months?
   - (vi) Have the insurers been complying with the guidelines under the scheme requiring that they respond to correspondence, make offers and determine liability within set time periods?
   - (vii) What arrangements have insurers reached regarding contracting out with their panel solicitors? Are claimant's solicitors the only legal representatives being asked to accept reduced costs?

So if I may, I place all of those on notice for response in due course.

Mr BOWEN: If I can make just perhaps one comment, the answers to some of those require audit of the insurers' performance. As you may have picked up from our response on performance indicators, we intend for a number of areas of the scheme to engage external auditors. We are proposing to do the first assessment of the insurers' compliance with the new scheme in June, and that will be undertaken by Professor Ted Wright from the Justice Research Centre.

So some of that information I will not have available until that audit is undertaken. I mention that now, and that will form part of our reply, but I give you a clear undertaking that as soon as we get the audit results we will make that available.

9.2 Written Answers to Questions Taken on Notice by the Motor Accidents Authority, received by the Motor Accidents Authority on 5 June 2000.

9.2.1 Appointment of Medical Assessment Service Assessors

Following is an update on the recruitment of Medical Assessors by panel.

- **Impairment Assessment Panel**

  Recruitment of this panel will not commence until mid-2001. Training courses in the required methods of impairment assessment will be offered at the University of Sydney from November 2000, and running throughout 2001, for any interested health practitioners to attend. Selection on to the MAS panel will require attendance at the relevant modules of this training, but this alone will not confirm selection on to the panel.

  The MAA intends to select on the basis of competence in assessment of impairment in the applicant's nominated areas of speciality, to be assessed by an exam involving case studies. Additional selection criteria will relate to the applicants' qualifications, experience (at least 5 years post-qualification in nominated area), commitment to continuing education in their field, demonstrable impartiality, good written and verbal communication skills, and professional integrity and credibility within their profession.

  A training session covering the role of the assessor and issues of procedural fairness will be compulsory for appointees to the panel.

- **Interim Impairment Assessment Panel**

  Until this recruitment process is complete, a panel of 22 highly experienced specialists have agreed to sit on an interim panel. These are the members of the reference groups who assisted the MAA by reviewing the AMA Guide and writing the MAA Guide to assessing permanent impairment. As such, they are very familiar with the procedures of assessment. An orientation session for members of this group is planned for the near future, to ensure they are familiar with reporting and procedural requirements. A list of the members of this interim panel is attached.

- **Disputes Panel**

  To date the MAA has offered appointment to a total of, 15 Rehabilitation Physicians, 14 Occupational Physicians, 17 physiotherapists and 15 Occupational Therapists. Each has been appointed to assist with issues within a particular field of expertise (such as adult brain

injury, musculo-skeletal injury, spinal cord injury, etc). Their names will be announced as soon as confirmation of acceptance is received from all.

In addition, a "Reserve List" has been created in each discipline, for use should there be a need to expand the panel.

There will be further appointments in the above specialities, as mail-outs seeking further applications are either underway or planned, specifically targeting practitioners in some nominated areas (such as paediatric brain injury, spinal cord injury) where it was felt that there were insufficient applications from suitably experienced people.

Applications have been received and selection is underway in the following areas:
Psychologists – 166 applicants
Psychiatrists – 47 applicants
Rheumatologists – 16 applicants
Neurologists – 14 applicants

Further mail-outs are planned, commencing in June 2000, seeking applications from interested surgeons and from nominated radiologists, opthalmologists, periodontists and orthodontists, gynaecologists and anaesthetists. Selection criteria and the selection process will be as previously described.

It is anticipated that recruitment and training of the Disputes Panel will be complete by October 2000.

- **Training of Disputes Panel**

Attendance at a full day training session is required for appointment to the panel. The first of these are planned for 22.7.00 and 26.8.00 and places are filling fast. The training will cover an overview of the scheme and the role of the assessors, procedural matters including the requirements for procedural fairness, the code of conduct for assessors, reporting requirements, and some cross-discipline workshop sessions involving case studies of contentious (hypothetical) dispute scenarios.

9.2.3 New Scheme Claim Numbers

Mr Bowen advised the Standing Committee that information relating to claiming rates under the new scheme would be available upon the provision of quarterly return data by insurers. The table below details the claims experience to the end of March 2000.

Claims information as at 31 March 2000 quarter ending - Motor Accidents Compensation Act 1999

Claims Status	Total Number of Claims	Total Incurred Cost ($)	Legal Costs ($)	Percentage of Legal Cost (%)
Finalised	430	228,934	4,127	1.80
Open	4,007	117,366,374	71,565	0.06
Total	4,437	117,595,308	75,692	0.06

Source: Motor Accidents Authority claims register as at 31 March 2000

9.2.3 New Scheme Operation (Arising from the submission to the Committee prepared by the NSW Bar Association)

(a) How many staff does the Authority have employed monitoring insurers performance under the scheme? When does the Authority anticipate that the compliance unit will be fully staffed and operational?

The Insurance Division within the MAA is largely responsible for the monitoring of the scheme and insurer performance, including compliance monitoring undertaken by the Compliance Unit. Currently, there are eleven positions on the establishment. These are as follows:

Manager. Insurance Division (vacant. Position advertised on 28 May.)
Principal Compliance Officer (newly created, to be advertised on 14 June)
Senior Compliance Officer (existing position)
Compliance Officer (existing position)
Assistant Compliance Officer (existing position)
Principal Financial Analyst (existing position) looking at insurer profits and licence obligations.
Principal Statistician (existing position)
Senior Statistician X 2 (existing positions)
Senior Premium Analyst (existing position) monitoring premiums and relativities.
Clerical support officer.

It is anticipated that the Compliance Unit will be fully staffed by end July 2000.

(b) What statistical data is available regarding the performance of the scheme during the first six months (October 1999- March 2000)? For example:

(i) How many claims have been lodged during that period (first six months of the new scheme)?

The total number of claims lodged since 5 October 1999 to 31 March 2000 is 4,437.

(ii) How many of those claims have been settled?

430 claims have been settled.

(iii) What premium revenue have the insurers collected during that period?

For the six-month period, commencing 1 October 1999, Green Slip insurers have reported a total of $649,401,327 gross written premium. This amount excludes GST and includes 4 days prior to the commencement of the new scheme.
(Source: Motor Accidents Authority Premiums database as at 31 March 2000).

(iv) What has been the expenditure on claims under the new scheme in that period? What proportion of that expenditure is on legal costs?

The total expenditure on finalised claims under the new scheme is $228,934. The Reserve on open claims is $117,595,308.

Legal costs account for 1.8% of the total expenditure on completed claims. It is too early to make judgements about the scheme at this stage based on this figure as completed matters will have been finalised on the basis of ANFs.

(v) What profit levels have insurers experienced during those six months?

There has been insufficient development of claims to indicate profit levels for the period. The Authority will be releasing two Issue Papers on methodology for measuring insurer profits/losses by accident year.

It is expected following consultation and consideration of response to the papers, a methodology for consistent reporting will be agreed by October 2000 and submitted to the Law and Justice Committee. The first report on insurer profit levels is expected to be publicly available in October 2001.

(vi) Have insurers been complying with the guidelines under the scheme requiring that they correspond, make offers and determine liability within set time periods?

The MAA is presently establishing a Compliance Division within its operations to monitor compliance with guidelines and regulations made under the Motor Accidents Compensation Act 1999.

As implementation of the new Scheme remains in the early stages, the MAA has not to date, audited insurer compliance with the Claims Handling Guidelines. However, the MAA proposes to undertake its first assessment of insurer compliance with the new Scheme in June. The Justice Research Centre will undertake the compliance assessment.

(vii) What arrangements have insurers reached regarding contracting out with their panel solicitors? Are claimant's solicitors the only legal representatives being asked to accept reduced costs?

The MAA is presently monitoring the impact of regulation upon legal costs to the Scheme. The MAA has not requested information in respect to arrangements insurers have reached with their panel solicitors regarding contracting out of the regulated fee schedule. In isolation the information would be of little value. For the information to be fairly evaluated it would need to be assessed relative to all practices.

It should be borne in mind that legal fees have been regulated to prevent excessive legal fees and to discourage the use of lawyers in simpler claims.

9.2.4 List of injuries deemed over 10% whole person permanent impairment

The MAA Impairment Assessment Guidelines have deemed the total loss of one or more mammary glands and total permanent loss of taste and olfaction as injuries greater than 10% whole person permanent impairment.

9.2.5 The impact of GST on regulated fees

This matter is awaiting finalisation of a whole of Government position on the variation of regulated fees to account for GST impact.

9.2.6 Maximum amount of Non-Economic Loss

Under the previous Act, the *Motor Accidents Act 1988*, the cap on amounts awarded for non-economic loss was indexed annually on or before 1 October each year. A similar provision has been incorporated into the new *Motor Accidents Compensation Act 1999* (at section 146).

The new Act set the maximum amount that a court may award for non-economic loss at $260,00 (section 134). At the time the legislation was passed in June 1999, this was the same figure as that

set under the 1988 Act. The intention was to keep the cap on non-economic loss consistent across both Acts so that on 1 October 1999, the cap would be indexed under both Acts.
Unfortunately, the new Act did not come into force until 5 October 1999 with the result that whilst non-economic loss cap was indexed for all accidents up to 5 October (under the old Act), it was not indexed for all accidents under the revised scheme from 5 October.

It is intended to rectify this matter by amending the amount in section 134(1) to make it consistent with the indexed figure under the previous Act (the figure is $273,000) and from 1 October 2000, both caps can be indexed at the same time.

The MAA is presently preparing a letter of recommendation in the above terms to the Minister, the Hon John Della Bosca.

9.2.7 Role of Psychologists in Impairment Assessments (subsequent submission received from Mr Joe Gubbay

Concern

The central concern of Mr Gubbay's submission is that psychologists are not listed in the MAA's "Guidelines for the assessment of permanent impairment" as being able to conduct permanent impairment assessments.

Response

The MAA Impairment Guidelines envisage that psychiatrists will conduct assessments of mental and behavioural disorders and neurologists or rehabilitation specialists will conduct assessments of brain damage. While in the short term it is not anticipated that there will be major changes to the neurological section of the guidelines, it is anticipated that there will be changes to the mental and behavioural section. (This has been discussed in previous answers).

A person with a brain injury will usually have mental as well as physical impairments, therefore an assessor will usually be required to assess not only their cognitive, behavioural, or emotional status but also their physical status eg gait and mobility.
A single assessor, not a multidisciplinary panel, will conduct the impairment assessments. These assessments will be based on assessments from other health and medical practitioners such as neuropsychological assessments from psychologists and visual acuity reports from ophthalmologists. In the short to medium term it is unlikely that psychologists will be used to conduct an impairment assessment for brain injury, although their reports are crucial to the assessment.

As previously stated, a review and evaluation program is being developed for the mental and behavioural component of the guidelines. Part of this review will consider the issue of

psychologists conducting these impairment assessments. During previous discussions with representatives from the Australian Psychological Society the MAA agreed to consider this issue. The MAA in assessing the proposal must consider a number of complex issues;

- The AMA Impairment Guidelines, on which the MAA Impairment Guidelines have been based, were developed on the basis of a medical practitioner conducting a medical examination;

- Not all psychologists will be able to conduct these examinations. The relevant qualifications, training and experience of psychologists will need to be specified. When the MAA has tried to do this in the past in relation to the appropriate psychologists to conduct neuropsychological assessment trade practice and anti-competition issues arose;

- Interpretation of medical tests eg liver function tests in regards to the claimant's condition and pre-existing condition;

- A precedent may be established in allowing psychologists to conduct impairment examination that may be used by other health professions.

The Australian Psychological Society will be involved in any ongoing decision-making in this area.

The training of impairment assessors will probably commence in November 2000. All interested parties will be able to undergo the training, including MAA staff, insurance staff and lawyers. However initially priority initially will be given to relevant medical practitioners. A more specific and rigorous selection process will be used to select MAA assessors, probably in early to mid 2001.

The exclusion of psychologists at this time from conducting impairment assessments does not damage their reputations, as no health providers, including physiotherapists, other than medical practitioners are currently conducting these assessments.

The role of psychologists in the treatment of many motor accident cases is acknowledged. It is worth noting that the MAA has taken the revolutionary step of using health practitioners, other than medical practitioners, to resolve other disputes in the scheme, such as disputes regarding reasonable and necessary treatment. The MAA is currently recruiting a "Disputes Panel", separate from the panel of impairment assessors. This will comprise doctors and therapists of all disciplines, and Psychologists will be well represented on this panel. In the case of brain injury, for example, where there is a dispute about the results or interpretation of a neuropsychological assessment, this would be referred to an experienced neuropsychologist from the Disputes Panel, and this dispute would be resolved prior to any assessment of permanent impairment. Thus avoiding impairment decisions being made without adequate assessment of cognitive function, as concerned Mr Gubbay.

Appendix 1 and 2 can be obtained from the committee secretariat by phoning (02) 9230 3311, faxing (02) 9230 3371, or emailing lawandjustice@parliament.nsw.gov.au

APPENDIX 1

DOCUMENTS RELATING TO COSTING OF THE MOTOR ACCIDENTS SCHEME

PriceWaterhouseCoopers, 11 June 2000
Trowbridge Consulting, 10 June 2000

Costing the Motor Accidents Scheme

The Motor Accidents Compensation Act 1999 provides (at Schedule 5[14]) for most premiums to be held at of below $330 in the first 12 months after the commencement of the Act. This reduction has been primarily achieved by reducing transaction costs such as legal fees and insurer profits under the new scheme.

Premium reductions were the result of a comprehensive and integrated package of reforms to the CTP Scheme. The attached documents from consulting actuaries PriceWaterhouseCoopers and Trowbridge Consulting detail the costings of the changes made to the Scheme.

Ultimately, it has been estimated that the Act will achieve:

- *40% reduction in legel fees (including medico-legal fees);*
- *37% reduction in insurer profits; and*
- *24% reduction in claims handling costs.*[2]

2 MAA, Written answers to questions taken on notice at 8 May 2000 hearing.

APPENDIX 2

ARTICLE CONCERNING WHIPLASH INJURY AND COMPENSATION

J David Cassidy and ors, "Effect of Eliminating Compensation for Pain and Suffering on the Outcome of Insurance Claims for Whiplash Injury", *The New England Journal of Medicine*, 342(16), 20 April 2000, 1179-1186, 1211-1213.

Whiplash injury and Compensation

Mr Bowen in reply to the question from The Hon Mr Breen noted that 'a study by one of the medical colleges which showed that when they moved from a fault-based to a no-fault based system there was a massive reduction in the length of time for which people were receiving treatment for whiplash because there was no longer a compensation payment at the end.'(Report of Proceedings at page 28)

Mr Bowen undertook to provide the Committee with a copy of the study; the study entitled 'Effect of eliminating compensation for pain and suffering on the outcome of insurance claims for whiplash injury' is appended.[3]

3 MAA, Written response to questions taken on notice at 8 May 2000 hearing.