

Standing Committee on Law and Justice

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

Seventh Report

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## Terms of reference

1. That, in accordance with the provisions of section 210 of the *Motor Accidents Compensation Act 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 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 Council of their functions,
  - (b) to report to the House, with such comments as it thinks fit, on any matter appertaining to the Authority or Council 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 Council 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 Council,
  - (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 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 Committee to investigate a particular compensation claim under the *Motor Accidents Compensation Act*.<sup>1</sup>

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<sup>1</sup> Motion moved by the Hon Tony Kelly MLC and agreed to by the Legislative Council, Minutes of Proceedings, No 13, 25 June 2003, Item 5

# **Provisions of the *Motor Accidents Compensation Act 1999 (NSW)* relating to the role of the Parliamentary Committee**

## **Section 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.

## **Section 97 Regulations**

- (2) The Motor Accidents Council may refer to the Parliamentary Committee any inconsistency between the regulations and the MAA Claims Assessment Guidelines and the Parliamentary Committee may review and make recommendations about the resolution of any such inconsistency.

## **Section 177 Audit of accounting records and of compliance with guidelines**

- (7) The Authority may from time to time carry out an audit to determine the profitability of a licensed insurer and for that purpose may exercise the functions of a person appointed under subsection (1). The Authority is to report on any such audit to the Parliamentary Committee, on a confidential basis.

## **Section 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.

## Committee membership

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**The Hon Christine Robertson MLC** Australian Labor Party *Chair*

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**The Hon David Clarke MLC** Liberal Party *Deputy Chair*

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**The Hon Rick Colless MLC** National Party

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**The Hon Greg Donnelly MLC** Australian Labor Party

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**The Hon Amanda Fazio MLC** Australian Labor Party

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**Ms Lee Rhiannon MLC** The Greens

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## Chair's foreword

This report is the culmination of the Committee's seventh review of the exercise of the functions of the Motor Accidents Authority (MAA) and Motor Accidents Council (MAC). This year, the Committee made some changes to the way it conducts its Inquiry. The Committee made a broad public call for submissions, receiving more submissions than in previous years and from a more diverse range of participants. The Committee also engaged in a detailed questions on notice process and heard from a wider range of stakeholders at the public hearing in March. As a result, the Committee has covered a broad range of issues and has been able to produce a comprehensive and detailed report reviewing all of the major functions of the MAA.

The MAA and MAC continue to perform their functions under the Act in an appropriate and competent manner. The MAA and MAC are delivering on their responsibilities and have demonstrated a willingness to engage with and resolve emerging issues in the motor accidents scheme. The Committee has noted that CTP premiums continued to fall in 2004-2005, both in dollar terms and as a percentage of weekly earnings

A key issue in the current Inquiry was the rate of profit earned or likely to be earned by licensed CTP insurers on premiums written in the NSW motor accidents scheme. Estimates of profits likely to be realised on premiums written in accident years to date significantly exceed the profit margins approved by the MAA prior to those premiums being written. The Committee found that the reasons for this difference primarily relate to an unexpected fall in the risk premium, that is, a fall in the frequency and costs of motor accidents. In a system backed by private capital, a fall in the risk premium translates into an increased profit for insurers, just as a rise in the risk premium may lead to a reduced profit or a loss. This is in keeping with the design and operation of the Act. The Committee found no evidence of any failing on the part of the MAA in the area of insurer profits.

The Committee also reviewed the operations of the Motor Accidents Assessment Service (MAAS), the civil justice system administered by the MAA for motor accidents claims. The Committee notes ongoing reforms in the administration of MAAS and looks forward to further reviewing the implementation of those reforms in coming years. The Committee makes several recommendations to assist the MAA to further improve the operation of MAAS.

The Committee reviewed the MAA's road safety and medical treatment functions, noting the positive work performed by the MAA in these areas, a point highlighted by several stakeholders. Lastly, the Committee examined significant legislative changes associated with the implementation of the Lifetime Care and Support Scheme for those catastrophically injured in motor vehicle accidents in NSW. The Committee has been supportive of the implementation of such a scheme for some time.

I would like to express my thanks to all those who participated in this year's review, particularly those in the non-government sector who took time out of their busy schedules to assist the Committee with their submissions. I also appreciate that this year's review entailed a significant amount of work for the MAA in answering the Committee's questions, and in preparing for the hearing. I thank the MAA for its efforts, and hope that the positive relationship between the MAA and the Committee continues into the future.

Thanks are also due to my fellow Committee members, who worked together in a positive fashion, and to the members of the Committee secretariat, for their professionalism in managing the Inquiry process.



Hon Christine Robertson MLC

**Committee Chair**

# Executive summary

## Introduction (Chapter 1)

This is the Committee's *Seventh Review* of the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC). The focus of the review is primarily on the MAA, the MAC being a stakeholder body with no executive capacity. The MAA has a range of important powers and functions; it is the market regulator for the NSW CTP scheme; it considers and approves the CTP premiums paid by NSW motorists; it regulates the profitability of the licensed insurers; it administers an alternative civil justice system for motor accidents claims; and it promotes road safety and improved health outcomes for injured motorists. Accordingly, the range of subjects covered in this Inquiry has been diverse. The Committee received submissions from interested stakeholders and members of the public, and heard oral evidence from the MAA, MAC, the Insurance Council of Australia and the NSW Bar Association. The Committee is of the view that the MAA and MAC continue to perform their functions under the Act in a competent and effective manner. The Inquiry process has however uncovered several areas of possible improvement, and the Committee has made 23 recommendations to that effect. The Committee also provides an overview of the MAA's assessment of the performance of the motor accidents scheme in 2004-2005.

## MAA as market regulator: CTP premiums and insurer profitability (Chapter 2)

The MAA reviews and approves CTP premiums proposed by licensed insurers, including the proposed profit margin estimated to be realised on those premiums. Two distinct issues arose in respect of profits in the course of this Inquiry. In regards to retrospective profit i.e. profit estimated to be realised on previous accident years, profit estimates prepared by the MAA indicate that insurers will realise profits substantially higher than those estimated in premiums filings. Some Inquiry participants suggested that insurers had unduly profited whilst claimants had received inadequate damages. The Committee inquired into this issue and found that the primary cause of increased profits was an unexpected fall in the claim frequency in NSW. The Committee found that the MAA had performed its functions in respect of this issue in a proper manner. In regards to prospective profit i.e. profit margins contained in premiums filed with the MAA, the Committee heard evidence of an ongoing debate between insurers and the MAA regarding the appropriate profit margin in the NSW CTP scheme. The MAA has a discretion to approve profit margins bounded on the low end by a 'reasonable return on capital' and at the high end by the concept of 'excessiveness.' The Committee considers that the MAA has properly exercised its discretion in this regard, and recommends that the MAA maintain its position against insurer requests for an increased profit margin on CTP premiums.

## MAA as market regulator: insurer compliance with MAA guidelines (Chapter 3)

The second aspect of the MAA's market regulator function is oversight of the market behaviour of the licensed insurers. To that end, the MAA has issued a range of guidelines regulating insurer behaviour in respect of claims handling, market practice and the provision of treatment, rehabilitation and attendant care services. To promote compliance with the guidelines, the MAA has developed a Compliance Strategy, including a Regulatory and Enforcement Policy. In this Chapter the Committee considers the MAA's oversight of insurer compliance with the guidelines. The Committee is of the view that the MAA has developed an appropriate regulatory framework directed to the continuous improvement of insurer compliance. However, the Committee recommends that the Motor Accidents Authority closely monitor insurer compliance with the Treatment, Rehabilitation and Attendant Care Guidelines to

ensure that the medical needs of the claimants are not prejudiced by commercial relationships between insurers and service providers.

## **MAA as dispute resolution service provider: the performance of the Motor Accidents Assessment Service (Chapter 4)**

One of the principal objectives of the 1999 reforms to the NSW motor accidents scheme was to increase the proportion of the premium dollar paid to claimants by reducing transaction costs such as legal fees. To that end, the *Motor Accidents Compensation Act 1999* (NSW) established an alternative dispute resolution system for motor accidents claims. The system is administered by the MAA through the Motor Accidents Assessment Service (MAAS), which comprises the Medical Assessments Service (MAS) and the Claims Assessment and Resolution Service (CARS). The MAA is in the process of implementing its MAAS Reform Agenda, which is designed to improve the quality and timeliness of MAAS processes. The Committee received evidence of some success in this regard, and makes a number of recommendations to further improve the performance of MAAS. The Committee also notes the preliminary results of a study of user perceptions of CARS and MAS conducted by the Justice Policy Research Centre on behalf of the MAA.

## **The MAA and road safety (Chapter 5)**

The lead road safety agency in NSW is the Road and Traffic Authority (RTA). However, the *Motor Accidents Compensation Act 1999* (NSW) imposes a responsibility to promote road safety on the MAA also. The MAA has concentrated its road safety efforts on those groups and on those injuries which are of the greatest cost to the motor accidents scheme, including young people and motorcyclists. The MAA conducts its road safety function through its Grants Program, which distributes funds to non-government agencies to conduct road safety projects. For example, the MAA funds the *Arrive Alive* program aimed at young drivers, which includes direct funding to groups of young people and the sponsorship of sporting teams and entertainment/events. The Committee also reports on the MAA's road safety initiatives in respect of children, pedestrians, motorcyclists and rural and regional road users.

## **The MAA and the medical treatment of injured road users (Chapter 6)**

One of the objects of the 1999 reforms to the motor accidents scheme was to promote the faster recovery and rehabilitation of injured road users. To that end, the MAA has important functions directed to promoting improved health outcomes for claimants. In this Chapter the Committee notes and endorses a proposal by the MAA to incorporate improvements in health outcomes into the MAA's assessment of the performance of the motor accidents scheme. The Committee also considers a significant initiative by the MAA in respect of the community participation of persons with a spinal cord injury, notes continuing progress in the care and treatment of whiplash and associated disorders, notes proposals for further work by the MAA in respect of anxiety disorder, chronic whiplash and traumatic brain injury, and notes a proposal by one Inquiry participant regarding the provision of trauma care services to persons injured in motor accidents in NSW. The Committee recommends that the MAA continue to work towards a meaningful measure of health outcomes as a criterion of scheme performance.

## Other issues raised in the *Seventh Review* (Chapter 7)

In this Chapter the Committee considers a range of other issues raised by Inquiry participants regarding the operations of the MAA and MAC and the performance of the motor accidents scheme in the course of the *Seventh Review*. The Committee notes significant legislative developments which occurred during the reporting period, the most important of which is the creation of a new Lifetime Care and Support Scheme (LTCSS) to make life-long provision for the medical and care needs of persons who suffer catastrophic injury in a motor accident in NSW. The LTCSS will be administered by a new Lifetime Care and Support Authority, rather than the MAA. The Committee also notes the introduction of the no-fault benefit for children and the no-fault benefit for blameless of inevitable accidents, and canvasses two minor changes to the scope of the Nominal Defendant scheme. In addition, the Committee reports on the gap between CTP and public liability insurance, CTP premiums for buses and coaches, interim payments for the injured, withdrawals of admissions of liability in court proceedings, the proposed analysis of damages awards to be conducted by the MAA, the functions of the Motor Accidents Council, and establishing loss of income for casual workers. The Committee recommends that the Minister for Commerce take steps to bring the gap between CTP and public liability insurance to the attention of the public.

# Summary of recommendations

## **Recommendation 1**

9

That the Motor Accidents Authority consider and report on possible scheme changes, including possible legislative changes, to further increase the percentage of premiums ultimately paid to claimants.

## **Recommendation 2**

14

That the Motor Accidents Authority (MAA) provide the Committee with a separate and specific annual report on insurer profits, as required by section 28 of the *Motor Accidents Compensation Act 1999* (NSW), as soon as possible after the data and other information required to prepare the report are collected, and where possible, prior to the Committee's future hearings with senior officers of the MAA and MAC.

## **Recommendation 3**

25

That the Motor Accidents Authority maintain its position against insurer requests for increased profit margins on NSW CTP premiums.

## **Recommendation 4**

39

That the Motor Accidents Authority (MAA) prepare a report on the impact of the 1999 reforms, including procedural reforms initiated by the MAA in respect of legal costs, on the propensity to claim, and the impact of the fall in the propensity to claim on the profitability of the licensed insurers, and that the MAA provide a copy of the report to the Committee.

## **Recommendation 5**

52

That the Motor Accidents Authority continue to regularly review and, where necessary, update, the various guidelines issued by it in respect of the market behaviour of insurers, including the *Market Practice Guidelines*, *Claims Handling Guidelines* and the *Treatment, Rehabilitation and Attendant Care Guidelines*.

## **Recommendation 6**

53

That the Motor Accidents Authority closely monitor insurer compliance with the Treatment, Rehabilitation and Attendant Care Guidelines to ensure that the medical needs of the claimants are not prejudiced by commercial relationships between insurers and service providers.

## **Recommendation 7**

53

That the Motor Accidents Authority (MAA) review its information strategy regarding its complaints handling procedures, and that the MAA publish on its web-site appropriate information regarding the making of complaints regarding NSW CTP insurers, and otherwise make the information available to members of the general public.

## **Recommendation 8**

54

That the Motor Accidents Authority (MAA) review the Claims Handling Guidelines to determine whether the Guidelines, or any other Guideline issued by the MAA, should be amended to ensure that insurers provide appropriate information to potential Nominal Defendant claimants.

**Recommendation 9**

67

That the Motor Accidents Authority continue to monitor the number of Whole Person Impairment (WPI) disputes referred to the Medical Assessment Service for resolution with a view to further reducing, if possible, the number of disputes regarding WPI.

**Recommendation 10**

76

That the Motor Accidents Authority (MAA), on receipt of the final report of the Justice Policy Research Centre into user perceptions of the Motor Accidents Assessment Service (MAAS), prepare a response outlining any changes the MAA intends to make to the administration of MAAS, and identifying any possible amendments to *Motor Accidents Compensation Act 1999* (NSW), in light of the findings of the Justice Policy Research Centre, and that the MAA provide this response to the Committee.

**Recommendation 11**

79

That the Motor Accidents Authority (MAA) monitor the implementation of the revised MAA Guidelines for the Assessment of Permanent Impairment, and that the MAA report to the Committee on the implementation of the Guidelines in the course of the Committee's next review.

**Recommendation 12**

80

That the Minister for Commerce review the operation of the *Motor Accidents Compensation Act 1999* (NSW) in respect of problems associated with the non-binding status of some Motor Accident Service assessments, with a view to identifying any possible legislative changes.

**Recommendation 13**

84

That the Motor Accident Authority report to the Committee on its further efforts to analyse the impact of the costs regulation on claimants with a view to determining whether the regulation significantly disadvantages claimants at the expense of insurers.

**Recommendation 14**

86

That the Motor Accidents Authority remain in consultation with key user groups, including representatives of the legal profession, insurers and assessors, with a view to ensuring the continual improvement of the Medical Assessments Service and the Claims Assessment and Resolution Service.

**Recommendation 15**

97

That the Motor Accidents Authority consult with all interested stakeholders, including the NSW Parliament Joint Standing Committee on Road Safety, prior to finalising the Road Safety and Rehabilitation Strategic Plan.

**Recommendation 16**

97

That the Motor Accidents Authority report to the Committee on the reasons for its decision to discontinue general road safety research grants, and on the merits of the MAA funding a scheme to promote the development of early career road safety researchers.

**Recommendation 17**

98

That the Motor Accidents Authority advise the Committee of the implementation of the recommendations of the Country Road Safety Summit that required action by the MAA.

- Recommendation 18** 100  
That the Motor Accidents Authority continue to work with interested stakeholders to develop a meaningful measure of health outcomes as a criterion of effectiveness of the NSW motor accidents scheme.
- Recommendation 19** 107  
That the Motor Accidents Authority continue to work with interested stakeholders to promote improved health outcomes in the NSW motor accidents scheme, including in respect of anxiety, chronic whiplash, spinal injury and brain injury.
- Recommendation 20** 107  
That the Motor Accidents Authority review its role in respect of the provision of trauma care services for persons injured in motor accidents in NSW to determine whether the MAA can contribute to placing trauma care services on a more sustainable basis.
- Recommendation 21** 121  
That the Minister for Commerce review the operation of section 81 of *Motor Accidents Compensation Act 1999* (NSW) in light of the decision of the NSW Court of Appeal in *Maile v Rafiq* [2005] NSWCA 410, with a view to determining whether the section should be amended to ensure that motor accidents disputes are resolved expeditiously.
- Recommendation 22** 124  
That the Minister for Commerce develop an information strategy to bring the existence of the gap between CTP and public liability insurance to the attention of NSW CTP policy holders and policy brokers.

## Glossary

<b>ANF</b>	Accident Notification Form
<b>CARS</b>	Claims Assessment and Resolution Service
<b>CTP</b>	Compulsory Third Party
<b>LTCSS</b>	Lifetime Care and Support Scheme
<b>ICA</b>	Insurance Council of Australia
<b>MAA</b>	Motor Accidents Authority
<b>MAAS</b>	Motor Accidents Assessment Service
<b>MAC</b>	Motor Accidents Council
<b>MAS</b>	Medical Assessment Service
<b>WPI</b>	Whole Person Impairment
<b>TRACS</b>	Treatment, Rehabilitation and Attendant Care Guidelines

# Chapter 1 Introduction and overview of scheme performance

In this Chapter the Committee outlines the Inquiry process, briefly discusses the constitution, powers and functions of the Motor Accidents Authority and Motor Accidents Council, comments on the future conduct of its review function, and provides an overview of the performance of the motor accidents scheme in 2004-2005.

## Committee's role to review the MAA and MAC

- 1.1** The Standing Committee on Law and Justice has been nominated by the Legislative Council to conduct the ongoing inquiry into the Motor Accidents Authority (MAA) and Motor Accidents Council (MAC) required by section 210 of the *Motor Accidents Compensation Act 1999* (NSW).<sup>2</sup> Provision for parliamentary oversight of the MAA and MAC was introduced as part of the 1999 reforms to the NSW motor accidents scheme. This is the seventh time the Standing Committee on Law and Justice has conducted this review.

## Background to MAA and MAC

### Functions of the MAA and structure of report

- 1.2** The MAA has primary responsibility for the administration of the NSW motor accidents scheme. The MAA has a combination of market regulator functions, dispute resolution functions, road safety functions, and medical care and treatment functions. The functions of the MAA are fully set out in Appendix 1 to this report.
- 1.3** The structure of this report is based on the above division of the MAA's functions. **Chapter 2** considers the MAA's market regulator functions in respect of CTP premiums and profits. **Chapter 3** considers the balance of the MAA's market regulator functions dealing with oversight of the market practices of the licensed insurers. **Chapter 4** considers the MAA's dispute resolution function. **Chapter 5** considers the MAA's role in the promotion of road safety and **Chapter 6** considers the MAA's functions in respect of the medical care and treatment of injured people. **Chapter 7** considers the balance of miscellaneous issues raised in the course of the current Inquiry.

### Constitution and directors of the MAA

- 1.4** Formally, the MAA is constituted by Chapter 8 of the *Motor Accidents Compensation Act 1999* (NSW) ('the Act') as a 'statutory body representing the Crown'.<sup>3</sup> The MAA is governed by a

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<sup>2</sup> Motion moved by the Hon Tony Kelly MLC and agreed to by the Legislative Council, Minutes No 13, 25 June 2003, Item 5

<sup>3</sup> *Motor Accidents Compensation Act 1999* (NSW), s198(2)

Board of Directors comprising the General Manager of the MAA and five part-time Directors appointed by the Governor.<sup>4</sup> In 2004-2005, the Board of Directors of the MAA comprised:

- Mr Richard Grellman FCA (Chair)
- Ms Penny Le Couteur (Deputy Chair)
- Mr Alan Hunt
- Ms Antoinette le Marchant
- Mr Roger Wilkins
- Mr David Bowen (General Manager).

**1.5** The Minister is empowered to issue written directions to the MAA in respect of the exercise of its functions ‘if the Minister is satisfied that it is in the public interest to do so.’<sup>5</sup> The MAA is compelled to obey such directions but is not otherwise subject to Ministerial control.<sup>6</sup>

### **MAA budget and funding**

**1.6** The MAA is funded principally by a levy on CTP insurance premiums. The levy is set by the MAA and collected from licensed insurers in proportion to their share of the CTP insurance market.<sup>7</sup>

**1.7** In 2004-2005, the levy was set at 2.5% of premiums, which generated \$36.675 million (\$23.489 million in 2003-2004).<sup>8</sup> Other revenue includes interest and recoveries from the Crown in respect of Nominal Defendant claims.<sup>9</sup>

**1.8** The MAA’s revenues for 2004-2005 totalled \$43.924 million. Expenditures for 2004-2005 were \$40.893 million, leaving a surplus of \$3.031 million.<sup>10</sup>

**1.9** Significant expenditures of the MAA in 2004-2005 included the following:

- \$10.922 million on staff and related costs.
- \$4.409 million for road safety grants and sponsorship.
- \$5.828 for nominal defendant claims.
- \$4.850 million for rehabilitation grants.
- \$6.397 million for medical assessor fees.

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<sup>4</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s199(2)

<sup>5</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s202(1)

<sup>6</sup> *Motor Accidents Compensation Act 1999 (NSW)*, ss202(2) and (4)

<sup>7</sup> *Motor Accidents Compensation Act 1999 (NSW)*, ss212-214

<sup>8</sup> MAA, *Annual Report, 2004-2005*, p38

<sup>9</sup> MAA, *Annual Report, 2004-2005*, p42

<sup>10</sup> MAA, *Annual Report, 2004-2005*, p42

- \$2.314 million for CARS assessor fees.<sup>11</sup>

### **Constitution of the MAC**

- 1.10** The MAC is the stakeholder body created to advise the MAA and the Minister regarding the operation of the motor accidents scheme. The MAC is also a mechanism by which the MAA can communicate with stakeholders.
- 1.11** The MAC is constituted by section 207(1) of the Act. The MAC is subject to the control and direction of the Minister except in relation to the contents of advice, reports or recommendations given by the MAC to the Minister or the MAA.<sup>12</sup>
- 1.12** The MAC comprises twelve members:
- the Chair and Deputy of the MAA.
  - two persons appointed by the Minister in consultation with the Insurance Council of Australia.
  - two persons appointed by the Minister in consultation with the Law Society of NSW and NSW Bar Association.
  - two persons appointed by the Minister in consultation with the Australian Medical Association and other relevant health practitioners.
  - one person not involved in the insurance industry and appointed by the Minister in consultation with the NRMA.
  - one person appointed by the Minister in consultation with associations concerned with injured persons.
  - one person appointed by the Minister in consultation with consumer organisations.
  - The General Manager of the MAA.<sup>13</sup>

### **MAC Budget**

- 1.13** MAC administration is conducted by the MAA. Fees paid to MAC members in 2004-2005 totalled \$134,000, down from \$138,000 in 2003-2004.<sup>14</sup>

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<sup>11</sup> MAA, *Annual Report*, 2004-2005, p42

<sup>12</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s207(2)

<sup>13</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s208

<sup>14</sup> MAA, *Annual Report*, 2004-2005, p42

## Conduct of Inquiry

- 1.14** The Committee resolved to commence the current Inquiry by resolution passed at its meeting held 17 November 2005. The Committee wrote to interested stakeholders seeking submissions for the Inquiry. The Committee also made a call for public submissions by way of advertisements in the major Sydney newspapers. This was the first time the Committee has made a call for public submissions. The Committee received 19 submissions, an improvement on previous MAA reviews. A list of submission makers is included in Appendix 2.
- 1.15** As has been its practice in previous years, the Committee produced a series of questions on notice for the MAA, based on the MAA's *Annual Report* and submissions received. The Committee conducted a public hearing on 31 March 2006, at which the Chair and senior officers of the MAA and MAC appeared. Mr David Bowen, General Manager of the MAA, made a presentation to the Committee on the issue of insurer profits, which was accompanied by a detailed written report on the same issue. This was the first time the Committee has had the benefit of a detailed MAA report on the issue of insurer profits.
- 1.16** Representatives of the Bar Association and the Insurance Council of Australia also appeared to give evidence. This is the first occasion on which the Committee has had the benefit of oral evidence from witnesses other than the MAA and MAC at a public hearing. A list of witnesses is included at Appendix 3.
- 1.17** The Committee would like to thank all those who participated in this year's review. The procedural changes made by the Committee as part of this year's review substantially broadened the range of views and issues considered by the Committee. For example, the Committee's questions on notice to the MAA were more detailed than in previous years. The Committee acknowledges that this in turn required more work from the MAA in preparing for this review.

## Relationship between Committee and MAA

- 1.18** The Committee notes that the attitude of the MAA to the inquiry process remains positive and constructive. Mr David Bowen, General Manager of the MAA, commented that parliamentary oversight of the MAA provided the MAA with a forum in which to put forward its views on the operation of the motor accidents scheme, whilst also ensuring that the MAA operates in a transparent manner:

I think this is an excellent process in being able to put on to the record how we think the scheme is operating and then being interrogated on that record. I think that is quite appropriate and it is good transparency in relation to regulation, so to that extent I think it has been an excellent development.<sup>15</sup>

- 1.19** Mr Bowen, commenting on the conduct of this year's review, observed that the Committee had successfully broadened its outlook beyond the customary debate between the insurers and the lawyers:

I thought that the response from the Committee was excellent in generating a lot more submissions and a lot broader based submissions from interested parties on the

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<sup>15</sup> Mr David Bowen, Evidence, 31 March 2006, p29

scheme and if that can be maintained I think it is excellent to get perspectives from people who have been through it, from victims' associations, from medical professions, from road safety, and the rehabilitation community because otherwise unfortunately we run that risk of dealing with the commentary on the scheme as being a debate between the lawyers and the insurers and we miss the breadth of it, so I think it was excellent that we generated those submissions<sup>16</sup>

- 1.20** Mr Bowen suggested that the inquiry process could be improved in coming years if the Committee further broadened the scope of its inquiry to include medical and claims assessors:

I know you are having both the ICA and the Bar Association speaking today. If there was anything otherwise to add, where time permitted, I think in future hearings, say for example the views of some of the senior medical staff, who are some of our expert medical assessors, on how that is going may give you a better perception on that particular issue than perhaps listening to the parties who have had either good or bad outcomes before the assessors. The intent of that whole scheme, for example, is to have the decision making on expert medical issues made by the expert medical practitioner. I am sure they have a view on it quite different from the two sides who may appear before them, for example, but I also know that the time of the Committee members may preclude broadening it that far, but there was a very good set of questions, I thought, that we were given this year and I thought the submissions were very broad.<sup>17</sup>

### Future conduct of review

- 1.21** The Committee is hopeful that its oversight of the MAA contributes to the successful operation of the motor accidents scheme and promotes public confidence in the administration of the scheme. However, the Committee continues to reflect on how it can perform its role more effectively. In the course of the current review the Committee made several procedural changes to the Inquiry process. As noted above, the Committee took steps to obtain the views of a broader range of stakeholders than had previously participated in an MAA Inquiry. The Committee also used the questions on notice process in a more detailed manner than in previous years. The Committee considers that these changes have contributed to a more effective Inquiry process.
- 1.22** The Committee also recognises that, seven years after the introduction of the 1999 reforms, the operation of the scheme has largely stabilised. Whilst there remains scope for improvement in the administration of the scheme, for example, in the administration of the Motor Accidents Assessment Service, further changes to the scheme are likely to be incremental, rather than substantial.
- 1.23** The Committee also recognises that, in general, the MAA has proven to be a competent and accountable administrator of the motor accidents scheme. The Committee has uncovered no instances of maladministration in the period in which it has been conducting MAA reviews. To the extent that there are controversial elements in the NSW motor accidents scheme (such as the use of the 10% Whole Person Impairment (WPI) threshold for damages for non-

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<sup>16</sup> Mr Bowen, Evidence, 31 March 2006, p30

<sup>17</sup> Mr Bowen, Evidence, 31 March 2006, p30

economic loss), such controversy relates primarily to features of the Act, rather than to the administration of the Act by the MAA.

**1.24** In relation to future reviews of the MAA and the MAC, conducted in the next Parliament by the Committee designated by the Legislative Council pursuant to section 210 of the *Motor Accidents Compensation Act 1999*, the Committee encourages further changes in the way the review is undertaken.

**1.25** A key issue in this year's review was the question of insurer profits and this issue will no doubt be central to future reviews of the Motor Accidents Scheme. In addition, the Committee believes future reviews of particular aspects of the MAA's operations should proceed in a rolling fashion, beginning with the administration of the MAAS, and then moving onto road safety functions and rehabilitation and treatment functions. Witnesses from stakeholder groups would be well placed to give evidence on the MAA's performance of these functions, for example, medical and claims assessors, road safety experts and medical service providers.

## Scheme performance in 2004-2005

**1.26** The Act requires the MAA to monitor the performance of the motor accidents scheme and to report to the Minister 'as to the administration, efficiency and effectiveness of that scheme.'<sup>18</sup> As previously reported by this Committee, the MAA assesses the performance of the scheme against four indicators:

- affordability
- effectiveness
- efficiency
- fairness.<sup>19</sup>

**1.27** Affordability is assessed against the price of CTP premiums; effectiveness is measured in terms of the speed and cost of the claims handling process; efficiency is measured in terms of the proportion of the premium dollar being paid to claimants (as opposed to transaction costs); and fairness refers to whether the most seriously injured are receiving adequate compensation.<sup>20</sup> A proposal by the MAA to incorporate health outcomes for injured claimants in its assessment of scheme performance is discussed in Chapter 6.

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<sup>18</sup> *Motor Accidents Compensation Act 1999* (NSW), s206(2)(b)

<sup>19</sup> NSW Legislative Council, Standing Committee on Law and Justice, Report 16, *Review of the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council - Second Report*, February 2001 (hereafter *Second Review*), p3

<sup>20</sup> See Mr Richard Grellman, Evidence, 31 March 2006, pp2-3 and *Second Review*, pp4-6

## MAA's assessment of scheme performance in 2004-2005

### *Overall assessment*

- 1.28 The MAA's assessment of the performance of the NSW motor accidents scheme in 2004-2005 is that the scheme 'continues to work well, providing benefits to both consumers and claimants.'<sup>21</sup> The Committee notes that this assessment demonstrates continuity with scheme performance in 2003-2004, when the MAA stated that 'the scheme is performing well. Injured people are getting medical treatment faster and seriously injured people getting increased compensation.'<sup>22</sup>

### *Affordability*

- 1.29 Ms Concetta Rizzo, Deputy General Manager of the MAA, advised the Committee that NSW CTP premiums continued to fall in 2004-2005, both in dollar terms and as a percentage of weekly earnings:

In summary, the position as it was when we lodged last year's annual report in regards to affordability, the premiums have continued to come down in this scheme. The average premium now for Sydney Class 1, which is the biggest group and is our headline indicator, the average premiums in December were \$322 plus GST. The reason we always add GST is to compare it to the old Act when it was GST free, so that compares to an average of \$441 in 1999 before the legislation was introduced. The best price is even lower than that and that is another indicator of how affordable the scheme has become. In relation to average weekly earnings, it has dropped from 50 percent of average weekly earnings before 1999 to below 28 percent now, or as at December, so that is a huge drop. It is very clear that premiums have reduced on average for the majority of motorists in the State.<sup>23</sup>

### *Effectiveness*

- 1.30 Mr Richard Grellman, Chair of the MAA and MAC, advised the Committee of improvements in scheme effectiveness in 2004-2005: 'With regard to effectiveness, what we do there is measure how quickly claims are made now compared with how long it took them to be made in the previous scheme, and that has certainly been quicker.'<sup>24</sup>
- 1.31 The MAA reported an improvement in the time taken to resolve CTP claims by the Motor Accidents Assessment Service (MAAS):

The scheme also continues to deliver through earlier resolution of claims. It has been particularly pleasing to note a significant improvement in the time for disposition of MAAS matters reflecting the huge effort made by staff of the [Motor Accidents Assessment Service] MAAS working with the assessors.<sup>25</sup>

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<sup>21</sup> MAA, *Annual Report*, 2004-2005, p5

<sup>22</sup> MAA, *Annual Report*, 2003-2004, p5

<sup>23</sup> Ms Concetta Rizzo, Evidence, 31 March 2006, pp3-4

<sup>24</sup> Ms Rizzo, Evidence, 31 March 2006, p4

<sup>25</sup> MAA, *Annual Report*, 2004-2005, p5

- 1.32 The performance of MAAS is discussed in detail in Chapter 4.
- 1.33 The MAA highlighted the use of Accident Notification Forms (ANFs) as a significant factor in facilitating faster access to treatment:
- The 1999 reforms continue to deliver faster access to medical treatment for claimants. The Accident Notification Form has been an unqualified success. In allowing much faster access to treatment and has been backed up by continuous improvement in the CTP insurer's management of the treatment and medical needs of claimants.<sup>26</sup>
- 1.34 The MAA also singled out improved compliance by insurers with MAA guidelines regarding market behaviour as a success story of 2004-2005:

The MAA – through its audit of the Claims Handling Guidelines and the Treatment, Rehabilitation and Attendant Care Guidelines – has noted significant improvement by insurers over the last few years in meeting their obligations to claimants medical and care needs. The challenge over the next year is to move from this base to develop 'best practice' standards for the industry.<sup>27</sup>

### ***Efficiency***

- 1.35 The Committee understands that around 60% of gross premium is ultimately paid to claimants, as compared to 58% under the previous scheme. In this respect, Ms Rizzo stated that:

With respect to efficiency, that is calculated on the filings that insurers submit to us and that is always summarised in the annual report. The approximate figures, without going to the table, are that around 60 percent of that premium goes in payments to the claimants. About another 11 percent goes to legal and investigation costs, 8.7 percent is the insurer targeted profit margin in the filings, and the remainder of the whole are the acquisition and claims handling expenses that the insurers incur in running their departments. That was higher than efficiency was in the previous scheme when it was 58 percent.<sup>28</sup>

- 1.36 Mr Grellman also advised the Committee that, although the percentage of premium paid to claimants is currently within an acceptable range, there remains room for improvement on this front:

In terms of efficiency, the percentage of premiums finding their way through to claimants remains acceptable. We no doubt continue to feel that we would like to see that improve, but it is certainly, under the current scheme, a much higher percentage than we have seen in previous schemes and in terms of the effectiveness of the scheme, just the way claims are managed, the efficiency of the processes, we think again we are seeing improvements all the time, so there is a level of effectiveness that we feel is acceptable.<sup>29</sup>

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<sup>26</sup> MAA, *Annual Report*, 2004-2005, p5

<sup>27</sup> MAA, *Annual Report*, 2004-2005, p5

<sup>28</sup> Ms Rizzo, Evidence, 31 March 2006, p4

<sup>29</sup> Mr Grellman, Evidence, 31 March 2006, p3

### ***Fairness***

- 1.37 The MAA reported that it measured scheme fairness by examining the damages paid to persons suffering from a very serious brain injury, and that this group of claimants are receiving larger damages payments under the reformed scheme than under the previous scheme:

The last indicator is fairness and the way we measure that is we relate that to the most serious claims and because the most serious claims take quite a long time to settle, we have selected very serious brain injury claims as our group of claims on which to base the fairness indicator, and according to that, the indicators are that it is faster and that those serious claims at the moment are in fact getting larger damages than they were in the previous scheme. That, of course, can go up and down depending on the actual claims in the sample, but at the moment they are certainly being treated as least as fairly and their damages are higher than they were in the previous scheme. In summary, they are the four performance indicators that we use.<sup>30</sup>

### **Committee comment**

- 1.38 The Committee considers that the NSW Motor Accidents Scheme continues to function in an appropriate manner, assessed against the performance indicators of affordability, effectiveness, efficiency and fairness. The Committee notes Mr Grellman's observation that there may be room for further improvement in scheme efficiency i.e. the percentage of the premium dollar ultimately paid to claimants. The Committee therefore recommends that the MAA consider and report on possible scheme changes, including possible legislative changes, to further increase the percentage of premiums ultimately paid to claimants.

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### **Recommendation 1**

That the Motor Accidents Authority consider and report on possible scheme changes, including possible legislative changes, to further increase the percentage of premiums ultimately paid to claimants.

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<sup>30</sup> Ms Rizzo, Evidence, 31 March 2006, p4

## Chapter 2 MAA as market regulator: CTP premiums and insurer profitability

In this Chapter the Committee considers the performance by the MAA of its functions in respect of CTP premiums and insurer profitability. The Committee considers claims that the insurers have earned excessive profits in each accident year since the introduction of the 1999 reforms. The Committee also examines the ongoing debate between the MAA and insurers as to the appropriate rate of profit in premiums approved by the MAA for current and future accident years.

### Overview

- 2.1 The *Motor Accidents Compensation Act 1999* (NSW) ('the Act') imposes a number of functions on the MAA in respect of the licensing and regulation of CTP insurers. Central to the regulation of licensed CTP insurers is the 'file and write' process whereby insurers 'file' with the MAA proposed CTP premiums for the MAA's approval before 'writing' those premiums in the market. The file and write process gives the MAA an indirect role in regulating the profitability of the insurers.
- 2.2 Issues associated with the MAA's regulation of insurer profits can be divided into two categories:
- Prospective profit i.e. the profit margin included in CTP premiums for the current accident year, and
  - Retrospective profit i.e. the profit realised on premiums written by insurers in past accident years i.e. 1999-00 to 2004-05.
- 2.3 In regards to prospective profit, the Committee received evidence regarding the ongoing debate between the MAA and the insurers as to the percentage of premium which should be allocated to profit. This question turns on the calculation of an adequate rate of return on capital invested by insurers in the CTP scheme. The insurers advocate a market based approach to the determination of an adequate return on capital. On the other hand, the MAA has taken considerable steps to develop an actuarial model to guide it when considering profit margins. The difference between the MAA view and the insurer view is up to 4% of gross CTP premiums. On a premium pool valued at nearly \$1.4 billion dollars a year<sup>31</sup>, the difference between the MAA view and the insurer view is worth tens of millions of dollars annually, or about \$13 per CTP policy.
- 2.4 In regards to retrospective profit, estimates of realised profits in respect of accident years to date exceed the profit margins contained in premium filings for those accident years, and which were approved by the MAA. The MAA stated in its 2004-2005 *Annual Report* that 'the (CTP) profit level being achieved by insurers is well in excess of those predicted in premium filings, primarily as a result of the CTP insurers being slow to pass on reductions in risk premiums.'<sup>32</sup> As discussed below, whereas approved profit margins were in the range of 7.5%

<sup>31</sup> MAA, *Annual Report 2004-2005*, p82

<sup>32</sup> MAA, *Annual Report, 2004-2005*, p6

to 10% of gross premium written, estimates of realised profit range to 24.8% of gross premium. The Committee has inquired into the reasons behind this gap and whether, having regard to the gap, the MAA has properly performed its function of reviewing and approving profit margins in CTP premiums filed by insurers.

- 2.5** Some Inquiry participants suggested that, if the estimates are correct, they raise basic issues regarding the equity of the 1999 reforms to the motor accidents scheme. For example, Mr Ross Letherbarrow SC, Co-Chair of the Common Law Committee of the NSW Bar Association, stated that:

... the only way to really value whether this is a good or a bad system is to know how much profit is being made and how much money is being paid out to injured people, so the only thing I could suggest is that those that regulate the regulators, probably being yourselves, keep pushing the issue of how profitable the scheme is and how much injured people are getting as opposed to insurance companies.<sup>33</sup>

- 2.6** There is some debate about the reliability of the MAA's profit estimates given the long tail nature of CTP insurance. However, it is common ground between the insurers, the MAA and the Bar Association that motorists have had less accidents and that the 'risk premium' has therefore been lower than allowed for in premiums filed by insurers with the MAA. All other things being equal, a fall in the risk premium will translate into higher insurer profits.
- 2.7** The NSW Bar Association attributes part of the improved result for insurers to the 'design and operation of the Act'.<sup>34</sup> The Bar Association claims that the Act has 'proved far more effective in reducing benefits to the injured than had been anticipated'.<sup>35</sup> This claim was disputed by other Inquiry participants. Further, it must be stressed that the MAA has no power to set benefit levels. Benefit levels are structured by the Act on a modified common law basis. That is, even if the Act has been more successful than anticipated in reducing benefit levels (and this is by no means clear), this is not due to any fault on the part of the MAA.
- 2.8** In the following sections of this chapter the Committee provides background information before considering the issues of prospective and retrospective profit in turn.

## Background

- 2.9** In this section the Committee discusses the role of the licensed insurers in the current motor accident scheme, outlines its understanding of its own role in respect of insurer profits, discusses the adequacy of reports by the MAA to the Committee in respect of profits, outlines the legislative framework for the regulation of profits by the MAA and notes evidence regarding CTP premiums and insurer profits.

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<sup>33</sup> Mr Letherbarrow, SC, Evidence, 31 March 2006, p44

<sup>34</sup> Submission 11, NSW Bar Association, p2

<sup>35</sup> Submission 11, NSW Bar Association, p2

### **Role of the licensed insurers in the motor accidents scheme**

- 2.10** The NSW motor accidents scheme relies on the provision of private capital by licensed insurers. The Committee notes that the advantage of a system backed by private, rather than public, capital, is that tax payers are not exposed to the risk of a shortfall in the event that premiums do not meet liabilities in any given accident year. In this respect, the Insurance Council of Australia (ICA) submitted that the presence of insurer capital ensures that payments are made as when they fall due, irrespective of a shortfall in premiums:

... insurers provide (and are required by the Australian Prudential Regulation Authority to provide) substantial capital to support the business they underwrite. The presence of this capital ensures that claims will be paid as and when they fall due for payment, regardless of whether the level of premium initially collected by the insurer at the time the policy was issued was sufficient to meet the cost of those claims.<sup>36</sup>

- 2.11** There are currently seven insurers active in the NSW CTP market: AAMI, Allianz, CIC Allianz, GIO, NRMA, QBE and Zurich.<sup>37</sup> The MAA's view is that competition in the NSW CTP market is relatively healthy, as evidenced by falling CTP premiums and changes to the bonus/malus structures used by some insurers. In this respect, the MAA stated that:

... the current CTP market provides competitive risk rated premiums for the majority of motorists ... In addition to reductions in best prices, a number of insurers also filed with changes to their bonus/malus structures.<sup>38</sup>

- 2.12** The MAA has also referred to increasing advertising as evidence of competition in the NSW CTP market.<sup>39</sup>

### **Role of the MAA and of the Committee in respect of insurer profits**

- 2.13** As discussed in the following sections, the Act provides the MAA with a discretion to accept and reject premiums within a range bounded by an 'adequate return on capital' at the lower end and the concept of 'excessiveness' at the higher end. In considering a premium filing the MAA has regard to the percentage of the premium allocated to profit.

- 2.14** It is not the Committee's role to second-guess the MAA in the exercise of its discretion under the Act. The Committee is concerned primarily to determine whether the MAA has exercised its functions under the Act in a proper manner, having regard to the broad discretion allowed to it by the Act. The Committee has also had regard to the complexity and difficulty of the MAA's role in respect of profits. The primary consideration for the Committee has been whether the MAA has taken reasonable steps to properly inform itself of the meaning of 'adequate return on capital' and 'excessive' premium.

- 2.15** Further, the Committee is not an independent umpire in the ongoing dispute between the MAA and the insurers in respect of profit levels. Rather, the Committee is concerned to

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<sup>36</sup> Insurance Council of Australia, Submission 14, p3

<sup>37</sup> MAA, *Annual Report*, 2004-2005, p76

<sup>38</sup> MAA, *Annual Report*, 2004-2005, p77

<sup>39</sup> MAA, *Annual Report*, 2004-2005, p77

inquire into whether the MAA has properly performed its functions under the Act, including its market regulator functions. As market regulator, the MAA has functions which impact on every road user in NSW. It is important that these functions are performed properly.

### **Adequacy of MAA reports to the Law and Justice Committee**

**2.16** Section 28 of the Act provides that:

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.

**2.17** The Committee has expressed dissatisfaction with the comprehensiveness of the MAA's report to the Committee on profits for several years. Prior to this year, the MAA did not provide the Committee with a separate and specific annual report on profits, instead referring the Committee to the relevant sections of the *Annual Report*. Recommendation 5 of the *Fifth Review* was:

... that, in fulfilling its statutory obligation under section 28 of the *Motor Accidents Compensation Act 1999*, the MAA present a separate and specific report on insurer profits annually to the Committee.

**2.18** Recommendation 4 of the *Sixth Review* was:

That in order for the MAA to satisfy the statutory obligation set out in section 28 of the Act, the MAA present a separate and specific report on insurer profits annually to the Committee. The report should contain:

- The MAA's assessment of the profit margins and the actuarial basis for its calculation in relation to each of the licensed insurers, and
- The data provided to it by the insurers pursuant to section 28(1) that forms the basis of their assessment.

**2.19** Changes to the way the MAA reports on insurer profits made during this Review have largely ameliorated the Committee's concerns. At the hearing held on 31 March 2006 Mr David Bowen, General Manager of the MAA, made a presentation to the Committee on the issue of insurer profits. Further, subsequent to the hearing the MAA provided the Committee with a highly detailed written report on insurer profits. The Committee notes that it found the presentation and report most helpful in its deliberations, and thanks the MAA for its efforts.

**2.20** The Committee considers that it would be assisted in its work if the MAA provided a similar report to the Committee in the course of subsequent inquiries, and recommends that the MAA does so, as required by the Act, as soon as possible after the data and other information required to prepare the report are collected, and where possible, prior to the Committee's hearing with senior officers of the MAA and MAC.

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## Recommendation 2

That the Motor Accidents Authority (MAA) provide the Committee with a separate and specific annual report on insurer profits, as required by section 28 of the *Motor Accidents Compensation Act 1999* (NSW), as soon as possible after the data and other information required to prepare the report are collected, and where possible, prior to the Committee's future hearings with senior officers of the MAA and MAC.

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### Insurer profit: the legislative framework

**2.21** Section 5(2)(d) of the *Motor Accidents Compensation Act 1999* 'acknowledges':

... that insurers, as receivers of public money that is compulsorily levied, should account for their profit margins, and their records should be available to the Authority to ensure that accountability.<sup>40</sup>

**2.22** To promote the accountability of CTP insurers the Act creates a regime by which CTP premiums are reviewed and registered by the MAA. CTP insurers are required to file proposed premiums with the MAA, which must then either reject or approve the premium.<sup>41</sup>

**2.23** Section 27 of the Act provides that the MAA may reject CTP premiums on the following bases only:

- the premium will not fully fund the present and likely future liability under this Act of the licensed insurer concerned, or
- the premium is, having regard to actuarial advice and to other relevant financial information available to the Authority, excessive, or
- the premium does not conform to MAA Premium Determination Guidelines in force under this Part, or
- the premium has been determined in a manner that contravenes section 30 (Maximum commission payable to insurers agents).<sup>42</sup>

**2.24** The Act provides that a premium will not 'fully fund' an insurer's liabilities under the Act unless it includes 'a profit margin in excess of all claims, costs and expenses that represents an adequate return on capital invested and compensation for the risk taken.'<sup>43</sup> The Act does not define 'adequate return on capital.' Nor does the Act define 'excessive.' These terms have been left to the MAA (and possibly, eventually, the courts) to define.

**2.25** The Act provides that disputes between the MAA and licensed insurers are to be arbitrated pursuant to the *Commercial Arbitration Act 1984* (NSW), and that the Independent Pricing and Regulatory Tribunal 'may' act as an arbitrator in such a dispute, or may appoint an arbitrator

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<sup>40</sup> *Motor Accidents Compensation Act 1999* (NSW), s5(2)(d)

<sup>41</sup> *Motor Accidents Compensation Act 1999* (NSW), s26

<sup>42</sup> *Motor Accidents Compensation Act 1999* (NSW), s27(1)

<sup>43</sup> *Motor Accidents Compensation Act 1999* (NSW), s27(8)(c)

'from a panel constituted by the Minister and consisting of persons who have appropriate knowledge and understanding of economics, general insurance and the interests of consumers.'<sup>44</sup> As discussed at paragraph 2.67, the IPART dispute resolution mechanism has yet to be invoked by the insurers.

### The 'file and write' process: review of CTP premiums by MAA

- 2.26 As noted at paragraph 2.1, insurers file with the MAA proposed CTP premiums for the MAA's approval before writing, or selling, those premiums in the market. Insurers must comply with the MAA Premium Determination Guidelines when submitting premiums for MAA approval. The Guidelines include requirements regarding the determination of the risk premium and premium relativities. Insurers must provide the MAA with a Premium Filing Report explaining and justifying the proposed premium and the assumptions on which it is based. A certificate from an actuary that the proposed premium will fully fund the insurer's liabilities must accompany the Report.<sup>45</sup>
- 2.27 The MAA advised the Committee that the process for considering and approving/rejecting a premium involves a number of steps, including review by the Deputy General Manager, comparison with previous filings by the same insurer, comparison against reports from the MAA's independent actuaries and possible referral for consideration and report by those actuaries.<sup>46</sup>
- 2.28 As noted above, the MAA is empowered to formally reject a premium filing. The Committee was advised that the MAA has formally rejected a premium filing on the grounds that the premium is 'excessive' on four occasions (discussed further at paragraph 2.60). However, the Committee understands that it is the practice of the MAA to attempt to resolve disputes regarding premium filings by negotiation, rather than by outright rejection pursuant to section 27 of the Act. In this respect, Mr Bowen, General Manager of the MAA, stated that:

... the process of receipt of premium involves some internal review by the MAA. It invariably involves some questions back to the insurers and perhaps in those questions an indication of areas of concern which often lead to the amendment of filings, so in addition to rejection there is a process that would lead to, on occasions, amendments of filings before it got to a rejection stage, if you like.<sup>47</sup>

- 2.29 The MAA also reviews the risk ratings proposed by the insurers. In this respect the MAA advised the Committee that:

The MAA has laid the groundwork for maximum competition in the MAA Premiums Determination Guidelines. The Guidelines allow insurers to use objective risk rating factors of their own choosing (except race) to determine levels of discount and loading on their base prices, with a restriction that insurers cannot rate on geographical areas smaller than the MAA declared regions.<sup>48</sup>

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<sup>44</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s27(6)(c)

<sup>45</sup> MAA, *Premium Determination Guidelines*, March 2003, cl 4.3, p8

<sup>46</sup> MAA, *Response to additional questions on notice*, Q1.4, p3

<sup>47</sup> Mr Bowen, Evidence, 31 March 2006, p16

<sup>48</sup> MAA, *Response to questions on notice*, Q7.2, p10

- 2.30** The fact that CTP premiums are not fully risk rated distorts the NSW CTP Market.<sup>49</sup> The Committee notes that the file and write process was subject to review during the 1998 Competition Policy Review. The MAA advised the Committee that the outcome of that review was that the file and write process ‘offered the balance between the need to facilitate competition in setting premiums and providing best outcomes for consumers, including meeting the community rating requirements.’<sup>50</sup>

### **CTP premiums**

- 2.31** A primary aim of the 1999 reforms was to reduce the cost of CTP insurance for NSW motorists. The reforms have succeeded dramatically in this regard. The Committee notes that the average cost of CTP insurance has fallen from around 50% of average weekly earnings prior to the introduction of the 1999 reforms to approximately 29% in June 2005.<sup>51</sup> In this respect, Ms Concetta Rizzo, Deputy General Manager of the MAA:

The average premium now for Sydney Class 1, which is the biggest group and is our headline indicator, the average premiums in December were \$322 plus GST. The reason we always add GST is to compare it to the old Act when it was GST free, so that compares to an average of \$441 in 1999 before the legislation was introduced. The best price is even lower than that and that is another indicator of how affordable the scheme has become.<sup>52</sup>

### **Composition of CTP premiums**

- 2.32** In assessing the profit margin on a CTP premium it is necessary to first have some understanding of the sums of which a CTP premium is composed.

- 2.33** CTP insurers file with the MAA a ‘base premium’ comprising the risk premium together with loadings for expenses, levies and profit.<sup>53</sup> The MAA defines the risk premium as:

... the insurer’s estimate of the cost of claims based on projected claims frequency and projected average claim size. The risk premium is expressed as an average price per policy.<sup>54</sup>

- 2.34** The MAA provided the following breakdown of a CTP premium as at 30 June 2005:<sup>55</sup>

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<sup>49</sup> MAA, *Response to questions on notice*, Q7.4, p11

<sup>50</sup> MAA, *Response to questions on notice*, Q7.3, p10

<sup>51</sup> MAA, *Annual Report*, 2004-2005, p77

<sup>52</sup> Ms Rizzo, Evidence, 31 March 2006, pp3-4

<sup>53</sup> MAA, *Annual Report*, 2004-2005, p78

<sup>54</sup> MAA, *Annual Report*, 2004-2005, p78

<sup>55</sup> MAA, *Annual Report*, 2004-2005, p79

<b>Element of premium</b>	<b>per cent</b>	<b>\$</b>
Risk premium (total)	70.8	230
Risk premium (claim payments)	60.0	193
Risk premium (legal and investigation costs)	10.8	37
Claims handling expenses	4.9	16
Acquisition expenses	15.6	50
Profit	8.7	28
Average premium (Sydney Class 1) as at 30 June 2005	100	324

#### **Historical rate of profit in the NSW motor accidents scheme prior to 1999 reforms**

**2.35** The Committee notes that the rate of profit realised by insurers in the NSW motor accidents scheme has fluctuated widely since 1990. The MAA provided the Committee with the following analysis of profit levels over the period 1990 to 1999 i.e. prior to the introduction of the current scheme.<sup>56</sup>

<b>Underwriting year ended 30 June</b>	<b>Estimate % profit/(loss)</b>
1990	56
1991	52
1992	12
1993	(12)
1994	(33)
1995	(12)
1996	26
1997	25
1998	21
1999	25
<b>Average</b>	<b>22</b>

<sup>56</sup> MAA, *Response to questions on notice*, Q2.4, p2

## Prospective profit

- 2.36 Prospective profit refers to the profit margin contained in CTP premium filings for the current accident years. The profit margin contained in the filing is an estimate of the profit that will be earned on a premium, provided that the other assumptions contained in the filing, such as those concerning the risk premium, hold true.
- 2.37 The Committee notes that the MAA may not approve a premium which will not fully fund an insurer's liability under the Act, and may reject premiums which are excessive. In practice, this means that the MAA may approve premiums falling within a range bounded on the low end by the concept of an 'adequate return on capital' and at the high end by the concept of 'excessiveness.' These terms are not defined in the Act. For insurers and motorists, many millions of dollars turn on their meaning. Perhaps not surprisingly, they have been subject of some debate between the MAA and the licensed insurers.
- 2.38 Mr Bowen stated that the MAA considers that a reasonable return on capital is in the order of 6-8% of gross premium, whereas the insurers consider that the appropriate figure is 10-14% of gross premium:

In practice we think that the profit level as a percentage of gross premium should be that it is reasonable in the 6 to 8 percent range and that anything at 10 percent or above would be excessive ... The insurer view that you adverted to is that those figures are too low ... they would take the view that the market expectation for CTP as a long-tail class of business is to provide a return on capital of 12 to 17 percent, which converting it to a percentage of gross premium would be 10 to 14 percent, so 10 to 14 percent are comparable figures, and they would take the view that anything below 9 percent is inadequate and does not meet the statutory tests.<sup>57</sup>

- 2.39 Mr Bowen indicated that the debate between insurers and the MAA regarding an adequate return on capital has been running for the last four years.<sup>58</sup> The Committee has previously reported on this issue.<sup>59</sup>

## The MAA's definition of 'adequate return on capital': the Taylor Fry methodology

- 2.40 As noted in previous reports of this Committee, the MAA utilises a methodology developed by Taylor Fry actuaries to calculate an adequate return on capital in the NSW CTP market. The Committee does not propose to examine the methodology in detail and does not presume to be in a position to comment on the accuracy of the model.
- 2.41 For the purposes of this report, a brief description of the Taylor Fry methodology is sufficient. The methodology is comprised of three elements:

<sup>57</sup> Mr Bowen, Evidence, 31 March 2006, p7

<sup>58</sup> Mr Bowen, Evidence, 31 March 2006, p7

<sup>59</sup> NSW Legislative Council, Standing Committee on Law and Justice, Report 27, *Review of the Exercise of the Functions of the Motor Accidents Authority and Motor Accidents Council - Sixth Report*, May 2005 (hereafter *Sixth Review*), p28

- The determination of a suitable quantum of total capital (net assets) for a representative insurer
- The determination of a suitable allocation of insurer capital to NSW CTP
- The calculation of a profit loading to service the allocated capital at a fair rate of return.<sup>60</sup>

**2.42** ‘Fair rate return’ is defined as ‘a return which would emerge in a freely competitive market.’<sup>61</sup>

**2.43** The ‘representative insurer’ developed by Taylor Fry is ‘based on the average of insurers writing CTP businesses in NSW’:<sup>62</sup>

Taylor Fry calculations are based on a representative insurer holding capital equal to 58% of CTP technical provisions, which is approximately equal to 66% of outstanding claims provision (OCP) for NSW CTP. The insurer holds additional (implicit) capital as a prudential margin within the provision for outstanding claims. The Taylor Fry methodology for allocating capital to the CTP line of business is consistent with APRA’s new prudential regime.<sup>63</sup>

**2.44** According to the Taylor Fry methodology, an adequate return on capital for a ‘representative insurer’ is 4.5%-6% of gross premium.

**2.45** The Committee notes that the profit margin required to support an adequate return on capital is a function of the level of capital allocated to the NSW CTP insurance line by any given insurer. The profit margin required to support an adequate return on capital will fall, all other things being equal, as the level of capitalisation of any given insurer falls.

**2.46** The Australian Prudential Regulation Authority (APRA) sets minimum capital requirements in the NSW CTP scheme. The ICA advised the Committee that NSW CTP insurers currently exceed the APRA minimum capitalisation level by 100%.<sup>64</sup>

**2.47** The Committee notes that APRA has not agreed to submissions by the MAA that capital requirements for NSW CTP insurance should be lowered on the basis that the regulation of the scheme by the MAA distinguishes it from other long tail insurance classes. In this respect, Mr Bowen stated that:

We have for some years ... been having discussions with APRA, the Australian Prudential and Regulatory Authority, over the level of capital required to support the CTP business. It is treated by APRA as a long-tail class and it certainly is a long-tail class of business and clearly it therefore has much more intensive capital needs than the short-tail class of business in which the premium comes in and claims are received and paid out within a very short period of time. But APRA has not agreed to our

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<sup>60</sup> MAA, *Annual Report*, 2004-2005, p79

<sup>61</sup> MAA, *Response to additional questions on notice*, p3

<sup>62</sup> MAA, *Annual Report*, 2004-2005, p80

<sup>63</sup> MAA, *Annual Report*, 2004-2005, p80

<sup>64</sup> Insurance Council of Australia, *Response to questions on notice*, p2

submission that the regulated nature of this product distinguishes it from other long-tail classes of business and should allow for a lower minimum capital requirement.<sup>65</sup>

- 2.48** The Committee is aware that the actual capitalisation levels of the licensed insurers vary widely.<sup>66</sup> Further, the allocation of capital by the representative insurer used in the Taylor Fry methodology is ‘slightly higher than the highest notional capital allocation reported by an individual CTP insurer’.<sup>67</sup> For these reasons the MAA accepts that profit margins filed by individual insurers will vary from that derived from the Taylor Fry methodology. In this respect, the MAA has stated that it:

... accepts that the level derived by the Taylor Fry methodology sets the minimum level of profit to ensure an adequate return on capital and that actual profit levels will be within a range above this as long as the level is justified by the insurer and not considered by the MAA as excessive.<sup>68</sup>

#### Average rate of profit in CTP filings as a percentage of gross premium

- 2.49** The average profit margin approved by the MAA for accident years since the introduction of the new scheme has ranged from 7.7% of gross premium in 1999-2000 to 8.7% of gross premium in 2004-2005. CTP insurers filed premiums including the following allowances for profit in the years 1999-2000 to 2004-2005.<sup>69</sup>

Filing period	Profit range (%)	Weighted average profit (%)
1999-2000	7.5 – 9.5	7.7
2000-2001	7.5 – 9.5	7.9
2001-2002	7.5 – 9.5	8.2
2002-2003	7.5 – 9.5	8.2
2003-2004	7.5 – 9.7	8.5
2004-2005	7.5 – 10.0	8.7

#### Difference between MAA’s view of adequate profit margin and profit margins filed by insurers

- 2.50** Average profits margins in CTP filings have exceeded the MAA’s definition of a minimum level of profit required to ensure an adequate return on capital every year since 1999-2000. Whereas the MAA considers that an adequate rate of profit is 4.5-6% of gross premium, average profits margins have ranged from 7.7% to 8.7% of gross premium.

<sup>65</sup> Mr Bowen, Evidence, 31 March 2006, p13

<sup>66</sup> MAA, *Review of Insurer Profits*, Appendix 2

<sup>67</sup> MAA, *Review of Insurer Profits*, pp3-4

<sup>68</sup> MAA, *Review of Insurer Profits*, p4

<sup>69</sup> MAA, *Annual Report*, 2004-2005, p80

### **Insurer view as to meaning of ‘adequate return on capital’**

- 2.51** The ICA is of the view that the MAA’s approach to the determination of an adequate return on capital is fundamentally misguided. The ICA argued that the Taylor Fry methodology was complex and technical, and suggested that the proper approach to determining an adequate return on capital was to let the market decide. In this respect, Mr Booth stated that the insurer’s desired approach:

... is more of a market based approach whereby insurers can only operate across the various lines of the businesses that they operate in if they can provide a reasonable return on the capital that has to back up those businesses and the reasonable rate of return ultimately is set in the capital markets.<sup>70</sup>

- 2.52** The ICA submitted that insurers must compete on international capital markets to secure adequate capital backing, subject to competitive and regulatory factors:

Each insurer determines the level of capital it applied to the NSW CTP business, and the return on the capital it wishes to achieve by participating in the business. Obviously, an insurer wishes to offer a sound return to its shareholders, as it competes for their support (i.e. capital) in the Australian and international capital markets. At the same time, the insurer’s desire to maximise the return on capital is tempered by the competitive nature of the business, and the statutory obligation to justify the expected return on capital to the MAA.<sup>71</sup>

- 2.53** The ICA further argued that market forces already operate in the NSW motor accident scheme in the sense that, if the insurers cannot derive a sufficient return they will be unable to compete in capital markets and would be unable to participate in the NSW CTP scheme. In this respect, Mr Booth stated that:

... from ICA's perspective it does not really matter whether the technical answer is somewhere between 4.5 and six, if the capital markets are not going to give you the capital to operate your business if that is the sort of profit return which will become available, from an insurer perspective it is no use entering into a debate about whether the number is correct, or not, they just cannot operate the business.<sup>72</sup>

- 2.54** Although the insurers prefer a market based approach to the determination of an adequate return on capital, the insurers have also engaged their own actuaries to critically review the Taylor Fry methodology. A portion of the correspondence passing between the actuaries and the MAA is included in the *MAA Review of Insurer Profits*. The Committee is not qualified to comment on that debate, and simply notes that Taylor Fry has not substantially altered its view of an adequate return on capital in response to criticism.<sup>73</sup>

- 2.55** The Committee also notes the results of a 2004 study by Trowbridge Deloitte *Profit margins for NSW CTP*, which indicated that the expected market rate of return on CTP insurance is in the

<sup>70</sup> Mr Booth, Evidence, 31 March 2006, p35

<sup>71</sup> Submission 14, p3

<sup>72</sup> Mr Booth, Evidence, 31 March 2006, p35

<sup>73</sup> See correspondence from Dr Greg Taylor (actuary for the MAA) to MAA in Appendices 2-3, MAA, *Review of Insurer Profits*

range of 12% to 17% per annum, expressed as a percentage return on capital. As stated by the MAA, to achieve a return on capital in this range, an insurer would require a profit margin of 10% to 14% of gross premium:

The study's conclusion was that market expectations of Return on Equity for CTP business lie in the range of 12%-17% per annum. In relation to profit margins expressed as a percentage of gross premiums, the profit margin should fall within the range of 10%-14%.<sup>74</sup>

- 2.56** The Trowbridge Deloitte study also found that a profit margin below 9% of gross premium was considered by CTP insurers to be unlikely to produce an adequate return on capital.<sup>75</sup>

### **Meaning of 'excessive' premium**

- 2.57** If a premium will support a more than adequate return on capital, a question arises as to whether the MAA should reject that premium on the grounds that it is 'excessive' within the meaning of section 27(1)(b) of the Act.
- 2.58** There is an allowable range of profits that may be earned under the Act before a premium becomes 'excessive.' It falls to the MAA to decide on the parameters of that range. It is not for the Committee to substitute its own view for that of the MAA, but to determine whether the MAA has exercised its discretion reasonably having regard to the information available to it.
- 2.59** The MAA has determined that a premium will be 'excessive' for the purposes of the Act if it contains a profit loading of more than 10% of gross premium. In this respect, the MAA stated that:

The MAA's 2004/05 Annual Report (p 80) states that the average profit margin in insurer filings for the years 1999/2000 to 2004/2005 ranged from 7.7% to 8.7%. The MAA has not accepted a profit margin over 10% in premium filings and is still of the view that, based on actuarial advice from Taylor Fry Actuaries, 6%-8% of total premium written represents an adequate rate of return to CTP insurers.<sup>76</sup>

- 2.60** The Committee understands that the MAA has utilised its power to reject a premium on four occasions since the inception of the Act, including once in 2004-2005. On each occasion the MAA rejected the premium on the grounds that it was 'excessive.'<sup>77</sup> In each case the profit margin exceeded 10% of gross premium.<sup>78</sup>
- 2.61** Asked by a Committee member whether the licensed insurers are currently making 'excessive' profits in the NSW CTP scheme, Mr Richard Grellman, Chair of the MAA and Chair of the MAC, was equivocal, and referred to an ongoing debate between the MAA and the insurers:

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<sup>74</sup> MAA, *Response to questions on notice*, Q6.4, p9

<sup>75</sup> MAA, *Response to questions on notice*, Q6.4, p9

<sup>76</sup> MAA, *Response to questions on notice*, Q2.3 p2

<sup>77</sup> MAA, *Response to questions on notice*, Q5.4 and 5.5, p7. See also questions taken on notice at hearing, 31 March 2006, Q4, p4

<sup>78</sup> MAA, *Response to questions on notice*, Q2.3 p2

I am far from sure that there are excessive profits at the moment. There is a very active debate taking place between the MAA and the underwriting community and the Insurance Council of Australia as to what we are actually talking about, because profit is one of those frustrating issues that can be measured in different ways, depending on actuarial analyses and so on that can be applied that may produce different answers, depending on who does the calculation, but my attitude ... is that there is a point at which a fair and reasonable return on the capital employed is met. Beyond that it would be, I think, unacceptable and the debate and the discussion is very live at the moment, so I cannot actually say to you that I think that the profits that have been derived are definitely unarguably excessive.<sup>79</sup>

- 2.62** However, when pressed on the question of whether he would eventually conclude that profits should be reduced, Mr Grellman indicated that it is likely that he will eventually come to this conclusion: 'I suspect that will be my conclusion, but I do not have enough facts yet to be sure.'<sup>80</sup>
- 2.63** The ICA submitted that, based on data recently released by APRA, that the overall level of premiums is not excessive in comparison to the overall level of claims and insurer operating expenses. The ICA referred to the APRA Half yearly General Insurance Bulletin, published on 30 March 2006, which provides information on claims and premiums for NSW and ACT CTP insurers:

This publication provides aggregate information regarding compulsory third party insurance in New South Wales and the Australian Capital Territory. For the 12 months to 30 June 2005, insurance companies reported Gross Premium Revenue of \$1,549 million for NSW and ACT CTP businesses. During the same period, insurers reported Gross Claims Expenses of \$1,486 million. In addition to the Gross Claims Expense, insurers will also incur the cost of acquiring the business and of administering the policies. It is clear from these figures that the overall level of premiums is not excessive when compared to the overall level of claims.<sup>81</sup>

### Market intervention by MAA

- 2.64** The MAA foreshadowed a more interventionist approach to insurer profit in its 2004-2005 *Annual Report*, indicating that it may intervene in the market to avoid insurer's earning excessive profits:

The MAA has a responsibility to ensure that the licensed insurers are able to make a reasonable return on the capital that they have invested in the market, which in turn will provide a competitive and risk weighted market for the benefit of NSW motorists. However the MAA also has a responsibility to ensure that those profits are not excessive and while generally competition in the market place will ensure the proper balance is met we would foreshadow that this is an area that the MAA will continue to monitor closely and intervene if necessary.<sup>82</sup>

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<sup>79</sup> Mr Grellman, Evidence, 31 March 2006, p6

<sup>80</sup> Mr Grellman, Evidence, 31 March 2006, p6

<sup>81</sup> ICA, *Response to questions on notice*, p3

<sup>82</sup> MAA, *Annual Report*, 2004-2005, p6

- 2.65** This is the first time that the Committee is aware of that the MAA has foreshadowed intervening in the market. Questioned on the MAA's policy on market intervention at the public hearing on 31 March 2006, Mr Bowen indicated that the MAA retained a power to intervene via the file and write process described above:

... if we thought that the position in relation to profit was not rectifying itself through the market we would intervene and that would be formally through the rejection of premiums and informally through the discussion with the CTP insurers.<sup>83</sup>

- 2.66** The MAA has also stated that the Act provides it with limited powers to intervene in the market, and that these powers do not extend to a power to reduce the premium of any particular motorist:

The *Motor Accidents Compensation Act 1999* provides the MAA with limited powers to intervene in the market. The MAA has the power to formally reject a premium if the premium is not fully funded, is excessive or does not conform to the MAA *Premium Determination Guidelines*. Once a premium has been filed, the MAA cannot determine prices charged to individuals other than to ensure that insurers' rating factors are objective.<sup>84</sup>

### Possible resolution of dispute by IPART

- 2.67** As noted at paragraph 2.25, disputes between the MAA and the licensed insurers may be arbitrated under the *Commercial Arbitration Act* by IPART or its nominee. Mr Bowen stated he did not believe that the MAA and insurers were moving towards a consensus in respect of insurer profits and that, eventually, the matter may be referred to IPART for determination:

I do not believe we are moving towards a consensus on it and I would expect that the difference between what the MAA is allowing as profit and what the insurers say they require to meet market expectations will at some point need to be tested and the mechanism for testing it under the legislation is that if the MAA rejects a filing and the insurer is unhappy with that rejection, the matter can be referred to IPART for determination. I suspect at some point that will occur, but it has not occurred yet.<sup>85</sup>

- 2.68** However, Mr Grellman stated that the prospect of the dispute between insurers and the MAA regarding profits being referred to IPART was remote on the basis that, in his estimation, neither side would wish to risk the possibility of an adverse result:

I would have to say that the likelihood of this dispute ending up in IPART would be, in my view, remote because once you end up in that forum there is a high level of risk that someone is going to get the wrong answer, so I think pragmatism is likely to continue to be a factor in this discussion, and Mr Bowen has alluded to this earlier, but the four rejections - there would have been many more informal discussions over a cup of tea, if you like, that would have seen a refiling and that is consistent with the relationship that the MAA attempts to maintain with the underwriters.<sup>86</sup>

<sup>83</sup> Mr Bowen, Evidence, 31 March 2006, p17

<sup>84</sup> MAA, *Response to additional questions on notice*, Q1.8, p5

<sup>85</sup> Mr Bowen, Evidence, Evidence, 31 March 2006, pp20-21

<sup>86</sup> Mr Grellman, Evidence, 31 March 2006, p21

- 2.69** The Committee notes that evidence from Mr Booth tends to suggest that the relationship between the MAA and the insurers remains positive notwithstanding disagreement between the MAA and the insurers in respect of profits:

I would like to echo the words of the chairman of the MAA in that there is a good working relationship between the Motor Accidents Authority as regulator and the insurance companies as the underwriters of risk and the financiers of the scheme. There is healthy debate and discussion on a broad range of issues. There is good dialogue between the Motor Accidents Authority and the industry. There are issues on which the Motor Accidents Authority and the industry from time to time do not agree. That is also healthy because, at the end of the day, we understand and respect the fact that the MAA is a statutory body commissioned by Parliament to undertake a regulatory role.<sup>87</sup>

### **Committee comment**

- 2.70** Minds may differ as to the proper basis for calculating an adequate return on capital in a regulated insurance market. It is clear that the MAA and the insurers take different approaches to the resolution of this question, each of which may have some merit. The Committee notes that the ambit of the dispute between the MAA and the insurers as to the appropriate rate of profit in a CTP premium is approximately 4% of gross premium. Although 4% may seem small on a per premium basis, 4% of a premium pool of \$1.4 billion a year is more than \$55 million annually. At the same time, the lower end of the insurer's definition of 'adequate return on capital' (10% of premium) is equal to the upper limit of the range allowed by the MAA before the premium is disallowed.
- 2.71** The Committee is not in a position to arbitrate between these different views. The Committee is concerned only to determine whether the view of the MAA is reasonably held, and is defensible. In this case, the Committee is satisfied that the MAA has taken reasonable steps to inform itself as to the meaning of an 'adequate return on capital' by engaging independent actuaries to advise it on this question. The Committee notes that the views of the MAA's actuaries are substantially unchanged despite being challenged by the insurers.
- 2.72** Should the insurers wish to test the MAA's view, the Act provides that the proper forum for them to do so is at IPART, pursuant to the provisions of the *Commercial Arbitration Act*. It would be regrettable if the matter did proceed to arbitration. However, the Act provides a dispute resolution mechanism for precisely these kinds of situations. Until that mechanism is invoked, the Committee recommends that the MAA maintain its position against insurer requests for increased profit margins on NSW CTP premiums.

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### **Recommendation 3**

That the Motor Accidents Authority maintain its position against insurer requests for increased profit margins on NSW CTP premiums.

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<sup>87</sup> Mr Booth, Evidence, 31 March 2006, p31

## Retrospective profit

**2.73** In the following sections the Committee considers the issue of retrospective profits. The Committee considers the MAA's internal process for reviewing premium filings, notes the discrepancy between profit margins contained in premium filings and estimates of realised profit (the 'profit gap'), canvasses the reliability of the profit estimates, and considers the reasons for emergence of the profit gap.

### Estimated rate of realised profit in the NSW CTP scheme as a percentage of gross premium

- 2.74** In comparison to the profit margins contained in premium filings, which ranged to an average of 8.7% of gross premium in any given accident year, the MAA currently estimates that, when all claims are paid out in respect of those premiums, insurers will realise profits ranging to 24.8% of gross premium.
- 2.75** The MAA provided the following information regarding its profit estimates for the years 2000 to 2003:<sup>88</sup>

Underwriting year ended 30 September	Premiums written (\$000)	Estimated profit (per cent)	Estimated profit (\$million)
2000	1325	24.8%	328
2001	1321	19.8%	261
2002	1342	21.5%	288
2003	1395	18.9%	264

- 2.76** These estimates are discounted to translate the profit estimates back to underwriting year dollars for valid comparison.
- 2.77** Hereafter, the Committee refers to the gap between profit margins on CTP premiums filed with the MAA, and the MAA's estimate of the profit that will be realised on those premiums, as the 'profit gap.'

### Criticism of insurer profit levels

- 2.78** The NSW Bar Association submitted that the MAA profit estimates indicate that insurers have derived 'excessive' profits from the CTP scheme amounting to over \$500 million since 1999:

... the CTP insurers stand to retain in excess of 20% of the premium collected over the first four years of the scheme's operation. The excess profit over that period (over

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<sup>88</sup> MAA, *Annual Report*, 2004-2005, p82

and above the MAA's designated reasonable profit of 7.5% to 10% of premium collected) is forecast to exceed half a billion dollars.<sup>89</sup>

- 2.79** The Bar Association submitted that 'the Motor Accidents Scheme should be reviewed so that the current excessive profits which CTP insurers are projected to receive can be redirected towards proper consideration for the injured.'<sup>90</sup>
- 2.80** The Australian Lawyers Alliance similarly submitted that 'CTP profits are clear evidence that premium monies that should be apportioned to injured people are not being awarded to them by the system.'<sup>91</sup>

### No mechanism for cross-subsidisation of accident years under the Act

- 2.81** The Committee notes that the motor accidents scheme is funded on a year to year basis by NSW motorists. The Act imposes requirements on the MAA to ensure that the premiums collected from motorists will 'fully fund' the liabilities of insurers in any given accident year. There is no mechanism under the Act for the cross-subsidisation of accident years. If insurers do not collect sufficient premiums to cover their liabilities and costs in any given accident they will suffer a loss. In this respect, Mr Bowen stated that:

The Motor Accidents Authority looks at the premium filings and the level of profit one year at a time, that is a requirement of legislation and the guidelines under the legislation, so the fact that the insurers have made a profit or indeed a loss in one particular year, other than as it impacts upon the variables in the next risk premium, is left with that year. There can be no adjustment to the premiums that they are filing this year because they have made excess profit or they have made a loss in a prior year.<sup>92</sup>

- 2.82** Mr Dallas Booth, Deputy Chief Executive Officer of the ICA, stated that insurers cannot 'load' losses from one accident year onto premiums in subsequent years: 'If an insurer makes a loss in CTP they cannot go and load next year's premium to cover the loss, they cannot do that.'<sup>93</sup>

### Calculation of profit by insurers

- 2.83** Mr Booth advised the Committee of the processes whereby insurers calculate their outstanding claims liability and, to the extent that their provisions exceed their estimate of liability, withdraw capital from a line of business. In this respect, Mr Booth stated that the withdrawal of capital amounts to profit for the insurers, and the injection of capital represents a loss:

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<sup>89</sup> Submission 11, p2

<sup>90</sup> Submission 11, p2

<sup>91</sup> Submission 12, p3

<sup>92</sup> Mr Bowen, Evidence, 31 March 2006, p8

<sup>93</sup> Mr Booth, Evidence, 31 March 2006, p36

Insurance companies have to go through and provide at their balance date each year - they go through their entire book of business and look at the premiums they have received in the last 12 months and look at the claims they have paid in the last 12 months across their book of business. The one thing they will do is say that is the premium income we have received, they are the claims we have paid and they will then say what about my outstanding claims across my whole book of business ... If in particular lines of business an insurer is running short in terms of its outstanding claims provisions, they have to be topped up in order to meet the relevant standards and to make proper provisions. If they have more than sufficient provisions in a particular line of business, they can release the provisions and that essentially becomes available to go into the profit return for the year.<sup>94</sup>

### **Release of capital by CTP insurers**

- 2.84** The MAA argued that insurers 'have acknowledged the experience of the early years by releasing some reserves.'<sup>95</sup> The Committee notes that the rate of withdrawal of capital by insurers, particularly in the earliest accident years under the new scheme, is reasonably close to the MAA's estimate of profit that will be realised in respect of those accident years. The rate of withdrawal of capital is also significantly higher than the profit margins approved by the MAA in respect of those years.
- 2.85** The MAA provided the following table based on information obtained from insurers in relation to their release of profit from NSW CTP:<sup>96</sup>

<b>Profit margins and released profit</b>					
	<b>Filed profit margin % of gross premium</b>	<b>Projected profit/loss % of gross premium</b>		<b>Pre tax profit release % of gross earned premium reported by insurers to MAA</b>	
99/00	7.7%	\$328m	24.8%	\$253m	19%
00/01	7.9%	\$261m	19.8%	\$257m	19%
01/02	8.2%	\$288m	21.5%	\$195m	15%
02/03	8.2%	\$264m	18.9%	\$161m	12%
03/04	8.5%	\$252m	17.1%	\$53m	4%
04/05	8.7%			\$9m	1%
<b>Notes</b>	<b>Filing periods: year ending 30 June</b>	<b>Underwriting years Ending 30 September</b>		<b>Accident years / accounting years Differ by insurer: therefore approximate</b>	

<sup>94</sup> Mr Booth, Evidence, 31 March 2006, p33

<sup>95</sup> MAA, *Response to questions on notice*, Q2.7, p3

<sup>96</sup> MAA, *Response to questions on notice*, Q2.7, p3

### **Reliability of profit estimates**

- 2.86 As noted in the tables above, since the inception of the new scheme insurers have filed premiums including profit margins averaging between 7.7% and 8.7% of gross premium written. However, the MAA estimates that the profit margins that will in fact be realised by insurers in the underwriting years 2000 to 2003 range from 18.9% in 2003 to 24.8% in 2000. This is a significant difference.
- 2.87 However, both the MAA and the insurers caution against relying too heavily on the MAA profit estimates. CTP insurance is long tail in nature. That is, the full cost of accidents occurring in any one year will only be known after the resolution of all claims arising out of those accidents, and this process may take years. For example, 88% of claims received in respect of the first accident year under the reformed scheme have been finalised, representing only 66% of the estimated total cost of those claims.<sup>97</sup>
- 2.88 The MAA also submitted that profit estimates must also be further qualified to take account of the fact that larger dollar value claims take the longest to resolve: ‘As the larger claims are finalised over the next few years, this may change the estimated incurred claims cost for the underwriting year.’<sup>98</sup>
- 2.89 The ICA similarly noted that ‘insurers will not know the extent to which a set of premiums were adequate to cover the risk taken until a number of years after the premiums have been collected.’<sup>99</sup> The ICA submitted that experience with previous years bears out its observation that profit estimates are rarely in line with realised profit:

Experience under the current and former Acts is that the claims cost outcome is rarely in line with the level of costs expected to be incurred at the time the premium is set. The longer term history of the Motor Accidents Scheme, since 1989, has been both positive and negative for insurers.<sup>100</sup>

- 2.90 The Committee notes that the insurers did not provide any evidence of their own estimates of realised profit. No individual insurer provided a submission to the Inquiry or indicated a desire to appear at the public hearing. A Committee member asked Mr Booth whether the insurers maintained their own profit estimates and whether these reports were showing anything different from the MAA’s reports. Mr Booth replied that the licensed insurers do in fact maintain profit estimates but that the ICA was not privy to those estimates:

Each insurer will have its own view how its portfolio is travelling. They must do that in terms of setting their own provision for outstanding claims for their broader capital management and financial management of the company. It is an area that happens in each company and is an area that ICA does not become involved in.<sup>101</sup>

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<sup>97</sup> MAA, *Annual Report*, 2004-2005, p81

<sup>98</sup> MAA, *Annual Report*, 2004-2005, p81

<sup>99</sup> Submission 14, p2

<sup>100</sup> Submission 14, p3

<sup>101</sup> Mr Booth, Evidence, 31 March 2006, p34

- 2.91** The Bar Association of NSW argued that insurers should have a reasonable estimate of the value of their outstanding claims. In this respect, Mr Letherbarrow SC stated that:

The fallacy of some arguments that, oh well, we don't know what is going to come out and bite us, is that these insurers have known of these files for six years, someone who is injured that cannot be assessed now, and they have continual audits, continual examinations of them. They know what is in them and for them to say, oh look, it might come out of the woodwork, it will not come out of the woodwork. They know what is there.<sup>102</sup>

- 2.92** Further, Mr Letherbarrow SC argued that older claims do not generally turn out to be high value claims, but rather 'junk' claims:

From a practitioner's point of view as well, old claims - and I have done a lot of old claims over the years - do not turn out to be huge matters. The old ones tend to be ones that turn up in court or are assessed and there are all sorts of problems with them. They do not turn out to be the big claims. They often turn out to be the junk claims. In any event, the insurers have been examining these claims for years, they know what is in the background, they know what is in the tail.<sup>103</sup>

- 2.93** Mr Letherbarrow SC also argued that the notion that it is premature to estimate realised profit is 'ridiculous', noting that, if the view of the ICA is adopted, it would not be possible to reach any conclusions as to profit until the scheme is 'long since dead'.<sup>104</sup>

### **Committee comment**

- 2.94** The first issue for the Committee to consider is the reliability of the MAA profit estimates. The Committee notes that the estimates are to be approached with caution given the long tail nature of CTP insurance. However, the Committee also notes that if it were to wait until all claims have been finalised it will be waiting a very long time before it can come to any view on the performance of the MAA in respect of profits. In considering the profit estimates the Committee has also had regard to its own functions under the Act and its terms of reference. It is important to note that the Committee is not an investor or an actuary, but rather a parliamentary body with a responsibility to oversight the performance by the MAA of its functions based on the best information available from time to time.

- 2.95** The Committee also notes the large withdrawals of capital by insurers discussed at paragraph 2.84. These withdrawals, which range to 19% of gross premium, largely mirror the MAA profit estimates and tend to indicate that the insurer's view of the likely profit that will be realised in accidents years to date is not significantly different from the MAA's view.

- 2.96** The Committee is satisfied that the profit estimates are sufficiently reliable for the Committee's purposes in this Inquiry. The profit estimates indicate that it is highly likely that there will be a significant discrepancy between profit margins in CTP premiums filed with the MAA and the profit that will be realised on those premiums. The remaining question is

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<sup>102</sup> Mr Letherbarrow SC, Evidence, 31 March 2006, pp42-43

<sup>103</sup> Mr Letherbarrow SC, Evidence, 31 March 2006, p43

<sup>104</sup> Mr Letherbarrow SC, Evidence, 31 March 2006, p39

whether the MAA has adequately performed its functions under the Act with respect to the approval of profit margins in CTP filings. This involves consideration of the reasons for the emergence of the profit gap.

### **Reasons for gap between profit margins and profit estimates**

**2.97** The gap between the profit margins filed in CTP premiums and the estimates of the profit likely to be realised on those premiums is due to the *risk premium* being lower than anticipated, rather than any of the other components of the premium set out at paragraph 2.34.

**2.98** The MAA's 2004-2005 *Annual Report* indicates that three components of the risk premium have been lower than expected:

- Claim frequency
- Propensity to claim
- Average cost per claim.<sup>105</sup>

**2.99** In the following sections the Committee considers each of these factors in turn.

#### ***Meaning of 'risk premium'***

**2.100** The risk premium is the estimated cost of claims in any given accident year. As noted at paragraph 2.34, the 'risk premium' comprises approximately 70.8% of a CTP premium. Mr Bowen advised the Committee that the risk premium is determined by a large number of variables:

The assumed level of claim frequency, which is just the rate at which people are claiming; the propensity to claim, which is the number of claims compared to the number of motor accident injuries that occur; the level of injury severity, which may vary from year to year, a variation in frequency that has very little impact, for example, on overall claim costs if it was only a variation in smaller claims and the larger claims were still there; the average claims cost, how much is being provided on average for claims through settlements, CARS decisions and verdicts of the court, the level of legal and investigation costs; because insurers hold this money for a long time we also need to take account of inflation and investment assumptions, and the final one, superimposed inflation, is the level to which claim costs grow over and above inflation.<sup>106</sup>

**2.101** The MAA and the ICA are agreed that these are the main factors impacting on the risk premium.<sup>107</sup>

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<sup>105</sup> MAA, *Annual Report*, 2004-2005, p81

<sup>106</sup> Mr Bowen, Evidence, 31 March 2006,p7

<sup>107</sup> Mr Bowen, Evidence, 31 March 2006, p7

### ***Fall in claim frequency***

**2.102** Claim frequency is the number of notifications per 10,000 registered vehicles, or, as Mr Bowen explained, ‘the rate at which people are claiming.’<sup>108</sup> The claim frequency has dropped from approximately 46 in 1999 to 32 in the most recent years of the scheme.<sup>109</sup>

**2.103** Mr Bowen stated that the most significant factor impacting on the profit gap was the drop in claim frequency which has occurred since the introduction of the 1999 reforms:

One of or perhaps the most critical issue in explaining why there have been estimated excess profits in the early years of this scheme has been the drop in claim frequency ... from September 1999 there has been a drop in the number of claims which somewhat mirrors - not always exactly but somewhat mirrors - the drop in casualty rates.<sup>110</sup>

**2.104** The MAA advised the Committee that other Australian jurisdictions have also reported a decreasing trend in the claim frequency, although at a decreasing rate in recent years.<sup>111</sup>

**2.105** The reasons for the drop in the claim frequency are not well understood. The MAA suggested that there are at least three contributing factors:

- improvements in road safety, and
- an increase in the number of cars registered in NSW, and
- a decrease in the number of casualties per registered vehicle.<sup>112</sup>

**2.106** The MAA speculated in its *Annual Report* that the prolonged drought may have had an effect on the claim frequency, although the reasons for this are not articulated.<sup>113</sup>

**2.107** In respect of road safety improvements, Mr Bowen stated that the drop in the claim frequency ‘is not a scheme-related drop. It is not an effect of the 1999 reforms. It is driven primarily ... by road safety improvements because it is happening all around the country and indeed in many comparable jurisdictions elsewhere.’<sup>114</sup>

**2.108** The Committee notes that an increase in the number of registered vehicles will lead to a reduction in the risk premium if the rate of casualties remains the same because in those circumstances the rate of casualties per vehicle, and hence per CTP policy, will fall.

**2.109** Mr Booth also noted that the claim frequency had stabilised over the last two years:

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<sup>108</sup> Mr Bowen, Evidence, 31 March 2006, p7

<sup>109</sup> MAA, *Annual Report*, 2004-2005, p83

<sup>110</sup> Mr Bowen, Evidence, 31 March 2006, p7

<sup>111</sup> MAA, *Response to questions on notice*, Q4.2, p6

<sup>112</sup> MAA, *Annual Report*, 2004-2005, p83

<sup>113</sup> MAA, *Annual Report*, 2004-2005, p83

<sup>114</sup> Mr Bowen, Evidence, 31 March 2006, p8

Clearly for the first three to four years of the scheme the numbers of claims coming in have been lower than expected. Our information, and this is looking at the total industry or the total claims experience, our information is in the analysis that we have done, the monitoring done for us, has shown that claim frequency has now stabilised and it has been stabilised for the last two years or so, so there are no further reduction in claim numbers.<sup>115</sup>

**2.110** The MAA advised the Committee that it is awaiting actuarial advice as to whether the claim frequency has stabilised.<sup>116</sup>

**2.111** Mr Bowen advised the Committee that the MAA had assessed the risk premium based on actuarial advice that the risk premium would not fall in the manner that it did in the period since 1999. Mr Bowen also noted the difficulties faced by actuaries called upon to calculate the risk premium on CTP insurance:

... you are an actuary sitting preparing a CTP filing in September 1999. The only information you have on claim frequency is that graph that has gone up to that point, from which there is no way you can do other than assume that the frequency will continue at that sort of trend line. Even when you get to September 2000 you will see there was a little blip that year. You would be sitting there thinking it has dropped a little bit over the four quarters of 1999-00 but it has risen in this last quarter. Does that mean as I am preparing the filing this year it is going back up, it is going down, or going to the same plateau?<sup>117</sup>

**2.112** Mr Bowen also noted that in the period since 1999 the average claim size has risen, indicating that the fall in the claim frequency is at the less severe end of the injury range:

... the average claim size has in fact risen ... That tells us that what has happened is that the majority of the matters dropping out of the scheme, the drop in claim frequency, has probably come from less severe injuries, so there has been no significant reduction in the number of catastrophic and very serious injuries. We look at the hospitalisation rates as being a drop but not as significant a drop in hospitalisation rates, so the claims drop. The reduction in injury has probably been at a less severe end, meaning that those claims that are left in the scheme have achieved a higher average claim size.<sup>118</sup>

**2.113** Mr Bowen stated that, as a result of a succession of falls in the claim frequency, CTP premiums have 'chased' the risk premium downwards:

... as the frequency has gone down in that staggered way the premium prices have chased them down, but because there is a significant gap on frequency and this is quite sizeable, it has gone from .4 percent to .24 percent. That is an enormous drop in claim frequency and that has lead to the risk premium, based on that frequency, having been set much higher than the claims cost coming out of that year, but in a

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<sup>115</sup> Mr Booth, Evidence, 31 March 2006, p36

<sup>116</sup> MAA, *Response to questions on notice*, Q4.1, p6

<sup>117</sup> Mr Bowen, Evidence, 31 March 2006, pp8-9

<sup>118</sup> Mr Bowen, Evidence, 31 March 2006, p9

way that was not predictable at the time that the filing was made. That is the key message today.<sup>119</sup>

- 2.114** Mr Booth supported this analysis, stating that nobody had expected the claim frequency to fall in the manner that it has:

[Claim numbers] were lower to a reasonably surprising degree. So you say well for the first years as experience starts to emerge, that is interesting, we have a lower number of claims here. Nobody expected that. With all the work done prior to the development and passage of the Motor Accidents Compensation Act nobody, the actuaries, the insurers, the Government, nobody expected there would be this sort of a change.<sup>120</sup>

- 2.115** Mr Booth also argued that the insurers had acted responsibly by continually adjusting their premiums downwards in light of developing scheme experience:

... there is a process of constant adjustment taking account of all the trends that are known and are being observed all the time and the process of constant adjustment has been occurring and our submission is that, as the trends in claim numbers have been seen to be firm, the insurers have responded to that, they have adjusted their prices accordingly, they have adjusted their assumptions, the core components of what makes up a premium, and they have reduced their prices and have provided the benefit of that back to the community of New South Wales.<sup>121</sup>

### ***Fall in propensity to claim***

- 2.116** As Mr Bowen explained, the propensity to claim ‘is the number of claims compared to the number of motor accident injuries that occur.’<sup>122</sup> The MAA estimates that the propensity of NSW motorists to make a motor accident claim has fallen from 58% in the first year of the new scheme to 48% in more recent years:

The propensity to claim is the number of notifications per NSW road casualty. The upper limit of this measure is well below 100% in NSW, as the scheme is fault based and an injured person may lodge a claim only when a negligent vehicle owner or driver caused the injuries ... The estimated propensity to claim (including ANFs) is 58% for accident Year 1 (similar to later years of the old scheme when the rate was around 60%) and has dropped to around 48% for more recent accident years.<sup>123</sup>

- 2.117** In summary, there are more vehicles registered in NSW, those vehicles are having fewer accidents, and persons injured in NSW motor accidents are becoming less likely to make a claim. The following table illustrates the fall in the number of accidents since the inception of the new scheme:<sup>124</sup>

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<sup>119</sup> Mr Bowen, Evidence, 31 March 2006, p9

<sup>120</sup> Mr Booth, Evidence, 31 March 2006, p35

<sup>121</sup> Mr Booth, Evidence, 31 March 2006, p36

<sup>122</sup> Evidence, 31 March 2006, p7

<sup>123</sup> MAA, *Annual Report*, 2004-2005, p84

<sup>124</sup> MAA, *Annual Report*, 2004-2005, p84

Accident Year	Registered vehicles ('000)	Claim frequency/ 10,000 vehicles	NSW road casualties	Propensity to claim	Casualties/ 10,000 vehicles
1999-2000	3,644	46	29,061	0.58	80
2000-2001	3,737	41	29,993	0.52	80
2001-2002	3,829	37	30,080	0.47	79
2002-2003	3,934	33	27,745	0.46	71
2003-2004	4,049	32	26,961	0.48	67

- 2.118** These falls translate into significant reductions in the total number of motor accidents claims. The fall in the number of motor accidents claims is illustrated in the table below:<sup>125</sup>

Year	Full claims	Accident Notification Forms	Estimate of outstanding claims	Estimate of ultimate number of claims
1999-0000	14,034	2,669	141	16,844
2000-2001	12,315	2,906	281	15,502
2001-2002	10,882	2,705	468	14,055
2002-2003	9,583	2,548	754	12,885
2003-2004	9,184	2,319	1,309	12,812

#### *Fall in costs per claim*

- 2.119** The 1999 reforms reduced the amount of damages recoverable by motor accidents claimants in respect of non-economic loss. The Act also introduced procedural reforms so that fewer cases would end up in court. These reforms reduced the risk premium by reducing the average cost of a claim.
- 2.120** As reported by the MAA, the effect of the 1999 reforms was to reduce the number of claimants who received each head of damages, although this was partially offset by increases in the average payment in respect of the remaining heads of damages. For example, the percentage of claimants receiving damages for non-economic loss fell from 61% in the last year of the old scheme to 7% in the first year of the new scheme, but the average payment in respect of past and future economic loss increased.<sup>126</sup>

<sup>125</sup> Based on table in MAA, *Annual Report*, 2004-2005, p83

<sup>126</sup> MAA, *Annual Report*, 2004-2005, pp85-86

- 2.121** However, insurers did not immediately pass on the fall in the cost per claim to motorists. The MAA notes that insurers initially filed premiums which did not incorporate 100% scheme effectiveness for several years after the introduction of the 1999 reforms:

The average claim size has been lower than projected in premium filings reflecting the effective implementation of the 1999 reforms. With the introduction of the untested scheme in 1999, insurers originally filed for less than 100% scheme effectiveness in the first years of the scheme. As the scheme settled and demonstrated its effectiveness, insurers responded by incorporating scheme effectiveness of 100% in their filings with the effect that premiums reduced further.<sup>127</sup>

- 2.122** The MAA advised the Committee that insurers did not incorporate 100% scheme effectiveness into premium pricing until approximately mid 2003:

The inclusion of 100% effectiveness happened as a result of the insurers' acceptance of the lowered claim frequency and the effectiveness of the NEL gateway. Filings rejected by the MAA in mid 2003 had not incorporated the full effectiveness of the reforms and the comparatively high average claim size was one reason for the rejection of the filing. This date can be viewed as the point at which 100% effectiveness was included in filings.<sup>128</sup>

- 2.123** The MAA argued that it was reasonable for the insurers not to factor in 100% scheme effectiveness until mid 2003 in order to ensure that the scheme was fully funded as per section 27 of the Act.<sup>129</sup>

#### ***Possible impact of fall in costs per claim on propensity to claim***

- 2.124** The impact of scheme reforms on claim sizes and propensity to claim was the subject of conflicting oral evidence at the public hearing on 31 March 2006. A Committee member asked Mr Letherbarrow SC whether it was correct to say that premiums have fallen and profits have remained 'healthy' 'simply because benefits to the injured parties have been cut?' In response, Mr Letherbarrow SC stated that scheme changes has the effect of 'discouraging' people from making a claim:

I have heard that road safety is one of the major reasons allegedly. That somewhat surprises me. I think that would be definitely a factor, but one of the larger factors, as you have put it, people are discouraged what is the point to make claims. Road safety does impact upon this but I think not as much as the scheme in itself. It basically discourages people from seeking compensation and people who are very badly injured.<sup>130</sup>

- 2.125** In contrast, Mr Bowen argued that while the reduction in benefit levels achieved by the 1999 reforms may lead to a reduction in the size of claims, it is unlikely to have led to a decrease in the number of claims:

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<sup>127</sup> MAA, *Annual Report*, 2004-2005, p81

<sup>128</sup> MAA, *Response to additional questions on notice*, Q1.2, p2

<sup>129</sup> MAA, *Response to additional questions on notice*, Q1.2, pp1-2

<sup>130</sup> Mr Letherbarrow, Evidence, 31 March 2006, p40

That may lead to a reduction in the claim size but it should not lead to a reduction in the claim numbers because in fact we have made it, through the ANF [Accident Notification Form] process, simpler for people to bring a claim for a small amount.<sup>131</sup>

- 2.126** Mr Bowen also pointed out that there was no injury for which an injured person could not bring a claim under the 1999 reforms, and that it was unlikely that the changes which did occur would have discouraged claimants from making a claim:

There has been no injury for which you cannot bring a claim. The major change in the 1999 legislation was to introduce a threshold or a new threshold. There has always been a threshold for non-economic loss. It was to introduce a new threshold. That impacts upon the amount of damages people get, but it was unlikely to have influenced the number of claims that are brought because we know, for example, people will bring ANFs for a couple of hundred dollars. We encourage them to do that. We want them to get the treatment. We do not want them thinking it is too hard and they will not bother. I do not think that has lead to a reduction in the claim numbers. It will impact on the claim size but not the numbers.<sup>132</sup>

- 2.127** The ICA submitted that the ‘the cost of claims has been consistent with what was predicted at the time the legislation was passed.’<sup>133</sup>

#### ***Possible impact of costs restrictions on propensity to claim***

- 2.128** The Committee notes that the MAA, as part of its functions in respect of the Motor Accidents Assessment Service, has imposed restrictions on costs recoverable in Claims Assessment and Resolution Service (CARS) proceedings. The costs regulation is discussed in more detail in Chapter Four.

- 2.129** Mr Letherbarrow SC argued that the combination of costs penalties and restrictions on costs recoverable had the effect of dissuading many people from bringing a claim that they otherwise would have made but for these factors, and had also encouraged many solicitors to leave motor accidents compensation practice:

There are cost penalties. For a lot of claimants it is just not worth it any more. The lawyers in relation to the smaller claims, albeit the ones which frankly should get some non-economic loss, can charge so little money that no-one bothers to have a go. The cost penalties are such that insurers can bleed you dry in relation to a lot of matters. Just by putting up a fight the cost penalties are such that it just become uneconomic for people to actually make a claim.<sup>134</sup>

- 2.130** The ICA submitted that insurers, like claimants, are also subject to costs penalties in motor accidents claims:

There are cost penalties that dissuade any party to legal proceedings from presenting baseless arguments to the courts. Insurers, on behalf of their policyholders, are subject to cost penalties if they pursue groundless defences to a claim. The cost penalties

<sup>131</sup> Evidence, 31 March 2006, p8

<sup>132</sup> Evidence, 31 March 2006, p8

<sup>133</sup> ICA, *Response to questions on notice*, p3

<sup>134</sup> Evidence, 31 March 2006, p39

apply to all parties to the proceedings, not just to the claimant (see section 348, *Legal Profession Act 2004*).<sup>135</sup>

### Committee comment

- 2.131 The Committee is satisfied that the primary reason for the discrepancy between profit margins contained in CTP filings and the MAA's estimate of the profit likely to be realised on those premiums is the fall in the risk premium between 1999 and the present, comprising a reduction in the claim frequency, propensity to claim and the average cost per claim.
- 2.132 The Committee accepts that no reasonable participant in the CTP industry could have predicted the fall in the claim frequency. Indeed, the reasons for the fall are still not fully understood. As the MAA is required to ensure that the motor accidents scheme is fully funded from year to year, the MAA acted reasonably in ensuring that premium prices 'chased' the fall in the claim frequency downwards, rather than racing ahead of the fall in the claim frequency.
- 2.133 Further, the Committee considers that it was reasonable for the MAA, in view of its overriding responsibility to ensure that the motor accident scheme is fully funded, to have allowed insurers a margin in respect of the phasing in of the impact of the 1999 reforms on premiums on the basis that there was a risk that the reforms may not have been 100% effective.
- 2.134 As a result of the above, NSW CTP insurers have made higher than anticipated profits. Such higher profits are an inevitable consequence of a fall in the risk premium in an insurance scheme backed by private capital.
- 2.135 The fall in the risk premium discussed above should now be priced into CTP premiums. Provided the risk premium does not fall further, profits realised on recent accident years should approximate the profit margins contained in premium filings for those years. The Committee will therefore be surprised if, in the absence of further unexpected falls in the risk premium, the gap between profit margins contained in CTP premiums and MAA estimates of the profit likely to be realised on those premiums does not narrow considerably in coming years. The Committee will keep this issue under review in future reviews.
- 2.136 The Committee also has some concerns regarding the impact of the fall in the propensity to claim on the risk premium. The MAA's *Annual Report* does not provide a detailed analysis of the reasons for the fall in the propensity to claim. The NSW Bar Association strongly contended that the effect of the 1999 reforms, including changes to the regime covering legal costs, was to discourage motorists from bringing a claim. The MAA does not accept that this is the case, and argues that reforms introduced by the MAA, including the Accident Notification Form, make it easier for injured motorists to make a claim.
- 2.137 The Committee accepts that the MAA has taken steps to make it easier to make a claim, and strongly encourages the MAA to continue with these efforts. However, the MAA's own figures indicate a substantial drop in the propensity to claim since the introduction of the 1999 reforms. It is not clear to the Committee which motorists are less likely to make a claim. The Committee is concerned that those most in need of compensation may be the persons most easily discouraged from making a claim.

<sup>135</sup> ICA, *Response to questions on notice*, p3

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- 2.138** The Committee considers that this issue is in need of more detailed analysis. The Committee therefore recommends that the MAA prepare a report on the impact of the 1999 reforms, including procedural reforms initiated by the MAA in respect of legal costs, on the propensity to claim, and the impact of the fall in the propensity to claim on the profitability of the licensed insurers, and that the MAA provide a copy of the report to the Committee.
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#### **Recommendation 4**

That the Motor Accidents Authority (MAA) prepare a report on the impact of the 1999 reforms, including procedural reforms initiated by the MAA in respect of legal costs, on the propensity to claim, and the impact of the fall in the propensity to claim on the profitability of the licensed insurers, and that the MAA provide a copy of the report to the Committee.

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## Chapter 3 MAA as market regulator: insurer compliance with MAA guidelines

In this Chapter the Committee considers the performance of the MAA in overseeing the compliance of CTP insurers with *Claims Handling, Market Practice and Treatment, Rehabilitation and Attendant Care* guidelines issued by the MAA pursuant to the *Motor Accidents Compensation Act 1999* (NSW).

### Overview

- 3.1 The MAA *Annual Report* lists seven corporate priorities for the MAA, including ‘being an effective regulator.’ For the MAA, being an ‘effective regulator’ entails two goals:
- To ensure a high level of compliance by insurers
  - To promote a competitive CTP insurer market.<sup>136</sup>
- 3.2 In this Chapter the Committee is concerned with the first of these goals. The Committee notes the range of guidelines issued by the MAA to regulate insurer behaviour; considers MAA strategies to promote insurer compliance with their obligations under the *Motor Accidents Compensation Act 1999* (NSW) (‘the Act’), their operating licences and MAA guidelines; reviews insurer compliance in 2004-2005; and considers a number of issues raised by Inquiry participants regarding MAA oversight of insurer compliance.
- 3.3 In considering the MAA’s performance as a market regulator the Committee has had regard to the fact that around 13,000 CTP claims are made in NSW in any given year.<sup>137</sup> It is unrealistic to expect that there will be 100% compliance by insurers with MAA requirements in the context of such a large number of claims. However, the Committee has also had regard to the impact of motor accidents on claimants and to the heavy toll of disputes regarding treatment and claims handling on claimants. The Committee has therefore been concerned to ensure that the MAA has put in place the following:
- A regulatory framework capable of identifying and remedying instances of insurer non-compliance, and
  - Strategies directed to the continual improvement of insurer compliance.
- 3.4 In addition, the Committee sought evidence that the MAA is actively policing the Act and the various guidelines issued by it.
- 3.5 The Committee notes that the MAA is a business regulator, rather a prudential regulator. The role of a prudential regulator is to promote public confidence in the financial system by ensuring that, under all reasonable circumstances, financial institutions are able to fulfil their financial obligations to their depositors, policyholders or fund members.<sup>138</sup> The primary

<sup>136</sup> MAA, *Annual Report*, 2004-2005, p12

<sup>137</sup> MAA, *Annual Report*, 2004-2005, p83

<sup>138</sup> John F. Laker, Chair, APRA, *The Prudential Regulator at Work*, speech to the Australian Institute of Company Directors, NSW Division, 22 March 2006, p3,

responsibility for prudential regulation of the NSW CTP scheme lies with the Australian Prudential and Regulatory Authority (APRA), a Commonwealth agency. The MAA and APRA have entered a memorandum of understanding regarding the prudential regulation of the CTP insurers.<sup>139</sup>

## MAA guidelines

**3.6** The MAA is empowered to issue guidelines regulating the conduct of licensed CTP insurers, and to audit the books and records of the insurers to assess their compliance with those guidelines and with the Act.<sup>140</sup> The MAA has issued a range of guidelines including the following:

- Market Practice Guidelines
- Claims Handling Guidelines (for CTP insurers)
- Treatment, Rehabilitation and Attendant Care Guidelines.

### Market Practice Guidelines

**3.7** The Committee notes that the objective of the Market Practice Guidelines (MPG) is to ensure that CTP insurance is available across all of NSW on a partially community-rated basis. Community rating refers to the partial subsidy of high-risk drivers, such as young drivers, by other CTP insurance holders, to ensure that CTP coverage is universal, or close to universal. In this respect, the MAA has stated that:

... one of the objects of these Market Practice Guidelines is to prevent insurers from discriminating against motorists they regard as high risk in the issuing of CTP policies (except for pricing differentiation permitted under the MAA Premium Determination Guidelines).<sup>141</sup>

**3.8** The MPGs contain a series of prohibitions designed to prevent insurers engaging in ‘risk avoidance’ strategies. For example, insurers must not advise young drivers that they can obtain a cheaper premium from another insurer, and telephone calls are not to be screened by area code.<sup>142</sup>

### Claims Handling Guidelines (for CTP insurers)

**3.9** The Claim Handling Guidelines include provisions relating to various aspects of the claims process, including making and processing claims, claims investigation, requests for

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[www.apra.gov.au/Speeches/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=10463](http://www.apra.gov.au/Speeches/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=10463)  
(accessed 17 July 2006)

<sup>139</sup> MAA, *Annual Report*, 2004-2005, p12

<sup>140</sup> *Motor Accident Compensation Act 1999* (NSW), s177

<sup>141</sup> MAA, *Market Practice Guidelines*, 1 January 2006, p1

<sup>142</sup> MAA, *Market Practice Guidelines*, 1 January 2006, p2, cl 3(a) and 3(f)

information, payment of expenses and claims settlement.<sup>143</sup> The MAA updated the CHGs on 1 July 2004 to require insurers to provide:

- Reasons for an allegation of contributory negligence
- Copies of all treatment reports in their possession, and
- Advice about internal dispute resolution procedures when declining to pay for treatment expenses.<sup>144</sup>

**3.10** Recommendation 9 of the Committee's *Sixth Review* of the MAA was that, with regard to claims investigation, 'the MAA develop and implement a code of conduct for surveillance under the New South Wales Scheme, and that the code include when surveillance is appropriate and the manner in which surveillance should be conducted.'

**3.11** As part of the current Review, the MAA reported that it has conducted a review of surveillance practices in the NSW CTP scheme and is in the process of incorporating guidelines regarding surveillance into the CHGs:

The MAA sought feedback from the insurance industry in relation to the proposed change to the Claims Handling Guidelines in November 2005. The industry noted that current practice accords with surveillance principles. The MAA is in the process of finalising an amendment to the Claims Handling Guidelines to incorporate surveillance principles from 1 July 2006.<sup>145</sup>

### Treatment, Rehabilitation and Attendant Care Guidelines

**3.12** One of the principal aims of the 1999 reforms was to promote the speedy recovery of persons injured in motor accidents. The Treatment, Rehabilitation and Attendant Care Guidelines (TRACs) are designed to 'encourage early and appropriate treatment and rehabilitation and to achieve optimum recovery from injuries sustained in motor accidents and to provide appropriately for the future needs of those with ongoing disabilities.'<sup>146</sup> The TRACs contribute to the achievement of best practice by insurers by providing standards and criteria against which the insurers can assess their performance. An effect of the TRACs is consistency between insurers.<sup>147</sup>

**3.13** The Committee notes that there is significant potential for concerns regarding the appropriate care and treatment of an injured person to degenerate into a dispute between an injured person and an insurer. The TRAC Guidelines contain provisions designed to reduce the prospect of such disputes occurring. The TRACs contain a set of 'general principles', including the following:

- 'Wherever possible, claimants should exercise choice about the selection of their treatment, rehabilitation and/or attendant care provider. However, the

<sup>143</sup> MAA, *Claims Handling Guidelines*, 2004

<sup>144</sup> MAA, *Annual Report*, 2004-2005, p88

<sup>145</sup> MAA, *Response to questions on notice*, Q45.1, p39

<sup>146</sup> MAA, *Treatment, Rehabilitation and Attendant Care Guidelines*, May 2004, p1

<sup>147</sup> MAA, *Treatment, Rehabilitation and Attendant Care Guidelines*, May 2004, p1

insurer is only obliged to pay for treatment, rehabilitation and attendant care costs that are reasonable and necessary, properly verified and relate to injuries resulting from the motor vehicle accident.<sup>148</sup>

- ‘The selection of a service provider should be determined by the claimant’s needs, not the relationship between the insurer and the service provider. Any commercial relationship between the insurer and the service provider is not a factor to be considered when selecting a service provider.’<sup>149</sup>
- ‘The insurer is not responsible for developing treatment, rehabilitation or attendant care plans. This is the responsibility of the service provider.’<sup>150</sup>

**3.14** The Committee was advised that the MAA is currently updating the injury codes in respect of the TRAC Guidelines.<sup>151</sup> The Committee also notes that the MAA has developed a specific set of Guidelines in respect of the treatment of whiplash and associated disorders.<sup>152</sup>

## MAA Compliance Strategy

**3.15** The MAA finalised an updated *Compliance Strategy* for the period 2005-2008 in 2005, the principal objectives of which are to ensure insurers provide:

- Early access to appropriate treatment, rehabilitation and compensation
- Non-economic loss compensation for the most severely injured claimants with ongoing impairment and disabilities
- Fair and equal access to CTP insurance.<sup>153</sup>

**3.16** The Committee notes that the *Compliance Strategy* incorporates a range of compliance mechanisms including review of insurer self-assessment reports, monitoring the MAA complaints and claims databases, stakeholder surveys, reviewing insurer claims handling compliance systems and audits.<sup>154</sup> In addition, the MAA finalised its *Regulatory and Enforcement Policy* ‘to assist MAA officers in applying a fair and consistent approach to insurer non-compliance’.<sup>155</sup> The MAA consulted with representatives of insurers, the legal profession, interstate CTP regulators, APRA and ASIC in developing the *Compliance Strategy* and the *Regulatory and Enforcement Policy*.<sup>156</sup>

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<sup>148</sup> MAA, *Treatment, Rehabilitation and Attendant Care Guidelines*, May 2004, General Principles, cl 6, p2

<sup>149</sup> MAA, *Treatment, Rehabilitation and Attendant Care Guidelines*, May 2004, General Principles, cl 7, p2

<sup>150</sup> MAA, *Treatment, Rehabilitation and Attendant Care Guidelines*, May 2004, General Principles, cl 9, p2

<sup>151</sup> MAA, *Response to questions on notice*, Q14.1, p14

<sup>152</sup> MAA, *Annual Report*, 2004-2005, p88

<sup>153</sup> MAA, *Annual Report*, 2004-2005, p13

<sup>154</sup> MAA, *Annual Report*, 2004-2005, p13

<sup>155</sup> MAA, *Annual Report*, 2004-2005, p13

<sup>156</sup> MAA, *Annual Report*, 2004-2005, p13

## MAA Regulatory and Enforcement Policy

**3.17** The *Regulatory and Enforcement Policy* identifies three different strategies for ensuring insurer compliance with MAA guidelines and with the Act:

- The MAA audit program
- Insurer self assessment reports incorporating action plans to remedy and reduce non-compliance, and
- Complaints from CTP insurance policy holders and from claimants and their legal representatives to the MAA.<sup>157</sup>

**3.18** However, the MAA's primary enforcement strategy is education of insurers regarding the guidelines and the Act.<sup>158</sup> The MAA considers that the range of enforcement options available to it are best seen as a 'pyramid' of regulatory techniques:

The model is hierarchical in that it promotes the consideration of regulatory tools at the base of the pyramid such as education and persuasion before considering the use of penalty provisions which sit at the top of the pyramid.<sup>159</sup>

**3.19** The Committee notes that the MAA's approach to market regulation has developed as the scheme has matured.<sup>160</sup>

## Major and minor non-compliance

**3.20** The Committee is aware that the MAA, as a matter of policy, distinguishes between minor and major instances of non-compliance by insurers. Minor non-compliance is 'generally of a technical or relatively inconsequential nature, and unlikely to cause significant harm to stakeholder/s.'<sup>161</sup> Major non-compliance is non-compliance which 'has caused, or is likely to cause, the claimant or other stakeholder significant harm.'<sup>162</sup> The MAA also has regard to whether the non-compliance was wilful or negligent and to the compliance history of the insurer in question when determining whether non-compliance is major or minor.

**3.21** The MAA takes the view that education, persuasion and warnings are the appropriate responses to 'minor' non-compliance by insurers. The MAA reports that these techniques have generally proven to be effective, with insurers generally responding in a timely fashion.<sup>163</sup>

**3.22** In regards to major non-compliance, as well as the techniques applied to minor non-compliance, the MAA may elect to impose a penalty on the insurer pursuant to the provisions

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<sup>157</sup> MAA, *Regulatory and Enforcement Policy*, p1

<sup>158</sup> MAA, *Regulatory and Enforcement Policy*, p1

<sup>159</sup> MAA, *Regulatory and Enforcement Policy*, p2

<sup>160</sup> MAA, *Regulatory and Enforcement Policy*, p1

<sup>161</sup> MAA, *Regulatory and Enforcement Policy*, p4

<sup>162</sup> MAA, *Regulatory and Enforcement Policy*, p4

<sup>163</sup> MAA, *Regulatory and Enforcement Policy*, p3

of the *Motor Accidents Compensation Act 1999* (NSW). In determining whether to impose a penalty the MAA considers submissions from the insurer regarding any mitigating factors.<sup>164</sup>

**3.23** In the case of major non-compliance by insurers, the MAA is empowered to:

- Issue a 'letter of censure'
- Impose a civil penalty not exceeding \$50,000.<sup>165</sup>

**3.24** The *Regulatory and Enforcement Policy* indicates that the MAA will issue a 'breach notice' in respect of major non-compliance where the insurer is able to make out mitigating circumstances. The MAA advised the Committee that a breach notice carries no civil penalty:

A breach notice is a formal warning issued by the MAA to an insurer, however there is no penalty attached. If after consideration of any mitigating factors the MAA considers that the seriousness of an insurer's non-compliance warrants more than a breach notice, the MAA will apply one of the following penalties that are listed in terms of increasing severity: letter of censure; add new licence condition; civil penalty; publication of non-compliance; report to Minister; criminal penalty; suspension of licence; cancellation of licence.<sup>166</sup>

**3.25** Where the insurer is unable to make out mitigating circumstances, the MAA issues a 'penalty notice' imposing a civil penalty. In either case the MAA may request a report from the insurer on preventative/remedial action in respect of the major non-compliance.

## Measurements of insurer compliance in 2004-2005

**3.26** The MAA's 2004-2005 *Annual Report* indicates that the MAA is satisfied with the compliance of insurers with the guidelines and the Act:

The NSW CTP industry generally achieved high levels of compliance during the reporting period based on:

- the MAA's 2005 audit of compliance performance against the TRAC guidelines
- the insurers' 2004 compliance with self-assessment reports against the CHGs
- the number of complaints received by the MAA and the outcome of the complaint investigations.<sup>167</sup>

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<sup>164</sup> MAA, *Regulatory and Enforcement Policy*, pp4, 8-9

<sup>165</sup> *Motor Accidents Compensation Act 1999* (NSW), s166(1)

<sup>166</sup> Letter from the Hon John Della Bosca MLC, Minister for Commerce, to Committee Chair, 23 August 2006

<sup>167</sup> MAA, *Annual Report*, 2004-2005, p13

**3.27** In the following sections the Committee considers the various measures of insurer compliance referred to above, and notes the attitude of the insurers to the MAA's performance of its market regulator functions.

### **Complaints received by MAA in 2004-2005**

**3.28** The Committee notes that the MAA reported that it received 118 complaints in 2004-2005, 114 of which related to the management of claims by insurers. Of these complaints:

- 50 alleged a breach of the CHGs
- 9 alleged a breach of the TRAC guidelines
- 36 related to improper insurer behaviour, and
- 19 alleged that the insurer was not just and expeditious in resolving a claim.<sup>168</sup>

**3.29** Of these 118 complaints, 102 were finalised in 2004-2005, with 53 resolved in favour of the complainant and 42 resolved in favour of the insurer, with the balance of complaints found to be outside the jurisdiction of the MAA.<sup>169</sup>

### **Insurer self-assessment reports**

**3.30** The MAA has reported that it has reviewed insurer self-assessment reports for 2002 and 2003 and found that the reports were accurate and reliable based on the results of the MAA audit program.<sup>170</sup> The MAA has reported that insurer self-assessment reports 'improved significantly in quality and level of reporting detail' in 2004-2005, and that insurer compliance with the CHGs continues to improve.<sup>171</sup>

### **MAA Audit Program**

**3.31** The MAA conducted an audit of the Market Practice Guidelines in 2005, concluding that all insurers were compliant.<sup>172</sup> The MAA also conducted an audit of compliance with the TRAC Guidelines in 2005, finding that all 'insurers achieved an overall satisfactory rating out of the full range of criteria. Three of the six insurers exceeded the required standards with two achieving an overall commendable result and one (QBE) achieving an overall excellent result.'<sup>173</sup>

**3.32** The MAA has also reported improved outcomes for claimants as a result of insurer compliance with the Whiplash and Associated Disorder (WAD) Guidelines:

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<sup>168</sup> MAA, *Annual Report*, 2004-2005, p13

<sup>169</sup> MAA, *Annual Report*, 2004-2005, p13

<sup>170</sup> MAA, *Annual Report*, 2004-2005, p13

<sup>171</sup> MAA, *Annual Report*, 2004-2005, p88

<sup>172</sup> MAA, *Annual Report*, 2004-2005, p14

<sup>173</sup> MAA, *Annual Report*, 2004-2005, p88

After the introduction of the guidelines, insurers have made payments more quickly and have finalised claims more quickly. Insurer's payments on claims for WAD and lower back injuries are consistent with the guidelines. Most importantly, an independent evaluation by PricewaterhouseCoopers has confirmed that both the guidelines and the legislative reforms have improved the health outcomes of WAD claimants.<sup>174</sup>

### **Three instances of major non-compliance in 2004-2005**

- 3.33** The Committee notes that the MAA reported three instances of major non-compliance in 2004-2005. The MAA provided the following particulars of these incidents:

One of the three breaches involved an insurer not meeting its statutory duty to ensure the expeditious funding of a claimant's treatment (breach of section 84(2) of the *Motor Accidents Compensation Act 1999*). The other two breaches involved insurers who made late changes to their determinations on liability, and consequently were not expeditious in their duty to resolve the claim (breach of section 80 of the *Motor Accidents Compensation Act 1999*).<sup>175</sup>

- 3.34** The Committee notes that, in relation to the first breach, the MAA inquired into the insurer's claims handling processes and concluded that the insurer had taken appropriate remedial action to address the non-compliance. In respect of the latter two breaches, the MAA required the insurers to implement 'more rigorous policies and procedures for reviewing and approving liability determinations'.<sup>176</sup>

### **Insurer attitude to MAA Audit Program**

- 3.35** The Committee notes comments from Mr Dallas Booth, Deputy Chief Executive Officer of the Insurance Council of Australia (ICA), describing the MAA as occasionally 'excessive' and 'zealous' in its attitude to insurer compliance:

From the insurer's point of view I think there is occasionally a feeling of excessive and zealous auditing of obligations without necessarily taking account of the total situation in terms of claims handling generally, but I think that is something where those things occur, again it is an opportunity where insurers are capable of raising those matters with the MAA. We have an honest and sometimes very frank dialogue and it is good that we can and we appreciate the opportunity to be able to do that.<sup>177</sup>

- 3.36** The ICA suggested in evidence that the MAA's compliance strategy is directed solely at insurers, with little emphasis on compliance by claimants and their legal representatives. In this respect, Mr Booth stated that compliance by claimants was as essential to the smooth operation of the claims process as compliance by insurers:

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<sup>174</sup> MAA, *Annual Report*, 2004-2005, p88. The reference to legislative reforms is a reference to the 1999 scheme reforms designed to promote the faster rehabilitation of injured persons.

<sup>175</sup> MAA, *Response to questions on notice*, Q14.3, p15

<sup>176</sup> MAA, *Response to questions on notice*, Q14.3, p15

<sup>177</sup> Mr Booth, Evidence, 31 March 2006, p34

... insurers feel that on one side of the claim the insurer response to the claim is thoroughly audited and monitored on a regular basis, but often those who are responsible for the assistance of the claimant are not necessarily audited and in fact may not be audited at all but there are really, in order for the claims process to work very efficiently, the making of the claim and the provision of information has to be happening as efficiently as the handling of the claim and the assessment of the damages and the payment of the claim.<sup>178</sup>

## Criticism of insurer conduct and MAA oversight of insurer conduct

- 3.37 The Committee received a small number of submissions from Inquiry participants that alleged improper behaviour by some CTP insurers and/or inadequate oversight by the MAA. As the terms of reference prevent the Committee from investigating particular complaints, the Committee notes only the types of issues that were raised. The Committee also notes that it received very few submissions of this nature given the large number of CTP claims made against insurers every year.

### Allegations of bias on the part of MAA

- 3.38 One Inquiry participant submitted that there are no 'checks and balances' in the current system, and that the MAA is biased in favour of insurers and against claimants:

At this time there are no checks and balances in the existing system ... except the MAA of NSW which, in my personal experience of dealing with its officers, at both junior and senior levels, deals with claimants in an overtly prejudicial manner in all instances and with the CTP insurers and their representatives in a clearly biased manner.<sup>179</sup>

- 3.39 Another Inquiry participant submitted that the MAA appears to operate on the assumption that most claimants are making fraudulent claims, and fails to appreciate the needs of claimants to access treatment quickly:

The culture of the MAA is not a supportive, caring one designed to achieve rehabilitation of the injured person. There is no sense that when dealing with injured people, delays can cause serious deterioration of injuries. The attitudes and treatment I have received seemed to be based on a presumption that most claimants are making fraudulent claims.<sup>180</sup>

### Late withdrawals of liability

- 3.40 One Inquiry participant submitted that the MAA had failed to stop insurers abusing the exceptions allowing late withdrawals of liability, leading to higher legal costs for claimants:

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<sup>178</sup> Mr Booth, Evidence, 31 March 2006, p34

<sup>179</sup> Submission 6, p5

<sup>180</sup> Ms Robyn Brown, Submission 16, p1

Why is it the case that CTP Insurer's legal counsel can continue to use this mechanism in order to inflate claimant's legal costs and delay the expeditious resolution of their claim for compensation in the court system without the compliance section of the MAA enforcing the existing legislation?<sup>181</sup>

- 3.41** The NSW Bar Association also raised the issue of insurers making late withdrawals of liability, sometimes years after the initial admission of liability:

An insurer is required to issue a notice under s81 of the MAC Act within three months of receipt of a claim form either admitting or denying liability. The Bar Association is aware of some CTP insurers seeking to withdraw an admission of liability years after an initial admission was made. A number of such cases have resulted in complaints to the MAA.<sup>182</sup>

- 3.42** The Committee was advised that the MAA has remedied this problem by way of changes to policies and procedures for determining liability introduced on 1 January 2005, and that since that time 'there have been no subsequent withdrawals of an admission of liability.'<sup>183</sup>

- 3.43** A related issue is whether an insurer can withdraw an admission of liability made in court proceedings in circumstances where they could not withdraw a section 81 admission. This issue is discussed in Chapter 7.

#### **Alleged abuse of market power by insurers in respect of provision of treatment, rehabilitation and attendant care**

- 3.44** One Inquiry participant submitted that insurers abuse their market position to encourage providers of care and rehabilitation services to recommend treatment options on the basis of cost rather than need:

It is my experience that at the rehabilitation level insurers engage the least medically qualified people to assess both care and rehabilitation needs and they prescribe this agenda to be assessed not on a medical basis but on a cost basis and they exert undue influence and duress on the deliverers of these care and rehabilitation providers to pursue such agendas and outcomes that deliberately mitigate their exposure to cost level of care and rehabilitation and eventually compensation for damages as yet again they control the purse strings and the deliverers of these services dance to the Insurer's tune.<sup>184</sup>

- 3.45** Another Inquiry participant made a general criticism of the MAA's approach to overseeing the provision of treatment, rehabilitation and attendant care, arguing that the MAA does not view its role as being to ensure that optimum treatment is carried out promptly:

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<sup>181</sup> Submission 6, p6

<sup>182</sup> Submission 11, p10

<sup>183</sup> MAA, *Response to questions on notice*, Q37.1, p34

<sup>184</sup> Submission 6, p6

Part 2 of their stated role is ‘to promote appropriate treatment of injured persons.’  
*Why doesn’t the MAA see their role as one that oversees and ensures that optimum and quick rehabilitation is carried out? If it isn’t their role, then whose role is to ensure that this happens?*<sup>185</sup>

### Compliance rates

- 3.46** The Australian Lawyers Alliance submitted that ‘the MAA should be aiming for a higher level of CTP insurer compliance with treatment, rehabilitation and attendant care guidelines. Its present rating is only noted as “satisfactory”.’<sup>186</sup>

### Inadequate MAA/MAS complaints mechanism

- 3.47** One Inquiry participant submitted that the MAA has inadequate complaint handling mechanisms:

The MAA does not have a grievance handling process for internal and external complaints that would attempt to sort things out when they go wrong. (As the Insurance Ombudsman does not handle CTP complaints there is no one else to approach). I rang the MAA to complain and was given the number of the Insurance Enquiries Complaints Service, who gave me the number of the Insurance Ombudsman who informed me that they handle every form of insurance complaint except CTP, they gave me a number to call – it was the MAA.<sup>187</sup>

- 3.48** The Inquiry participant posed the question: ‘why doesn’t the MAS have any grievance handling procedures – for both internal and external complaints?’<sup>188</sup>

- 3.49** The Committee notes that the Insurance Ombudsman Service is an industry (rather than a government) ombudsman approved by the Australian Investment and Securities Commission (ASIC) with jurisdiction over participating insurers only.

- 3.50** The MAA advised the Committee that the Motor Accidents Assessment Service (MAAS) has an internal complaints handling process whereby ‘complaints are registered, acknowledged and then investigated by an appropriate administrative manager. Following investigation, the Assistant General Manager (MAAS) decides on the appropriate remedial action to be taken, if any, and responds to the complaint accordingly.’<sup>189</sup>

- 3.51** A review of the MAA web-site by the Committee reveals that the web-site does not clearly set out how to make a complaint, the acceptable subject matter of a complaint, or the MAA’s policy for dealing with complaints.

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<sup>185</sup> Submission 16, p1 (original emphasis)

<sup>186</sup> Australian Lawyers Alliance, Submission 12, p3

<sup>187</sup> Submission 16, p2

<sup>188</sup> Submission 16, p2

<sup>189</sup> MAA, *Response to questions taken on notice at hearing 31 March 2006*, p2

## **Difficulties associated with Nominal Defendant claims**

**3.52** The Committee received evidence from one Inquiry participant of difficulties experienced by him in filing a claim against the Nominal Defendant after suffering personal injury in a hit-and-run accident. For the purposes of the Act, the Nominal Defendant is the MAA. The Inquiry participant submitted that:

- 28 days is insufficient time to make an ANF claim in circumstances where the claim is against the Nominal Defendant
- Insurers should be obliged to advise potential claimants of the processes for making a claim against the Nominal Defendant.<sup>190</sup>

**3.53** The Committee put these suggestions to the MAA. The MAA advised the Committee that the Claims Handling Guidelines already require insurers to provide information to potential Nominal Defendant claimants, and that an ANF claim is not available in respect of claims against unidentified vehicles:

Based on the information provided, the claim in question appears to relate to a Nominal Defendant claim where the motor vehicle accident was caused by an unidentified vehicle. Clause 2.1 of the MAA Claims Handling Guidelines provides that, if a person lodges an ANF in circumstances where the vehicle at fault in the accident is unidentified:

*'The insurer will advise a person, who seeks to lodge an ANF where the vehicle held at fault in the accident is unregistered or unidentified, that an ANF is not applicable and provide the person with a claim form. The insurer will also advise that the completed claim form should be forwarded to the MAA for allocation under the Nominal Defendant Scheme within 6 months of the date of the accident.'*

The submission of the claim form also means that an injured person is able to pursue a claim if their treatment expenses exceed the \$500 threshold of the ANF and/ or if they wish to pursue a claim for other compensation entitlements not applicable to the ANF – e.g. loss of income.<sup>191</sup>

## **Committee comment**

**3.54** As noted at paragraph 3.3, the Committee has had regard both to the large number of motor accident claims, and to the impact of those claims on claimants, in considering the MAA's performance of its market regulator functions. The Committee was concerned to determine whether the MAA has in place:

- A regulatory framework capable of identifying and remedying instances of insurer non-compliance
- Strategies directed to the continual improvement of insurer compliance.

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<sup>190</sup> Name suppressed, Submission 5, p1

<sup>191</sup> MAA, *Response to questions on notice*, Q36.1, p33

- 3.55** The Committee notes that the MAA has put in place a range of guidelines to regulate the market behaviour of the licensed insurers. The Committee is of the view that the MAA is competently performing its functions in this area.
- 3.56** The MAA has already reviewed and updated some of these guidelines. For example, as noted at paragraph 3.14, the MAA has recently updated aspects of the Treatment, Rehabilitation and Attendant Care Guidelines. The Committee recommends that the MAA continue to regularly review and, where necessary, update, the various guidelines issued by it in respect of the market behaviour of insurers.
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### **Recommendation 5**

That the Motor Accidents Authority continue to regularly review and, where necessary, update, the various guidelines issued by it in respect of the market behaviour of insurers, including the *Market Practice Guidelines*, *Claims Handling Guidelines* and the *Treatment, Rehabilitation and Attendant Care Guidelines*.

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- 3.57** The Committee also sought evidence that the MAA is actively policing the Act and the various guidelines issued by it. The Committee is satisfied that the MAA has achieved these goals. In this respect, the Committee notes evidence from the ICA of occasional ‘zealousness’ on the part of the MAA in the performance of its audit program.
- 3.58** The Committee notes evidence from the ICA that the MAA is not concerned to regulate the compliance of claimants and their legal representatives. However, the Committee notes that the market regulator functions of the MAA are directed at the protection of consumers against the abuse of market power by insurers. In any event, as the compensation monies are in the hands of the insurers, the greatest incentive for a claimant to comply with their obligations is the prospect of their claim being delayed, whereas for insurers precisely the opposite is true.
- 3.59** In respect of the compliance of legal representatives, the Committee notes that the MAA does not have disciplinary powers in respect of solicitors or barristers. Complaints regarding legal representatives are best directed to the specialist bodies dealing with those persons, including the Law Society, the Bar Association, and the Legal Services Commissioner.
- 3.60** The Committee received a limited number of complaints regarding the conduct of insurers and the oversight of insurers by the MAA.
- 3.61** The Committee is unable to express any view in respect of allegations of bias on the part of the MAA, except to say that the Committee finds it unlikely that the MAA would exhibit systemic bias against claimants.
- 3.62** In respect of complaints regarding late withdrawals of liability, the Committee notes that the MAA has acknowledged and remedied this problem.
- 3.63** The Committee is concerned about the potential conflict between medical and financial considerations in the provision of treatment, rehabilitation and attendant care for claimants. The Committee notes that the MAA has taken steps to avoid such conflicts by issuing the TRAC Guidelines, which prohibit insurers from prioritising their commercial relationships with service providers over the needs of the injured. However, the Committee considers that

this is an area that should be kept under review by the MAA. The Committee therefore recommends that the MAA continue to closely monitor insurer compliance with the TRAC Guidelines to ensure that the medical needs of the claimants are not prejudiced by commercial relationships between insurers and service providers.

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### **Recommendation 6**

That the Motor Accidents Authority closely monitor insurer compliance with the Treatment, Rehabilitation and Attendant Care Guidelines to ensure that the medical needs of the claimants are not prejudiced by commercial relationships between insurers and service providers.

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- 3.64** In respect of compliance rates, the Committee notes that two insurers obtained a ‘commendable’ and one insurer (QBE) obtained an ‘excellent’ result. The Committee encourages the MAA to continue to work towards high compliance rates through the various techniques included in the *Compliance Strategy*, ranging from education to civil penalties.
- 3.65** The Committee notes the submission from one Inquiry participant that the MAA has inadequate complaints mechanisms. The Committee notes that the MAA does in fact accept and investigate complaints. However, as noted at paragraph 3.50, the MAA’s complaints policy is not clearly identified on the MAA web-site. The Committee therefore recommends that the MAA review its information strategy regarding its complaints handling procedures, and that the MAA publish on its web-site appropriate information regarding the making of complaints regarding NSW CTP insurers, and otherwise make this information available to members of the public.

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### **Recommendation 7**

That the Motor Accidents Authority (MAA) review its information strategy regarding its complaints handling procedures, and that the MAA publish on its web-site appropriate information regarding the making of complaints regarding NSW CTP insurers, and otherwise make the information available to members of the general public.

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- 3.66** One Inquiry participant submitted that the MAA should impose requirements on insurers to advise potential claimants against the Nominal Defendant (the MAA) of the processes for making such a claim. The Committee did not receive sufficient evidence to be able to conclude that insurers do not currently handle Nominal Defendant claims in an appropriate manner. However, the Committee recommends that the MAA review the Claims Handling Guidelines to determine whether the Guidelines, or any other guidelines issued by the MAA, should be amended to ensure that insurers provide appropriate information to potential Nominal Defendant claimants.

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### **Recommendation 8**

That the Motor Accidents Authority (MAA) review the Claims Handling Guidelines to determine whether the Guidelines, or any other Guideline issued by the MAA, should be amended to ensure that insurers provide appropriate information to potential Nominal Defendant claimants.

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## Chapter 4 MAA as dispute resolution service provider: the performance of the Motor Accidents Assessment Service

In this Chapter the Committee considers the performance of the Motor Accidents Assessment Service (MAAS) in resolving disputes regarding CTP claims. The MAAS is a division of the MAA and is comprised of the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS).

### Overview

- 4.1 One of the objects of the 1999 reforms to the motor accidents scheme was to increase the proportion of the premium dollar paid to claimants by reducing transaction costs such as legal fees. To that end, the *Motor Accidents Compensation Act 1999* (NSW) ('the Act') established an alternative dispute resolution regime in respect of both medical assessment and claims assessment. In addition, the Motor Accidents Compensation Regulation 2005 limits legal and medico-legal costs recoverable in most motor accidents claims.
- 4.2 Medical assessment refers to the determination by expert medical practitioners of questions of fact relating to injuries suffered by a claimant in a motor accident, including degree of Whole Person Impairment (WPI). Claims assessment refers to the determination by a legal practitioner of liability (or fault) for, and the quantum of damages payable in respect of, an injury to which the motor accidents scheme applies. Damages are assessed on a modified common law basis.
- 4.3 The great majority of motor accident claims are now resolved without recourse to the courts i.e. 'administratively'. The effectiveness of the MAA in administering the dispute resolution regime established by the Act is therefore critical to the successful operation of the motor accidents scheme as a whole. The MAA's dispute resolution functions are performed by the Motor Accidents Assessment Service (MAAS), which comprises the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS).
- 4.4 In this Chapter the Committee considers the performance of the MAA in its role as a provider of dispute resolution services. The Committee outlines the legislative background to medical assessment and claims assessment by the MAA, considers key performance indicators regarding the performance of the MAAS in resolving disputes, notes preliminary findings of a study of user perceptions of MAAS, and considers issues raised by Inquiry participants regarding MAS and CARS.

### Background

- 4.5 In circumstances where a claimant and insurer are agreed on liability and quantum of damages, there is no need for the claim to be resolved by the MAAS. However, where agreement is not possible, claimants and/or insurers may refer their dispute to the MAAS for resolution.

## Medical assessment under Part 3.4 of the Act

- 4.6 Part 3.4 of the Act provides for the medical assessment of personal injuries suffered in motor accidents in NSW. In short, the purpose of medical assessment is to determine disputed questions of fact regarding medical injuries suffered in a motor accident. A claimant or an insurer may refer a dispute regarding any of the following to a medical assessor appointed by the MAA for resolution:
- (a) whether the treatment provided or to be provided to the injured person was or is reasonable and necessary in the circumstances
  - (b) whether any such treatment relates to the injury caused by the motor accident
  - (c) whether an injury has stabilised
  - (d) the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident
  - (e) the degree of impairment of the earning capacity of the injured person as a result of the injury caused by the motor accident.<sup>192</sup>
- 4.7 A court or claims assessor may also refer a dispute regarding the above for medical assessment.<sup>193</sup>
- 4.8 Medical assessors are appointed by the MAA. Medical assessors are medical practitioners who continue to conduct their own medical practices. A finding by a medical assessor in respect of the following is binding on the parties, claims assessors and the courts:
- whether the degree of permanent impairment of the injured person is greater than 10%
  - whether any treatment already provided to the injured person was reasonable and necessary in the circumstances
  - whether an injury has stabilised.<sup>194</sup>
- 4.9 Other findings of fact made by a medical assessor are evidence of the existence of those facts, but are not binding.<sup>195</sup>
- 4.10 The Committee notes that medical assessors are under a duty to afford procedural fairness to parties to a medical assessment and to provide reasons for their findings.<sup>196</sup> Medical assessors enjoy an immunity from suit in respect of any thing done by them in good faith in the course of a medical assessment.<sup>197</sup>

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<sup>192</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s58

<sup>193</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s60

<sup>194</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s61(2)

<sup>195</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s61(3)

<sup>196</sup> *Motor Accidents Compensation Act 1999 (NSW)*, ss61(4) and 61(9)

<sup>197</sup> *Motor Accidents Compensation Act 1999 (NSW)*, s59A

- 4.11** Administratively, medical assessors appointed by the MAA under the Act form the Medical Assessments Service (MAS), which forms part of MAAS.
- 4.12** As the MAA states, expert determination by independent medical assessors avoids the ‘wasteful use of “duelling doctors” in the claims process.<sup>198</sup> Under the old scheme claimants and insurers engaged and paid for their own expert medical witnesses. Under the current scheme medical issues are resolved by a medical practitioner independent of both the claimant and the insurer. The cost of the medical assessment is born by the MAA, and ultimately by CTP policy-holders through the CTP levy.

#### **Claims Assessment under Part 4.4 of the Act**

- 4.13** Part 4.4 of the Act requires the MAA to establish the Claim Assessment and Resolution Service (CARS). Together with the MAS, CARS also forms part of MAAS.
- 4.14** Claimants and insurers must first attempt to resolve a dispute regarding liability or quantum between themselves before referring it to CARS. The Act provides that claimants must make a claim within six months of the date of the accident, or if the claim relates to the death of a person, within six months of the person’s death. Insurer’s have three months from the date of receipt of a claim to admit or deny liability. Where an insurer admits liability, including partial liability, the Act provides further time limits by which an insurer must make an offer of settlement. A claim cannot be referred to CARS until the expiration of two months from the date of the offer of settlement.<sup>199</sup>
- 4.15** After the expiration of the above time periods, a claimant or insurer may refer a dispute regarding fault or quantum of damages to a claims assessor for determination. The claims assessor is required to make findings on the basis of such information as is ‘conveniently available to the claims assessor, even if one or more of the parties to the assessment does not co-operate or ceases to co-operate.<sup>200</sup> The assessor is required to provide reasons for his or her decision.<sup>201</sup>
- 4.16** A finding by a claims assessor in respect of liability is not binding on either party to the assessment.<sup>202</sup> A finding by a claims assessor in respect of quantum is binding on the insurer, but not the claimant.<sup>203</sup> However, the effect of the costs regulation (discussed below) is that a claimant who wishes to contest a finding on quantum must do substantially better in Court or will suffer costs penalties.
- 4.17** Claims assessors have considerable flexibility in respect of claims assessment procedures, and may chose to adopt more or less formal arrangements, subject to the requirements of the Act, the Regulation and the Claims Assessment Guidelines. In this respect, the MAA stated:

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<sup>198</sup> MAA, *Annual Report*, 2004-2005, p90

<sup>199</sup> *Motor Accidents Compensation Act 1999* (NSW), ss72, 81, 82, 91

<sup>200</sup> *Motor Accidents Compensation Act 1999* (NSW), s94(2)

<sup>201</sup> *Motor Accidents Compensation Act 1999* (NSW), s94(5)

<sup>202</sup> *Motor Accidents Compensation Act 1999* (NSW), s95(1)

<sup>203</sup> *Motor Accidents Compensation Act 1999* (NSW), s95(2)

The CARS procedures are intended to be flexible with an emphasis on dealing with matters on the papers or at conference, rather than formal hearings.<sup>204</sup>

- 4.18** However, claims assessment proceedings do resemble court proceedings in some respects. The procedures of CARS, which resemble rules of court, are contained in regulations made by the Governor<sup>205</sup> and in Claims Assessment Guidelines issued by the MAA.<sup>206</sup> The Regulation includes limits on legal costs recoverable in motor accidents disputes.<sup>207</sup> Parties to an assessment are entitled to legal representation.<sup>208</sup> Claims assessors have the power to compel parties to attend an assessment and to produce documents and information relevant to the assessment, although they do not have the power to issue subpoenas to third parties.<sup>209</sup> Like medical assessors, claims assessors are immune from suit in respect of anything done in good faith in the course of claims assessment.<sup>210</sup>
- 4.19** The extent to which claims assessment proceedings have tended to become more formalised, and more akin to court proceedings, was an issue raised in the course of the Inquiry, and is discussed below at paragraph 4.81.
- 4.20** All disputes regarding liability and quantum must first be referred to CARS for assessment before they can be dealt with by the courts.<sup>211</sup> However, the regulation may provide for the exemption of certain classes of claims from this requirement. In addition, the Principal Claims Assessor may exempt claims from assessment by CARS on the basis that ‘it is not suitable for assessment’.<sup>212</sup>
- 4.21** The Act also provides for ‘special assessment’ by CARS of a range of disputes that may arise under the Act, such as whether a late claim should be time barred and exemptions for non-compliance with various requirements under the Act.<sup>213</sup>

### **MAAS Reform Agenda and the Hannaford consultation process**

- 4.22** The Committee has previously reported on the MAAS Reform Agenda, which was developed following the Hannaford consultation process conducted by the MAA with interested stakeholders. Recommendation 1 of the *Sixth Review* was that the Minister ‘provide the Committee with an update on the progress of the reforms for the Motor Accidents Assessment Service...’ The Government response to the *Sixth Review* stated that:

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<sup>204</sup> MAA, *Annual Report*, 2004-2005, p94

<sup>205</sup> *Motor Accidents Compensation Act 1999* (NSW), ss97 and 228

<sup>206</sup> *Motor Accidents Compensation Act 1999* (NSW), s69(1)

<sup>207</sup> Motor Accidents Compensation Regulation 2005, schedule 1

<sup>208</sup> *Motor Accidents Compensation Act 1999* (NSW), s104(2)

<sup>209</sup> *Motor Accidents Compensation Act 1999* (NSW), s100(1)

<sup>210</sup> *Motor Accidents Compensation Act 1999* (NSW), s103

<sup>211</sup> *Motor Accidents Compensation Act 1999* (NSW), s108

<sup>212</sup> *Motor Accidents Compensation Act 1999* (NSW), s92(1)(b)

<sup>213</sup> *Motor Accidents Compensation Act 1999* (NSW), s96

Between October 2003 and June 2004, the MAA held a series of consultation forums with key stakeholders to review the processes and procedures of the Motor Accidents Assessment Service (MAAS) as they affect service users and participants. Representatives from the legal and insurance industries, medical assessors of the Medical Assessment Service (MAS), claims assessors of the Claims Assessment and Resolution Service (CARS) and members of the Motor Accidents Board and the Motor Accidents Council participated in the forums.

The initiatives arising from the consultation forums form the basis of the proposed MAAS reform agenda. The key themes and aims of the reform agenda include:

Improve the climate for dispute resolution

Streamline assessment processes

Simplify internal processes.<sup>214</sup>

- 4.23** The MAA advised the Committee that the Reform Agenda is expected to reduce the costs of administering MAAS by improving the quality and timeliness of MAS and CARS assessments.<sup>215</sup>
- 4.24** The Committee notes that the MAA gazetted revised *Medical Assessment Guidelines* and *Claims Assessment Guidelines* in March 2006. The new guidelines came into effect on 1 May 2006. The MAA advised the Committee that legislation to affect other elements of the MAAS Reform Agenda will be introduced into Parliament in 2005-2006.<sup>216</sup>
- 4.25** The MAA advised the Committee that the major changes effected by the revised *Medical Assessment Guidelines* include: clarifying the procedures and requirements for the lodgement of applications for medical assessment and replies; reducing by half the timeframe in which officers of MAS are to register applications, provide copies of documents and advise parties of outcomes; providing a simplified method for addressing obvious errors; and clarifying that all documents that parties intend to rely on should be provided in the application or reply.<sup>217</sup>
- 4.26** The major changes to the *Claims Assessment Guidelines* are as follows: clarifying the procedures and requirements for the lodgement of applications for claims assessment and replies; reducing by half the timeframe within which the Principal Claims Assessor is required to make a determination regarding an application for exemption; tightening the timeframe within which the Principal Claims Assessor or an officer of CARS is to allocate a matter to an assessor for assessment; providing that allegations of false or misleading statements give rise to a discretionary exemption ground as opposed to a mandatory exemption ground so that all claims are assessed on the merits; and clarifying that CARS assessors have the power to dismiss applications that are not being pursued or where directions are not being complied with.<sup>218</sup>

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<sup>214</sup> *Government response to the Sixth Review of the exercise of the functions of the MAA and MAC*, p1

<sup>215</sup> MAA, *Response to questions on notice*, Q22.4, p23

<sup>216</sup> *Government response to the Sixth Review*, p1

<sup>217</sup> MAA, *Response to questions on notice*, Q11.2, p13

<sup>218</sup> MAA, *Response to questions on notice*, Q12.2, p13

- 4.27 Other changes suggested as part of the Reform Agenda include joint lodgement of documents at CARS/MAS by claimants and solicitors, new MAAS forms and electronic lodgement of documents.<sup>219</sup>
- 4.28 The Committee understands that the MAA has continued to consult with stakeholders subsequent to the completion of the Hannaford consultations through its MAAS Reference Group.<sup>220</sup>

### **MAAS Claims Advisory Service**

- 4.29 The Committee notes that the MAA provides an ‘outreach’ service for claimants without legal representation who make an application either to CARS or MAS. In this respect, the MAA stated that the MAA Claims Advisory Service:

... provides procedural advice and general support and information to direct claimants. The service seeks to ensure that direct claimants have a complete understanding of the MAS and CARS processes and procedures, and that all relevant information is provided to the particular dispute resolution service.<sup>221</sup>

- 4.30 The Claims Advisory Service is available to assist unrepresented claimants ‘complete applications and replies, offers reminders of appointments and explains the options available once an application has been finalised.’<sup>222</sup>

### **Relationship between MAA and Workcover**

- 4.31 The Committee notes that the MAA and Workcover share premises at 1 Oxford Street, Darlinghurst. The Committee inquired of the MAA whether there was any scope for integration of the operations of the MAA and Workcover. The MAA advised the Committee that there is no scope for such integration:

Whilst the Motor Accidents Assessment Service and Workers Compensation Commission share a floor of office space at 1 Oxford Street, Darlinghurst, the services do not share a registry or support services. The MAA does not consider that there is scope for integration of accreditation protocols for Claims Assessment and Resolution Service (CARS) claims assessors and Workers Compensation Commission arbitrators. The MAA does not ‘accredit’ claims assessors. Claims assessors who are recruited to CARS must be legally qualified, personal injury experts and experienced in assessing motor accidents claims. Arbitrators involved in the workers compensation scheme, on the other hand, are selected according to a very different set of criteria.<sup>223</sup>

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<sup>219</sup> MAA, *MAAS Bulletin*, November 2005, pp2-3

<sup>220</sup> MAA, *MAAS Bulletin*, November 2005, p2

<sup>221</sup> MAA, *Response to questions on notice*, Q25.1, p24

<sup>222</sup> MAA, *Response to questions on notice*, Q25.1, p24

<sup>223</sup> MAA, *Response to additional questions on notice*, Q1.12, pp7-8

## Performance of the Motor Accidents Assessment Service

**4.32** In this section the Committee considers the performance of MAS and CARS against key indicators, including the number of applications and assessments and the quality and timeliness of assessments, and notes a number of performance-related issues affecting MAS and CARS.

### Performance of the Medical Assessments Service

#### *Number of applications and number of assessments*

**4.33** The MAS received 5,693 applications for medical assessment in 2004-2005, comprising:

- 657 applications in respect of treatment disputes
- 3,421 applications in respect of permanent impairment and stabilisation
- 648 applications in respect of earning capacity
- 967 applications for further medical assessment.<sup>224</sup>

**4.34** The MAA reports that the number of applications received by MAS has decreased over the last three years. In this respect the MAA stated that:

This was so for treatment disputes, permanent impairment/stabilisation disputes, and disputes about earning capacity, although the reduction in the number of impairment/stabilisation disputes was not as pronounced as the other types of disputes.<sup>225</sup>

**4.35** However, applications for further medical assessment have increased in the same period.<sup>226</sup> The Committee notes that further medical assessment refers to a second or subsequent medical assessment to take account of deterioration in an injury in the period since the initial assessment, and is to be distinguished from medical review, which is effectively an appeal from the original assessment by way of a new assessment. Medical reviews are discussed further below at paragraph 4.53.

**4.36** Although the MAA does not express a view as to the reasons behind the fall in the number of MAS applications, the Committee assumes that a contributing factor is the fall in the total number of motor accidents claims discussed in Chapter Two.

**4.37** MAS completed 4,526 assessments in 2004-2005, down from 6,003 assessments in 2003-2004, comprising:

- 440 treatment assessments
- 2,980 permanent impairment and stabilisation assessments
- 581 earning capacity assessments

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<sup>224</sup> MAA, *Annual Report*, 2004-2005, p90

<sup>225</sup> MAA, *Annual Report*, 2004-2005, p90

<sup>226</sup> MAA, *Annual Report*, 2004-2005, p90

- 525 further medical assessments.<sup>227</sup>

***Quality and timeliness of MAS assessments***

- 4.38 The Committee reported on the timeliness of MAS assessments as part of the *Sixth Review*, noting that ‘delays in the claims handling process can contribute to increased stress to claimants’ and encouraging ‘actions to streamline and speed up the claims process.’<sup>228</sup>
- 4.39 The Committee notes that the timeliness of matters finalised has improved in every accident year to date.<sup>229</sup> In 2003-2004, the last year for which figures are available, the MAA reported the following finalisation rates:
- 35% finalised in 5 months
  - 86% finalised in 9 months
  - 94% finalised in 12 months.<sup>230</sup>
- 4.40 The Committee notes that the average life cycle of an MAS assessment in 2004-2005 was 142 days.<sup>231</sup> The MAA has advised that the life cycle of a complaint is effected by a number of issues that arise during the course of the assessment process, including the following:
- late lodgement of replies to applications
  - further information needed from parties to clarify injuries/ issues before deciding on appropriate referral
  - availability of assessors and assessor utility
  - appointments requiring rescheduling by parties (up to 10%)
  - failure to attend by parties.<sup>232</sup>
- 4.41 The MAA advised the Committee that it aims to reduce the MAS life cycle to 132 days by 31 December 2006.<sup>233</sup>
- 4.42 The MAA has reported on the percentage of assessments which meet statutory time frames for the progress of assessments:
- 97% of applications were on time
  - 99% of MAS replies made on time
  - 33% of preliminary assessments done on time (within 15 working days).<sup>234</sup>

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<sup>227</sup> MAA, *Annual Report*, 2004-2005, p90

<sup>228</sup> *Sixth Review*, p37

<sup>229</sup> MAA, *Annual Report*, 2004-2005, p21

<sup>230</sup> MAA, *Annual Report*, 2004-2005, p21

<sup>231</sup> MAA, *Annual Report*, 2004-2005, p21

<sup>232</sup> MAA, *Response to questions on notice*, Q19.5, p20

<sup>233</sup> MAA, *Response to questions on notice*, Q19.3, p19

- 4.43** The MAA did not provide an explanation as to why such a low percentage of preliminary assessments are completed on time.
- 4.44** The MAA reviews medical assessment determinations for compliance with the MAA's quality assurance (QA) standards. In 2004-2005:
- 68% of MAS certificates/reports met QA standards, and
  - 50% of assessment determinations referred to a review panel resulted in no change to the outcome.<sup>235</sup>
- 4.45** The Committee notes significant recent improvements in QA compliance by MAS assessors. The MAA advised the Committee that 'In the six month period from 1 July 2005 to 31 December 2005, 82% of medical assessments met the Quality Assurance standards. That is an increase of 12% compared to the previous financial year.'<sup>236</sup>
- 4.46** The Committee also notes the MAA's stated desire to further improve QA:

As the new Quality Assurance measures take effect, the number of certificates/reasons issued by MAS assessors containing obvious errors that require amendment should continue to improve towards a compliance target of 85%-90% by 31 December 2006.<sup>237</sup>

- 4.47** The Committee notes that the MAA has taken steps to improve the quality and timeliness of MAS assessments, including:
- Standardisation of MAS reporting templates
  - Ongoing education and peer exchange programs for MAS assessors, including newsletters, forums and targeted training programs
  - The introduction of a new QA approach to medical assessments, including the appointment of a dedicated QA officer.<sup>238</sup>

### ***Whole Person Impairment assessments***

- 4.48** Claimants are entitled to damages for non-economic loss in respect of personal injury under the motor accidents scheme only if their degree of WPI exceeds 10% and is permanent, calculated according to the American Medical Association Guides to the Evaluation of Permanent Impairment ('AMA Guides'). The AMA Guides are subject to an interpretive gloss prepared by the MAA and contained in MAA Guidelines for the Assessment of the Degree of Permanent Impairment.
- 4.49** Of the 2,783 determinations regarding WPI made by the MAS in 2004-2005, only 567 were determined in favour of claimants.<sup>239</sup> These figures may indicate that too many unmeritorious

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<sup>234</sup> MAA, *Annual Report*, 2004-2005, p21

<sup>235</sup> MAA, *Annual Report*, 2004-2005, p20

<sup>236</sup> MAA, *Response to questions on notice*, Q19.1, p19

<sup>237</sup> MAA, *Response to questions on notice*, Q19.2, p19

<sup>238</sup> MAA, *Annual Report*, 2004-2005, pp20, 22

WPI claims are being lodged with MAS. The Committee notes progress on this issue achieved in the course of the MAAS Reform Agenda. The MAAS trialled a new system whereby insurers, when rejecting a claim for non-economic loss, are required to provide claimants with an enhanced statement of the reasons on which the decision to reject the claim was based.

- 4.50** The MAA has stated that the results of the trial show a 20% fall in the number of WPI disputes referred to MAS. Half of this reduction related to concessions made by the insurer that the claimant was over 10% WPI, and half resulted from concessions by claimants that they did not exceed the 10% WPI threshold.<sup>240</sup> The Committee also notes that, under the trialled system, the outcome of WPI disputes corresponded with the position taken by the insurer in 92% of disputes.<sup>241</sup> The new procedure will become mandatory for all WPI disputes.<sup>242</sup> The Committee also notes that the MAA has targeted WPI awareness programs at MAAS users in order to ‘reduce inefficiencies in the current scheme’.<sup>243</sup>

#### ***Continued fall in treatment disputes***

- 4.51** In the course of the *Sixth Review* the Committee noted the decreasing number of disputes referred to MAS regarding treatment. The MAA advised the Committee that the fall in treatment disputes was due to MAA initiatives to educate and assist parties in identifying and using appropriate treatment options, for example, by issuing treatment guidelines in respect of particular injuries.<sup>244</sup> The Committee notes that the number of treatment disputes referred to MAS for assessment fell in 2004-2005, continuing the trend established in earlier years.<sup>245</sup>

- 4.52** The Committee revisited this issue during the current Inquiry. The MAA advised the Committee that:

The treatment guidelines are considered to have generally contributed to both a reduction in disputes at MAS or are useful in resolving disputes that are referred. Statistical information collected by MAS indicates that, since the second half of 2002, the number of overall treatment dispute applications being referred to MAS has been decreasing. This data cannot, however, definitively state whether or not the treatment guidelines published by the MAA have had an effect on the number of treatment dispute applications referred to MAS.<sup>246</sup>

#### ***Review applications***

- 4.53** Review applications are only accepted if the Proper Officer of the MAS is satisfied that there is ‘reasonable cause to suspect that the assessment is incorrect in a material respect’.<sup>247</sup> Of the

<sup>239</sup> MAA, *Annual Report*, 2004-2005, p91

<sup>240</sup> MAA, *MAAS Reform Agenda Update*, October 2005, p16

<sup>241</sup> MAA, *MAAS Reform Agenda Update*, October 2005, p17

<sup>242</sup> MAA, *MAAS Reform Agenda Update*, October 2005, p18

<sup>243</sup> MAA, *MAAS Reform Agenda Update*, October 2005, p19

<sup>244</sup> *Sixth Review*, p46

<sup>245</sup> MAA, *Annual Report*, 2004-2005, p90

<sup>246</sup> MAA, *Response to questions on notice*, Q46.2, p40

<sup>247</sup> MAA, *Annual Report*, 2004-2005, p23

973 review applications determined by the MAS in 2004-2005, only 180, or 18%, were accepted.

**4.54** Of the 144 reviews conducted by MAS in 2004-2005:

- 72 (50%) reversed the outcome of the original determination
- 49 (34%) altered a detail of the original determination
- 23 (19%) confirmed the original certificate.<sup>248</sup>

**4.55** The significance of these figures was the subject of some debate between Inquiry participants. The NSW Bar Association cited the figures as an example of wide spread failings in the motor accidents scheme. In this respect, Mr Letherbarrow SC stated:

If you have a look at the MAA's own report this year, of the matters that go to review from MAA's assessors, 50 percent are reversed, and that has been the case for a number of years, by their own internal assessment process. Another 35 percent are altered in a significant way. So of all the matters that go to review, something like 84 percent are successful. Of court appeals, 20 percent are successful. To me there are so many things wrong with it, I could spend hours here giving you chapter and verse and example after example.<sup>249</sup>

**4.56** However, the Minister for Commerce, Hon John Della Bosca MLC, pointed out in correspondence to the Committee that the number of MAS determinations overturned on review was less than 1% of the total number of determinations made by MAS since the introduction of the new scheme in 1999.<sup>250</sup>

#### ***Amendment of assessment certificates***

**4.57** In the course of the *Sixth Review* the Committee was advised that the MAA had sought amendments to 25% of MAS certificates reviewed by it, and that 18% of the requests for amendments related to matters of methodology and reasoning. An MAS certificate records the assessor's determination of the dispute. The assessor retains a discretion not to make the suggested amendments under cl 10.1 of the *Medical Assessment Guidelines*. The Committee expressed concern on the number of amendments being sought by the MAA and recommended that the MAA report to the Committee on the particulars of the amendments.

**4.58** The Government response to the *Sixth Review* provided the following details of the requests for amendments:

- The report did not provide required reasons for a decision (6%)
- The report did not include details of apportionment between accident related and other injuries (3%)
- The report did not include all issues or injuries referred to for assessment (3%)

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<sup>248</sup> MAA, *Annual Report*, 2004-2005, p23

<sup>249</sup> Mr Letherbarrow SC, Evidence, 31 March 2006, p38

<sup>250</sup> Letter from the Hon John Della Bosca MLC, Minister for Commerce, to the Committee Chair, 9 May 2006, p1

- The report did not include details of findings on examination in an impairment assessment (3%)
- The report contained an inconsistency between a finding and the assessment outcome (stabilisation and earning capacity disputes) (2%)
- The report did not follow the prescribed method for assessing whole person impairment (1%).<sup>251</sup>

**4.59** The Committee notes that the MAAS has changed the way it reviews MAS certificates since the *Sixth Review*. In this respect, the MAA advised the Committee that ‘From 1 January 2006, MAS assessors have been required to submit final decisions only and therefore no quality assurance checks or requests for amendment have been undertaken prior to publication of the decision to the parties.’<sup>252</sup> The Committee notes that this requirement has been formalised in the revised MAA *Medical Assessment Guidelines*. The MAA has stated that it has moved its QA focus from pre-publication checking of assessment certificates to a ‘comprehensive Post-publication QA program, [which] focuses on MAS Assessor development’.<sup>253</sup>

**4.60** The Committee also notes that no Inquiry participant raised the number of amendments required of MAS assessment certificates as an ongoing issue in the course of the *Seventh Review*. However, research by the Justice Policy Research Centre indicates a deep suspicion on the part of claimant and insurer solicitors regarding this practice. This issue is discussed further at paragraph 4.63.

#### ***Committee comment***

**4.61** The efficient performance of MAS is critical to the successful operation of the motor accidents scheme. The Committee notes that the performance of MAS improved in 2004-2005. The continuing fall in treatment disputes indicates that the MAA’s treatment guidelines are providing valuable guidance to claimants and insurers, enabling them to resolve more disputes without recourse to MAS. Improvements in quality assurance compliance by MAS assessors are also encouraging. On the issue of assessment reviews, the Committee notes that, although 50% of review applications have resulted in a reversal of the original assessment, this number represents less than 1% of all MAS determinations since the introduction of the new scheme. The Committee considers that this is an outstanding result.

**4.62** An issue of concern for the Committee is the number of whole person impairment (WPI) disputes being referred to MAS, and the outcomes of those disputes. WPI assessment outcomes dramatically favour insurers, suggesting that there may be room to further reduce the number of disputes regarding WPI. The Committee notes that this is a difficult issue, and that the MAA has taken steps to address it as part of the MAAS Reform Agenda. The Committee recommends that the MAA continue to monitor the number of WPI disputes referred to MAS for assessment with a view to further reducing, if possible, the number of disputes regarding WPI.

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<sup>251</sup> *Government response to Sixth Review*, p4

<sup>252</sup> MAA, *Response to additional questions on notice*, Q2(f), p3

<sup>253</sup> MAA, *MAAS Reform Agenda Update*, October 2005, p33

- 4.63** As discussed in previous reports of this Committee and at paragraph 4.57 above, MAS certificates are reviewed by the MAA for compliance with QA standards. This may involve review of the methodology and reasoning of the assessor. As noted at paragraph 4.94, both claimant and insurer solicitors have expressed concern regarding this issue. The Committee notes that, following the *Sixth Review*, MAS changed its practices in this regard so that QA checks are only conducted on final certificates and reasons, and not on draft certificates and reasons. The Committee is hopeful that this change will ameliorate the concerns of solicitors noted above.

### **Recommendation 9**

That the Motor Accidents Authority continue to monitor the number of Whole Person Impairment (WPI) disputes referred to the Medical Assessment Service for resolution with a view to further reducing, if possible, the number of disputes regarding WPI.

## **Performance of the Claims Assessment and Resolution Service**

### ***Number of applications and number of assessments***

- 4.64** CARS received 4,418 applications for assessment in 2004-2005, a reduction of 8% from 4,803 applications received in 2003-2004.<sup>254</sup> These applications comprised:
- 1,712 (39%) applications for exemption from assessment
  - 2,470 (56%) general assessment applications
  - 10 (0%) further assessment applications
  - 226 (5%) special assessment applications.<sup>255</sup>
- 4.65** In the same period CARS completed 2,137 assessments, almost equal to the 2,139 assessments completed in 2003-2004, comprising:
- 1,442 (68%) exemptions
  - 544 (25%) general assessments
  - 1 (0%) further assessment
  - 150 (7%) special assessments.<sup>256</sup>
- 4.66** The Committee notes that the significant difference between the number of general assessment applications and the number of completed general assessments is largely due to the large number of claims settled subsequent to the making of an application for assessment. As the MAA has reported, in 2004-2005, 63% of applications for general or further assessment

<sup>254</sup> MAA, *Annual Report*, 2004-2005, p94

<sup>255</sup> MAA, *Annual Report*, 2004-2005, p94

<sup>256</sup> MAA, *Annual Report*, 2004-2005, p94

were settled, and only 22% were assessed.<sup>257</sup> This is consistent with experience in previous years.

### ***Quality and timeliness of CARS assessments***

**4.67** The MAA reported that in 2004-2005, 95% of CARS certificates or reasons required no amendment. The MAA also reported on the timeliness of CARS applications, indicating that:

- 87% of preliminary conferences were held on time
- 95% of preliminary conference reports submitted were on time
- 34% of assessment conferences that resulted in an assessment were on time
- 62% of matters were deferred at least once
- 63% of reasons and certificates were completed on time.<sup>258</sup>

**4.68** In the 2003-2004 application year, the last year for which the figures are available:

- 48% of applications were completed within five months
- 63% were finalised within nine months
- 72% were finalised within 12 months.<sup>259</sup>

**4.69** The average life cycle of a CARS proceeding is 243 days.<sup>260</sup> The MAA indicated that it expects the MAAS Reform Agenda to reduce the life cycle of CARS proceedings, but did not specify by how much the life cycle was expected to fall.<sup>261</sup>

**4.70** The MAA reported that it had undertaken several initiatives in 2004-2005 to improve the quality and timeliness of CARS assessments, including:

- Conducting a performance audit of CARS assessors from scheme inception to November 2004, with feedback provided to assessors, and the development of bench marks for future performance reviews
- Ongoing communication, education and peer exchange programs
- The use of a selection and reappointment process.<sup>262</sup>

**4.71** The Committee notes that the MAA appointed 12 additional CARS assessors in November 2004, and does not anticipate increasing the number of assessors in the near future.<sup>263</sup>

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<sup>257</sup> MAA, *Annual Report*, 2004-2005, p95

<sup>258</sup> MAA, *Annual Report*, 2004-2005, pp20-21

<sup>259</sup> MAA, *Annual Report*, 2004-2005, p21

<sup>260</sup> MAA, *Annual Report*, 2004-2005, p21

<sup>261</sup> MAA, *Response to questions on notice*, Q20.5, p21

<sup>262</sup> MAA, *Annual Report*, 2004-2005, p20

<sup>263</sup> MAA, *Response to questions on notice*, Q20.5, p21

- 4.72** The Committee understands that the MAA is conducting a survey of claimant's experience of CARS.<sup>264</sup> The Committee looks forward to viewing the results of this survey as part of the next review.

#### ***Delays at allocation phase***

- 4.73** The MAA reported in the *MAAS Bulletin* for February 2006 that the 'main driver of the overall CARS finalisation rate is general assessment applications.'<sup>265</sup> In this respect, the MAA noted that delays in the referral phase, during which an application is allocated to an assessor, tend to impact of finalisation rates:

... there is a direct relationship between the time taken to finalise a matter and the time taken to complete the allocation and preparation phases. In particular, deferrals at these phases invariably mean a matter will exceed the statutory time frame before finalisation.<sup>266</sup>

- 4.74** The Committee notes that the primary reason for delays at the allocation phase is the lodgement of CARS and MAS applications simultaneously. In this respect, the MAA stated that:

Lodging CARS and MAS applications at the same time .... creates an inbuilt deferral period where the CARS matter cannot proceed until all related MAS matters are finalised.<sup>267</sup>

- 4.75** The Committee queried whether the simultaneous lodgement of CARS and MAS applications tended to indicate a lack of understanding of the distinct roles of MAS and CARS on the part of claimants and their solicitors. The MAA advised the Committee that this was not the case, and that this problem 'relates to the late lodgement of disputes rather than a lack of understanding on the part of claimants and solicitors about the roles of MAS and CARS.'<sup>268</sup>

#### ***Late assessment conferences***

- 4.76** The *Claims Assessment Guidelines* provide that an assessment conference is to be held within 25 days after a preliminary conference.<sup>269</sup> As noted at paragraph 4.67, only 34% of all CARS assessment conferences were held on time. The MAA advised the Committee that the length of time from preliminary conference to assessment conference in the period between 1 July 2004 and 30 June 2005 was as follows:

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<sup>264</sup> MAA, *Annual Report*, 2004-2005, p20

<sup>265</sup> MAA, *MAAS Bulletin*, February 2006, p3

<sup>266</sup> MAA, *MAAS Bulletin*, February 2006, p3

<sup>267</sup> MAA, *MAAS Bulletin*, February 2006, p3

<sup>268</sup> MAA, *Response to additional questions on notice*, Q1.14, p8

<sup>269</sup> MAA, *Claims Assessment Guidelines*, cl 10.8

<b>Number of days</b>	<b>Number of conferences</b>	<b>%</b>
0 to 25	366	33.5%
26 to 35	150	13.7%
36 to 45	164	15.0%
46 to 55	159	14.5%
56 to 65	113	10.3%
66 or more	141	12.9%
<b>Total</b>	<b>1093</b>	<b>100.0%</b>

**4.77** The MAA advised that the reason why so many assessment conferences were not held on time was because ‘the parties were not ready to “take a date” within that time period’ for various reasons including:

- applications were not properly prepared
- ‘assessors allowing the parties a reasonable time period to comply with directions to prepare the matter for assessment (i.e. a typical situation allowing three weeks for the claimant to submit their material and then two weeks for the insurer to submit their material takes the date of assessment beyond 25 days)’
- ‘difficulties were experienced in finding a date convenient to the assessor, the claimant and the claimant’s legal representatives, the insurer and the insurer’s legal representatives.’<sup>270</sup>

**4.78** The MAA advised the Committee that, although the timing of an assessment conference is largely in the hands of the parties, the MAA has amended the *Claims Assessment Guidelines* to ensure that the parties are properly prepared for a conference, thus reducing the prospect of further delays:

The timeliness of the assessment conference is very much in the hands of the parties. It is essential that claims are prepared in order to ensure a true and proper assessment is made and the MAA has taken steps to ensure that the parties to a dispute (both claimants and insurers) are prepared at the time an application for general assessment is lodged. The revised MAA *Claims Assessment Guidelines* and general assessment forms require the parties to a dispute to lodge all supporting documentation and provide a summary of the case at the time that the application is lodged. The Guidelines also provide for the lodgement of additional information only at the request of the claims assessor or by consent of both parties. It is anticipated that the overall time between lodgement and assessment conference will decrease as a result of these reforms.<sup>271</sup>

<sup>270</sup> MAA, *Response to questions on notice*, Q20.1, p20

<sup>271</sup> MAA, *Response to questions on notice*, Q20.3, p21

### ***Review of CARS assessments in the Supreme Court***

- 4.79** The Committee is aware that a party has sought judicial review of a CARS assessment in the Supreme Court on only six occasions since 1999, out of a total of over 17,000 CARS assessments in that period.<sup>272</sup>
- 4.80** The Committee understands that insurers commenced all of the six applications and that only one application proceeded all the way to judgement. In *Richards v Richards* [2006] NSWSC 140, decided on 16 March 2006 by Malpass M, the Supreme Court considered a challenge to the validity of a CARS assessment for jurisdictional error. The challenge succeeded on the grounds that the assessor had incorrectly awarded damages for attendant care services where the statutory threshold had not been met.

### ***Complexity of CARS processes***

- 4.81** The Committee received submissions that, as the scheme has developed, CARS assessments have tended to become more formalised and to more closely resemble court proceedings. In this respect the NSW Bar Association submitted that:

The costs regulations were predicated on the belief that CARS would operate as a cheap and efficient method for resolving disputes. The system is no longer quick, efficient or cheap. In particular, CARS assessors have imposed onerous requirements upon claimants as part of ‘standard direction’ for the preparation of a CARS assessment. In addition to a claim form, a Statement of Particulars and a completed CARS Application, a claimant is now regularly directed to provide:

- (i) a list of all documents before the CARS assessor
- (ii) a schedule of out-of-pocket expenses
- (iii) a submission on the technical application of the MAC Act to the economic loss claim
- (iv) statements from all witnesses
- (v) a chronology
- (vi) a complete schedule of damages
- (vii) written submissions in support of the schedule of damages.

This level of preparation is beyond that required for a court hearing.<sup>273</sup>

- 4.82** The Committee notes that the Bar Association’s submission on this point was made in the context of the Association’s submission that the costs recoverable in CARS proceedings should be increased. This issue is discussed at paragraphs 4.117 to 4.133.
- 4.83** The Committee put the Bar Association’s view to the MAA. The MAA responded by pointing to several procedural improvements available under the new scheme:

<sup>272</sup> See MAA, *Response to questions on notice*, Q21.1, p22

<sup>273</sup> Submission 11, p12

While a strict comparison of old scheme cases versus new scheme cases is not possible, the following observations may be made:

- For a claimant to prove his or her case in the District Court or at CARS, a similar amount of documentation including tax returns, letters from employers, medical reports and accounts is required. The number of medical reports required under the new scheme has reduced due to the involvement of MAS.
- The CARS forms are simpler than the Statement of Claim, Defence and Statement of Particulars that are required to be filed in the District Court.
- Both CARS and the Court require schedules of damages to be prepared.
- New CARS forms commencing from 1 May 2006 are significantly streamlined.<sup>274</sup>

#### ***Committee comment***

- 4.84** The Committee notes the challenges faced by the MAA in respect of the administration of CARS. On the one hand, the MAA is required to process claims assessments as quickly as possible, and with minimal expense. However, in order to promote more consistent outcomes (itself an important aspect of justice) it may be necessary to develop more formal procedures. These priorities tend to conflict.
- 4.85** Further, many aspects of the performance of CARS are, in some respects, outside the control of the MAA. If claimants do not comply with timetables or do not prepare adequately for an assessment, delays will inevitably follow. The Committee is reluctant to encourage the MAA to take a more punitive approach to non-compliance by claimants.
- 4.86** On a more positive note, the small number of judicial review applications filed in the Supreme Court in respect of a CARS assessment tends to indicate that CARS assessments are overwhelmingly conducted according to law. Further, the MAA's statistics referred to above do not indicate that there are any significant systemic issues in respect of the administration of CARS. Rather, the concern of the Committee is that there should be a culture of continual improvement at CARS, especially given the relatively youthful nature of the system.
- 4.87** As noted above, the MAA has recently introduced changes to the operation of CARS as part of the MAAS Reform Agenda. The Committee is interested in whether the reforms will address the issues raised by the Bar Association regarding the tendency of CARS applications to become more formalised and complex over time. The Committee anticipates inquiring into the implementation of the MAAS Reform Agenda as part of its *Eighth Review*.
- 4.88** In the following sections of this Chapter the Committee discusses user perceptions of MAAS and notes a number of issues raised by Inquiry participants in the course of this Inquiry regarding the performance of MAS and CARS.

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<sup>274</sup> MAA, *Response to questions on notice*, Q20.6, p21

## User perceptions of MAS and CARS

**4.89** The Committee notes that the MAA has commissioned a series of reports on user perceptions of MAS and CARS from the Justice Policy Research Centre (JPRC) at the University of Newcastle, Faculty of Law. The MAA provided the Committee with copies of preliminary reports by the JPRC. In this section the Committee notes some of the key findings of this research.

### Claimant perceptions of MAS

**4.90** The JPRC report indicates that claimants' perceptions of MAS are generally ambivalent or supportive, although the system was commonly thought to operate slowly. Some of the key findings of the study were as follows:

- There was no strong preference amongst claimants for either court based assessment or assessment by MAS
- Claimant perceptions of MAS assessors were generally favourable
- Claimants tended to rate the administration of MAS favourably (eg, clarity of correspondence)
- The majority of claimants rated the timeframe between referral of the dispute to the MAS and attendance at the medical assessment as slow
- Claimants tended to have little familiarity with the Claims Advisory Service, although those who did recall having contact with the Service rated it positively.<sup>275</sup>

### CTP insurer perceptions of MAS

**4.91** The JPRC report indicates that insurers tend to regard MAS positively, with over 90% rating it as fair, although there was some disquiet over the fact that some MAS determinations are non-binding. Some of the key findings of the report were as follows:

- The majority of insurers rated the MAS as effective
- 90% of insurers rated the MAS as fair
- 75% of insurers believed the MAS had reduced costs associated with motor vehicle accidents
- About half of CTP insurers viewed the MAS system as an improvement on the old medico-legal court based system of dispute resolution
- 'Many' interviewees commented on the unfairness of the 10% WPI threshold
- A 'significant minority' thought claimants were pursuing WPI claims 'without merit'

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<sup>275</sup> Justice Policy Research Centre, *Evaluation of the Motor Accidents Assessment Act 1999, Study Four: Claimant Perceptions of the MAS – Preliminary Findings*, pp65-66

- The most common reasons why insurers did not rate the MAS more highly was that some assessments are non-binding, because the MAS system has not eliminated the need for independent medical reports, and because of delays and inefficiencies at MAS.<sup>276</sup>

**4.92** The issue of unmeritorious WPI assessments is discussed at paragraph 4.62.

### **CTP insurer perceptions of CARS**

**4.93** The JPRC report indicates that insurers tend to be critical of CARS. For example, although 50% thought CARS had reduced costs, only 40% thought CARS was an improvement on the old court based system of dispute resolution. Some of the key findings contained in the JPRC report are as follows:

- Insurers were generally critical of CARS, with less than 50% rating it as effective and efficient, and only 40% rating it as fair
- Less than 40% of interviewees thought CARS was an improvement on the old court-based system of dispute resolution
- 50% of interviewees thought the establishment of CARS had reduced costs associated with motor vehicle accidents
- Insurers identified a number of advantages of CARS, including the fact that insurers can initiate CARS proceedings, rather than having to wait for the claimant to litigate
- Insurers were critical of the absence of a right of appeal, especially given the perceived poor quality of some decisions
- A number of interviewees referred to the amount of paperwork and the bureaucratic nature of CARS
- Less than half of interviewees thought the introduction of prescribed claims handling guidelines had helped with the early resolution of claims.<sup>277</sup>

### **Solicitor perceptions of MAS**

**4.94** The JPRC reveals a wide gulf between claimant and insurer solicitor perceptions of MAS, with claimant solicitors much more critical of MAS than insurer solicitors. However, both groups expressed shared concern regarding several issues, including the potential inconsistency in the application of the AMA Guides in the assessment of WPI. Some of the key findings of the report are as follows:

- Claimant solicitors express a much lower degree of approval of MAS than insurer solicitors

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<sup>276</sup> Justice Policy Research Centre, *Evaluation of the Motor Accidents Assessment Act 1999, Study Two: CTP Insurer's Perceptions of the MAS and the CARS – Preliminary Findings*, p50

<sup>277</sup> Justice Policy Research Centre, *Evaluation of the Motor Accidents Assessment Act 1999, Study Two: CTP Insurer's Perceptions of the MAS and the CARS – Preliminary Findings*, p51

- Claimant solicitors were generally dissatisfied with the MAS system, including the legislative framework (which they regarded as ‘inherently unfair’), MAS assessors, increased workload, and the impact of the costs regulation
- Claimant and insurer solicitors both commented on inconsistency between MAS assessors and a lack of transparency in the MAS process
- Claimant and insurer solicitors both expressed concerns that the MAA Permanent Impairment Guidelines and the AMA4 Guidelines are, in some respects, inconsistent and unjust, and capable of subjective interpretation
- Non binding assessments were regarded as a waste of time (especially assessment of future economic loss) as they were ignored by CARS assessors, judges and insurers
- Some claimant solicitors considered that it took too long for treatment disputes to be assessed
- Many solicitors noted that MAS had not put an end to the practice of obtaining independent medico-legal reports
- Both claimant and insurer solicitors were deeply suspicious of MAS vetting assessment certificates
- A large number of solicitors thought assessors were biased due to conflicts between their private practice and their engagement with the MAA
- Both groups of solicitors were critical of delays within MAS.<sup>278</sup>

### Solicitor perceptions of CARS

**4.95** The JPRC report indicates that claimant solicitors tend to be more positive in their attitude to CARS than insurer solicitors. However, both groups of solicitors expressed concern regarding possible conflicts of interest for CARS assessors arising out of their private practice and MAA commitments. Some of the key finding of the JPRC report were as follows:

- CTP insurer solicitors considered CARS had advantages for small and straightforward claims, but expressed concerns about the inability of insurers to appeal against a general assessment
- CTP insurer solicitors generally advocated conferring greater powers on assessors, for example, to compel parties to comply with directions
- Claimant solicitors were more positive than insurer solicitors about CARS
- Both solicitor groups considered legal representation to be indispensable to the operation of CARS
- Many claimant solicitors considered that their workload had either remained the same or increased due to the increased complexity and volume of paperwork involved in a CARS assessment

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<sup>278</sup> Justice Policy Research Centre, *Evaluation of the Motor Accidents Assessment Act 1999, Study Three: Solicitors' Perceptions of the MAS and the CARS – Preliminary Findings*, pp143-144, 146

- A large number of solicitors from both groups thought assessors were biased due to conflicts between their private practice and their engagement with the MAA
- Both groups of solicitors were critical of delays with CARS.<sup>279</sup>

### Committee comment

- 4.96** The above analysis by the JPRC provides an invaluable insight into the operations of MAS and CARS. The research shows that user perceptions of MAAS are mixed, with clear differences of opinion between competing user groups, such as between claimants and insurers, and solicitors acting for claimants and solicitors acting for insurers. This indicates that user perceptions of MAAS may have, in some cases, more to do with the substance of the Act, rather than its administration by the MAA. For example, the antipathy of claimant solicitors for MAS may have more to do with the perceived inherent unfairness of the 10% WPI threshold than with any failing of the MAA. However, in those cases where the research shows an overlap of concern between otherwise competing user groups, the MAA may be able to make some improvement to its processes. For example, the Committee notes that both claimant and insurer solicitors were critical of delays at CARS.
- 4.97** The Committee looks forward to receiving a copy of the final report in due course. The Committee recommends that the MAA, on receipt of the final report, prepare a response outlining any changes the MAA intends to make to the administration of MAS and CARS, and identifying any possible legislative changes, in light of the findings of the Justice Policy Research Centre, and that the MAA provide this response to the Committee.
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### Recommendation 10

That the Motor Accidents Authority (MAA), on receipt of the final report of the Justice Policy Research Centre into user perceptions of the Motor Accidents Assessment Service (MAAS), prepare a response outlining any changes the MAA intends to make to the administration of MAAS, and identifying any possible amendments to *Motor Accidents Compensation Act 1999* (NSW), in light of the findings of the Justice Policy Research Centre, and that the MAA provide this response to the Committee.

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### Issues raised by Inquiry participants

- 4.98** In this section the Committee examines issues raised by Inquiry participants in respect of the operation of MAAS, namely:
- The suggested abolition of MAAS/abolition of 10% WPI threshold
  - Problems associated with the assessment of future economic loss by MAS
  - The regulation of legal costs in CARS proceedings
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<sup>279</sup> Justice Policy Research Centre, *Evaluation of the Motor Accidents Assessment Act 1999, Study Three: Solicitors' Perceptions of the MAS and the CARS – Preliminary Findings*, pp145-146

- Late allegations of fraud and false and misleading statements
- Late withdrawals of liability, and
- Late payment of settlement monies

### **Abolition of MAAS and abolition of 10% WPI threshold**

**4.99** The NSW Bar Association submitted that MAAS should be abolished and the claims process returned to the District Court. The Committee notes that this position was part of the Bar Association's larger objection to the use of the 10% WPI test as a threshold for access to damages for non-economic loss. The Bar Association submitted that the motor accidents scheme should revert to judicial determination of entitlement to damages for non-economic loss. The Australian Lawyers Alliance submitted that MAS should be abolished, but not CARS.<sup>280</sup>

#### ***Abolition of 10% WPI threshold***

**4.100** As in previous years, the Bar Association made strong submissions against the continued use of the 10% WPI threshold for damages for non-economic loss. The Bar Association argued that the AMA Guides, as used by the MAA, are inconsistent and subjective. The Bar Association made submissions in respect of several specific injuries which it claims are treated inconsistently under the Guides, and submitted that the inconsistencies arose because 'different groups of surgeons met in the USA to draft the different sections of the AMA guides' in relation to those injuries.<sup>281</sup>

**4.101** Mr Letherbarrow SC also submitted that the AMA Guides were unfair in that they do not provide for the combination of psychiatric and physical impairment:

Now you may or may not know that under these scales you cannot add the two together, but to get 10 percent physical you are pretty badly injured, but you do not get a result. To get 10 percent psychiatric, you are also pretty badly injured. You add those two together and you have a human being who cannot function, but you cannot add them together. Consequently, the people just do not receive a result and this, we say, is dreadfully unfair.<sup>282</sup>

**4.102** Mr Letherbarrow SC also argued, on the basis that insurers are deriving excessive profits from the CTP scheme, the 10% WPI threshold could be replaced with the more lenient test allowed under the *Civil Liability Act 2002* (NSW) without undue cost to the motorists of the NSW:

... it is a very affordable fix because, going back to the profitability, we say the cat is finally getting out of the bag here and after years of the lawyers saying that insurers are making a lot of money, it is now becoming apparent to everybody, including the Motor Accidents Authority which in the summary of its report sets out the fact that in

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<sup>280</sup> Australian Lawyers Alliance, Submission 12, p5

<sup>281</sup> NSW Bar Association, Submission 11, p6

<sup>282</sup> Mr Letherbarrow SC, Evidence, 31 March 2006, p39

the first four years of the scheme they are making more than they expected, they are making so much money now this cap could be abolished.<sup>283</sup>

- 4.103** This submission was rejected by Mr Bowen, who stated that if the 10% WPI test was replaced by the test available under the *Civil Liability Act*, CTP prices would rise by \$100:

The proposition that was put to the General Purpose Committee was, as I understand it, to abolish the impairment guidelines and have what is perceived as a consistent test for access to non-economic loss based on the civil liability provisions, which is a subjective test as to whether or not a person is 15 percent of the worst case. It is a little bit more complex than that, but that is the indication. That in fact is the position that operated in the Motor Accidents Scheme. There was a verbal threshold which operated there up until the 1999 reforms. If it was put back you could expect that the \$100 taken off the price of green slips would go back on to the price of green slips.<sup>284</sup>

- 4.104** The Law Society of NSW also submitted that the 10% WPI test should be abolished and replaced with a test similar to that currently used under the *Civil Liability Act 2002* (NSW).<sup>285</sup>

#### ***MAA Review of MAA Guidelines for WPI assessment***

- 4.105** As noted at paragraph 4.48, WPI is assessed according to the American Medical Association Guides for the Degree of Permanent Impairment, read together with MAA Guidelines for the assessment of Permanent Impairment. As part of the *Sixth Review* the Committee reported that the MAA was conducting a review of the MAA Guidelines. Recommendation 10 of the *Sixth Review* was that the MAA provide the Committee with the results of its review of the MAA Guidelines. The Government response to *Sixth Review* stated that:

The revised MAA Guidelines for the assessment of the degree of permanent impairment were developed following a review by a working group comprising representatives from various medical fields and the MAA. The aim of the review was to provide greater clarity and guidance for medical assessors when interpreting and applying the Guidelines ... The revised Guidelines were finalised in July 2005 and published in the Government Gazette of 22 July 2005 at page 3857.<sup>286</sup>

- 4.106** The Committee notes that the MAA consulted with interested stakeholders in reviewing the MAA Guidelines, including MAS assessors, medical colleges, the Australian Medical Association (AMA), the Law Society of NSW and compulsory third party insurers. The draft revised Guidelines were also considered by the Motor Accidents Council.<sup>287</sup> The MAA advised the Committee that ‘no difficulties or specific problems with the (revised) Guidelines have been identified to date.’<sup>288</sup>

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<sup>283</sup> Mr Letherbarrow SC, Evidence, 31 March 2006, p39

<sup>284</sup> Mr Bowen, Evidence, 31 March 2006, p23

<sup>285</sup> Law Society of NSW, Submission 15, p2

<sup>286</sup> *Government Response to the Sixth Review*, p6

<sup>287</sup> *Government Response to the Sixth Review*, p6

<sup>288</sup> MAA, *Response to oral questions taken on notice at hearing held 31 March 2006*, p6

### ***Committee comment***

- 4.107** The Committee notes the strong objections to continued use of the 10% WPI threshold for access to damages for non-economic loss received during this Inquiry. The Committee has considered the issue of the WPI threshold in previous reports. The test was also the subject of a detailed report by the General Purpose Standing Committee No 1 in 2005. That Committee made a package of recommendations designed to unify the various personal injury compensation regimes in force in NSW, including the motor accidents scheme. The recommendations included a return to judicial determination of access to damages for non-economic loss by means of the verbal test currently applied under the *Civil Liability Act*.
- 4.108** The Committee notes that the Government has rejected the recommendations of General Purpose Standing Committee No 1 on this subject.<sup>289</sup> The WPI test, and the MAAS, will continue to be key features of the motor accidents scheme. The Committee does not intend to revisit the issue of the abolition of the 10% WPI test given the extensive coverage it has already received in recent times.
- 4.109** However, the Committee will continue to monitor the impact of the 10% WPI test on claimants in the context of the exercise by the MAA of its functions and the performance of the motor accidents scheme as a whole in future reviews. In this context, the Committee notes that the MAA has recently revised the MAA Guidelines for the Assessment of Permanent Impairment. The Committee recommends that the MAA monitor the implementation of the revised MAA Guidelines, and that the MAA report to the Committee on the implementation of revised the Guidelines in the course of the Committee's next review.

### **Recommendation 11**

That the Motor Accidents Authority (MAA) monitor the implementation of the revised MAA Guidelines for the Assessment of Permanent Impairment, and that the MAA report to the Committee on the implementation of the Guidelines in the course of the Committee's next review.

### **Problems associated with assessments of future economic loss by MAS**

- 4.110** As noted at paragraph 4.94, some solicitors expressed the view that non-binding MAS assessments were of questionable utility. The Committee inquired of the MAA whether the non-binding status of some MAS assessment caused difficulties for claimants, insurers and the MAA itself.
- 4.111** The MAA advised the Committee that the non-binding status of MAS assessments regarding future economic loss means that claimants are unable to obtain an enforceable decision in relation to recommended treatment. The MAA noted that claimants 'may wait for many months or years before they receive approval or payment for necessary treatment unless they

<sup>289</sup> *Government Response to GPSC 1, Personal Injury Compensation*, 8 June 2006

can gain access under the public health system, have private health insurance that will cover them or are financially able to pay for the treatment themselves.<sup>290</sup>

**4.112** The MAA advised the Committee that insurers were faced with two difficulties: deciding whether to pay for treatment, and planning for the cost of future care.<sup>291</sup>

**4.113** The MAA noted that the lack of finality in assessments also tended to lead to multiple assessments regarding the same issue:

... it is possible for a dispute in relation to future treatment to currently be assessed three times – once by MAS (non-binding certificate), once by CARS (determination binding on the insurer but not the claimant if the CARS determination is rejected) and finally by a court (binding on both parties). The same evidence may be put before each assessor and the judge and the same decision may be reached but only one decision is binding on all parties.<sup>292</sup>

**4.114** The MAA noted that delays of this kind tend to frustrate the early provision of medical treatment and may lead to more costly and severe injuries in the longer term.<sup>293</sup> The Committee notes that the early provision of treatment and rehabilitation was one of the primary objectives of the 1999 reforms.

**4.115** The MAA also noted that, as a result of these difficulties, 'parties are not bringing their future treatment disputes to MAS.'<sup>294</sup> The MAA did not advise the Committee of where parties are most likely to take their disputes, other than MAS, in these circumstances.

#### ***Committee comment***

**4.116** The Committee notes that the non-binding status of some MAS assessments presents difficulties for claimants, insurers and the MAA. The Committee recommends that the Minister for Commerce review the operation of the Act in respect of the status of MAS assessments with a view to identifying any possible legislative changes.

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#### **Recommendation 12**

That the Minister for Commerce review the operation of the *Motor Accidents Compensation Act 1999* (NSW) in respect of problems associated with the non-binding status of some Motor Accident Service assessments, with a view to identifying any possible legislative changes.

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<sup>290</sup> MAA, *Response to additional questions on notice*, Q1.15, p9

<sup>291</sup> MAA, *Response to additional questions on notice*, Q1.15, p9

<sup>292</sup> MAA, *Response to additional questions on notice*, Q1.15, p9

<sup>293</sup> MAA, *Response to additional questions on notice*, Q1.15, p9

<sup>294</sup> MAA, *Response to additional questions on notice*, Q1.15, p9

## Regulation of legal costs

- 4.117** The Motor Accident Compensation Regulation 2005 regulates legal fees recoverable in the NSW motor accidents scheme. Although parties may contract out of the Regulation, a successful party may not recover from an unsuccessful party more than the costs allowed in the Regulation as part of a CARS award.<sup>295</sup>
- 4.118** The effect of this rule is that a successful claimant who contracts out of the Regulation will have to make up the costs shortfall from their damages award. That is, a costs shortfall may arise when a claimant who contracts out of the costs regulation is awarded less than their actual costs in a CARS assessment; the less generous the costs regulation, the more significant is the likely shortfall.
- 4.119** The Committee received submissions that the shortfall may be more pronounced in the motor accidents scheme than in other areas of personal injury law. In this respect, the Bar Association submitted that:

... it is understood that the current scheme has seen a significantly wider gap between solicitor/client costs and recoverable party/party costs than in any other forms of civil litigation. Claimants seem to be subsidising the operation of the scheme and insurer profits.<sup>296</sup>

### *Impact of costs regulation on claimants and claimant solicitors*

- 4.120** The impact of the costs regulation on claimants was the subject of debate during the course of this Inquiry. The Committee received anecdotal evidence from the Bar Association that the limitations on costs recoverable in the NSW CTP scheme substantially benefit insurers over claimants. As noted above, the preferred position of the Bar Association is that the MAAS should be abolished and claims returned to the District Court. However, the position of the Bar Association is that, if the MAAS is to be retained, the costs regulation should be relaxed:

So I think CARS should go in a similar way that MAS should go, but if it does not, because of the size of these cases, the costs need to increase. Insurers have a lot of money to defend in front of CARS and the plaintiff's lawyers can only get a certain amount. The insurers can fight these just with an open cheque book and that is what happens.<sup>297</sup>

- 4.121** Mr Letherbarrow SC submitted that the limitation on costs recoverable in CARS proceedings had led to many solicitors leaving this area of practice, making it more difficult for claimants to obtain legal representation:

... if you are at a CARS assessment, there are the various caps and it is very unprofitable to do the work. That is one of the reasons why I think the claims numbers have gone down, because a lot of lawyers have said, look, there is no point in

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<sup>295</sup> Motor Accidents Compensation Regulation 2005, cl 9 and 11

<sup>296</sup> Submission 11, p12

<sup>297</sup> Mr Letherbarrow, SC, Evidence, 31 March 2006, p43

doing this work any more, we are not making any money, we will let it go to the specialist firms who can swings and roundabouts it.<sup>298</sup>

- 4.122** The MAA advised the Committee that it was very difficult to analyse the impact of the costs regulation on claimant's because of the difficulty in obtaining information from solicitors regarding their billing practices and in obtaining permission to access claimant files.<sup>299</sup>

#### ***Suggested amendments to the costs regulation***

- 4.123** The Bar Association submitted that the costs regulation is unjust to claimants in circumstances where, subsequent to a CARS assessment, an insurer wishes to contest the assessment in court. In this respect, the Bar Association submitted that:

The costs of court proceedings after a matter has proceeded through CARS are also heavily regulated and restricted. This is presumably as a disincentive for claimants to take a matter to court. However, not all cases are litigated because the claimant wishes to reargue the case. An insurer who alleged contributory negligence can force a claimant to litigate in circumstances where the claimant wishes to accept the assessor's award.<sup>300</sup>

- 4.124** The MAA has agreed to consider the Bar Association's submission to this Inquiry that the costs regulation should be amended to increase costs allowable to a claimant on a rehearing triggered by an insurer.<sup>301</sup>

- 4.125** The Bar Association also submitted that the costs regulation should be amended to encourage the early settlement of CARS assessments by allowing a claimant to recover higher costs (calculated on a party/party basis) if they beat an offer of settlement made by an insurer prior to the assessment.<sup>302</sup>

- 4.126** The MAA rejected this proposal on the basis that it inconsistent with the objectives of CARS:

The issue of cost penalties is inconsistent with the objectives of the Claims Assessment and Resolution Service (CARS). CARS is an administrative process that was established for the primary purpose of resolving claims rather than assessing cost disputes. It should also be noted that the MAA issues guidelines for insurers regarding the management of claims.<sup>303</sup>

#### ***Previous recommendations of this Committee in respect of legal costs***

- 4.127** In the course of the *Sixth Review* the MAA advised the Committee of difficulties encountered by the Justice Policy Research Centre when it investigated this issue on behalf of the MAA:

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<sup>298</sup> Mr Letherbarrow, SC, Evidence, 31 March 2006, p43

<sup>299</sup> MAA, *Response to questions on notice*, Q16.1, p17

<sup>300</sup> Submission 11, p12

<sup>301</sup> MAA, *Response to questions on notice*, Q16.3, p17

<sup>302</sup> Submission 11, p12

<sup>303</sup> MAA, *Response to questions on notice*, Q16.2, p17

Our previous research indicates that lawyers are generally very reluctant to give access to detailed cost information, and the position from a professional conduct point of view is probably that they need their clients' permission to give us access to the file. We proceeded on that basis, and then ran into the second layer of difficulty, in the form of a restrictive ethics clearance which required us to approach claimants in writing and to request a written permission (by return mail). Ultimately we got this permission only from 35 claimants - too small a number.<sup>304</sup>

- 4.128** Recommendation 2 of the *Sixth Review* was 'That the MAA investigate methods, other than those used in the Justice Policy Research Centre research, to analyse the effects of the costs regulation and review the legal costs scale.' The Government response to the *Sixth Review* indicated that:

The effect of the legal costs regulation is regularly reviewed by the MAA and details included in the MAA's Annual Report. A more detailed review of the options for regulating legal costs in motor accident matters was recently undertaken by the MAA in the context of the development of the Motor Accidents Compensation Regulation 2005, which commenced on 1 September 2005.<sup>305</sup>

- 4.129** In response to questions on notice the MAA advised the Committee that a more detailed review of the costs regulation would be conducted in the event of any significant changes to the scheme.<sup>306</sup> The MAA also advised the Committee that it received no public submissions on the effect of contracting out of the costs regulation in the course of its public consultation program on the Motor Accidents Compensation Regulation 2005.<sup>307</sup>

- 4.130** The Bar Association submitted that it had contributed to the review of the costs regulation conducted in preparation for the gazettal of the Motor Accidents Compensation Regulation 2005, that the MAA had accepted some technical amendments proposed by the Bar Association, but that 'nothing further has been heard from the MAA with regard to the second part of the Association's submission regarding broader issues for concern in relation to legal costs'.<sup>308</sup> In this respect, the Bar Association also submitted that:

... the MAA has been advising the Standing Committee that the costs regulation would receive a proper and thorough review. We are not aware that such a review has been undertaken.<sup>309</sup>

- 4.131** The Committee has reviewed the Regulatory Impact Statement (RIS) for the Motor Accidents Compensation Regulation 2005 (which contains the costs regulation). The RIS indicates that, as a result of the 1999 reforms to the motor accidents scheme, legal costs have fallen by approximately 60%. As a result, a greater share of CTP premium is being paid to claimants. On this and related bases, the RIS recommended that the previous costs regulation be re-

<sup>304</sup> *Sixth Review*, pp15-16

<sup>305</sup> *Government Response to the Sixth Review*, pp1-2

<sup>306</sup> MAA, *Response to questions on notice*, Q16.5, p18

<sup>307</sup> MAA, *Response to questions on notice*, Q16.1, p17

<sup>308</sup> Submission 11, p11

<sup>309</sup> Submission 11, p11

made, subject to some minor amendments.<sup>310</sup> The RIS clearly makes the case for the status quo in regards to the regulation of legal costs.

#### ***Committee comment***

- 4.132** The Committee notes the difficulties associated with analysing the impact of the MAA costs regulation on claimants. However, the Committee also notes anecdotal evidence received from the NSW Bar Association that the effect of the costs regulation is to benefit insurers over claimants because insurers are able to contest claims with an ‘open cheque book’, whereas the resources of claimants are much more limited. The Committee therefore recommends that the MAA report to the Committee on its further efforts to analyse the impact of the costs regulation on claimants with a view to determining whether the regulation significantly disadvantages claimants at the expense of insurers.
- 4.133** In respect of particular issues raised in the course of this Inquiry, the Committee notes the Bar Association’s submission regarding the apparent injustice suffered by claimants who, despite being content with a CARS assessment, are required to litigate the assessment in court in circumstances where the costs of the court proceedings are limited, for example, because the insurer disputes the assessor’s finding on liability. The Committee notes the MAA’s agreement to review this aspect of the operation of the costs regulation. The Committee looks forward to reviewing the results of the review in the course of its next Inquiry into the MAA.

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#### **Recommendation 13**

That the Motor Accident Authority report to the Committee on its further efforts to analyse the impact of the costs regulation on claimants with a view to determining whether the regulation significantly disadvantages claimants at the expense of insurers.

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#### **Late allegations of fraud and false and misleading statements against claimants**

- 4.134** In its initial submission to this Inquiry the NSW Bar Association cited anecdotal evidence that insurers were increasingly making late allegations of ‘false and misleading statements’ and of fraud in order to ‘derail’ the CARS process:

The Bar Association has received feedback from members that there seems to be an increasing trend of insurers making late allegations of ‘false and misleading statements’ by claimants or alleging ‘fraud’. Such allegations are made in the days preceding a CARS assessment and have the effect of requiring the matter to be exempted and sent to court. Nine months delay often ensues. The Bar Association’s members have the impression that some insurers are making these allegations without the false or misleading statement being of a serious nature simply for the purposes of derailing the CARS process and delaying the claim.<sup>311</sup>

- 4.135** In response to questions on notice the Bar Association elaborated on this observation, stating that ‘In alleging a false or misleading statement, the insurer is not required to provide any

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<sup>310</sup> MAA, *Regulatory Impact Statement: Motor Accidents Compensation Regulation 2005*, pp19-21

<sup>311</sup> NSW Bar Association, Submission 11, p10

proof or evidence to the MAA; the mere making of the allegation is enough to force an exemption to occur.<sup>312</sup>

**4.136** The Committee also reported on this issue in the course of the *Sixth Review*, where the Committee noted the delays that may flow from a late allegation of this kind.<sup>313</sup>

**4.137** The Committee understands that this issue has now been resolved. The Committee was advised by the Bar Association that ‘the MAA has recently addressed and fixed this problem’ by amending the *Claims Assessment Guidelines*:

Under new Claims Assessment Guidelines which take effect from 1 May 2006, the allegation of a false and misleading claim will no longer be a mandatory ground for exemption, but rather a discretionary ground for exemption. The insurer will now need to satisfy the Principal Claims Assessor (PCA) that there are proper grounds to suspect fraud or a material false and misleading statement before an exemption is granted.<sup>314</sup>

### Late withdrawals of liability

**4.138** The Committee also notes the submission by the Bar Association that it is ‘aware of some CTP insurers seeking to withdraw an admission of liability years after an initial admission was made.’<sup>315</sup> The Committee has previously reported on late withdrawals of admissions of liability by insurers. In the course of the *Sixth Review* the Committee noted advice received from the MAA regarding the number of complaints received by it on this issue, and efforts by its Compliance Branch to resolve those complaints.<sup>316</sup>

**4.139** As noted in Chapter Three, the MAA investigated two insurers regarding the late withdrawal of liability in 2004-2005. These breaches ‘involved insurers who made late changes to their determinations on liability, and consequently were not expeditious in their duty to resolve the claim (breach of section 80 of the *Motor Accidents Compensation Act 1999*).’<sup>317</sup> The MAA advised the Committee that it had ‘required the insurers concerned to implement more rigorous policies and procedures for reviewing and approving liability determinations.’ The Committee notes that, as stated by the MAA, ‘since the implementation of the new policies and procedures for determining liability on 1 January 2005, there have been no subsequent withdrawals of an admission of liability to date [by the two insurers concerned].’<sup>318</sup>

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<sup>312</sup> NSW Bar Association, *Response to questions on notice*, 10 April 2006, p1

<sup>313</sup> *Sixth Review*, pp54-55

<sup>314</sup> NSW Bar Association, *Response to questions on notice*, 10 April 2006, p2

<sup>315</sup> Submission 11, p10

<sup>316</sup> *Sixth Review*, p53

<sup>317</sup> MAA, *Response to questions on notice*, Q14.3, p15

<sup>318</sup> MAA, *Response to questions on notice*, Q37.2, p34

### Late payment of settlement monies

- 4.140 The Committee has previously reported on the late payment of settlement monies by insurers. During the *Sixth Review*, the Committee reported that the MAA was investigating this issue.<sup>319</sup>
- 4.141 The Committee notes that a proposed legislative change emerging from the MAAS Reform Agenda is the imposition of time limits for the payment of settlement monies, including legal costs, by insurers.<sup>320</sup>
- 4.142 As noted in Chapter Four, the Government response to the *Sixth Review* indicated that legislation to implement the MAAS Reform Agenda will be introduced into Parliament in 2005-2006. At the time of finalising this report, the proposed legislation has not been introduced into Parliament.

### Committee comment

- 4.143 As noted at paragraph 4.3, the effective performance of the MAA's dispute resolution function is critical to the success of the reformed motor accidents scheme. By reducing transaction costs, including legal fees, the MAA is able to ensure that more of the premium dollar is provided to injured claimants. The Committee is encouraged by the MAA's continuing efforts to improve the quality and timeliness of MAAS proceedings, particularly through the MAAS Reform Agenda. The Committee notes that several aspects of the MAAS Reform Agenda have already been implemented, whilst others require legislative changes. The Committee anticipates inquiring into the implementation of the MAAS Reform Agenda as part of the upcoming *Eighth Review*.
- 4.144 In the meantime, the Committee recommends that the MAA remain in consultation with key MAAS user groups, including representatives of the legal profession, insurers and assessors, with a view to ensuring the continual improvement of MAS and CARS.
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### Recommendation 14

That the Motor Accidents Authority remain in consultation with key user groups, including representatives of the legal profession, insurers and assessors, with a view to ensuring the continual improvement of the Medical Assessments Service and the Claims Assessment and Resolution Service.

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<sup>319</sup> *Sixth Review*, pp65-66

<sup>320</sup> MAA, *MAAS Reform Agenda Update*, October 2005, p34

## Chapter 5     The MAA and road safety

In this Chapter the Committee considers the performance by the MAA of its functions in relation to road safety in NSW. The Committee notes developments regarding the MAA Grants Program and the Road Safety and Rehabilitation and Strategic Plan, and discusses MAA road safety initiatives targeted at high risk groups, including young people, children, motorcyclists, pedestrians, rural and regional road users and repeat drink driving offenders.

### Overview

- 5.1 Almost 30,000 people are injured on NSW roads every year. MAA programs directed to the care and treatment of injured road users are discussed in the next Chapter.
- 5.2 The MAA's road safety functions are derived from the *Motor Accidents Compensation Act 1999* (NSW) ('the Act') which states that the MAA is to 'provide funding for: (i) measures for preventing or minimising injuries from motor accidents, and (ii) safety education.'<sup>321</sup> The Committee notes that in 2004-2005 the MAA spent \$4.409 million on road safety grants and sponsorships, down from \$5.707 million in 2003-2004.<sup>322</sup>
- 5.3 In this Chapter the Committee considers the contribution of the MAA to preventing and reducing motor accidents. Whilst the MAA is not the lead road safety agency in NSW (that role falls to the Roads and Traffic Authority (RTA)), the MAA has an important role to play in promoting the safety of NSW road users.

### Background

- 5.4 In this section the Committee considers the place of the MAA in the larger NSW road safety regime, including the relationship between the MAA and RTA, and discusses recent developments regarding the MAA Grants Program and the MAA Road Safety and Rehabilitation Strategic Plan.

#### Relationship between MAA and other road safety agencies

- 5.5 The lead road safety agency in NSW is the RTA. Ms Kathleen Hayes, Manager, Injury Prevention and Management with the MAA, stated that the MAA focuses on 'educational and behavioural' programs, rather than 'law enforcement' programs:

... the MAA is not the lead road safety agency in New South Wales, that is the RTA, so in a sense we pick and choose the types of activities that we are involved in and we have a particular emphasis on education and behavioural type programs rather than, say, engineering law enforcement.<sup>323</sup>

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<sup>321</sup> *Motor Accidents Compensation Act 1999* (NSW), s206(2)(f)

<sup>322</sup> MAA, *Annual Report*, 2004-2005, p42

<sup>323</sup> Ms Kathleen Hayes, Evidence, 31 March 2006, p26

- 5.6 The MAA advised the Committee of its participation in various road safety forums convened by the RTA, including Government Agencies in Road Safety (GASRS) and the Road Safety Taskforce, and in other ad hoc committees on an issue-by-issue basis.<sup>324</sup>
- 5.7 The Committee is aware that shared responsibility can sometimes lead to duplication and waste of government services. The MAA advised the Committee that it had attempted to reduce the prospects of any duplication of services by focusing its initiatives on those injuries which represent the greatest cost to the CTP scheme, and by targeting particular groups of road users such as young drivers.<sup>325</sup>
- 5.8 The MAA and RTA also ‘communicate on a regular basis about proposed initiatives and in some cases jointly fund activities.<sup>326</sup> The Committee notes that the MAA and RTA are currently jointly funding a number of significant initiatives, including the following:
- Sober Driver Program – an education program for repeat drink drive offenders.
  - Motorcycle and driver education public education campaign – a motorcycle safety awareness campaign targeting both motorcycle riders and drivers.
  - Operation Roadsafe (incorporating Operation Westsafe) – to address road safety issues in the Sydney metropolitan region, including speeding.<sup>327</sup>
- 5.9 These initiatives are discussed in more detail later in this Chapter.
- 5.10 The Committee notes the submission by NRMA Motoring and Services that the MAA, rather than focussing on behavioural change, should place a greater emphasis on government investment in road infrastructure ‘which is likely to be more effective and cost-beneficial for road safety than educational and awareness campaigns.<sup>328</sup> The MAA did not accept this proposal, noting that ‘The RTA, as the lead agency for road safety in NSW, is in the best position to advise the Government on the most appropriate areas for investment in road infrastructure.<sup>329</sup> The Committee also notes the submission of one Inquiry participant that ‘Straightened and widened roads would not stop drivers becoming intoxicated, becoming tired, losing concentration, speeding, overtaking when unsafe to do so’ and otherwise engaging in dangerous road safety behaviours.<sup>330</sup>

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<sup>324</sup> MAA, *Response to questions on notice*, Q28.1, p26

<sup>325</sup> MAA, *Response to questions on notice*, Q28.2, p26

<sup>326</sup> MAA, *Response to questions on notice*, Q28.2, p26

<sup>327</sup> MAA, *Response to questions on notice*, Q28.3, p26

<sup>328</sup> NRMA Motoring and Services, Submission 13, p2

<sup>329</sup> MAA, *Response to questions on notice*, Q28.5, p27

<sup>330</sup> Mr John Hives, Submission 10, p1

## MAA Grants Program and MAA Road Safety and Rehabilitation Strategic Plan

- 5.11** The MAA Grants Program funds both road safety and rehabilitation programs. The Committee notes that total Grants Program expenditure in 2004-2005 was \$10.4 million.<sup>331</sup> The focus in this Chapter is on road safety programs, however the Committee's comments relating to the review of the Grants Program, discussed below, apply to the program generally.
- 5.12** The Committee noted in the *Sixth Review* that the Grants Program had been subject to independent evaluation by consultant Pricewaterhouse Coopers (PwC). PwC made a number of recommendations to improve the performance of the program, including improved selection and evaluation processes. The MAA reported that it had engaged two consultants to produce a 3-5 year strategy for its road safety and rehabilitation programs.<sup>332</sup>
- 5.13** The Committee understands that work in this area is continuing. The MAA advised the Committee during this *Seventh Review* that it has already implemented some of the recommendations of the PwC review, primarily in the area of rehabilitation programs.<sup>333</sup> The Minister advised the Committee that the finalisation of the Strategic Plan has been delayed due to scheme changes associated with the introduction of the Lifetime Care and Support Plan (discussed in Chapter 7):
- The finalisation of the MAA Road Safety and Rehabilitation Strategic Plan has been delayed due to the need to define responsibilities between the MAA and the new Life Time Care and Support Authority. The Plan is expected to be completed by the end of 2006.<sup>334</sup>
- 5.14** The MAA has stated that the Strategic Plan will 'focus on injury issues that impact on the CTP scheme, and will apply a more rigorous, outcome oriented approach to the allocation of MAA funding.'<sup>335</sup> In the interim, the MAA has agreed to meet all funding commitments already made over the next four years.<sup>336</sup>
- 5.15** Several Inquiry participants commented on the MAA Grants Program and the Road Safety and Rehabilitation Strategic Plan.
- 5.16** NRMA Motoring and Services, referring to the PwC review of the Grants Program, submitted that 'the NRMA would wish to improve the standard of evaluation [of the Grants Program], in particular aiming at the evaluation of outcomes as opposed to processes.'<sup>337</sup>
- 5.17** The Committee notes the submission of the Brain Injury Association of NSW Inc that 'consultation with stakeholders regarding the development of a three year strategic plan and

<sup>331</sup> MAA, *Response to questions on notice*, Q46.7, p41

<sup>332</sup> *Sixth Review*, pp75-77

<sup>333</sup> MAA, *Response to questions on notice*, Q10.4, p12

<sup>334</sup> Letter from the Hon John Della Bosca MLC, Minister for Commerce, to Committee Chair, 23 August 2006

<sup>335</sup> MAA, *Annual Report*, 2004-2005, p15

<sup>336</sup> MAA, *Response to questions on notice*, Q10.4, p12

<sup>337</sup> Submission 13, p2

evaluation framework for the program will only take place once the plan is complete.<sup>338</sup> The MAA's *Annual Report* for 2004-2005 states that 'Stakeholders will be informed about the Strategic Plan when it has been completed.'<sup>339</sup> The Association submitted that it would 'welcome the opportunity to review a draft document for final comment prior to the completion of the strategic plan.'<sup>340</sup>

- 5.18** The George Institute for International Health (the George Institute) submitted that road safety and rehabilitation initiatives should be funded for longer timeframes and with a higher level of funding than is currently made available by the MAA:

... in order to achieve outcomes such as increased awareness, a change in attitude or reductions in the incidence of road trauma, it is imperative that both the road safety research grants and projects need to receive greater levels of funding and have longer timeframes in which to deliver; this is not the current situation with the programs and, to some extent, the research programs.<sup>341</sup>

- 5.19** The George Institute also submitted that the MAA should adopt a more rigorous approach to the evaluation of initiatives funded through the Grants Program:

... we would recommend that the MAA adopts a more rigorous evaluation of its initiatives to ensure the research grants and programs deliver to set objectives.<sup>342</sup>

- 5.20** In addition, the George Institute suggested that the MAA should develop an 'agenda of road safety research', including funding a scheme for the development of young researchers.<sup>343</sup> In this respect the Institute submitted that:

... we would urge the MAA to place greater emphasis on research that focuses attention more on the prevention spectrum of motor vehicle-related trauma. As well, with a current dearth of qualified road safety researchers, we would encourage the MAA to support a scheme for the development of young researchers.<sup>344</sup>

- 5.21** The Committee notes the statement on the MAA's web-site that 'The MAA will no longer be calling for annual research grants, however, research may be commissioned in priority areas to support program development.'<sup>345</sup>

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<sup>338</sup> Submission 7, Brain Injury Association of NSW Inc, p1

<sup>339</sup> MAA, *Annual Report*, 2004-2005, p15

<sup>340</sup> Submission 7, p1

<sup>341</sup> Submission 8, George Institute for International Health, p1

<sup>342</sup> Submission 8, p1

<sup>343</sup> Submission 8, p1

<sup>344</sup> Submission 8, p1

<sup>345</sup> [www.maa.nsw.gov.au/default.aspx?MenuID=163](http://www.maa.nsw.gov.au/default.aspx?MenuID=163) (accessed 11 July 2006)

## Targeted road safety initiatives

**5.22** In this section the Committee considers the MAA's targeted road safety programs, including those directed at young people, motorcyclists, pedestrians, children, rural and regional road users and repeat drink drivers.

### Selection of priority groups

**5.23** As noted at paragraph 5.7, the MAA has targeted its road safety initiatives at those injuries and groups which represent the greatest cost to the motor accidents scheme, including young people and motorcyclists. In this respect, Ms Hayes stated:

The current priorities at the authority are specifically young people, and children in particular. Other groups that we are interested in are pedestrians and motorcyclists and the reasons that we are interested in these particular groups are that they are the groups that are either high incidence or high cost to the CTP scheme. In relation to young people and children clearly it also means that there is a rather large burden both on families and the community where people have injuries for a long time, so they are the particular groups that we are focusing on at the moment.<sup>346</sup>

### Road safety and young people

**5.24** The Committee has previously reported on the MAA's road safety initiatives for young people, particularly the *Arrive Alive* program. The Committee notes that the MAA defines 'young people' as those between the ages of 17 and 25.<sup>347</sup>

**5.25** Ms Hayes advised the Committee that that the MAA conducts two main types of activities directed at road safety for young people through its *Arrive Alive* programs:

- The provision of road safety grants of up to \$10,000 to groups of young people, and
- Sponsorship programs.

**5.26** In relation to road safety grants, Ms Hayes stated that the MAA funds the production of films, music, videos, murals and other community based arts and entertainment projects by young people. The Committee was advised that the MAA funds around twenty such programs a year.<sup>348</sup>

**5.27** Ms Hayes stated that the MAA's policy is to give young people responsibility for these programs where appropriate, and that the programs had been reasonably successful:

It is hard to actually judge how successful they may be. We think that they are reasonably successful in actually engaging those young people who are involved in it, bearing in mind that working with young people is not an easy task and we are

<sup>346</sup> Ms Hayes, Evidence, 31 March 2006, p26

<sup>347</sup> Ms Hayes, Evidence, 31 March 2006, p26

<sup>348</sup> Ms Hayes, Evidence, 31 March 2006, p26

handing over in a sense the responsibility of doing it to them, so you have to sort of wear the vagaries of that I suppose.<sup>349</sup>

- 5.28 In respect of sponsorships, Ms Hayes stated that the MAA targets organisations and teams with which young people are already engaged:

The other large component of that program is our sponsorship based programs where the authority provides funding to a range of activities that young people are already involved in an attempt to try to engage with them, so that we fund a range of sporting activities for men and women, in rugby league for men and soccer and netball with women.<sup>350</sup>

- 5.29 The Committee notes that, in 2004-2005, the MAA sponsored the South Sydney Rabbitohs, Wests Tigers and St George Illawarra rugby league teams, Soccer NSW and Netball NSW female players, the University Games, the Wheelchair Sports Roadshow and Youth Rock.<sup>351</sup> Ms Hayes stated that, in addition to naming rights, the MAA also obtained the services of sponsored players to talk to young people directly about road safety.<sup>352</sup>

- 5.30 The MAA advised the Committee that it consults with young people in a range of forums. In this respect the MAA stated that it had established an advisory program to assist it in the administration of the *Arrive Alive* grants scheme:

... advisory committee has been established under the *Arrive alive* grants scheme and includes up to six young people. The committee is directly involved in the selection and implementation of individual projects and provides a leadership role for young people undertaking projects.<sup>353</sup>

- 5.31 The Committee also notes that the MAA is 'in regular contact with non-government organisations and Government agencies which are directly involved with young people in relation to specific injury prevention management issues and programs.'<sup>354</sup>

- 5.32 The Committee is aware that the MAA has produced an *Arrive Alive* web-site to promote road safety messages. The web-site contains details of sporting competitions and other initiatives sponsored by the MAA such as live music events. The site receives an average 20,000 hits a month.<sup>355</sup> Secretariat staff have reviewed the *Arrive Alive* web-site and have informed the Committee that Endeavour Sports High is top-seed for the 2006 *Arrive Alive* Schoolboys Rugby League Championship. The Committee wishes all the schools participating in the championship a safe and enjoyable season. The Committee would also like to be able to view the results of the girls Netball NSW championships and other events sponsored by the MAA through the *Arrive Alive* program. The web-site is available at: [www.arrivealive.com.au](http://www.arrivealive.com.au).

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<sup>349</sup> Ms Hayes, Evidence, 31 March 2006, p26

<sup>350</sup> Ms Hayes, Evidence, 31 March 2006, p26

<sup>351</sup> MAA, *Annual Report*, 2004-2005, p28

<sup>352</sup> Ms Hayes, Evidence, 31 March 2006, p26

<sup>353</sup> MAA, *Response to questions on notice*, Q31.2, p29

<sup>354</sup> MAA, *Response to questions on notice*, Q31.2, p29

<sup>355</sup> MAA, *Response to questions on notice*, Q31.2, p29

### ***Safe alternative transport for young people***

**5.33** Youthsafe advised the Committee of its current work in the area of ‘safe celebrating’ for young people. Youthsafe submitted that an important element of safe celebrating for young people was the provision of safe alternatives forms of transport. In this respect, Youthsafe submitted that the MAA was in a position to support safe celebrating initiatives:

The issue of safe alternative transport options is one that Youthsafe believes the MAA should consider supporting. Appropriate safe transport needs are variable. MAA is in a good position to support much needed research into sound, safe alternative transport options and to support implementation of measures shown to be effective.<sup>356</sup>

**5.34** In response, the MAA advised the Committee that it participates in the promotion of safe alternative forms of transport by funding transport, generally buses, to and from Youth Week and *Arrive Alive* events and the University Games.<sup>357</sup> However, the MAA advised the Committee that it is not in a position to commit additional resources to this area:

The MAA supports any collaborative efforts to promote the use of safe, alternative transport options by young people. The MAA is not, however, in a position to commit additional funding to this area other than that already provided through current projects.<sup>358</sup>

### ***Motorcyclist road safety***

**5.35** The MAA advised the Committee that it has developed an ongoing strategy to reduce motor cyclist injuries, including the following elements:

- Continued support of a joint advertising campaign (outdoor, print and radio advertisements) with the RTA targeting both drivers and motorcyclists and highlighting issues of speeding, drink riding, braking safely, protective clothing and driver awareness of motorcycles
- Provision of funding to the Motorcycle Council of NSW (MCC) for a range of projects including the development of the *Motorcycle Council of NSW Road Safety Strategic Plan* and the *Users Guide to Motorcycle Protective Clothing*, as well as the Motorcycle Protective Clothing Seminar which resulted in the formation of a working party to further protective clothing standards
- Provision of funding for research to improve the research and evidence base for future program development
- Development of professional knowledge and skills through seminars and conferences

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<sup>356</sup> Youthsafe, Submission 4, p3

<sup>357</sup> MAA, *Response to questions on notice*, Q31.3, pp29-30

<sup>358</sup> MAA, *Response to questions on notice*, Q31.4, p30

- Provision of opportunities through the MAA Local Government Road Safety Grants Program, administered by the Institute of Public Works Engineering Australia (IPWEA), for councils to apply for grants for projects targeting motorcyclists and drivers.<sup>359</sup>

### Pedestrian road safety, including children

**5.36** The Committee notes that the MAA is engaged in a number of initiatives to promote road safety outcomes for pedestrians, including a number of initiatives targeted at children.

**5.37** The Committee is aware of significant public attention regarding the safety of children in driveways following an incident involving the daughter of a prominent NSW sportsman last year. The Committee notes the MAA's ongoing efforts in this area, including by convening the Children Killed and Injured in Driveways Steering Committee. The MAA advised the Committee that the Steering Committee was 'established to reduce the risk to young pedestrians from low speed off road accidents such as those in driveways'. In this respect, the MAA stated that:

The [steering] Committee has sponsored research to determine the circumstances surrounding such accidents and initiatives to promote increased supervision wherever vehicles might be moved, as well as the provision of safe play areas for children. The Committee has also supported the preparation of a technical specification to improve vehicle rearward visibility.<sup>360</sup>

**5.38** The Committee notes that the MAA has funded initiatives to reduce the risk of road injury to young pedestrians from reversing vehicles, including funding councils, health and community agencies across NSW to promote driveway safety messages and producing a driveway safety television commercial.<sup>361</sup>

**5.39** The MAA has also collaborated with Kidsafe NSW to develop a program to promote road safety behaviours amongst children and their carers, the *Kids Need a Hand* in Traffic campaign.<sup>362</sup> The MAA also supports the annual *Walk Safely to School* day, which is co-ordinated by the Pedestrian Council of Australia, and provides grants to Local Councils through the MAA Local Government Road Safety Grants Program.<sup>363</sup>

### Children and road safety

**5.40** The Committee notes that CTP claims by children account for 9% of all claims, and 12% of all claim costs.<sup>364</sup> Road transport accidents are the most common cause of death for persons aged between 0-17 in NSW.<sup>365</sup>

<sup>359</sup> MAA, *Response to questions on notice*, Q32.1 p30

<sup>360</sup> MAA, *Response to questions on notice*, Q34.1 p31

<sup>361</sup> MAA, *Annual Report*, 2004-2005, p29

<sup>362</sup> MAA, *Response to questions on notice*, Q34.1 p31

<sup>363</sup> MAA, *Response to questions on notice*, Q34.1 p31

<sup>364</sup> [www.maa.nsw.gov.au/default.aspx?MenuID=151](http://www.maa.nsw.gov.au/default.aspx?MenuID=151) (accessed 11 July 2006)

**5.41** The MAA has funded a number of road safety initiatives for children, including research on child occupant restraints, as part of its Child Road Safety Program.<sup>366</sup> The Committee notes that research shows that ‘children under four years of age are being moved up from forward facing child restraints to booster and adult seat belts before they are ready. If a child’s upper body isn’t properly restrained, it dramatically increases the risk of serious injury.’<sup>367</sup>

**5.42** The Committee notes that the MAA has collaborated with Kidsafe to fund the *Choose Right, Fit Right* campaign to promote the proper use of child restraints:

The *Choose Right Fit Right* community education campaign, launched by the MAA in 2005 in partnership with Kidsafe NSW, aims to encourage the proper use of restraints for child passengers. The campaign was developed in response to MAA sponsored research into child passenger safety which found that children are being moved on from child restraints before they are ready. The state-wide campaign assists parents and carers of children aged between two and six years to choose, correctly fit and use restraints that are appropriate for a child’s size.<sup>368</sup>

### Rural and regional road safety

**5.43** The Committee notes data provided by the MAA which indicates that, although the motor vehicle injury rate in Sydney is roughly the same as for the rest of the State, the rate of road fatalities is significantly lower in the Sydney region compared to the rest of NSW.<sup>369</sup> The Committee also notes that country areas have lower claims numbers but higher costs, reflecting the fact that motor accidents in country areas tend to result in more serious injuries:

For sedans and other ordinary passenger vehicles, the claim frequency (i.e. claims/10,000 vehicles) in the country is 0.6 times the claim frequency in the Sydney metropolitan area. However, the country claim size is 1.2 times the Sydney metropolitan claim size.<sup>370</sup>

**5.44** The MAA also advised the Committee that it funds and promotes road safety for rural and regional road safety users through its general statewide road safety programs, including the Local Government Road Safety Grants Program and the *Arrive Alive* program:

The MAA targets rural and regional road safety issues through the provision of funding opportunities on a statewide basis. The MAA funded Local Government Road Safety Grants Program, for example, offers funding to councils for local activities that focus on MAA target groups such as pedestrians, motorcyclists, young people and children. These grants are offered annually. Funding is also offered annually to groups of young people for projects targeting local issues through the *Arrive alive* grants scheme, as well as sponsorship of a number of statewide activities

<sup>365</sup> [www.maa.nsw.gov.au/default.aspx?MenuID=151](http://www.maa.nsw.gov.au/default.aspx?MenuID=151) (accessed 11 July 2006)

<sup>366</sup> MAA, *Annual Report*, 2004-2005, p28

<sup>367</sup> MAA, *Annual Report*, 2004-2005, p30

<sup>368</sup> MAA, *Response to questions on notice*, Q30.2, p28

<sup>369</sup> MAA, *Response to questions on notice*, Q34.1, p31

<sup>370</sup> MAA, *Response to questions on notice*, Q34.1, p31

such as Youth Week, the Arrive Alive Cup and the statewide schoolboy rugby league competition.<sup>371</sup>

- 5.45** The MAA also participated in the Country Road Safety Summit in May 2004. The MAA advised the Committee that the Summit produced a total of 137 recommendations for government action:

In addition, in May 2004 the MAA participated in the *Country Road Safety Summit* which provided an opportunity for a bipartisan review of safety on country roads. The summit released a Communiqué which included 137 recommendations to be considered by Government.<sup>372</sup>

- 5.46** The Committee notes that whilst the bulk of the recommendations of the Summit are directed to the RTA, several are directed to the MAA. For example, recommendation 1.11 states:

The RTA in conjunction with the Motor Accidents Authority review and research the role of cruise control in heavy vehicle crashes. The RTA to report back the results of the review/research to the Road Freight Advisory Council and discuss options to improve road safety outcomes.<sup>373</sup>

- 5.47** Committee was not advised of progress on the implementation of these recommendations.

### **Drink driving**

- 5.48** The MAA advised the Committee that it collaborates with the RTA, the Department of Corrective Services and the Attorney General's Department to deliver the NSW Sober Driving Program, an educational program for repeat drink driving offenders.<sup>374</sup> The program includes dedicated resources for Aboriginal participants.<sup>375</sup> The Committee notes that the program, which is funded to June 2007, is currently the subject of an independent evaluation.

### **Committee comment**

- 5.49** The Committee commends the MAA for its important work in the area of road safety. It is apparent that the MAA is performing its functions in respect of road safety competently, and with a view to ongoing improvement. The Committee notes in particular that the MAA Grants Program has recently been subject to independent review, and that the MAA is engaged in the process of developing a 3-5 year Road Safety and Rehabilitation Strategic Plan.
- 5.50** The Committee notes the submission from the Brain Injury Association that consultation with stakeholders will only take place once the plan is complete, and the statement in the MAA's

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<sup>371</sup> MAA, *Response to questions on notice*, Q34.1 p32

<sup>372</sup> MAA, *Response to questions on notice*, Q34.1 p31

<sup>373</sup> NSW Country Road Safety Summit, Communiqué, 28 May 2004, p4

<sup>374</sup> MAA, *Response to questions on notice*, Q28.4, p27

<sup>375</sup> MAA, *Response to questions on notice*, Q28.4, p27

*Annual Report* that the plan will not be given to stakeholders until it is completed.<sup>376</sup> The Committee considers that, as a general principle, government agencies should consult with interested stakeholders before finalising important policies, subject to reasonable time and resource constraints. The benefits of consultation include increased ‘buy-in’ from stakeholders and the chance to resolve operational issues before a policy comes into effect. The Committee therefore recommends that the MAA consult with all interested stakeholders, including the NSW Parliament Joint Standing Committee on Road Safety, prior to finalising the Road Safety and Rehabilitation Strategic Plan.

### **Recommendation 15**

That the Motor Accidents Authority consult with all interested stakeholders, including the NSW Parliament Joint Standing Committee on Road Safety, prior to finalising the Road Safety and Rehabilitation Strategic Plan.

- 5.51** The Committee also notes the submission by the George Institute regarding the funding of road safety research by the MAA, including the Institute’s proposal that the MAA fund a scheme to promote the development of young road safety researchers. The Committee notes the MAA’s decision not to fund general road safety research through the Grants Program, although it will continue to fund research directed at specific road user groups, such as children. The Committee is not aware of the reasons for this decision, and can therefore express no view as to its merits. However, the Committee recommends that the MAA report to the Committee on the reasons for its decision to discontinue general road safety research grants, and on the merits of the MAA funding a scheme to promote the development of early career road safety researchers.

### **Recommendation 16**

That the Motor Accidents Authority report to the Committee on the reasons for its decision to discontinue general road safety research grants, and on the merits of the MAA funding a scheme to promote the development of early career road safety researchers.

- 5.52** The Committee also notes the participation of the MAA in the Country Road Safety Summit in 2004. The Committee notes that the Summit made several recommendations directed to the MAA. However, the Committee was not advised of progress on the implementation of the recommendations of the summit. The Committee therefore recommends that the MAA advise the Committee of the implementation of the recommendations of the Summit which were directed to the MAA.

<sup>376</sup> MAA, *Annual Report*, 2004-2005, p15

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**Recommendation 17**

That the Motor Accidents Authority advise the Committee of the implementation of the recommendations of the Country Road Safety Summit that required action by the MAA.

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# Chapter 6     The MAA and the medical treatment of injured road users

In this Chapter the Committee notes the important link between the MAA's medical care and treatment functions and the performance of the scheme generally, and discusses a number of discrete issues relating to the MAA's role in promoting better health outcomes in respect of whiplash, spinal injury and other injuries and trauma care.

## Overview

- 6.1** Two of the principal objectives of the 1999 reforms to the motor accidents scheme were to reduce the costs of CTP insurance and to promote the faster recovery and rehabilitation of persons injured in motor accidents. The Committee notes that these goals are complementary, rather than conflicting.
- 6.2** Section 206(3) of the *Motor Accidents Compensation Act 1999* (NSW) imposes functions on the MAA in respect of the provision of acute care, treatment, rehabilitation and long term support services for persons injured in motor accidents, namely:
- to monitor those services
  - to provide support and funding for research and education in connection with those services that will assist effective injury management
  - to provide support and funding for programs that will assist effective injury management, and
  - to develop and support education programs in connection with effective injury management.
- 6.3** As noted in Chapter Five, the MAA funds programs in this area through its Grants Program. The Committee notes that MAA expenditure on rehabilitation grants in 2004-2005 was \$4.850 million, up from \$2.414 million in 2003-2004. General issues regarding the Grants Program and the development of the MAA's Road Safety and Rehabilitation Strategic Plan are discussed in Chapter Five.
- 6.4** In this Chapter the Committee notes the important link between the performance of the MAA's medical care and treatment functions and the performance of motor accidents scheme generally, before discussing a number of issues relating to particular kinds of injury, including whiplash and associated disorders, spinal injury, and trauma care.

## Scheme performance and medical outcomes for claimants

- 6.5** The Committee has previously reported on the MAA's criteria for assessing the performance of the motor accidents scheme.<sup>377</sup> As discussed in Chapter 1, the MAA reports to the Minister

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<sup>377</sup> Legislative Council, Standing Committee on Law and Justice, Report 13, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – First Report*, p6

on the performance of the scheme on an annual basis, measured in terms of affordability, effectiveness, efficiency and fairness. Affordability is assessed against the price of CTP premiums; effectiveness is measured in terms of the speed and cost of the claims handling process; efficiency is measured in terms of the proportion of the premium dollar being paid to claimants (as opposed to transaction costs); and fairness refers to whether the most seriously injured are receiving adequate compensation.<sup>378</sup>

- 6.6** The Committee notes that the MAA's current scheme indicators do not directly take account of the impact of the scheme on the health of claimants. However, in the course of the current *Review* the MAA advised the Committee of its continuing efforts to incorporate medical outcomes for injured road users into its assessment of scheme performance:

... we have in mind that health outcomes need to become a key indicator of scheme performance as well as other measures but appreciate that requires really some system of measuring and we are in discussions with some medical groups about how we can apply that to particular injury types other than just whiplash.<sup>379</sup>

#### **Committee comment**

- 6.7** The Committee is supportive of the MAA's efforts to incorporate health outcomes for injured road users into the MAA's criteria for the assessment of the performance of the motor accidents scheme. The Committee is also aware of the difficulties associated with producing a meaningful measure of health outcomes in general. The Committee recommends that the MAA continue to work with interested stakeholders to develop a meaningful measure of health outcomes as a criterion of effectiveness of the motor accidents scheme.
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#### **Recommendation 18**

That the Motor Accidents Authority continue to work with interested stakeholders to develop a meaningful measure of health outcomes as a criterion of effectiveness of the NSW motor accidents scheme.

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#### **Medical treatment issues**

- 6.8** In this section the Committee considers several issues raised in the course of this Inquiry concerning the role of the MAA in relation to the treatment of injured road users, including issues regarding whiplash, anxiety, spinal injury, brain injury, surgical intervention and the provision of trauma care services.

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<sup>378</sup> See Mr Grellman, Evidence, 31 March 2006, pp2-3 and *Second Review*, p6

<sup>379</sup> Mr Bowen, Evidence, 31 March 2006, p5

## Whiplash and Associated Disorders (WAD)

- 6.9** The Committee notes that whiplash and associated disorders (WAD) account for 40% of all claims in the NSW motor accidents scheme.<sup>380</sup> The Committee is aware that MAA efforts to reduce the impact and cost of WAD have continued over several years. In particular, the MAA released *Guidelines for the Management of Whiplash-Associated Disorders* in January 2001 ('WAD Guidelines'). In relation to the Guidelines, the MAA stated that:

The Guidelines, developed by a multi-disciplinary committee, reviewed the available evidence and made consensus recommendations on best treatment and management practices. Separate publications were developed for medical/ health professionals, insurers and consumers.<sup>381</sup>

- 6.10** The MAA has promoted use of the WAD Guidelines by medical and health professionals through an ongoing education program. The MAA advised the Committee that it had also conducted 'a pilot project on the Central Coast involving visits with individual general practitioners to promote awareness of the Guidelines and the Accident Notification Form.'<sup>382</sup>
- 6.11** The Committee notes that the MAA is currently reviewing the WAD Guidelines and that the review is expected to be completed by mid 2006.<sup>383</sup> At the time of writing this report, the Committee has not been informed of the outcome of this review.
- 6.12** As part of the *Sixth Review* the Committee noted that initiatives by the MAA in respect of WAD appeared to have contributed to significantly improved outcomes for WAD sufferers.<sup>384</sup> As part of the current *Review*, the MAA advised the Committee that its recent research confirmed the effectiveness of its programs in respect of WAD:

The methodology used by the team was to compare health outcomes at two years post injury for three cohorts of injured persons. The first cohort group included people who were injured in 1999 and therefore dealt with under the prior motor accidents scheme. The second cohort group included those injured in 2001 after the introduction of the *Motor Accidents Compensation Act 1999*, with its heavy emphasis on early and appropriate treatment. The third cohort group included those injured in 2003 after the introduction and dissemination of the MAA guidelines for the treatment of whiplash, which included both practitioner and consumer guides. While the study is ongoing, the results to date indicate that health outcomes have improved following the 1999 legislation with a greater number of claimants injured in 2003 recovered within three months and six months post injury compared with those injured in 2001.<sup>385</sup>

- 6.13** Mr Bowen advised the Committee that the improved health outcomes have actually resulted in a reduction of costs to the motor accident scheme:

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<sup>380</sup> MAA, *Response to questions on notice*, Q44.1, p38

<sup>381</sup> MAA, *Response to questions on notice*, Q44.1, p38

<sup>382</sup> MAA, *Response to questions on notice*, Q44.1, p38

<sup>383</sup> MAA, *Response to questions on notice*, Q44.1, p38

<sup>384</sup> *Sixth Review*, pp72-74

<sup>385</sup> MAA, *Response to questions on notice*, Q44.1, p38

... the earlier intervention that was required, the earlier treatment that was required as a result of the 1999 amendments and then the provision of clinical information to GPs and physiotherapists, has led to significant improvement in health outcomes ... that has come at a lower cost, which in health economic terms is fairly counter-intuitive. Normally an intervention in the health area comes at a cost and you measure the cost benefit on that basis. Here we have a health improvement and at a lower cost.<sup>386</sup>

- 6.14** The Committee asked the MAA whether it had plans to apply its approach to WAD to other injuries. The MAA stated that, as a general principle, the use of treatment guidelines is effective to promote an evidence based approach to injury management:

The MAA considers that developing treatment guidelines is an effective strategy for improving the management of motor vehicle related injuries. Guidelines promote an evidence-based approach to management by key stakeholder groups (health professionals, insurers and consumers) and provide information that would otherwise not be readily available.<sup>387</sup>

- 6.15** The MAA also stated that it is progressing the development of guidelines for anxiety and for chronic whiplash:

This strategy has worked particularly well in relation to whiplash-associated disorders which are a common injury but were previously not well managed. The same model has already been applied to anxiety and further guidelines will be developed for chronic whiplash. The MAA monitors and considers the need for guidelines in new areas and is in regular dialogue with the medical profession.<sup>388</sup>

### Anxiety disorders

- 6.16** Mr Bowen advised the Committee that the MAA has released guidelines for the treatment of anxiety related disorders and that the MAA is '... currently looking at an evaluation mechanism for guidelines we put out in relation to anxiety and post-traumatic stress to see whether we are getting any improvement there.'<sup>389</sup>

- 6.17** The MAA advised the Committee that, although most persons survive a motor vehicle accident without experiencing an anxiety related disorder, for those who are hospitalised for physical injury as a result of a motor vehicle accident, the prevalence of anxiety disorders is reasonably high:

In most cases people who are involved in or witness a motor vehicle accident will not develop Acute Stress Disorder (ASD) or Post Traumatic Stress Disorder (PTSD). Prevalence studies of ASD and PTSD after a motor vehicle accident have largely involved people requiring hospital treatment - i.e. having suffered physical injuries. The results of this research indicate that approximately 15% will develop ASD, 10%-

<sup>386</sup> Mr Bowen, Evidence, 31 March 2006, p24

<sup>387</sup> MAA, *Response to questions on notice*, Q44.2, p39

<sup>388</sup> MAA, *Response to questions on notice*, Q44.2, p39

<sup>389</sup> Mr Bowen, Evidence, 31 March 2006, p24

30% will develop PTSD and 2.5%-8% will develop late onset PTSD (after 6 months).<sup>390</sup>

- 6.18** The MAA advised the Committee that the rate of psychological claims has been relatively stable since the inception of the new scheme; psychological claims have accounted for 9% of all claims in the last two accident years, compared to 11% of claims under the old scheme.<sup>391</sup>

### Community Participation Program

- 6.19** The Committee notes that the MAA contributes to the Community Participation Program for persons who have suffered a spinal cord injury. The MAA and the Department of Ageing, Disability and Home Care jointly fund the program, which is ‘tralling and evaluating a model of service coordination to improve the community participation of people with spinal cord injury.’<sup>392</sup> The total cost of the Community Participation Program is \$2 million, and there are 40 participants. The MAA’s contribution to the Program is ‘used to provide interim care and other services, so that a person can be discharged back into the community as soon as they are medically ready.’<sup>393</sup>

- 6.20** The MAA advised the Committee that it has engaged the University of Sydney to evaluate the Community Participation Program by comparing health outcomes for program participants with health outcomes for persons in a ‘control’ group:

A control group of spinal cord patients receiving the usual services is being compared to an intervention group receiving additional service coordination and gap funding for services. The Rehabilitation Studies Unit of the University of Sydney is using standardised measures to evaluate the effect of the intervention for participants and their families. As the data collection timeframe is based on time since injury and/ or discharge, the availability of data for comparison is only in the initial stages.<sup>394</sup>

- 6.21** The MAA also informed the Committee that early indications are that the program has been a success, with a 25% reduction in hospital stay achieved amongst program participants:

There are currently 41 people being assisted through this project with the first patient discharged from hospital in October 2004 and the last expected to be discharged in March 2006. An analysis of the early data has shown a 25% reduction in the length of hospital stay for the intervention group. This has been achieved through improving the coordination of existing services and utilisation of the current systems for housing, home modification, transport and personal care.<sup>395</sup>

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<sup>390</sup> MAA, *Response to questions on notice*, Q46.4, p40

<sup>391</sup> MAA, *Response to questions on notice*, Q46.4, p41

<sup>392</sup> MAA, *Annual Report*, 2004-2005, p17

<sup>393</sup> MAA, *Annual Report*, 2004-2005, p17

<sup>394</sup> MAA, *Response to questions on notice*, Q26.1, p25

<sup>395</sup> MAA, *Response to questions on notice*, Q26.1, p25

- 6.22** The Community Participation Program extends to assistance post-release, including alterations to housing and the provision of high level personal care for two years post release from hospital, as described by the MAA:

Following spinal cord injury a person must make significant changes to their life. Of the 41 participants in the program, 27 changed their housing arrangements and 29 required home modifications. 13 require high level personal care assistance on an ongoing basis. The post hospital support being offered by the project to participants has been extended from one to two years. This will provide the opportunity to support participants to engage in community or vocational activities.<sup>396</sup>

- 6.23** The Committee notes that the MAA's work in respect of the treatment of injured persons, although funded by the MAA through the CTP levy paid by NSW motorists, has important flow-on benefits. Spinal Cord Injuries Australia submitted that the MAA's efforts in developing treatment guidelines in respect of spinal injuries had not only benefited those persons injured in motor accidents, but also persons suffering from spinal injuries generally:

The MAA has undertaken a lead role in the development of guidelines on how personal care services should be provided and on the level that people require. This is clearly demonstrated with the recent working party chaired by the MAA on 24 hour care and the guidelines that have come from that working party. Whilst this is targeted to people injured in motor vehicle accidents, these guidelines are applicable to people who received their injury in other ways.<sup>397</sup>

- 6.24** The Committee notes that the MAA's efforts in respect of spinal cord injuries were 'strongly endorsed' by Spinal Cord Injuries Australia.<sup>398</sup> The organisation 'encourage(s) the MAA to continue to establish such projects in the future and to use the results as a recommendation to government departments and other organisations for improvements in processes and procedures.'<sup>399</sup>

### Traumatic Brain Injury Care and Support Protocols

- 6.25** The Committee notes that the MAA introduced the *Traumatic Brain Injury Care and Support Protocols (Protocols)* on a trial basis in February 2005.<sup>400</sup> The focus of the *Protocols* is 'on providing a standard and consistent format for care and approval requests'.<sup>401</sup> The Committee notes that the MAA consulted with interested stakeholders in the development of the *Protocols*.<sup>402</sup>

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<sup>396</sup> MAA, *Response to questions on notice*, Q26.1, p25

<sup>397</sup> Spinal Cord Injuries Australia, Submission 1, p1

<sup>398</sup> Submission 1, p1

<sup>399</sup> Submission 1, p2

<sup>400</sup> MAA, *Annual Report*, 2004-2005, p17

<sup>401</sup> MAA, *Annual Report*, 2004-2005, p17

<sup>402</sup> MAA, *Annual Report*, 2004-2005, p17

**6.26** The MAA has conducted training for insurers and service providers on the application of the *Protocols*.<sup>403</sup> A review of the *Protocols* conducted by the MAA in November 2005 indicated ‘that both service providers and insurers appreciate the comprehensive structure of the protocols and the importance of the information exchanged through the recommended reporting practices.’<sup>404</sup> The MAA is currently considering the results of the review with a view to further development of the *Protocols*.<sup>405</sup>

**6.27** The Committee is also aware of initiatives by the MAA to enhance the community participation of persons suffering from a traumatic brain injury. In this respect, the MAA advised the Committee that:

The MAA is currently developing three additional projects to improve the community participation of people with a brain injury. Two of these projects are being developed with the Department of Education, the Independent Schools, the Catholic Schools, the Paediatric Brain Injury Units and DADHC and will address the needs of children with a brain injury at school and when leaving school. The third project will involve trialling a model of a therapy intervention for people with challenging behaviours in the community.<sup>406</sup>

**6.28** The Brain Injury Association of NSW Inc submitted that the Community Participation Program for persons with a spinal cord injury may provide a suitable template for persons with an acquired brain injury.<sup>407</sup>

### Surgical intervention, including orthopaedic surgery

**6.29** The Committee is aware of efforts by the MAA to measure and improve health outcomes in respect of persons requiring surgical intervention consequent upon an injury in a motor vehicle accident. The MAA advised the Committee that its research in this area confirmed experience from other jurisdictions that participants in a compensation scheme generally have worse health outcomes than persons who are not subject to a compensation scheme:

We have had the benefit of a presentation from Ian Harrison, an orthopaedic surgeon at Liverpool Hospital who did an examination of health outcomes for people post-surgery looking at all the studies he could collect from around the world, which unfortunately duplicates what we know generally, that people who are in compensation schemes have worse health outcomes even in a post-surgical setting.<sup>408</sup>

**6.30** Mr Bowen advised the Committee that the MAA has invited the Society of Orthopaedic Surgeons to collaborate with it in the development of guidelines for orthopaedic surgery associated with motor vehicle accidents, but that it may be some years before the MAA is able to assess the effectiveness of its efforts in this area:

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<sup>403</sup> MAA, *Response to questions on notice*, Q27.1, p25

<sup>404</sup> MAA, *Response to questions on notice*, Q27.1, p26

<sup>405</sup> MAA, *Response to questions on notice*, Q27.1, p26

<sup>406</sup> MAA, *Response to questions on notice*, Q26.2, p25

<sup>407</sup> Submission 7, p2

<sup>408</sup> Mr Bowen, Evidence, 31 March 2006, pp24-25

I have written to the Society of Orthopaedic Surgeons and said that that is something that we would like to work with them to address to see whether the development with them of some clinical guidelines on treatment for some of the more common orthopaedic surgery associated with motor vehicle accidents would lend itself to improving health outcomes in that area, but I suspect - well, I don't suspect, I know - it will be many years before I will be in a position to report back on any success with that, but I think we are moving down the correct path if we are focusing on that area.<sup>409</sup>

### Hospital treatment of road trauma victims

- 6.31** The Royal Australasian College of Surgeons provided the Committee with a detailed submission regarding the provision of trauma care services by surgeons in NSW hospitals. The substance of the submission was that trauma care should be concentrated in major hospitals in order to put specialisation in trauma care on a sustainable basis by ensuring those hospitals have an adequate volume of work. The College made several recommendations regarding a possible new partnership between the College and the MAA in respect of trauma services, including a new funding model for trauma care units based on performance measures.<sup>410</sup>
- 6.32** The Committee put the College's proposal to the MAA. The MAA advised the Committee that of the results of overseas research conducted which found that 'an institution must receive 750-800 trauma patients a year (about 15 per week) to develop the critical mass necessary to gain expertise and efficiencies in managing trauma.'<sup>411</sup> The MAA advised the Committee that there are several advantages in concentrating trauma care in the manner suggested by the College:

With fewer centres, there would be greater opportunities to maintain a best practice approach to the management of trauma and the promotion of early rehabilitation. The MAA is keen to ensure that trauma patients are followed up and in particular, that the need for rehabilitation is identified as early as possible and the necessary referrals made. It may also assist in encouraging the specialisation of surgeons in general trauma care referred to by the College. In addition, this approach would foster research opportunities not currently available such as in following up trauma patients. This model has been adopted in Victoria, which has one major trauma centre, and appears to be working well.<sup>412</sup>

- 6.33** However, while the MAA identified some advantages of concentrating trauma care services, it also stated that this issue is properly a matter for the Minister for Health.<sup>413</sup> In respect of the College's proposal to form a new partnership with the MAA, the MAA stated that it was happy to work with the College within the parameters of its own responsibilities:

<sup>409</sup> Mr Bowen, Evidence, 31 March 2006, pp24-25

<sup>410</sup> Royal Australasian College of Surgeons, Submission 9, pp1-5

<sup>411</sup> MAA, *Response to questions on notice*, Q43.1, p36

<sup>412</sup> MAA, *Response to questions on notice*, Q43.1, p37

<sup>413</sup> MAA, *Response to questions on notice*, Q43.1, p37

The MAA would be pleased to work cooperatively with the Royal Australian College of Surgeons on injury prevention and management issues. It is noted, however, that any proposal to reward treatment centres based on outcomes is a matter for the Minister for Health.<sup>414</sup>

### **Committee comment**

- 6.34** The Committee considers that the MAA is in a unique position to drive improvements in health outcomes for persons injured in motor vehicle accidents in NSW. The evidence received by the Committee in the course of this Inquiry indicates that the MAA has taken advantage of that position for the benefit not only of particular groups of injured road users, but for the benefit of the scheme as a whole. In this respect the Committee notes the close link between improved health outcomes for injured road users and the performance of the scheme. For example, advances in the treatment of whiplash and associated disorders have resulted in less pain and suffering for the injured, but also lower aggregate treatment costs. All other things being equal, lower aggregate treatment costs mean lower CTP premiums for NSW motorists. The Committee recommends that the MAA continue to work with interested stakeholders to promote improved health outcomes in the NSW motor accidents scheme, including in respect of anxiety, chronic whiplash, spinal injury and brain injury.

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### **Recommendation 19**

That the Motor Accidents Authority continue to work with interested stakeholders to promote improved health outcomes in the NSW motor accidents scheme, including in respect of anxiety, chronic whiplash, spinal injury and brain injury.

- 6.35** The Committee notes the proposal by the Royal Australasian College of Surgeons for the concentration of trauma care services in a smaller number of hospitals. International research cited by the MAA tends to support the College's proposal. The Committee concurs with the MAA that this issue is primarily one for the Minister for Health. However, as noted above, treatment issues bear on the costs of motor accidents and on the performance of the NSW motor accidents scheme. The Committee therefore recommends that the MAA review its role in respect of the provision of trauma care services for persons injured in motor accidents in NSW to determine whether the MAA can contribute to placing trauma care services on a more sustainable basis.

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### **Recommendation 20**

That the Motor Accidents Authority review its role in respect of the provision of trauma care services for persons injured in motor accidents in NSW to determine whether the MAA can contribute to placing trauma care services on a more sustainable basis.

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<sup>414</sup> MAA, *Response to questions on notice*, Q43.6, p37

## Chapter 7     Other issues raised in the *Seventh Review*

In this Chapter the Committee reports on a number of other issues concerning the operations of the MAA raised during the Inquiry. The issues include three significant legislative changes to the motor accidents scheme, CTP premiums for buses and coaches, Nominal Defendant claims, interim payments, the CTP-public liability insurance gap and late withdrawals of liability.

### Overview

7.1     In this Chapter the Committee considers a number of other issues which were raised in the course of the *Seventh Review*:

- The Lifetime Care and Support Scheme
- The no-fault for children benefit
- The blameless or inevitable accident benefit
- CTP premiums for buses and coaches
- Interim payments for the injured
- Withdrawals of admissions of liability and the operation of section 181 of the Act
- Insurance gap between CTP and public liability insurance
- Issues associated with Nominal Defendant claims
- Analysis of damages awards
- Establishing loss of income for casual workers
- Role of the Motor Accidents Council.

### Lifetime Care and Support Scheme (LTCSS)

7.2     The Committee has reported on proposals for the introduction of lifetime care for persons catastrophically injured in motor accidents for many years. Recommendation 3 of the Committee's 1997 *Second Interim Report* of the Motor Accidents Scheme (Compulsory Third Party Insurance) Inquiry was that the Government develop a 'no fault long term care scheme'.<sup>415</sup> More recently, the Committee reported on proposals for national and state catastrophic care schemes in both the *Fifth* and *Sixth Reviews*.<sup>416</sup>

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<sup>415</sup> Standing Committee on Law and Justice, *Inquiry into the Motor Accidents Scheme (Compulsory Third Party Insurance): Second Interim Report*, December 1997, p30

<sup>416</sup> Legislative Council, Standing Committee on Law and Justice, Report 25, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Fifth Report* (hereafter *Fifth Review*), p89 and *Sixth Review*, p64

- 7.3 During the course of the *Seventh Review* the NSW Parliament passed the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) ('the LTCSS Act'). The LTCSS Act provides for the establishment a new Lifetime Care and Support Scheme (LTCSS) to provide ongoing support for persons who suffer catastrophic injuries in motor vehicle accidents in NSW, irrespective of fault.<sup>417</sup> Rather than provide a lump sum in damages to provide for future needs, the LTCSS will provide care and services for the duration of a participant's life-time.
- 7.4 As noted by Mr Bowen, General Manager of the MAA, the MAA undertook 'some of the development of that proposal for Government'.<sup>418</sup>
- 7.5 The LTCSS will have a significant impact on the operation of the motor accidents scheme, and on the operations of the MAA. For example, a substantial amount of risk will be transferred from the scheme to the new LTCSS Authority, which will levy NSW motorists to fund that risk. CTP premiums will therefore fall, but the fall will be more than made up by the LTCSS levy. On an aggregate basis, motorists will pay on average \$20 more per year for their CTP premium and LTCSS levy. This issue is discussed at paragraph 7.20.
- 7.6 As noted in Chapter 6, the MAA has played a significant role in improving health outcomes for persons who suffer a catastrophic injury, for example, through its involvement in the Community Participation Program for persons with a spinal cord injury. It is not presently clear to the Committee how the establishment of LTCSS will impact on programs such as these. The Committee anticipates investigating this issue as part of future reviews.
- 7.7 In the following sections the Committee notes the reasons behind the development of LTCSS and some of the key features of LTCSS.

### **Number of potential participants**

- 7.8 Mr Bowen advised the Committee that approximately 125 people per year are catastrophically injured in motor accidents in NSW, most of whom have suffered a spinal cord injury or a traumatic brain injury:
- ... there are around 125 people per year who have a catastrophic injury as a result of a motor vehicle accident and that is defined as a spinal cord injury or a traumatic brain injury of a certain level that means that they will require some lifetime assistance. There may be up to two or three other types of matters that fall into that category, including severe burns, loss of sight, and double amputations, but primarily we are talking about spinal cord injury and brain injury.<sup>419</sup>
- 7.9 Mr Bowen also advised that the archetype of the catastrophically injured road user is a male in his late teens or early twenties.<sup>420</sup>
- 7.10 The NSW motor accidents scheme is fault based; claimants who cannot prove fault on the part of another driver will be unable to access damages under the scheme. Based on

<sup>417</sup> *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW)

<sup>418</sup> Mr Bowen, Evidence, 31 March 2006, p10

<sup>419</sup> Mr Bowen, Evidence, 31 March 2006, p10

<sup>420</sup> Mr Bowen, Evidence, 31 March 2006, p11

experience to date, of the 125 people who are catastrophically injured in any given accident year, only about half will be able to prove fault. Those who cannot prove fault will receive no compensation at all, and will be reliant on their own funds and on government for the provision of care. Of those who can prove fault, between one quarter and one third will have their damages reduced because of contributory negligence. In this respect, Mr Bowen stated:

Our research and some studies show that of the 65 who receive compensation between a quarter to a third will have some reduction in the amount of damages they receive because of contributory negligence and that reduction may be anything from 10 percent up to theoretically 100 percent, and occasionally we get one in the 90 to 100 percent range, but generally they will be in the order of 25 percent reduction for failure to wear a seat belt, which is a classic clear-cut case of contributory negligence. It is either contributing to the injury or contributing to the accident.<sup>421</sup>

### Inadequacy of lump sum compensation for the catastrophically injured

**7.11** The Committee has previously reported on the inadequacy of lump sum compensation for persons suffering a catastrophic injury.<sup>422</sup> Recommendation 12 of the *Sixth Review* was that the MAA conduct research into the ‘the issue of damages lasting the lifetime of those catastrophically injured.’ The Government’s response to this recommendation referred to the proposal to create the LTCSS.<sup>423</sup>

**7.12** Mr Bowen referred to studies regarding the longevity of compensation funds, noting that in many cases funds run out in the persons lifetime:

We know of the 40 or 45 who receive full compensation that in 20 years’ time around eight to 10 of them will have died. They may have died leaving some of their compensation to relatives, or they may have used it up, we do not know, and of the rest we know that around half of whom are left will have no funds left at the 20 year point in time. A fairly major piece of research conducted in 1997 followed up a very large number of people Australia-wide who received compensation benefits and they found that on average people were back on to social security 17 years after their settlement.<sup>424</sup>

**7.13** The LTCSS is designed to ameliorate the effect of these issues on the catastrophically injured by the direct provision of medical care and support to all those in need, rather than those who can prove fault, for the duration of their lives. In this respect, Mr Bowen stated:

So what it clearly shows is that people catastrophically injured, a big chunk do not get anything; of those who get compensation, some get a reduction; of those who get full compensation, a significant proportion of them will have run out of funds within a 20-year period. I suppose that is what the Lifetime Care Scheme is aimed to address. It is saying, rather than make the entry to it fault-based and rather than make it based on

<sup>421</sup> Mr Bowen, Evidence, 31 March 2006, p10

<sup>422</sup> *Sixth Review*, p62

<sup>423</sup> *Government response to the Sixth Review*, pp6-7

<sup>424</sup> Mr Bowen, Evidence, 31 March 2006, pp10-11

the provision of lump sum damages, it is providing a regime of care and support to the person over their full life.<sup>425</sup>

### **Eligibility for participation in the LTCSS**

- 7.14** Mr Bowen advised the Committee that participation in the LTCSS will be determined according to the injury sustained by, and the level of care and supervision required by, the injured person, assessed against guidelines developed by medical practitioners:

... the legislation sets up a system where eligibility to enter the scheme following a threshold determination that they were injured in a motor vehicle accident - that is one issue, so that is determined - is by a diagnosis-related system based on the injury they got and the level of care or level of supervision that they may require. Those guidelines have been produced really by groups of clinicians.<sup>426</sup>

- 7.15** The Committee notes that the LTCSS Act provides that disputes regarding eligibility for the scheme are to be resolved by a panel of medically qualified assessors.<sup>427</sup>

### **Level of care provided in LTCSS**

- 7.16** Mr Bowen advised the Committee that the level of care provided to LTCSS participants will be assessed according to guidelines, and that LTCSS participants will be assisted by a lifetime care coordinator to help them plan their release from hospital and return to the community:

Once a person is accepted into the scheme, the level of care and other support that they get is also determined by guidelines. In practice, for each person there will be a lifetime care coordinator to assist the person through the process and the coordinator will meet with the person and their family while they are still in acute care to plan for release from hospital and to maximise their level of participation in the community, in employment or education, in conjunction with their physical rehabilitation, rather than wait until a person is released and then start it at that stage.<sup>428</sup>

- 7.17** The Committee notes that there is scope within the LTCSS for self-management of care by suitable scheme participants. In this respect, Mr Bowen stated:

Where the person has the capacity and the desire to self-manage their own care, the legislation permits that by allowing the Authority to come to an agreement with that person for their own self-management of their care on a periodic basis, whether that be six-monthly or annually or indeed, in the case of some injuries, over a longer period of time.<sup>429</sup>

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<sup>425</sup> Mr Bowen, Evidence, 31 March 2006, p11

<sup>426</sup> Mr Bowen, Evidence, 31 March 2006, pp11-12

<sup>427</sup> *Motor Accidents (Lifetime Care and Support) Act 2006 (NSW)*, Part 3

<sup>428</sup> Mr Bowen, Evidence, 31 March 2006, p12

<sup>429</sup> Mr Bowen, Evidence, 31 March 2006, p12

- 7.18** Mr Bowen advised that there is also scope within the LTCSS for family members to be paid for the provision of care to LTCSS participants, although there will be a presumption against such an arrangement in the interests of maintaining ‘family dynamics’:

Where the family wish to be the carer, which may well be the case in relation to children, the scheme works on the assumption that the person is entitled to have all of their care needs met through the provision of professional care services and the disability organisations have strongly urged a presumption in favour of that so that it does not change the family dynamics, it does not change the dynamics from a family relationship to a carer and client relationship, but recognising that there will be circumstances where the family member is best placed and it is in the interests of the injured person for the family member to be the carer, the proposal is that the family member will be engaged as a paid carer, so it will not be gratuitously provided, and that they would have all of the protections of employment and that they would be trained to undertake the specialist care that needs to be provided. It is trying to move away from any reliance at all upon gratuitous family care so that, if it is required, it should be paid for.<sup>430</sup>

### **Administration of LTCSS by Lifetime Care and Support Authority and Council**

- 7.19** The Committee notes that arrangements for the administration of the LTCSS will mirror current arrangements for the administration of the CTP scheme. The LTCSS will be administered by a new Lifetime Care and Support Authority, which will be advised by an advisory Council comprised of interested stakeholders.<sup>431</sup>

#### **LTCSS levy**

- 7.20** As noted at paragraph 7.5, the LTCSS will be funded by a levy paid by all CTP policy holders. Mr Bowen described the process of setting the levy for LTCSS, indicating that those persons in the highest risk groups, such as motorcyclists, will contribute more to the scheme by way of a higher annual LTCSS levy:

The process is that there is a liability valuation, which estimates the lifetime cost on the assumed number of entrants to the scheme in the next year and taking or applying to that an assumption in relation to investment returns and assumptions about cash flow payments you set an aggregate amount that is required to be collected, which in year one of the new scheme will be in the order of \$300 million. That is then applied to individual policy holders by way of something akin to a relativities table, so there will be a different percentage of the CTP policy for different classes and geographic zones, a vehicle that tries to reflect the risk or the cost of a person injured by one of those types of vehicles. So, for instance, motorcycle riders will be extremely disproportionately represented in the lifetime care scheme compared to the number of vehicles on the road, so the impact on motorcycle riders will be much higher.<sup>432</sup>

<sup>430</sup> Mr Bowen, Evidence, 31 March 2006, p12

<sup>431</sup> *Motor Accidents (Lifetime Care and Support) Act 2006 (NSW)*, Part 6

<sup>432</sup> Mr Bowen, Evidence, 31 March 2006, p18

- 7.21** Mr Bowen advised the Committee that the average cost to motorists of the introduction of LTCSS will be \$20 per year, although some members of some groups, such as motorcyclists, may pay up to \$34 more per year than under current arrangements:

Applying that across the board in the existing CTP scheme indicates that the average levy will be in the order of \$66 per vehicle and that translates to about, on average, a \$20 net increase in the amount paid by the motorist, but that will vary so that people who are on better risk, over 55s and indeed 30 to 50 year olds, will pay a little bit less; those who are at a much higher risk and more likely to be participants or the cause of participants in the lifetime care scheme will pay more, up around the \$33-34 mark.<sup>433</sup>

### LTCSS does not exclude CTP claim

- 7.22** Mr Bowen informed the Committee that as well as accessing the LTCSS, catastrophically injured people can also make a CTP claim for those heads of damages not covered by LTCSS, such as future economic loss and damages for non-economic loss (i.e. pain and suffering):

People who are eligible will have their care and support provided for life. If they also have a CTP claim they will have a claim for all of the other heads of damage, for which they can get a lump sum, but not for the matters that are provided by the Lifetime Care and Support Scheme. For people who are compensable, that is injured through the fault of another person, they would certainly have a claim for non-economic loss and we would expect that they would be getting close to the maximum if not the maximum amount of non-economic loss and I would feel fairly certain that they would also have a claim for loss of future earning capacity because they have a lifelong disability.<sup>434</sup>

### Appointment of a Legislative Council Committee to supervise the LTCSA

- 7.23** The LTCSS Act provides for the appointment of a Legislative Council Committee with terms of reference relating to the supervision of the exercise of the functions of the LTCS Authority and the Advisory Council under the Act.<sup>435</sup> As at the time of writing this report, the House has not resolved to appoint a Committee to conduct the proposed review of the LTCS Authority and Council. However, during the second reading debate on the LTCSS Bill, the Minister for Commerce, the Hon John Della Bosca MLC, indicated that the Government intends to refer the supervisory function to this Committee.<sup>436</sup> The Committee welcomes this responsibility.

### Comment on LTCSS by Inquiry participants

- 7.24** Three submission makers expressed their support for the LTCSS. The Brain Injury Association of NSW Inc applauded the introduction of the scheme and the MAA's consultation process:

<sup>433</sup> Mr Bowen, Evidence, 31 March 2006, pp18-19

<sup>434</sup> Mr Bowen, Evidence, 31 March 2006, p11

<sup>435</sup> *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW), s68

<sup>436</sup> The Hon John Della Bosca MLC, Minister for Commerce, Legislative Council, *Hansard*, 4 April 2006, p21904

The Brain Injury Association of NSW Inc (BIANSW) applauds the Minister for Commerce, the Hon John Della Bosca and the Motor Accidents Authority for the introduction of and consultation regarding the *Lifetime Care and Support Assisting People with Catastrophic injuries from Motor Vehicle Accidents Scheme*. The Association considers the Scheme to be of enormous significance ...<sup>437</sup>

- 7.25** However, The Brain Injury Association expressed concern about some existing accident victims who will miss out on the LTCSS:

The Brain Injury Association of NSW would like the Committee to consider the needs of people who have received a traumatic brain injury from motor vehicle accidents, were at fault for their accident and subsequently did not receive compensation.

This group of people, many of whom currently reside inappropriately in nursing homes and boarding houses, receive limited support from Departments such as Disability, Ageing and Home Care and will not be eligible to receive services under the Lifetime Care Scheme (LTCSS) given that the scheme is not retrospective.

The Association considers that this group of people currently experiences severe inequity in service provision, inequity that will only become more pronounced with the introduction of the LTCSS. There is and will be a two tier system for service provision. There are those who receive inadequate care and support because their injury predates the introduction of the LTCSS and was non-compensable and those who will receive appropriate care and support as their injury follows the commencement of the LTCSS alongside those who previously received compensation.

While the Brain Injury Association of NSW fully supports the introduction of the LTCSS we encourage the Committee to consider this issue given the existence and potential for systemic discrimination to occur.<sup>438</sup>

- 7.26** The Australian Lawyers Alliance also expressed support for the scheme with one qualification:

This system is a good initiative for those at fault or in the case of inevitable accident, but those injured as the result of another person's negligence should have the option to seek a lump sum.<sup>439</sup>

- 7.27** In relation to the Alliance's qualification, the Committee notes that LTCSS participants who can prove fault will not be precluded from making a CTP claim for damages other than future medical expenses, as discussed at paragraph 7.22.

- 7.28** The NRMA stated that it supported the LTCSS provided that it could be introduced in an affordable manner:

The MAA, with the advice of the MAC has been working on a Lifetime Care and Support Plan (LTCSS). Under the LTCSS Plan, all people catastrophically injured in motor vehicle accidents in NSW will receive medical care and support services for life, regardless of who was at fault in the accidents. NRMA supports this initiative

<sup>437</sup> Submission 7, p1. See also, Submission 3, Accident Victims Alliance, p1

<sup>438</sup> Submission 7, p2

<sup>439</sup> Submission 12, p4

provided it can be introduced in an affordable manner. It is the NRMA view that such a plan should be funded from Insurer profit reserves with a minimal increase in CTP premiums (less than \$10).<sup>440</sup>

### **Committee comment**

- 7.29 The Committee is highly supportive of the introduction of the LTCSS. Under previous arrangements, most persons who suffer catastrophic injury in a motor accident in NSW receive either no compensation or inadequate compensation. The Committee notes that most of the persons in this group are young men with many years to live, and whose needs are therefore great. The Committee is hopeful that the LTCSS will substantially improve the welfare of this group of persons by ensuring that their medical and care needs are fully funded for life.
- 7.30 It is not clear at this time how the introduction of LTCSS will impact on the operations of the MAA. It would appear that most, if not all, of the MAA's functions in respect of the catastrophically injured will be transferred to the LTCS Authority. It would be regrettable if a change in administrative arrangements were to disrupt the good work already being performed in this area by the MAA. The Committee anticipates that it will inquire into the impact of the LTCSS on the performance by the MAA of its functions as part of future reviews.

### **No fault for children benefit**

- 7.31 The second major change to the NSW motor accidents scheme effected during the reporting period was the introduction of the no-fault for children benefit. The no-fault for children benefit was introduced by amendments to the *Motor Accidents Compensation Act 1999* (NSW) passed in April 2006.<sup>441</sup> At the time of writing this report, the amendments are yet to come into force.
- 7.32 As its name suggests, the no-fault for children benefit removes the need for children injured in a motor accident in NSW to prove fault in order to qualify for compensation. A child for the purposes of the Act is a person less than 16 years old. Previously, children were treated the same as other motor accidents claimants i.e. they could not access damages unless they could prove that another driver was to blame for their injuries. As the Minister for Commerce, the Hon John Della Bosca MLC stated, under a fault based scheme 'children are penalized for behaving as children do.'<sup>442</sup>
- 7.33 The MAA advised the Committee that the no-fault benefit will provide for 'recovery of the child's hospital, medical and pharmaceutical expenses, rehabilitation, respite care, attendant care service expenses and in the case of the death of the child, funeral or cremation

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<sup>440</sup> Submission 13, p1

<sup>441</sup> *Motor Accidents Compensation Amendment Act 2006* (NSW)

<sup>442</sup> The Hon John Della Bosca MLC, Minister for Commerce, Legislative Council, *Hansard*, 4 April 2006, p21919

expenses.<sup>443</sup> A claim for the no-fault benefit will be ‘made in the same manner as other fault based claims under the *Motor Accidents Compensation Act 1999*.<sup>444</sup>

- 7.34 The MAA advised the Committee that around 400 children will access the no-fault benefit in any given accident year:

It is estimated that up to 400 claims made by children will now proceed to have treatment, rehabilitation and care expenses met in full without either deduction for the child’s contributory fault in causing the accident or full denial of liability by the insurer.<sup>445</sup>

- 7.35 The Committee was also informed that most of the children participating in the scheme will have been injured as pedestrians or cyclists, rather than as passengers in a motor vehicle.<sup>446</sup>

- 7.36 The Committee notes that, as stated by the MAA, fault is more likely to be contested in claims involving children than in claims involving adults:

Children injured as pedestrians or pedal cyclists more generally have liability disputed in their claims. The MAA estimates that the claims of child pedestrians are rejected in 30% of cases and contributory negligence is alleged in 12% of cases. It has been further estimated that the claims of children injured as pedal cyclists are rejected in 36% of cases and contributory negligence is alleged in 17% of cases.<sup>447</sup>

- 7.37 The MAA advised the Committee of the relationship between the Lifetime Care and Support Scheme (LTCSS) and the no-fault for children benefit, with children who suffer catastrophic injury being eligible for participation in LTCSS:

It is estimated that approximately 10-11 children a year will be eligible for entry to the Lifetime Care and Support (LTCSS) scheme having suffered catastrophic injuries in a motor vehicle accident in which the driver of the vehicle was not at fault. Previously these children would not have any entitlement to compensation for their injuries.<sup>448</sup>

- 7.38 The MAA advised the Committee that it will continue to perform its market regulator and dispute resolution functions in respect of the no-fault for children benefit:

Given that a claim made for the children’s special entitlement will be progressed in the same manner as a fault based claim, the MAA’s regulatory role will extend to include such matters as the monitoring of insurer compliance with statutory obligations and the MAA *Claims Handling Guidelines*. Like other claimants, children who make a claim for the special entitlement will have access to the MAA’s dispute resolution services, the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS).<sup>449</sup>

<sup>443</sup> MAA, *Response to additional questions on notice*, Q1.10, p6

<sup>444</sup> MAA, *Response to additional questions on notice*, Q1.10, p6

<sup>445</sup> MAA, *Response to additional questions on notice*, Q1.10, p6

<sup>446</sup> MAA, *Response to additional questions on notice*, Q1.10, p5

<sup>447</sup> MAA, *Response to additional questions on notice*, Q1.10, p6

<sup>448</sup> MAA, *Response to additional questions on notice*, Q1.10, p6

<sup>449</sup> MAA, *Response to additional questions on notice*, Q1.10, p6

- 7.39** The MAA anticipates that the no-fault for children benefit can be introduced at minimal cost for the NSW motor accidents scheme and NSW motorists:

The provisions of the no-fault benefit for children receiving less serious injuries in motor vehicle accidents can be accommodated at a minimal cost to the scheme and within the \$20 average increase in green slip premium prices resulting from the introduction of the Lifetime Care and Support (LTCSS) scheme.<sup>450</sup>

### Committee comment

- 7.40** The Committee welcomes the introduction of the no-fault for children benefit. As the Minister for Commerce stated in his second reading speech to the Motor Accidents Compensation Bill 2006, an unfortunate side-effect of a comprehensive fault based motor accidents scheme is that it can sometimes penalise children for behaving like children. The Committee is hopeful that the benefit will remedy this problem, and looks forward to reviewing the operation of the benefit in future reviews.

## Blameless or inevitable accident benefit

- 7.41** The third significant change to the motor accidents scheme introduced in 2006 is the creation of a no-fault benefit for blameless or inevitable accidents.<sup>451</sup> This benefit was introduced by the *Motor Accidents Compensation Amendment Act 2006* (NSW). At the time of writing this report, the Act is yet to come into force.

- 7.42** The MAA advised the Committee that a ‘blameless’ or ‘inevitable’ accident is ‘characterised as one in which no party is at fault in the accident. Examples of such accidents include those where the driver’s loss of control is caused by a sudden and unforeseen onset of an illness or a sudden and unavoidable obstacle on the roadway (such as an animal).’<sup>452</sup> Previously, victims of a blameless or inevitable accident would not be able to prove fault and hence would be unable to access damages under the motor accidents scheme.

- 7.43** The Committee notes that claims in respect of blameless accidents will now be processed in the same way as fault based claims, as stated by the MAA:

A claim for motor accidents scheme compensation entitlements made under the blameless accident provisions will be made in the same manner as other fault based claims under the *Motor Accidents Compensation Act 1999*. Any person injured in a motor vehicle accident in which no one was at fault, with the exception of the driver of the vehicle causing the accident, will be entitled to make a claim for compensation.<sup>453</sup>

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<sup>450</sup> MAA, *Response to additional questions on notice*, Q1.10, p6

<sup>451</sup> *Motor Accidents Compensation Amendment Act 2006* (NSW), Schedule 1

<sup>452</sup> MAA, *Response to additional questions on notice*, Q1.11, p7

<sup>453</sup> MAA, *Response to additional questions on notice*, Q1.11, p7

- 7.44 Research conducted by the MAA indicates that up to fifty claims per year may be covered by the new blameless accident benefit.<sup>454</sup> The MAA estimates that the cost per policy of the benefit will be in the order of \$3 to \$4.<sup>455</sup>

#### Committee comment

- 7.45 The Committee welcomes the introduction of the no-fault, blameless accident benefit. The Committee anticipates inquiring into the administration of the benefit by the MAA in the course of the future reviews.

### CTP premiums for buses and coaches

- 7.46 The Bus and Coach Association of NSW ('the Association'), which represents private bus and coach operators, submitted that current arrangements for the levying of CTP premiums on different classes of buses and coaches are inadequate. The Committee reported on this issue in the course of the *Fifth Review*, noting that CTP premiums for buses and coaches had increased in the Central Coast area because of the re-classification of the Central Coast as part of the Newcastle zone, rather than the Country zone, for premium purposes. The MAA advised the Committee of transitional arrangements it had introduced to ease the burden of these increases on the affected operators.<sup>456</sup>
- 7.47 In the course of the current *Review* the Association submitted that current CTP pricing arrangements do not reflect the claims experience of different operators, and fail to distinguish between different bus and coach operating environments:

The Association seeks changes that distinguishes between the different bus and coach operating environments and give more precise recognition to those operators who manage their business in such a manner that minimises the number of claims.<sup>457</sup>

- 7.48 The substance of the Association's submission was that buses and coaches are used for a wide variety of purposes but current pricing does not reflect the different risks attendant upon those uses, or the behaviour of particular bus and coach operators. An obstacle to the more accurate pricing of CTP premiums identified by the Association was the inadequacy of information collected on CTP claim forms.<sup>458</sup>

- 7.49 The MAA acknowledged the concerns of the Association:

The MAA understands that the concern of the Bus and Coach Association is that there is very different claims experience as between different types and usage of buses. In particular, the MAA understands that the main concern relates to the different

<sup>454</sup> MAA, *Response to additional questions on notice*, Q1.11, p7

<sup>455</sup> MAA, *Response to additional questions on notice*, Q1.11, p7

<sup>456</sup> *Fifth Review*, p38

<sup>457</sup> Submission 2, Bus and Coach Association (NSW), p1

<sup>458</sup> Submission 2, p2

experience as between buses which pick up passengers on local routes and coaches travelling between cities and regional centres.<sup>459</sup>

- 7.50** In relation to the concerns expressed by the Association, the MAA expressed the view that the small size of the bus and coach premium pool makes it difficult to implement the Association's proposals:

The main consideration, however, is the size of the premium pool. There are already five different bus categories in the MAA's Schedule and the numbers of vehicles in each category are relatively small (see table for numbers of buses in the two largest regions). It would be unwise from an actuarial point of view to split them any further for the following reasons:

- It is difficult to rate a small class of vehicles because CTP claims are relatively unusual events and the smaller the class, the longer is needed for experience to accrue.
- Catastrophic accidents happen from time to time. Even if the normal claim frequency is reasonable, it can be expected that large vehicles could cause very serious injuries in crashes with either pedestrians or other smaller vehicles, for example. In determining the appropriate premium for a class of vehicles the occurrence of these unusual events must be taken into account. The smaller the base that the claims cost is spread across, the larger the premium that is allocated to individual vehicle owners.<sup>460</sup>

- 7.51** The MAA provided the following table illustrating the number of vehicles in each bus and coach category:

Bus categories: Sydney metro and Country regions: Annual policies			
		Number of annual policies	
		Sydney metro	Country
<b>6a</b>	Omnibus/tourist vehicle fare paying >16 seats	2,225	3,699
<b>6b</b>	Omnibus/tourist vehicle fare paying 10-16 seats	1,022	632
<b>6c</b>	STA	1,750	0
<b>6d</b>	Charity bus	683	326
<b>6e</b>	Private/Pensioner bus	1,197	896

- 7.52** The MAA advised that, pursuant to the *MAA Premium Determination Guidelines*, insurers retain a discretion as to the application of risk rating factors to particular groups of vehicles/drivers, and may provide lower premiums if they so wish:

<sup>459</sup> MAA, *Response to questions on notice*, Q35.1, p32

<sup>460</sup> MAA, *Response to questions on notice*, Q35.2, p32

If an insurer identifies that a particular type of bus or a specific fleet of buses has a claims experience that warrants a discount on their premium, the insurer can make this available at the present time.<sup>461</sup>

### **Committee comment**

- 7.53** The Committee notes the concerns raised by the Bus and Coach Association of NSW which feels that some bus and coach operators are paying too much for their CTP premiums. However, the Committee defers to the MAA on technical questions regarding the calculation of risk in respect of any given class of vehicles. The Committee notes the MAA's advice that the small size of the bus and coach vehicle pool makes it difficult to allocate risk in an alternative manner.

### **Interim payments for the injured**

- 7.54** The purpose of interim damages is to provide relief, in circumstances where liability is admitted, to the injured person and their family pending the assessment of damages. The Committee notes that section 83 of the *Motor Accidents Compensation Act 1999* (NSW) presently provides for interim payments in respect of treatment, rehabilitation and attendant care costs after liability has been admitted, but makes no provision for interim payments in respect of other heads of damages, such as past and future economic loss.
- 7.55** The question of whether to allow for the payment of interim damages in motor accident cases has been debated since the introduction of the new scheme in 1999.<sup>462</sup> More recently, recommendation 16 of the *Fifth Review* was that 'the Minister for Commerce and the Attorney General consider amending the Supreme Court Act 1970 and the District Court Act 1973 to allow awards of interim damages in motor accident cases.'<sup>463</sup> Recommendation 11 of the *Sixth Review* was that the Minister provide the Committee with an update on this issue.<sup>464</sup>
- 7.56** The Government response to the *Sixth Review* indicated that the Government will introduce legislation to provide for interim payments in 2005-2006, subject to the parliamentary program.<sup>465</sup> At the time of writing this report, the legislation has not been introduced into the Parliament.

### **Committee comment**

- 7.57** The Committee notes the advice of the Government that legislation to provide for interim damages in motor accidents cases will be introduced in the 2005-2006, subject to the parliamentary program. The Committee looks forward to the introduction of the legislation.

<sup>461</sup> MAA, *Response to questions on notice*, Q35.2, p33

<sup>462</sup> For example, see the Hon Jeff Shaw MLC, Legislative Council, *Hansard*, 19 November 1998, p10347

<sup>463</sup> *Fifth Review*, p79

<sup>464</sup> *Sixth Review*, p60

<sup>465</sup> *Government Response to the Sixth Review*, p6, MAA, *Response to additional questions on notice*, Q2(d), p3

## **Withdrawal of admissions of liability by amendment to pleadings in subsequent proceedings**

- 7.58 Section 81 of the *Motor Accidents Compensation Act 1999* (NSW) provides that an insurer is to admit or deny liability within three months of receipt of a claim, failing which the insurer is taken to have accepted liability. The section is designed to promote the speedy resolution of motor accidents disputes.
- 7.59 In *Maile v Rafiq* [2005] NSW Court of Appeal held that an admission of liability in a defence filed in proceedings may be withdrawn in circumstances where the corresponding section 81 notice could not be withdrawn. Arguably, a legislative scheme which requires an insurer to admit or deny liability within three months of a claim, but which allows the insurer to later amend a court pleading to deny liability, frustrates rather than promotes the objective of the Act to facilitate the speedy resolution of disputes.
- 7.60 The issue of withdrawal of a section 81 notice is considered in Chapter Four.

### ***Committee comment***

- 7.61 The Committee is concerned that the decision of the NSW Court of Appeal in *Maile v Rafiq* may frustrate one of the principal objects of the *Motor Accidents Compensation Act 1999* (NSW), namely, the expeditious resolution of motor accidents disputes. The Committee therefore recommends that the Minister for Commerce review the operation of the Act with a view to determining whether section 81 should be amended, in view of the decisions in *Maile*.

### **Recommendation 21**

That the Minister for Commerce review the operation of section 81 of *Motor Accidents Compensation Act 1999* (NSW) in light of the decision of the NSW Court of Appeal in *Maile v Rafiq* [2005] NSW Court of Appeal, with a view to determining whether the section should be amended to ensure that motor accidents disputes are resolved expeditiously.

## **CTP and public liability insurance gap**

- 7.62 The Committee reported on the gap between CTP and public liability insurance in the course of the *Fourth, Fifth and Sixth Reviews*. Briefly, the ‘gap’ refers to a range of liabilities for personal injury sustained in circumstances relating to motor vehicles which may not be covered either under CTP insurance or public liability insurance. The Bar Association has previously submitted that a possible example of such a liability is a liability for damage arising out of injury suffered whilst lifting a trailer preparatory to attaching it to a motor vehicle.<sup>466</sup> In such cases, a defendant who is at fault would be personally liable for the payment of damages arising from their negligence.
- 7.63 The Bar Association submitted that the gap arose because of a change in the definition of ‘motor accident’ in the *Motor Accidents Act 1988* (NSW):

<sup>466</sup> *Fifth Review*, p46

Until 1 January 1996 all accidents that arose out of the ‘use or operation’ of a motor vehicle were covered by the CTP policy of the vehicle. However, with amendments to the definition of injury inserted into the Motor Accidents Act 1988, the coverage provided by CTP policy shrank, so the policy only answered claims when an injury arose out of the ‘use or operation’ of the vehicle and where the accident involved the driving of the vehicle; a collision with a vehicle; the vehicle running out of control or a defect in the vehicle.<sup>467</sup>

- 7.64** The Bar Association submitted that this change occurred without a corresponding change in public liability policies, hence the existence of an insurance ‘gap’:

Many public liability policies have not been amended to reflect this change and still contain a broad exclusion clause which rules out any indemnity under the policy for an accident arising from the ‘use or operation’ of a vehicle ... this gap penalises both the injured (who may not have an insurer to recover against) and the insured (who may unwittingly find himself or herself personally liable). This gap is not just theoretical as cases are starting to come before the courts on just this point, for example *AMP General Insurance Ltd v Kull* [2005] NSWCA 442.<sup>468</sup>

- 7.65** The Committee has previously reported that this issue has been referred to the Insurance Council of Australia’s Liability Working Party.<sup>469</sup>

- 7.66** Recommendation 5 of the *Sixth Review* was that ‘the Minister provide the Committee with further details on what actions, if any, the MAA are required to take in light of receiving the legal advice on the issue of the gap between CTP insurance and public liability insurance for certain accidents involving motor vehicles.’

- 7.67** The Government response to the *Sixth Review* stated that legislation to clarify the application of the Act would be introduced into Parliament in 2005-2006.<sup>470</sup> The Committee notes that, as per the Government’s advice, the Government introduced the Motor Accidents Compensation Amendment Bill into Parliament in 2006. The Bill was passed by the Parliament in April 2006, but has yet to come into force.

- 7.68** The *Motor Accidents Compensation Act 2006* (NSW) will insert a new section 3A into the *Motor Accidents Compensation Act 1999* (NSW). The Explanatory Memorandum to the Bill states that section 3A is intended to clarify the operation of the *Motor Accidents Compensation Act*:

... make it clear that the Act only applies to a motor accident death or injury caused during the driving of a motor vehicle, a collision involving a motor vehicle or a motor vehicle’s running out of control, and does not apply to injury that arises gradually from a series of incidents.<sup>471</sup>

- 7.69** The Committee notes comments made by the Minister for Commerce, the Hon John Della Bosca MLC, in the committee of the whole in respect of the Motor Accidents Compensation

<sup>467</sup> Submission 11, p13

<sup>468</sup> Submission 11, p14

<sup>469</sup> *Fifth Review*, p46

<sup>470</sup> *Government response to the Sixth Review*, p3

<sup>471</sup> *Motor Accidents Compensation Amendment Bill 2006, Explanatory Memorandum*

Amendment Bill. The Minister stated that the purpose of the above amendment was to clarify the ambit of the NSW motor accidents scheme by limiting the definition of 'motor accident.' The Minister argued that the boundaries of the motor accidents scheme had become blurred by court decisions regarding access to damages under the scheme, and that it was necessary, in the interests of NSW motorists, to restore certainty to the operation of the scheme:

It must be remembered that additional costs to the scheme through litigation or a new class of claim are passed on to motorists who are paying green slip premiums to fully fund the scheme's liabilities. The proposed definition of "motor accident" in the Motor Accidents Compensation Amendment Bill restricts the circumstances in which a defect in a vehicle will give rise to an entitlement to claim under the Act. It will be restricted to those circumstances in which the injury is caused in the use or operation of a vehicle, whether or not as a result of a defect, during the driving, a collision, or the vehicle's running out of control. The amendment is to clarify that the purpose of the compulsory third party scheme is to cover injuries or death from motor vehicle accidents and not injury resulting from some activity that has an incidental connection with a motor vehicle. For example, it is doubtful that a motorist paying for a green slip would accept that the owner of the vehicle is at fault in causing a motor vehicle accident injury when the owner calls out the NRMA to replace a flat battery and, whilst working, on the battery the patrolman is struck on the head by the falling bonnet, which had a defective catch. These are the types of incidents that are rightly excluded from the motor accidents scheme.<sup>472</sup>

**7.70** The Committee also notes that the Government response to the *Sixth Review* states that "The functions of the MAA as set out under the *Motor Accidents Compensation Act 1999* relate to monitoring the operation of the motor accidents scheme. The MAA does not have a role with regard to the operation of public liability insurance."<sup>473</sup>

**7.71** The Bar Association submitted that the MAA has not done enough to bring the existence of the insurance gap to the attention of CTP policy holders. The Bar Association submitted that the MAA could undertake a range of actions to inform policy holders of the potential gap in their insurance coverage, including:

- Writing to public liability insurers to encourage them to change the wording of their policies
- Taking out newspaper advertisements, and advertisements in specialist trade journals read by insurance brokers
- Enclosing a notice with CTP insurance policies regarding the gap.<sup>474</sup>

### Committee comment

**7.72** The Committee notes the continuing gap between NSW CTP insurance and public liability insurance. The Committee notes that legislation passed in the reporting period confirms, and does not remedy, this gap. The Committee does not advocate the expansion of the application

<sup>472</sup> The Hon John Della Bosca MLC, Minister for Commerce, Legislative Council, *Hansard*, 4 April 2006, p21919

<sup>473</sup> *Government response to the Sixth Review*, p3

<sup>474</sup> Submission 11, p14

of the *Motor Accidents Compensation Act 1999 (NSW)* at this point in time. Expansion of the Act would have cost consequences for NSW motorists, but it is not self-evident that NSW motorists should bear those costs. However, the Committee considers that NSW motorists should at least be on notice regarding the potential gap in their insurance cover, and that it is appropriate that the Minister for Commerce take steps to bring the existence of the gap to the attention of NSW CTP policy holders and policy brokers. The Committee therefore recommends that the Minister develop an information strategy to bring the existence of the gap between CTP and public liability insurance to the attention of NSW CTP policy holders and policy brokers.

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### Recommendation 22

That the Minister for Commerce develop an information strategy to bring the existence of the gap between CTP and public liability insurance to the attention of NSW CTP policy holders and policy brokers.

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## Issues associated with Nominal Defendant claims

- 7.73 The Nominal Defendant scheme ‘provides compensation for injuries caused by the fault of an owner or driver of a vehicle that is unregistered (and therefore uninsured) or unidentified.<sup>475</sup> The Committee notes that, in order to be able to make a claim against the Nominal Defendant, ‘the accident must have occurred on a road or a road related area, which includes areas that are open to and used by the public for driving, riding or parking of vehicles.’<sup>476</sup>
- 7.74 The Committee notes that the *Motor Accidents Compensation Amendment Act 2006 (NSW)* effects two minor changes to the Nominal Defendant scheme. The changes relate to claims by trespassers and claims in respect of vehicles in a state of disrepair. At the time of writing this report, the Act is yet to come into effect.

### Trespassers

- 7.75 Changes to the scheme were prompted by the decision of the NSW Court of Appeal in *Ryan v Nominal Defendant* [2005] NSWCA 59. The Court found that the plaintiff was not precluded from recovering against the Nominal Defendant even though the plaintiff had been a trespasser at the time of the injury. As stated by the MAA, ‘The decision essentially reset the boundaries of the scope of cover under the Nominal Defendant scheme and created inconsistency in its operation.’<sup>477</sup>
- 7.76 The MAA advised the Committee that the *Motor Accidents Compensation Amendment Act 2006* will ‘exclude trespassers from cover under the Nominal Defendant scheme will remove the inconsistency created by the finding in the case of *Ryan v Nominal Defendant*.’ The MAA further

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<sup>475</sup> MAA, *Response to additional questions on notice*, Q1.18, p11

<sup>476</sup> MAA, *Response to additional questions on notice*, Q1.18, p11

<sup>477</sup> MAA, *Response to additional questions on notice*, Q1.18, p11

stated that the amendment ‘will have minimal impact on CTP premiums. The clarification removes the potential for increased litigation.’<sup>478</sup>

### **Vehicles in a state of disrepair**

- 7.77 A claimant may claim against the Nominal Defendant in circumstances where, *inter alia*, the vehicle involved is capable of being registered following the making of minor repairs. In this respect, the MAA stated that:

... the Nominal Defendant scheme enables a person injured in a motor vehicle accident involving an unregistered/ uninsured motor vehicle to claim compensation for their injuries. This currently includes a vehicle that is not exempt from registration and requires registration for lawful use or operation on a road in NSW and immediately before the motor accident occurred, was capable, or would following the repair of minor defects have been capable, of being so registered.<sup>479</sup>

- 7.78 The MAA advised the Committee that questions have arisen in the Courts as to the meaning of ‘minor repairs’:

In the 2004 decision of *Nominal Defendant v Lane*, the NSW Supreme Court of Appeal noted that the word “minor” calls for an assessment of degree without indication of the scale according to which the degree is to be assessed beyond the word “repair”. The court has taken the approach that the test is largely an economic test of ease and cost of repair of defects. Whilst on this occasion the court found in favour of the claimant, it is not intended that a person be excluded from recovery by virtue of the cost of repairs. The amendment clarifies the intended coverage of the Nominal Defendant scheme.<sup>480</sup>

- 7.79 The Committee reported on this issue in the course of the *Fifth and Sixth Reviews*. In both instances the Committee noted proposed legislative changes to clarify the operation of the Act.<sup>481</sup> The Committee notes that the *Motor Accidents Compensation Amendment Act 2006* has now clarified the application of the Nominal Defendant Scheme to vehicles in a state of disrepair.

### **Committee comment**

- 7.80 The Committee notes legislative changes to clarify the scope of the Nominal Defendant scheme in respect of claims by trespassers and claims in respect of vehicles in need of repairs. The Committee encourages the MAA to keep the Nominal Defendant scheme under review to identify further legislative changes, if necessary.

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<sup>478</sup> MAA, *Response to additional questions on notice*, Q1.18, p11

<sup>479</sup> MAA, *Response to additional questions on notice*, Q1.19, p12

<sup>480</sup> MAA, *Response to additional questions on notice*, Q1.19, p12

<sup>481</sup> *Fifth Review*, p14 and *Sixth Review*, p41

## Analysis of damages awards

- 7.81 Section 206(2)(b) of the Act requires the MAA to conduct an analysis of damages awarded under the new scheme. Such an analysis would help the Committee, and the public, to better understand the operations of the NSW motor accident scheme. Recommendation 13 of the *Sixth Review* was that the MAA conduct such an analysis. The Government response to the *Sixth Review* indicated that the analysis is underway, and will be included in the MAA's 2005-2006 *Annual Report*.

## Establishing loss of income for casual workers

- 7.82 The Committee reported on possible difficulties experienced by casual workers in demonstrating loss of income in the course of the *Fifth* and *Sixth Reviews*. Recommendation 12 of the *Fifth Review* was that the MAA 'work with licensed insurers to examine the experiences of casual workers in making claims, in order to identify whether they face any difficulties in establishing loss of income for claims purposes'.<sup>482</sup> The Government response to the *Fifth Review* indicated that the MAA had requested the Motor Accident Insurers Standing Committee (MAISC) to prepare a report on this issue. The MAISC's report was not available in time for the *Sixth Review*, but was supplied to the Committee in time for the current *Review*.
- 7.83 The MAISC report found that 'casual workers have access to various sources of information that are generally available and provide a credible and reliable basis for determining average weekly earnings', including tax returns, wage receipts, statements from job placement agencies and bank statements.<sup>483</sup> The MAISC concluded that 'a problem does not exist' in this regard, and reported that no complaints had been lodged with insurers in this area for the previous three years.<sup>484</sup>

### Committee comment

- 7.84 The Committee notes the investigation by the MAISC into possible obstacles to claims for damages to economic loss by casual workers under the NSW motor accidents scheme. The MAISC found that the casual workers have access to credible and reliable evidence regarding loss of income, and no complaints have been made against insurers in this area since at least May 2002. The Committee considers that this issue has been resolved, and thanks the MAA and the MAISC for their assistance.

<sup>482</sup> *Fifth Review*, p57

<sup>483</sup> Letter from Mr Dallas Booth, Deputy Chief Executive Officer, Insurance Council of Australia, to Mr David Bowen, General Manager, MAA, 16 May 2005, p1

<sup>484</sup> Letter from Mr Dallas Booth, Deputy Chief Executive Officer, Insurance Council of Australia, to Mr David Bowen, General Manager, MAA, 16 May 2005, p1

## The Motor Accidents Council

7.85 Two issues regarding the role of the Motor Accidents Council (MAC) were brought to the Committee's attention during this Inquiry:

- Advisory function of MAC in 2004-2005
- Reconstitution of MAC in 2005.

### Advisory function in 2004-2005

7.86 As discussed in Chapter 1, the MAC is the stakeholder body constituted to advise the MAA and the Minister on the administration of the motor accidents scheme. The Committee notes that the MAC considered the following issues in 2004-2005:

- proposed MAAS reform strategies identified during stakeholder consultations in 2003 and 2004
- proposals for inclusion in legislative reforms to the *Motor Accidents Compensation Act 1999*
- proposed Lifetime Care and Support (LTCSS) scheme
- four wheel drive vehicles CTP claims experience
- bereavement counselling for families who have lost children in motor vehicle accidents
- revised draft MAA Guidelines for the assessment of the degree of permanent impairment
- draft MAA Regulatory and Enforcement Policy
- research project by the University of Sydney and PricewaterhouseCoopers on Legislative change and improved health outcomes for people with whiplash
- motor accident scheme performance trends, based on quarterly scheme performance indicator updates and the MAA's 2003 Claims Handling Compliance Audit Report
- recommendations of the Sixth Report by the Standing Committee on Law and Justice.<sup>485</sup>

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<sup>485</sup> MAA, *Response to additional questions on notice*, Q47.2, p42

**7.87** Mr Grellman advised the Committee that he did not expect the MAC to develop a consensus view on all issues, and that it is to be expected that there will be tensions between members in respect of certain issues, for example, in respect of profits:

For example, on issues where you might be talking about claims and benefits or insurer profit, you will have a natural tension that exists between members of the legal profession, members of the insurance community, and perhaps health practitioners, and so it is not a forum where certainly, as chair, I expect to have consensus on every issue. That is why on only the rarest of occasions anything, for example, is put to a vote because you can predict that voting might take place along fairly expected lines, so it is much more of a forum for discussion, for information conveyance, and for members of the council to bring issues of concern forward that may require work by the authority or consideration by the board.<sup>486</sup>

### **Reconstitution of the Motor Accidents Council**

**7.88** Inaugural members of the MAC were appointed in 1999 for three years terms. New members were appointed in 2002 for three year terms expiring on 5 October 2005. The Committee understands that, in the period following 5 October 2005, there was a short hiatus in which the MAC did not have a full complement of members.

**7.89** Mr Grellman, Chair of the MAA and Chair of the MAC, advised the Committee that it is the Minister's practice to seek nominations from stakeholders for membership of the MAC and that there had been delays in obtaining the required nominations, resulting in a delay in the appointment of new MAC members:

One of the problems that I know that the Minister had in making his final determination on the constitution of the council is that he requested various representative organisations to nominate who they thought might be appropriate to become council members, and I think I am right in saying that there were some delays in getting information back from representative bodies, so some of the representative bodies themselves held the process up and I think I am right in saying that there was a couple of months when we were pushing one of them and I think the Minister's attitude was that he wanted to go to Cabinet with one recommendation and it was a lot of pushing and prodding to get that organisation to give us that information.<sup>487</sup>

**7.90** The Committee notes that the Minister appointed the following persons to the MAC on 3 April 2006:

- Ms Robyn Norman – representing the insurance industry under section 208(1)(c);
- Mr Phillip Cooper – representing the insurance industry under section 208(1)(c);
- Mr Andrew Stone – representing the legal profession under section 208(1)(d);

<sup>486</sup> Mr Grellman, Evidence, 31 March 2006, p29

<sup>487</sup> Mr Grellman, Evidence, 31 March 2006, p15

- Ms Penny Waters – representing the legal profession under section 208(1)(d);
- Dr Stephen Buckley – representing the health profession under section 208(1)(e);
- Dr Clayton King – representing the health profession under section 208(1)(e);
- Ms Jan McClelland – representing the non-insurance industry and nominated by the NRMA under section 208(f);
- Ms Monique King – representing injured persons under section 208(g);
- Mr Michael Griffiths – representing consumers under section 208(h).<sup>488</sup>

**7.91** As noted in Chapter 1, the Chair, Deputy Chair and General Manager of the MAA are *ex officio* members of the MAC, bringing the total membership of the MAC to twelve councillors.

**7.92** The delay in appointing new MAC members was the subject of evidence at the public hearing held 31 March 2006.

**7.93** Mr Grellman noted that the MAC is integral to the motor accidents scheme:

The concept of a council, there is no doubt it is integral to the running of scheme. The concept first emerged in the workers compensation arena and was picked up in the CTP arena. Although it is a representative body of stakeholders and service providers who are there to advise and be appraised of developments, and although it does not have any real decision making authority or powers, as such - those reside with the board or with the Minister - for the well running of the scheme to ensure that people who are interested in the scheme, particularly service providers and stakeholders are well aware of what is happening, what the trends are looking like et cetera, it is a very useful group to have meet on a fairly regular basis.<sup>489</sup>

**7.94** Mr Grellman advised that the MAA continued to consult with former members of the MAC and interested stakeholders during the period in which the MAC had no members:

... the draft of the annual report was conveyed to the members of the council, even though they had ceased to exist. We invited them in for a briefing and they were given early access to all of them. Since then there have been informal meetings with members of the legal profession, the underwriting community, and medical practitioners on several occasions to let them know issues of interest.<sup>490</sup>

**7.95** Mr Grellman also stressed that, as CTP insurance is long tail in nature, scheme performance is unlikely to change rapidly, for example, in the period when the MAC had no members:

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<sup>488</sup> Letter from the Hon John Della Bosca MLC, Minister for Commerce, to Committee Chair, 23 August 2006

<sup>489</sup> Mr Grellman, Evidence, 31 March 2006, p28

<sup>490</sup> Mr Grellman, Evidence, 31 March 2006, p30

... one of the issues that I think needs to be said, to keep all of this in perspective, because of the nature of the claims profile here, it is not as if the shape of the world changes from one month to the next. It is a very gradual trend and development that we see unfolding and to think that you might not attend a meeting one month and find that the scheme has gone topsy turvy, that is not going to happen, because it is a very gradual, long tailed scheme and so matters take months and sometimes years to determine whether or not a trend has become a fact.<sup>491</sup>

- 7.96** Mr Grellman stated that the delay in appointing new MAC members had not effected the operations of the MAA:

It has not frustrated any of the machinery of the Authority because the Council, as has been explained before, is really a forum for stakeholders and service providers to be kept abreast of developments in the scheme and there are a number of key personalities representing service providers with whom we have met informally over the time, so there has been informal dialogue with members of the legal profession, with some underwriters and indeed some medical practitioners.<sup>492</sup>

#### **Committee comment**

- 7.97** The Committee considers that the MAC is an integral part of the machinery of the NSW motor accidents scheme. The MAC is a valuable forum for the discussion of a variety of scheme related issues by interested stakeholders, as illustrated at paragraph 7.86, and for the provision of advice to the MAA. Delays in the appointment of MAC are to be avoided where possible. However, the Committee notes that the MAA continued to consult with former MAC members in the period in which there were no MAC members, and it appears that the performance of the scheme has not been unduly compromised by the delay in appointing new members of the MAC.

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<sup>491</sup> Mr Grellman, Evidence, 31 March 2006, p30

<sup>492</sup> Mr Grellman, Evidence, 31 March 2006, pp14-15

## Appendix 1 Functions of the MAA

Section	Role	Function and/or powers of the MAA
206 (2)	Monitor scheme performance and advise Minister	<p>(a) to monitor the operation of the motor accidents scheme under this Act, and in particular to conduct (or arrange for other persons to conduct) research into and to collect statistics or other information on the level of damages awarded by the courts, the handling of claims by insurers and other matters relating to that scheme</p> <p>(b) to advise the Minister as to the administration, efficiency and effectiveness of that scheme</p> <p>(c) to publicise and disseminate information concerning the scheme</p> <p>(d) to issue and keep under review relevant guidelines under this Act</p>
	Advice to motor accident claimants	(e) to provide an advisory service to assist claimants in connection with the claims assessment procedure under this Act
	Funding for accident prevention initiatives	(f) to provide funding for: measures for preventing or minimising injuries from motor accidents, and safety education
	Administration of the MAC	<p>(g) to provide administrative and other support to the Motor Accidents Council, sufficient to assist the Council to meet its priorities</p> <p>(h) to provide advice and make recommendations to the Motor Accidents Council on such matters as the Council requests or the Authority considers appropriate.</p>
206 (3)	The provision of acute care, treatment, rehabilitation,	<p>(a) to monitor those services</p> <p>(b) to provide support and funding for research and education in connection with those services that will assist effective injury management,</p>

	long term support and other services for persons injured in motor accidents	(c) to provide support and funding for programs that will assist effective injury management  (d) to develop and support education programs in connection with effective injury management.
159 and 171	Licence and supervise CTP insurers	To license and supervise NSW CTP insurers
173		To review and approve business plans of NSW CTP insurers.
177		To audit licensed CTP insurers to assess compliance with the Act and with MAA guidelines
182		To enter and inspect the premises and books of licensed insurers
24		To issue guidelines for the determination of CTP insurance premiums
27	CTP premiums	To consider and approve/reject CTP insurance premiums filed by insurers
29	Allocate high risk premiums	To make arrangements for the allocation of high-risk premiums as between licensed insurers
32	Nominal Defendant	To act as the 'nominal defendant' in respect of claims involving unidentified and uninsured motor vehicles arising under the Act
44	Guidelines for medical treatment	To formulate guidelines regarding the medical treatment of persons injured in motor accidents, the appropriate procedures with respect to the provision of rehabilitation services or attendant care services for injured persons, the procedures for the referral of disputes for assessment or review of assessments, and the procedure for assessment
59	Dispute resolution services	To appoint medical assessors for the resolution of disputes between injured persons and insurance companies regarding impairment and treatment issues
63		To refer medical assessment disputes to medical assessment review panels
65 and 106		To train medical assessors and claims assessors to promote accurate and consistent assessments

68		To produce motor accident claims handling guidelines to facilitate the resolution of motor accident claims as between injured persons and insurers
98		To establish and administer the Motor Accidents Claims Assessment and Resolution Service
135	Research into compensation levels	To publish information to assist courts to determine the appropriate level of compensation for non-economic loss resulting from motor accidents
28	Report on insurer profits	To report annually to the Law and Justice Committee on the profitability of the licensed CTP insurers

## Appendix 2 Submissions

No	Author
1	Mr Greg BERGAN, Spinal Cord Injuries Australia
2	Mr Darryl MELLISH, Bus and Coach Association (NSW)
3	Ms Judie STEPHENS OAM, Accident Victims Alliance
4	Ms Anne DEANS, Youthsafe
5	Name suppressed at request of author
6	Mr Patrick B HARRISON
6a	Confidential by resolution of the Committee
6b	Confidential by resolution of the Committee
7	Ms Deborah FRITH, Brain Injury Association of NSW Inc
8	Professor Mark STEVENSON, The George Institute for International Health
9	Dr Russell W STITZ FRACS, Royal Australasian College of Surgeons
10	Mr John HIVES
11	Mr Michael J SLATTERY QC, NSW Bar Association
12	Mr Patrick MCCARTHY, Australian Lawyers Alliance
13	Mr Tony STUART, NRMA
14	Mr Dallas BOOTH, Insurance Council of Australia Ltd
15	Ms June MCPHIE, Law Society of NSW
16	Ms Robyn BROWN
17	Name suppressed at request of author
18	Stacks/Goudkamp
19	Mr Eric KOTEV

## Appendix 3 Witnesses

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
<b>31 March 2006</b>	Mr David BOWEN	General Manager, Motor Accidents Authority
Parliament House	Mr Richard GRELLMAN	Chairman, Board of Director, Motor Accidents Authority
		Chairman, Motor Accidents Council
	Ms Concetta RIZZO	Manager, Insurance Division, Motor Accidents Authority
	Ms Kathy HAYES	Manager, Injury Prevention and Management Division, Motor Accidents Authority
	Mr Dallas BOOTH	Deputy Chief Executive Officer, Insurance Council of Australia
	Mr Philip SELTH	Executive Director, NSW Bar Association
	Mr Ross LETHERBARROW SC	Chair, Common Law Committee, NSW Bar Association

## Appendix 4 Minutes

**Minutes No 34, 17 November 2005, Room 1153, Parliament House, 1:00pm**

### **1. Present**

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Colless  
Mr Donnelly  
Ms Fazio  
Ms Rhiannon

### **2. Apologies**

None.

### **3. Minutes**

Resolved, on the motion of Ms Fazio, that the Minutes of Meetings No. 28, 29, 30, 31, 32 and 33 be adopted.

### **4. General correspondence**

Chair tabled the following correspondence:

- 5 August 2005, from Hon John Della Bosca MLC, providing copy of revised MAA Guidelines for the assessment of the degree of permanent impairment as requested by the Committee.

...

### **5. ...**

### **6. Seventh Review of the MAA and MAC- commencement of inquiry**

Resolved, on the motion of Ms Fazio, that the Committee commence its Seventh Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council and notify the Special Minister of State and the General Manager of the MAA accordingly.

Resolved, on the motion of Mr Donnelly, that immediately after the MAA's 2004-2005 Annual Report becomes public, the Committee write to the list of stakeholders distributed by the Secretariat to invite them to participate in the Seventh Review of the MAA, as well as any other stakeholders identified by Committee members, or the Secretariat in consultation with the Chair.

Resolved, on the motion of Mr Colless, that the Committee advertise to call for public submissions for the Seventh Review of the MAA and the MAC in The Sydney Morning Herald and The Daily Telegraph as soon as possible following the public release of the MAA's 2004-2005 Annual Report.

Resolved, on the motion of Mr Clarke, that a press release from the Chair announcing the Seventh Review be distributed to the Parliamentary Press Gallery and Media Monitors to coincide with the advertisements.

Resolved, on the motion of Ms Rhiannon, that the Committee hold a public hearing with the General Manager of the MAA, the Chair of the MAC and Senior Managers of the MAA in March 2006, on a date

to be confirmed by the Secretariat in consultation with the Chair and subject to the availability of members and witnesses.

## **7. Adjournment**

The Committee adjourned at 1:35pm.

**Rachel Callinan**  
Director

**Minutes No 35, 27 February 2006, Room 1153, Parliament House, 2:00pm**

### **1. Present**

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Colless  
Mr Donnelly

### **2. Apologies**

Ms Fazio

### **3. Minutes**

Resolved, on the motion of Mr Donnelly, that the Minutes of Meeting No. 34 be adopted.

### **4. ...**

## **5. Seventh review of the Motor Accidents Authority and Motor Accidents Council**

### **5.1 Correspondence**

The Chair tabled the following correspondence:

- 12 January 2006, from Royal Australian and New Zealand College of Psychiatrists, NSW Branch, declining invitation to provide a submission.
- 17 January 2006, from Australian Physiotherapy Association, NSW Branch, declining invitation to provide a submission.
- 23 November 2005, from Chair to Hon John Della Bosca MLC, Special Minister for State, advising of commencement of seventh review and requesting attendance of Mr Bowen and Mr Grellman at the public hearing.
- 8 February 2006, from Mr Patrick Harrison to the Chair making second supplementary submission
- 23 February 2006 to Hon John Della Bosca MLC, Special Minister of State, enclosing questions on notice for the MAA and the MAC

Resolved, on the motion of Mr Colless, that the Committee write to Mr Harrison advising him that his supplementary submission 6B dated 8 February 2006 raises matters outside the terms of reference of the inquiry and therefore will not be made public as part of the review, and that the Committee has referred the important issues raised by him to the appropriate Minister.

## **5.2 Publication of submissions**

Resolved, on the motion of Mr Donnelly, that in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233(1), and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish submissions no 1-14, excluding supplementary submissions 6A and 6B, with name suppression of submission no 5 at the author's request.

## **5.3 Public hearing**

Resolved, on the motion of Mr Donnelly, that the Committee invite the Insurance Council of Australia and the NSW Bar Association to appear, for 30 minutes each, at the public hearing of the Committee on 31 March 2006, and that the public hearing, currently scheduled from 10am to 1pm, be extended to 2pm.

## **6. Adjournment**

The Committee adjourned at 2:18pm until Friday 24 March at 9am.

**Rachel Callinan**  
Director

## **Minutes No 36, 24 March 2006, Waratah Room, Parliament House, 9:00am**

### **1. Present**

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Colless  
Mr Donnelly  
Ms Fazio  
Ms Rhiannon

### **2. Minutes**

Resolved, on the motion of Mr Colless, that the Minutes of Meeting No. 35 be adopted.

### **3. Seventh review of the MAA and the MAC**

#### **3.1 Correspondence**

Chair tabled the following correspondence:

- 1 March 2006, from Secretariat to Hon Carl Scully MP, Minister for Police, enclosing correspondence received from Mr Patrick Harrison.
- 2 March 2006, from Secretariat to Hon John Della Bosca MLC, Special Minister of State, enclosing correspondence received from Mr Patrick Harrison.
- 2 March 2006, from Chair to Mr Patrick Harrison, advising that supplementary submission 6B raises matters outside the Terms of Reference and won't be made public, and that the Committee has referred the issues raised to the relevant Ministers.

### **3.2 Publication of submissions**

Resolved, on the motion of Ms Rhiannon, that in order to better inform all those participating in the Inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW), to publish submission no 15.

### **3.3 Hearing**

Secretariat provided an update of the witnesses appearing. Chair advised that the questions on notice have been sent to the MAA via the Minister and the date for a reply has been extended to Friday 24 March 2006.

### **4. ...**

### **5. Adjournment**

The Committee adjourned at 12:00pm until Friday 31 March 2006, at 10:00am.

**Rachel Callinan  
Director**

### **Minutes No 37, 31 March 2006, Room 814/815, Parliament House, 10:00 am**

#### **1. Present**

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Colless  
Mr Donnelly

#### **2. Apologies**

Ms Fazio and Ms Rhiannon

#### **3. Minutes**

Resolved, on the motion of Mr Clarke, that the Minutes of Meeting No. 36 be adopted.

#### **4. Seventh review of the MAA and the MAC**

##### **4.1 Late submissions**

Resolved, on the motion of Mr Clarke, that the Committee accept Submissions No 16 and 17.

Resolved, on the motion of Mr Colless, that in order to better inform all those participating in the Inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW), to publish Submission Nos 16 and 17, whilst suppressing the identity of the author of Submission No 17 at the author's request.

#### **4.2 Hearing**

The public, the media and witnesses were admitted.

The Chair made a brief opening statement.

Mr Richard Grellman, Chair of the MAA and MAC, sworn and examined.

Mr David Bowen, Managing Director of the MAA, Ms Concetta Rizzo, Manager, Insurance Division, MAA, and Ms Kathy Hayes, Manager, Injury Prevention and Management Division, MAA, affirmed and examined.

Mr Bowen tendered a document 'Presentation to the Standing Committee on Law and Justice 31 March 2006'.

The Committee broke from 10:55am to 11:10am.

The witnesses agreed to take the Committee's remaining questions on notice and undertook to provide responses to the Committee within 14 days of receipt.

Evidence concluded and the witnesses withdrew.

The Committee broke from 12:45pm to 1:00pm.

Mr Dallas Booth, Deputy Chief Executive Officer, Insurance Council of Australia, sworn and examined.

Mr Booth agreed to take several questions on notice and undertook to provide responses to the Committee within 14 days of receipt.

Evidence concluded and the witness withdrew.

Mr Ross Letherbarrow SC, Chair of the Common Law Committee of the NSW Bar Association, sworn and examined.

Mr Philip Selth, Executive Director of the NSW Bar Association, affirmed and examined.

Mr Letherbarrow tendered a document containing photographs of motor vehicle accident victims. The Committee declined to accept the document.

Mr Letherbarrow tendered two documents:

- 'Personal Injuries Compensation Legislation: Case Examples'
- 'Letter from Michael Slattery QC to Premier Iemma dated 8 March 2006 regarding personal injury compensation'

Evidence concluded and the witnesses withdrew.

Hearing concluded at 2:05pm.

#### **5. Deliberative meeting**

##### **5.1 Publication of transcript of hearing**

Resolved, on the motion of Mr Donnelly, that in order to better inform all those participating in the Inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW), to publish the transcript of hearing held 31 March 2006.

### **5.2 Publication of tabled documents**

Resolved, on the motion of Mr Colless, that in order to better inform all those participating in the Inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW), to accept the following documents tendered at the hearing held 31 March 2006:

- Presentation to the Standing Committee on Law and Justice 31 March 2006
- Personal Injuries Compensation Legislation: Case Examples
- Letter from Michael Slattery QC to Premier Iemma dated 8 March 2006 regarding personal injury compensation.

Resolved, on the motion of Mr Colless, that in order to better inform all those participating in the Inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW), to publish the following documents tendered at the hearing held 31 March 2006:

- Presentation to the Standing Committee on Law and Justice 31 March 2006
- Personal Injuries Compensation Legislation: Case Examples
- Letter from Michael Slattery QC to Premier Iemma dated 8 March 2006 regarding personal injury compensation.

### **6. Adjournment**

The Committee adjourned at 2:10pm *sine die*.

**Rachel Callinan**  
Director

**Minutes No 39, 9:30am, Tuesday 12 September 2006, Room 1108, Parliament House, Sydney**

#### **1. Present**

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Colless  
Mr Donnelly

#### **2. Apologies**

Ms Rhiannon

#### **3. Minutes**

Resolved, on the motion of Mr Donnelly, that the Minutes of Meeting No. 38 be adopted.

4. ...

**5. Seventh review of the MAA and the MAC**

The Chair submitted her draft report titled *Review of the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council – Seventh Report, Report 31*, which, having been circulated was taken as being read.

The Committee proceeded to consider the draft report in detail.

Executive Summary read.

Resolved, on the motion of Mr Donnelly, that the Executive Summary be adopted.

Chapter 1 read.

Resolved, on the motion of Mr Colless, that recommendation 1 be adopted.

Resolved, on the motion of Mr Donnelly, that chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Donnelly, that recommendation 2 be adopted.

Resolved, on the motion of Mr Clarke, that recommendation 3 be adopted.

Resolved, on the motion of Mr Colless, that recommendation 4 be adopted.

Resolved, on the motion of Mr Donnelly, that chapter 2 be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Clarke, that recommendation 5 be adopted.

Resolved, on the motion of Mr Clarke, that recommendation 6 be adopted.

Resolved, on the motion of Mr Clarke, that recommendation 7 be adopted.

Resolved, on the motion of Mr Colless, that recommendation 8 be adopted.

Resolved, on the motion of Mr Colless, that chapter 3 be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Clarke, that recommendation 9 be adopted.

Resolved, on the motion of Mr Donnelly, that recommendation 10 be adopted.

Resolved, on the motion of Mr Clarke, that recommendation 11 be adopted.

Resolved, on the motion of Mr Colless that recommendation 12 be adopted.

Resolved, on the motion of Mr Clarke, that recommendation 13 be adopted.

Resolved, on the motion of Mr Colless, that recommendation 14 be adopted.

Resolved, on the motion of Mr Colless, that chapter 4 be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Colless, that paragraph 5.50 be amended by inserting the words ‘, including the New South Wales Parliament Joint Standing Committee on Road Safety,’ after the word ‘stakeholders’.

Resolved, on the motion of Mr Colless, that recommendation 15 be amended to read:

That the Motor Accidents Authority consult with all interested stakeholders, including the New South Wales Parliament Joint Standing Committee on Road Safety, prior to finalising the Road Safety and Rehabilitation Strategic Plan.

Resolved, on the motion of Mr Colless, that recommendation 15, as amended, be adopted.

Resolved, on the motion of Mr Clarke, that recommendation 16 be adopted.

Resolved, on the motion of Mr Donnelly, that recommendation 17 be adopted.

Resolved, on the motion of Mr Donnelly, that chapter 5, as amended, be adopted.

Chapter 6 read.

Resolved, on the motion of Mr Colless, that recommendation 18 be adopted.

Resolved, on the motion of Mr Colless, that recommendation 19 be adopted.

Resolved, on the motion of Mr Colless, that recommendation 20 be adopted.

Resolved, on the motion of Mr Colless, that chapter 6 be adopted.

Chapter 7 read.

Resolved, on the motion of Mr Donnelly, that paragraph 7.3 be amended by removing the words ‘At the time of finalising this report the Act is yet to come into force. When proclaimed the Act will establish...’ and inserting ‘The Act will provide for the establishment of...’.

Resolved, on the motion of Mr Colless, that paragraphs, 7.31, 7.41 and 7.74 be amended by removing the words ‘At the time of writing this report, the amendments are yet to come into force.’

Resolved, on the motion of Mr Clarke, that recommendation 21 be adopted.

Resolved, on the motion of Mr Colless, that recommendation 22 be adopted.

Resolved, on the motion of Mr Colless, that chapter 7, as amended, be adopted.

Resolved, on the motion of Mr Colless, that the appendices be adopted.

Resolved, on the motion of Mr Clarke, that the report, as amended, be the report of the Committee and be signed by the Chair and presented to the House in accordance with Standing Orders 227(3) and 230(5).

Resolved, on the motion of Mr Colless, that the Secretariat be permitted to correct any typographical and grammatical errors in the report prior to tabling.

**6. Adjournment**

The Committee adjourned at 10:30am *sine die*.

**Rachel Callinan**  
**Director**