

Standing Committee on Law and Justice

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

Ordered to be printed 20 December 2011 according to  
Standing Order 231

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice.**

Eleventh review of the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council / Legislative Council, Standing Committee on Law and Justice. [Sydney, N.S.W.] : The Committee, 2011. – xx, 93 p. ; 30 cm. (Report ; no. 48)

Chair: The Hon David Clarke MLC.

“December 2011”.

ISBN 9781920788407

1. New South Wales. Motor Accidents Authority.
2. New South Wales. Motor Accidents Council.
  - I. Title
  - II. Clarke, David.
  - III. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice. Report ; no. 48

363.125 (DDC22)

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## Terms of reference

1. That, in accordance with 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, and
  - (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 every two years.
4. That nothing in this resolution authorises the Committee to investigate a particular compensation claim under the *Motor Accidents Compensation Act 1999*.

These terms of reference were referred to the Committee by resolution passed LC *Minutes* No 17 (14/6/2011)194, Item 15.

## Committee membership

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The Hon David Clarke MLC	Liberal Party	<i>(Chair)</i>
The Hon Peter Primrose MLC	Australian Labor Party	<i>(Deputy Chair)</i>
The Hon Scot MacDonald MLC	Liberal Party	
The Hon Sarah Mitchell MLC	The Nationals	
The Hon Shaoquett Moselmane MLC	Australian Labor Party	
Mr David Shoebridge MLC	The Greens	

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## Chair's foreword

The NSW Motor Accidents Scheme is now in its thirteenth year, and the Law and Justice Committee has undertaken eleven reviews of the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC), as required by the *Motor Accidents Compensation Act 1999*.

Since 2008 the Committee has been required to undertake this review at least once every two years. Whilst the Committee undertook its last review in 2010, with the commencement of the 55<sup>th</sup> Parliament following the general election in March 2011, the newly re-established Law and Justice Committee decided that it would commence the Eleventh Review of the MAA and MAC this year. With this approach, the Committee expects that it will be able to conduct two reviews and receive the government response to both of these reports within the four year parliamentary term.

As this is the Eleventh Review the report builds on the outcomes and recommendations from previous reviews. The Committee continues to work collaboratively with the MAA and the MAC in the performance of our oversight function, and acknowledges the assistance and information provided by the MAA.

The Committee's work has, as always, benefited from the valuable contributions of stakeholders who have participated in our Reviews. Their involvement allows the Committee to explore the issues and to identify appropriate recommendations for improvements. On behalf of the Committee I thank all of our Review participants for their important contributions.

During this Eleventh Review the Committee has found that the Scheme and the MAA and the MAC continue to perform in an effective manner. The Committee has examined a diverse range of issues during this Review, relating to areas such as the level of insurer profits and access to damages for non-economic loss. This report also discusses several issues pertaining to the performance of the Medical Assessment Service and the Claims Assessment and Resolution Service. The Committee is confident that our recommendations in response to the issues raised by stakeholders will continue to assist the MAA and the MAC to enhance the performance of the Scheme.

With the recent change of Government has come a change in Committee membership. I express my thanks to my colleagues for their thoughtful contributions to this year's review. Our monitoring role has benefited greatly from both our individual perspectives and our cooperative approach. I also thank the staff of the Committee secretariat for their ongoing professional support, in particular Rachel Callinan, Director, Stewart Smith, Principal Council Officer, and Lynn Race, Assistant Council Officer.



Hon David Clarke MLC

**Committee Chair**

# Executive summary

## Introduction (Chapter 1)

This is the Committee's Eleventh Review of the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC), as required under the *Motor Accidents Compensation Act 1999*. Whilst the Committee undertook its last review in 2010, with the commencement of the 55<sup>th</sup> Parliament following the general election in March 2011, the newly re-established Law and Justice Committee decided that it would commence the Eleventh Review of the MAA and MAC this year. With this approach, the Committee expects that it will be able to conduct two reviews and receive the government response to both of these reports within the four year parliamentary term. The Committee has therefore reviewed the way in which the MAA and the MAC have exercised their functions with reference to the MAA's *Annual Report 2009/10*.

The current Review was conducted concurrently with the Committee's Fourth Review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council. That Review will be the subject of its own report, also to be published in December 2011.

The Eleventh Review of the MAA and the MAC examines a number of issues, with a focus including insurer profits and access to damages for pain and suffering. In addition, various aspects of the Motor Accidents Assessment Service, including the Medical Assessment Service and the Claims Assessment and Resolution Service are reviewed.

The Committee received 16 submissions from a variety of stakeholders. We also heard evidence from representatives of the MAA, the Law Society of NSW, the NSW Bar Association and the Insurance Council of Australia. In addition, evidence was obtained from the MAA and other participants through a process of written questions and answers. The Committee expresses its thanks to all those who participated in this year's Review, and in particular thanks the MAA for its cooperation.

## Scheme performance and other issues (Chapter 2)

As in previous reviews, the Committee examined the performance of the MAA with reference to four key indicators: affordability, effectiveness, fairness and efficiency. The Committee was satisfied that the Scheme continues to function in an appropriate manner when assessed against the broad performance indicators of affordability and effectiveness. In particular, the Committee accepts that, as measured against average weekly wage, a CTP Green Slip is considerably more affordable now than compared to ten years ago. Nevertheless, in Chapters Three and Four of this report, the Committee canvasses issues that are at the core of assessing whether the Scheme is fair and efficient, both in terms of CTP price, injury compensation and treatment of those who are injured in a motor vehicle accident. The Committee examined the issue of health outcome measures, which has been a recurring issue in each of the Committee's reports since the *Sixth Review Report*. In this Review, the MAA updated the Committee on a number of inter-agency projects that it is involved with that relate to the measurement of health outcomes for injured people in the Scheme, and provided an example of a study conducted by the University of Sydney. The MAA Corporate Plan 2011-2015 has also identified a key result area of promoting better health and social outcomes for those injured in a motor accident. The Committee acknowledges the importance of improving health outcomes for people involved in the Scheme, and recommends that the MAA identify the development of health outcomes performance measures as a priority work area.

The Motorcycle Council of NSW expressed concern about the Medical Care and Injury Services (MCIS) levy and its impact on CTP insurance premiums for motorcyclists. In our *Tenth Review Report* the Committee noted that whilst the MCIS levy is expressed on Green Slips as a separate item, it is not clear what proportion of the levy is used for the LTCS Scheme and what proportion is used for hospital and ambulance services and the administration costs of the Motor Accidents Scheme.

In the current Review the MAA advised that in consultation with the Motor Accidents Council, it had introduced a trial on the Authority's Green Slip calculator for motorists to obtain a breakdown of the insurer premium, the MAA levy and the LTCS levy when comparing Green Slip prices. The MAA also advised that the CTP insurers estimated that the technical and administrative work that would be required to itemise the levy on Green Slips would cost between \$80,000 and \$400,000 per insurer, a cost that would be passed on to motorists. The MAA stated that the trial will be reviewed after one year in operation to consider the level of interest in going to the expense of applying this information on the Green Slip itself.

Claims frequency and propensity to claim is also discussed as we have regularly done since our *Seventh Review Report*. Claims frequency has dropped from a figure of 41 (per 10,000 vehicles) in 2000/01 to a low of 23 in 2007/08. In the latest reporting year claim frequency had increased to 27. Similarly, the propensity to claim dropped from 51 per cent in 2000/01 to a low of 41 per cent in 2006/07, but has since risen to 47 per cent. During the current Review claim frequency or propensity to claim was not raised as an issue in the context of barriers to making a claim. However, it was raised in relation to the issue of insurer profits, and this is discussed in Chapter 3. Representatives of the Insurance Council of Australia explained to the Committee that the reduction in claims frequency was unprecedented, and whilst there had been a significant amount of analysis to determine why it had occurred, no one has been able to identify a reason. Furthermore, he noted that no one can predict what will happen to claim frequency in the future.

One of the important services provided by the MAA is the provision of information about the Scheme to stakeholders and the general public. It is important that people injured in a motor vehicle accident are aware of their rights and responsibilities. To do this the MAA operates a Claims Advisory Service, including translation services, and also extensively advertises its Green Slip calculator. The Committee acknowledges the efforts of the Motor Accidents Authority to publicise information about the CTP Scheme, including in several community languages. It is evident to the Committee that the Green Slip calculator is a valuable and useful tool for motor vehicle owners.

The Motorcycle Council of NSW raised concerns in relation to the adequacy of crash reporting data, and argued that the MAA required a better crash data facility to give them better base information so that they can do their job more effectively. The Council recommended that NSW adopt a similar scheme as to that which operates in Western Australia. The MAA noted that Western Australia is probably a world leader in this area, and that their streamlined system has led to many efficiencies, ranging from faster injury management to police spending less time filling out forms and more time on the 'front line'. The MAA informed the Committee that it had recently arranged for the West Australian Insurance Commission to give a presentation about its crash reporting scheme to stakeholders. The MAA subsequently commissioned a scoping study for a similar system to be implemented in NSW. The Committee welcomes the proactive approach taken by the MAA, and recommends that the MAA release the results of the scoping study, as well as the details of its recommendations in relation to implementing a similar model in NSW, in order to inform stakeholders and provide a mechanism for stakeholder comment.

The MAA derives its responsibility for injury prevention initiatives from section 206 of the *Motor Accidents Compensation Act 1999*. Under the Act, the MAA is required to provide funding for measures for preventing or minimising injuries from motor accidents, and safety education. The MAA advised the Committee that whilst the Centre for Road Safety has been the lead government agency for road safety in NSW since it was established in 2008, it remains committed to working closely with the Centre for Road Safety and will also continue to provide funding for road safety initiatives. The Committee notes the difficulty in determining from the Authority's Annual Report the actual amount spent on road safety and motor vehicle injury prevention programs, and recommends that the Annual Report should itemise 'Road safety grants and sponsorships' as a separate line item.

The Motor Accidents Council (MAC) is an advisory group appointed for a term of three years by the Minister for Finance. The role of the MAC is to facilitate input on the Motor Accidents Scheme from relevant stakeholders and to consider issues referred by the MAA with a view to providing advice and recommendations. The Committee heard from stakeholders that the MAC had been very active over the reporting period, and congratulates the Committee Chair Ms Aplin and Council members for their contribution to this important forum.

### **Insurer profits and other issues (Chapter 3)**

#### ***Insurer profits***

Insurers are required by the *Motor Accidents Compensation Act 1999* to report to the MAA the profit margin on which their premiums are based and the actuarial basis for calculating their profit margin. Insurers report to the MAA on two types of profits: prospective profit and realised profit. Prospective profit is that which the insurer expects to achieve at the time of filing a premium, given assumptions about the number of claims it expects to have to pay out, investment returns and premium income. Realised profit is what the insurer actually made in profit in a given year once all costs and income have been accounted for. A good understanding of realised profit may not be known for at least five years after the underwriting year.

The Committee has looked at the issue of insurer profits in each of its eleven Reviews. During the course of the *Tenth Review*, the MAA advised the Committee that it had commissioned an independent competition review of the Scheme. Hence the Committee recommended that the competition review involve stakeholder consultation and that the results be made public as soon as possible.

In the current Review, a number of participants again expressed concern about the size of the profits realised by insurers. For example, the NSW Bar Association noted that over several years of the Scheme's operation, insurers had retained profits well in excess of the prospective forecasts, and concluded that there must be a fundamental flaw in the design of the Scheme. The Law Society of NSW and the Australian Lawyers Alliance were also critical that realised insurer profits have repeatedly and significantly exceeded prospective profit forecasts. In response the Insurance Council of Australia explained to the Committee that insurance companies had benefitted from a fall in claim frequency, resulting in higher profit levels than forecast. The Insurance Council noted that the premium determination process is thorough and reviewed multiple times, and any bias or mistakes in the premium determination process would be identified.

In relation to the argument that CTP insurer profits are excessive, the MAA advised that it had taken steps to strengthen its regulatory oversight. The Authority explained that it had been actively looking at the rigour of the regulatory tools available to it within its legislative powers. It had produced new Premium Determination Guidelines that require greater disclosure of projected profit and rates of

return by insurance companies. In addition, the MAA asserted that its new modelling tools should enable a more rigorous assessment of the assumptions used by insurers in setting target profit margins. The MAA also advised the Committee that whilst the results of the competition review have not yet been released, the Minister for Finance and Services, the Hon Greg Pearce MLC, has initiated an internal review of CTP pricing. The Minister has asked the MAA to consider: insurer profits and costs; transparency in legal costs to ensure that injured people get to a fair level of their entitlement in their hand; fair and affordable CTP green slip pricing; and the Motor Accident Authority's operating model to ensure the agency has optimal regulatory powers.

The Committee notes that section 28 of the *Motor Accidents Compensation Act 1999* requires the MAA to assess the insurers' CTP profit margin, and the actuarial basis for its calculation, and to present a report on that assessment annually to the Parliamentary Committee. Previously the MAA has responded that the profit report included in the MAA Annual Report satisfies this statutory requirement. However, the Committee is not satisfied that the MAA is adequately fulfilling its statutory obligation under Section 28 of the Act, and therefore recommends that the MAA present a report on its assessment of insurer profit margins and the actuarial basis for its calculation, including an explanation for any material deviation on forecasted profit, to the Committee on an annual basis.

The Committee acknowledges that since the Committee's Tenth Review, there has been a change in government. Hence the Committee accepts that the new Minister responsible for the MAA, the Hon Greg Pearce MLC, has responded to the issue of insurer profits and other issues by commissioning this new CTP pricing review. Whilst the Committee supports this course of action by the Minister, we are undertaking preliminary investigation into engaging an actuarial consultant to assist the Committee to further examine the issue of insurer profits and provide advice on certain aspects of the MAA Scheme. In order to better inform the Committee and stakeholders, the Committee recommends that the MAA should publish information about the CTP pricing review, such as its terms of reference and timeframe. The Committee considers that the new CTP pricing review should include consultation with the public and stakeholders, and to facilitate this, the MAA should publish a discussion paper on the issue to help direct stakeholders' feedback.

The Australian Prudential Regulatory Authority (APRA), an Australian Government body, has the lead role to play in the prudential supervision and solvency of insurance companies. The solvency of licensed CTP insurers is also a key issue for the MAA and indeed the whole community, and the Committee notes that the MAA is working closely with APRA in this regard.

### ***Legal costs***

Legal costs under the Motor Accidents Scheme are regulated by the Motor Accidents Compensation Regulation 2005 (the Cost Regulation). The Cost Regulation governs, amongst other things, the maximum costs recoverable by legal practitioners for services provided to a claimant or an insurer in any motor accidents matter. In practice, legal representatives set their own fees, which are paid by their clients. If the client's claim is successful, the insurer reimburses the claimant an amount according to the Cost Regulation, leaving the client liable for any difference between the fee charged and the recoverable cost.

Legal costs arose as a concern for participants during the current Review, as it has during the Committee's six previous reviews. Over the years participants such as the Law Society of NSW and the NSW Bar Association, have repeatedly expressed concerns that as a consequence of increasing legal fees, the Cost Regulation does not adequately provide for recoverable costs, which can leave claimants unfairly disadvantaged. In the *Tenth Review Report*, the issue of legal costs was extensively discussed and

the MAA advised that the Cost Regulation was due to be automatically repealed on 1 September 2010, but that this date had been extended to 1 September 2011. The MAA established a working party to review the regulation, and the MAA advised the Committee that the result was a very good package and expected to put it to the Government for the remaking of the regulation.

The continuing importance of resolving the issue of legal costs was evident to the Committee, as during the course of the current Review the MAA advised that the number of claimants engaging legal representation had increased by some 13 per cent since 2002, and now over half of all year one claims involved legal representation. In addition, the proportion of motor accident cases in the court system had also increased. The MAA advised the Committee that the cost regulation had been extended again for another 12 months to 1 September 2012. The legal groups contributing to the Review were very critical that the costs regulation had not been updated. Similarly, as for legal costs, costs for services provided by a doctor under the Motor Accidents Scheme are regulated by the Cost Regulation. The Australian Medical Association (AMA) NSW presented concerns to the Committee that are similar to that presented by the legal representatives, that is, the Cost Regulation has not kept up to date with contemporary fees.

The Committee is concerned that the Costs Regulation was not revised on 1 September this year, and recommends that the Minister expedite the remaking of the Regulation rather than waiting until its expiry on 1 September 2012. The Committee also considers that an increase in transparency and understanding of costs in the Scheme is desirable, and recommends that the Government introduce amendments to the *Motor Accidents Compensation Act 1999* to provide the MAA with the authority to collect and disclose data on the amount of compensation that claimants receive once legal costs have been deducted.

During the Review the Australian Physiotherapy Association expressed concern to the Committee that some CTP insurers have set their own physiotherapy fee schedule, which may be quite fixed and take no account of the time or expertise of the physiotherapist involved. In response the Committee recommends that the MAA review the Physiotherapy Notice of Commencement and Physiotherapy Review Forms to incorporate physiotherapist type and expertise information so that an appropriate level of remuneration can be provided for.

The Committee also heard from Carers NSW, which noted that there is limited information for carers on the MAA and LTCSA's website. The Committee recommends that the MAA produce and publish on its website information specifically directed to assist carers.

### ***Discount rate***

The final issue discussed in Chapter Three is the discount rate. When a lump sum payment is awarded to seriously injured people to compensate for future economic loss resulting from that injury, the present value of the future economic loss is qualified by adopting a prescribed discount rate. The *Motor Accidents Compensation Act 1999* sets the discount rate for the Scheme at five per cent. The Australian Lawyers Alliance was concerned that the discount rate of five per cent may result in seriously injured people receiving inadequate compensation to meet their ongoing care needs. The MAA advised that a five per cent discount rate is used in other compensation schemes, and by other Australian States and Territories. The Committee notes that the introduction of the Lifetime Care and Support Scheme, which provides for the lifetime care needs of catastrophically injured persons, has reduced the overall impact of the discount rate on the Scheme. The discount rate was raised by only one stakeholder and the Committee will keep a watching brief on this issue.

## **Motor Accidents Assessment Service (Chapter 4)**

The final Chapter examines issues raised by participants in relation to the Motor Accident Assessment Service (MAAS). The MAAS is comprised of two components: the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS).

Inquiry stakeholders raised a number of issues relating to the MAS, which assesses medical disputes that arise between an injured person and an insurer regarding the treatment, stabilisation and degree of permanent impairment of injuries, as well as the level of impairment of a claimant's earning capacity.

In its *Eighth Review Report*, the Committee examined in detail the matter of delays in assessments and disputes under the MAS system. Some stakeholders noted that there was scope for improvement in the time taken to finalise assessments and disputes. The Committee's *Ninth Review Report* noted that the lifecycle of MAS assessments had reduced to 93 days as of May 2008.

In the current Review the MAA was asked why the median lifecycle for finalising medical disputes had risen to 101 working days in 2009/10, from a record low of 78 days in 2007/08 (the record high was 177 days in 2002/03). The MAA advised that it continues to monitor the timeliness of finalisations of medical disputes, and that the increase in the number of days taken to finalise a medical assessment may be attributed to a number of factors. The Committee acknowledges that the MAA has advanced a number of factors or reasons why the median lifecycle of MAS disputes has increased. However, it is not clear to the Committee how these reasons correspond to the experience and evidence put forward by the Law Society. The Committee will therefore keep a watching brief on this issue, and will take a keen interest in the issue for its next review.

### ***Access to damages for non-economic loss***

A focus of Chapter Four is the issue of access to damages for non-economic loss, that is, for pain and suffering, for a person injured in a motor accident. Under the Motor Accident Compensation Scheme, a person injured in a motor vehicle accident is not entitled to claim for damages for non-economic loss unless the degree of their permanent impairment as a result of the injury caused by the motor accident is greater than ten per cent. This test is referred to as the ten per cent whole person impairment (WPI) threshold.

The ten per cent WPI threshold for non-economic loss was examined in the Committee's *Eighth, Ninth and Tenth Review Reports*. Some stakeholders have criticised the threshold as being unfair because it excludes a significant proportion of those injured in motor accidents from receiving compensation for non-economic loss. Some stakeholders were also concerned that the score for assessment of psychiatric injury could not be combined with the score for the assessment of physical impairment when determining the degree of WPI.

The Committee review the proposals for reform presented by stakeholders including lowering the WPI threshold, permitting the aggregation of physical and psychological injuries and replacing the ten per cent WPI threshold with alternatives, such as the threshold in section 16 of the *Civil Liability Act 2002*. In addition the Committee reviews a proposal for a single system of compensation in NSW.

The Committee is concerned that the current WPI approach does not strike the right balance between Scheme efficiency and affordability and compensation for pain and suffering to those who are injured in a motor accident. The Committee is concerned that the ten per cent whole person impairment threshold has been set too high, and hence recommends that the NSW Government review the

threshold for access to damages for non-economic loss under the Motor Accidents Scheme to achieve a better balance between Scheme efficiency and compensation. To assist this review, the Committee recommends that the MAA publish a discussion paper outlining the issues, including an actuarial analysis of the ramifications to the Scheme, claimants, CTP pricing and insurers of: changing the threshold to access non-economic damages to that of s.16 of the *Civil Liability Act*; lowering the ten per cent whole person impairment threshold; and allowing both physical and psychological injuries to be aggregated to determine the whole person impairment threshold.

Another area of concern was the ability of MAS Assessors to make assessment about causation, i.e. whether the treatment provided to an injured person relates to the injury caused by the motor vehicle accident. This issue was particularly concerning for several stakeholders because of the binding nature of a MAS Assessors' assessment. The Committee acknowledges the competing views put forward by the various stakeholder groups in relation to the issue of legal causation. The Committee also notes the comments of the MAA that the MAS is working effectively. The Committee considers that it did not receive enough evidence to draw a conclusion as to whether legal or medical professionals should be responsible for determining the test of legal causation. As such, the Committee recommends that this issue should be referred to the MAC for its careful analysis and review.

Chapter Four also considers issues impacting on the Claims Assessment and Resolution Service (CARS), which provides a service to resolve disputes about claims, including procedural disputes and eligibility for exemptions from assessments, as well as undertaking general assessments of claims for damages.

The Committee acknowledges that the MAA undertook a review of CARS in the second half of 2010. During the current review the Committee sought information on the outcomes of the CARS review. However, the MAA advised that the review recommendations were being considered as part of a wider review, and hence had not been publicly released. In relation to CARS two issues arose during the current Review: the late claims process and section 89A pre-settlement conferences.

### ***Late claims***

In regards to the late claims process, the Australian Lawyers Alliance and the Bar Association argued that the requirement for claimants to provide a full and satisfactory explanation for the delay in lodging a claim has become an overwhelmingly difficult and time-consuming exercise. The MAA advises that late claims was a key issue that the CARS review addressed, and that whilst a response to that review has not been released yet, it was something that the MAA has agreed it needs to look at. The Committee looks forward to assessing this response at its next review.

### ***Section 89A pre-settlement conferences***

Section 89A of the *Motor Accidents Compensation Act 1999* was introduced in 2008, and provides for a compulsory settlement conference between the parties before proceedings to CARS. However, the Bar Association submitted to the Committee that complying with Section 89A of the Act has caused considerable expense for the parties, and that the insurers are taking technical points in almost every case. The Association argued that the result is that the requirements of the Act are difficult to comply with at reasonable cost. The Committee acknowledges that the MAA looked at the issue of s.89A conferences as part of the CARS review, and notes the preparedness of the MAA to look into the impact of section 89A settlement conferences and the concerns of the Bar Association. The Committee therefore recommends that the MAA meet with the Bar Association and other stakeholders as soon as practicable with a view to resolving the issue.

## Summary of recommendations

- Recommendation 1** 11  
That the Motor Accidents Authority identifies the development of health outcomes performance measures as a priority work area.
- Recommendation 2** 22  
That the Motor Accidents Authority publish the results of the scoping study that it commissioned into New South Wales adopting a similar crash reporting scheme as that in operation in West Australia. The Motor Accidents Authority should also publish the recommendations it made to government as a result of the scoping study in order to inform stakeholders, and provide a mechanism for stakeholder comment.
- Recommendation 3** 24  
That the Motor Accidents Authority include in its Annual Reports a separate line item[s] for reporting 'Road safety grants and sponsorships'.
- Recommendation 4** 41  
That the Motor Accidents Authority present a report on its assessment of insurer profit margins and the actuarial basis for its calculation to the Committee, including an explanation for any material deviation on forecasted profit, on an annual basis in order to fulfil its statutory obligation under section 28 of the *Motor Accidents Compensation Act 1999*.
- Recommendation 5** 42  
That the Motor Accidents Authority promptly publish information about the CTP pricing review, including its terms of reference and timeframe. In addition, the Motor Accidents Authority should publish a discussion paper on the issues covered in the review, consult widely including with stakeholders and the public, and publish its findings.
- Recommendation 6** 48  
That the Minister expedite the remaking of the Motor Accidents Compensation Regulation 2005, rather than waiting until its expiry on 1 September 2012.
- Recommendation 7** 48  
That the New South Wales Government pursue amendments to the *Motor Accidents Compensation Act 1999* to provide the Motor Accidents Authority with the authority to collect and disclose data on the amount of compensation a claimant receives once legal costs have been deducted.
- Recommendation 8** 51  
That the Motor Accidents Authority, in consultation with appropriate stakeholders, review the Physiotherapy Notice of Commencement and Physiotherapy Review Forms.
- Recommendation 9** 53  
That the Motor Accidents Authority produce and publish on its website information specifically directed to assist carers.

**Recommendation 10**

69

That the New South Wales Government review the threshold for access to damages for non-economic loss under the Motor Accidents Scheme in order to achieve a better balance between Scheme efficiency and compensation.

That the Motor Accidents Authority publish a discussion paper outlining the issues relating to access to non-economic loss damages. This discussion paper should include an actuarial analysis of the ramifications to the Scheme, claimants, CTP pricing and insurers of:

- changing the threshold to access non-economic damages to that of s.16 of the *Civil Liability Act*
- lowering the ten per cent whole person impairment threshold; and
- allowing both physical and psychological injuries to be aggregated to determine the whole person impairment threshold.

The Authority should make this review a priority, and publish the discussion paper, invite comment and pursue any subsequent legislative amendment during 2012.

**Recommendation 11**

72

That the Motor Accidents Council form a sub-committee to review, analyse and recommend a course of action to the Motor Accidents Authority on the issue of legal causation.

**Recommendation 12**

77

That the Motor Accidents Authority meet with the New South Wales Bar Association and other stakeholders as soon as practicable with a view to finding a solution to the issue of pre-settlement conferences under section 89A of the *Motor Accidents Compensation Act 1999*.

## Glossary

<b>CARS</b>	Claims Assessment and Resolution Service
<b>CTP</b>	Compulsory Third Party
<b>ICA</b>	Insurance Council of Australia
<b>LTSCA</b>	Lifetime Care and Support Authority
<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>The Scheme</b>	Motor Accidents Compensation Scheme
<b>WPI</b>	Whole Person Impairment

## Chapter 1 Introduction

This Chapter provides an overview of the Review process, outlining the Committee's approach to the Eleventh Review of the Motor Accidents Authority and the Motor Accidents Council. The Chapter briefly describes the Motor Accidents Compensation Scheme and concludes with an overview of the structure of the report

### The Committee's role

- 1.1 A Committee of the Legislative Council is required under section 210 of the *Motor Accidents Compensation Act 1999* to supervise the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC).
- 1.2 Since 1999, a resolution of the Legislative Council has designated the Standing Committee on Law and Justice to undertake this role, and has set out the terms of reference for the Committee's annual reviews. During its *Ninth Review Report*, the Committee recommended that this resolution be amended to require biennial reviews of the MAA and MAC. The Legislative Council supported this recommendation and amended the resolution accordingly on 22 October 2008.<sup>1</sup> The Committee was reappointed to this role for the 55<sup>th</sup> Parliament by resolution of the House on 14 June 2011.<sup>2</sup>
- 1.3 Information on the Committee's previous reviews, including reports, can be found on the Committee's website at [www.parliament.nsw.gov.au/lawandjustice](http://www.parliament.nsw.gov.au/lawandjustice).

### Conduct of the Eleventh Review

- 1.4 The Committee resolved to commence this Eleventh Review on 22 June 2011. The Committee will review the way in which the MAA and the MAC have exercised their functions since the Committee tabled its last report in October 2010 and examine the MAA's *Annual Report 2009/2010*.
- 1.5 This Eleventh Review was conducted concurrently with the Committee's Fourth Review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council. That Review will be the subject of its own report, also to be published in December 2011.
- 1.6 The Committee would like to thank all participants in this year's Review. As during previous reviews, the considered contributions of stakeholders have greatly assisted the Committee to successfully undertake its reviewing role.

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<sup>1</sup> *LC Minutes* (22/10/2008) 826.

<sup>2</sup> *LC Minutes*, 14 June 2011, p 194.

### Submissions

- 1.7 The Committee invited submissions through advertisements in *The Sydney Morning Herald*, *The Daily Telegraph*, and *The Land*, and through a press release distributed via *Media Monitors*. As with previous reviews, the Committee also wrote directly to a number of stakeholders to invite them to make a submission.
- 1.8 The Committee received 16 submissions from a range of stakeholders including a number of special interest advocacy groups, the legal and insurance sectors and private individuals. A list of submission authors is shown in Appendix 1.

### Hearings

- 1.9 The Committee held two public hearings on the 10<sup>th</sup> and 17<sup>th</sup> October 2011. The Committee heard from representatives from several organisations, including the Law Society of NSW, the NSW Bar Association, the Insurance Council of Australia, the Australian Lawyers Alliance, medical groups and the Motorcycle Council of NSW. At the second hearing Mr Andrew Nicholls, the Acting General Manager of the MAA, and Ms Susan Freeman, Acting Deputy General Manager, gave evidence. A full list of witnesses is provided in Appendix 2.

### Questions on notice

- 1.10 Following the practice developed during previous reviews, the Committee forwarded written questions on notice to the MAA prior to the public hearing. These questions were based on the MAA's *Annual Report 2009/2010* and issues raised in submissions. Unfortunately, the Government Response to the Committee's Tenth Report was not received to frame any questions on notice.
- 1.11 The MAA provided answers to these pre-hearing questions, which other stakeholders were asked to respond to during the hearing and in further questions on notice. Stakeholders were also asked to respond to the issues raised in each others' evidence. This allowed for the in-depth consideration of the issues.

## Overview of the NSW Motor Accidents Scheme

- 1.12 This section contains a brief overview of the NSW Motor Accident Scheme. A comprehensive description of the Scheme can be found in the Committee's *Ninth Review Report*.<sup>3</sup>
- 1.13 The NSW Motor Accidents Scheme (the Scheme) provides compensation for people injured in motor vehicle accidents in NSW that are the fault of another vehicle owner or driver. Compensation payments through the Scheme are financed from compulsory third party (CTP)

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<sup>3</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Ninth Review*, Report 36, September 2008, pp 5-8.

insurance premiums that must be taken out when registering a motor vehicle in NSW.<sup>4</sup> These insurance premiums are known as Green Slips.

- 1.14** For those injured in a motor accident, there are two ways to access benefits under the Scheme. The first is by submitting an Accident Notification Form. Anyone injured in a motor vehicle accident in NSW can submit an Accident Notification Form regardless of whether or not they were at fault. The Accident Notification Form provides for reimbursement for reasonable and necessary medical treatment expenses and payment for past loss of earnings up to a maximum total of \$5,000 in the first six months after the accident. To access these benefits the Accident Notification Form must be submitted within 28 days of the motor vehicle accident.
- 1.15** The second way to access benefits is through the Personal Injury Claim Form. In addition to the benefits available under the Accident Notification Form, an injured person may also be able to make a claim for personal injury compensation if:
- the accident was caused, or mainly caused by another driver or vehicle owner, or
  - the accident was a blameless accident, for example, an accident resulting from the sudden illness of the driver, such as heart attack or stroke, or vehicle failure such as a tyre blow-out, or
  - the person was under 16 years old at the time of the accident, regardless of who was at fault.
- 1.16** A driver completely at fault may not be eligible to make a Personal Injury Claim.
- 1.17** The MAA advises that depending on the circumstances of the accident, an injured person submitting a Personal Injury Claim form may be entitled to compensation that includes:
- reasonable and necessary medical, pharmaceutical, rehabilitation, respite care and attendant care expenses
  - other expenses and economic losses for example, loss of income and out of pocket expenses
  - non-economic loss, such as payment for their pain and suffering, if you have a serious, permanent injury.<sup>5</sup>
- 1.18** To access these benefits, the Personal Injury Claim Form must be submitted within six months of the motor vehicle accident. The Scheme does not cover damage to property or vehicles.<sup>6</sup>
- 1.19** The MAA regulates the Scheme and its participants and provides information and education to stakeholders and service providers. The MAA also operates an independent assessment and dispute resolution service.<sup>7</sup> Funds from the Scheme are also used by the MAA for research

<sup>4</sup> MAA, *What is a Green Slip*, accessed 10 August 2011, <[www.maa.nsw.gov.au/default.aspx?MenuID=264](http://www.maa.nsw.gov.au/default.aspx?MenuID=264)>

<sup>5</sup> MAA, *Claims*, accessed 16 November 2011, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=89>>

<sup>6</sup> MAA, *What is a Green Slip*, accessed 10 August 2011, <[www.maa.nsw.gov.au/default.aspx?MenuID=264](http://www.maa.nsw.gov.au/default.aspx?MenuID=264)>

<sup>7</sup> MAA, *What we do*, accessed 10 August 2011, <[www.maa.nsw.gov.au/default.aspx?MenuID=125](http://www.maa.nsw.gov.au/default.aspx?MenuID=125)>

and education projects that prevent and reduce injuries and their consequences, and road safety awareness campaigns.

- 1.20** The Motor Accidents Council is an advisory group appointed by the Minister for Finance. The role of the MAC is to allow input from relevant stakeholders and to consider issues referred to it by the MAA or the MAA Board, with a view to providing advice and recommendations. The Council may also consider issues of interest raised by their constituents.<sup>8</sup> The MAC is discussed further in paragraphs 2.86 – 2.91.

## Structure of report

- 1.21** This report is comprised of four chapters. Chapter 1 outlines the processes undertaken by the Committee during this Review, and provides a brief overview of the role of the MAA.
- 1.22** Chapter 2 examines the performance of the Scheme with reference to the four key indicators used by the MAA: affordability, effectiveness, fairness and efficiency. The Chapter also discusses: stakeholder issues relating to claims frequency and propensity to claim and the development of health outcome measures; concerns expressed about the Medical Care and Injury Service levy; vehicle crash data; and the role of the MAA in relation to vehicle injury prevention. The Chapter concludes by reviewing concerns raised by stakeholders about the operation of the Motor Accidents Council.
- 1.23** Chapter 3 begins by examining the issue of the level of insurer profits under the Motor Accidents Scheme. As in previous reviews, participants in the Review hold widely divergent views on the appropriateness of the levels of insurer profits under the Scheme. The Chapter also discusses issues raised by stakeholders in relation to legal and medical costs under the Motor Accidents Compensation Regulation 2005. The Chapter concludes by considering the discount rate applied to compensation awarded for future economic loss.
- 1.24** The final chapter, Chapter 4, focuses on the Motor Accidents Assessment Service (MAAS) which is comprised of the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS). The Chapter begins by discussing the Medical Assessment Service and the time take to finalise assessment and disputes. The Chapter then examines the whole person impairment threshold, which is used to determine access to damages for pain and suffering for those injured in a motor accident. The Chapter then briefly focuses on CARS, including an examination of the issue of late claims. The Chapter concludes by providing a brief review of the arguments that NSW should have a single system of compensation in NSW.

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<sup>8</sup> MAA, *Annual Report 2009/2010*, p 9.

## Chapter 2 Scheme performance

This Chapter considers the performance of the NSW Motor Accidents Compensation Scheme for 2009/10. The Scheme's performance is measured using the MAA's four key indicators: affordability, effectiveness, fairness and efficiency. The Chapter then examines claims frequency and propensity to claim, the development of health outcome measures, vehicle crash data, injury prevention programs and concludes with a discussion on the Motor Accidents Council.

### Key performance measures

**2.1** This section considers the performance of the Scheme in the period since the Committee's *Tenth Review Report*, tabled in October 2010.<sup>9</sup> A key consideration for the Committee is how the MAA reports on the performance of the Scheme. In its Annual Reports, the MAA reports on Scheme performance with reference to four key indicators:

- affordability
- effectiveness
- fairness
- efficiency.

**2.2** These four indicators are reviewed in the following sections.

#### Affordability

**2.3** Affordability is assessed in terms of the prices for CTP insurance premiums, known as Green Slips. Premiums for Green Slips are set by licensed insurance companies, taking into account factors such as:

- the driver's accident record
- age of the driver
- age and type of the vehicle
- purpose for which the vehicle is being used.<sup>10</sup>

**2.4** Mr Andrew Nicholls, Acting General Manager of the MAA, explained to the Committee that the key challenge regulating the Scheme is the balance between affordability for motorists, and sustaining the many competing forces within the Scheme:

The central challenge in the Scheme revolves around the fact that the Scheme has competing interests between what motorists think is reasonable as a cost for their Green Slip and how injured people are treated as they attempt to recover from their

<sup>9</sup> Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council, Tenth Report*. Report 43, October 2010.

<sup>10</sup> MAA, *How Green Slip Prices Are Set*, accessed 14 September 2011, <[www.maa.nsw.gov.au/default.aspx?MenuID=139](http://www.maa.nsw.gov.au/default.aspx?MenuID=139)>.

injury. There are other views from service providers, such as legal representatives, questions about what is reasonable compensation and what the insurers think is a proper return on the capital they have tied up in the Scheme. For this reason the key challenge of the Scheme is balance, balance between sustainability and affordability.<sup>11</sup>

- 2.5** The MAA's *Annual Report 2009/10* noted that after several years of record Green Slip affordability, since the onset of the global financial crisis in 2008 there has been an upward pressure on Green Slip prices. Insurers invest the premiums they collect to ensure they have sufficient funds to meet claim payments. However, lower investment returns, especially Commonwealth 10 year bond rates, associated with the global financial crisis, meant that insurers increased premiums to ensure they have adequate funds to make claim payments.<sup>12</sup>
- 2.6** The best price for Sydney metropolitan passenger vehicle Green Slips was revised on four occasions from \$377 at 30 June 2009 to \$404 in June 2010.<sup>13</sup> The MAA noted that the 'best price' takes no account of the market share of each of the seven insurers. The MAA argued that the 'weighted average best price' provides a measure based on each insurer's market share, and is a better reflection of prices available in the market. The MAA noted that it will adopt this reporting metric in its Annual Reports from this year. For motorists aged 30 – 54, the 'weighted average best price' was \$441 in the June 2011 quarter, compared to \$421 in the June 2010 quarter, an increase of 4.7 per cent.<sup>14</sup>
- 2.7** Another way to track affordability of Green Slips is to compare the price of a Green Slip to average weekly earnings. The MAA reported that the best price of a Green Slip has dropped from 50 per cent of average weekly earnings in 1999 to 33 per cent as at June 2010.<sup>15</sup>
- 2.8** Mr Nicholls explained that whilst CTP premiums are lower today in real terms than ten years ago, maintaining Scheme affordability is a challenge:

Green Slip premiums remain lower today in real terms than they were 10 years ago. When the Scheme commenced in 1999 premiums were about 55 percent of average weekly earnings. Today it is around 33 percent. Maintaining Scheme affordability is a major challenge currently facing the Scheme.<sup>16</sup>

- 2.9** The Insurance Council of Australia noted that from 1999 to June 2010 inflation had increased prices by 37.9 per cent, but that real premium prices had dropped by 28.2 per cent over that time period. It noted that had CTP premiums kept pace with inflation over that time, the average premium in the June quarter of 2010 would be \$596, which is 39.3 per cent more than the actual rate.<sup>17</sup>

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<sup>11</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, 17 October 2011, p 21.

<sup>12</sup> Motor Accidents Authority, *Annual Report 2009/10*, p 57.

<sup>13</sup> Motor Accidents Authority, *Annual Report 2009/10*, p 57.

<sup>14</sup> Motor Accidents Authority, Answers to pre-hearing questions on notice, p 3.

<sup>15</sup> Motor Accidents Authority, *Annual Report 2009/10*, p 57.

<sup>16</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, 17 October 2011, p 22.

<sup>17</sup> Insurance Council of Australia, Answers to supplementary questions, p 10.

### Effectiveness

- 2.10** 'Effectiveness' refers to the average time taken for insurers to make the first compensation payment to claimants.
- 2.11** The Committee's *Tenth Review Report* noted that there are a number of factors which can impact on the time taken by insurers to make the first compensation payment, including:
- whether an Accident Notification Form (ANF) or a Personal Injury Claim (PIC) has been lodged
  - delays in submitting accounts for treatment or rehabilitation
  - complex liability determinations
  - delays in approving payments by insurers
  - whether notification of an ANF or claim was made late, or if the claim is actually a worker's compensation or interstate claim.<sup>18</sup>
- 2.12** The MAA advised that the time taken by insurers to make the first payment on all claims has fallen from an average of 73.3 days in 2008/09 to an average of 72.4 days in 2009/10.<sup>19</sup>

### Fairness

- 2.13** 'Fairness' refers to whether people injured in motor vehicle accidents are receiving *adequate* compensation. This issue is also explored in greater depth in Chapter 4, in relation to the issue of the whole person impairment threshold for non-economic loss compensation.
- 2.14** The Committee's *Tenth Review Report* noted that the focus of the Scheme was shifting from vertical fairness, whereby the most seriously injured receive maximum compensation, to greater horizontal fairness, where all seriously injured people receive a consistently high level of support. Reforms in October 2008 improved the fairness of the Scheme by increasing the maximum amount payable under the early accident notification process from \$500 to \$5,000. In addition, the early payment Scheme now allows injured people to claim for lost wages using an Accident Notification Form. The prohibition of recovery for economic loss in the first five days following an accident was also removed.<sup>20</sup>
- 2.15** The *Tenth Review Report* noted that the reforms had led to the more than doubling of the average payment made on Accident Notification Forms, from \$400 to \$1000. The MAA informed this Review that the proportion of people involved in a vehicle accident and who lodged an Accident Notification Form under the early accident notification process was 40 per cent, and that the average payment made in 2009/10 was \$1282.<sup>21</sup>
- 2.16** A second phase of reform to improve fairness took effect from April 2010. Under this reform, the early accident notification benefit was extended to provide coverage of up to \$5,000 in

<sup>18</sup> Law and Justice Committee, Report 43, October 2010, p 8.

<sup>19</sup> Motor Accidents Authority, Answers to pre-hearing questions on notice, p 3.

<sup>20</sup> Law and Justice Committee, Report 43, p 9.

<sup>21</sup> Motor Accidents Authority, Answers to pre-hearing questions on notice, p 4.

medical costs and lost wages, for *all* persons who are injured in a motor vehicle accident, *regardless of fault*. Previously, the Scheme only provided assistance to people who were injured in motor vehicle accidents caused by a negligent, or at-fault, driver.<sup>22</sup>

### **Efficiency**

**2.17** The MAA Annual Report notes that the Scheme is considered to be 'efficient' if '... the highest possible amount of each dollar paid in premiums is returned to injured people as compensation payments'.<sup>23</sup> This can be achieved by reducing the transaction costs of administering the Scheme where possible.

**2.18** The MAA advised the Committee that this measure of efficiency is a lead indicator, derived from the insurers' estimates of their future costs. As discussed in Chapter 3, there is significant debate about how future costs are determined and whether enough premium dollar is paid in compensation. The MAA noted that because this measure relies on future projections of costs, it provides a notional view of efficiency:

The difference between premium collected and claims paid is one way of measuring Scheme efficiency. Other measures are affordability, propensity to claim and numerous time related measures. It must be noted that this measure of efficiency is a lead indicator which is derived from the insurers' estimates of their future costs. As such it provides a notional view of efficiency, which reflects the insurers' perceptions of market and economic conditions, which may fluctuate over time.<sup>24</sup>

**2.19** The projected return to claimants as a proportion of premiums paid was 66.5 per cent in 2009/10. This compares to 64% in 2008/09 and 63 per cent in both 2007/08 and 2006/07. The MAA advised that the percentage of premium paid out to claimants as benefits has been consistently around two thirds since the inception of the current Scheme in 1999, whereas in the five years prior to this it was less than 60 per cent.<sup>25</sup>

### ***Other outcome measures***

**2.20** The Committee also received evidence that to assess the effectiveness of the Scheme, two questions need to be answered: were the outcomes of an injury claim reasonable; and secondly, how did the insurer achieve those outcomes. Ms Frances O'Connor, Director, Injury Management IQ, explained that with current insurer practices, these questions could not be answered on a large scale or Scheme wide assessment:

To assess the effectiveness of all of this, two questions need to be answered: One, were the outcomes reasonable for that particular claim profile, and two, how were those outcomes actually achieved by the insurer, so what actually happened in that assessment and decision making process. At the moment with current insurer practice standards, neither of those can be answered on a claim by claim basis unless you look

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<sup>22</sup> Law and Justice Committee, Report 43, p 9.

<sup>23</sup> Motor Accidents Authority, Annual Report 2009/10, p 58.

<sup>24</sup> Motor Accidents Authority, Answers to pre-hearing questions on notice, p 4.

<sup>25</sup> Motor Accidents Authority, Answers to pre-hearing questions on notice, p 4.

through the whole file, but certainly not on a large scale and certainly not across the Scheme.<sup>26</sup>

- 2.21** Ms O'Connor noted that the ramification of this lack of performance data from the insurance companies means that the Motor Accidents Authority cannot be sure that the insurers are managing claims effectively:

How can the regulator be sure that they are actually managing claims to the best of their ability without this information?<sup>27</sup>

### **Committee comment**

- 2.22** The Committee is generally satisfied that the NSW Motor Accidents Scheme continues to function in an appropriate manner when assessed against the broad performance indicators of affordability and effectiveness. In particular, the Committee accepts that, as measured against average weekly wage, a CTP Green Slip is considerably more affordable now than compared to ten years ago.
- 2.23** Nevertheless, in Chapters Three and Four of this report, the Committee canvasses issues that are at the core of assessing whether the Scheme is fair and efficient, both in terms of CTP price, injury compensation and treatment of those who are injured in a motor vehicle accident.

## **Health outcome measures**

- 2.24** Health outcome measures have been a recurring issue in each of the Committee's reports since the *Sixth Review Report*, which was tabled in May 2005. In the Committee's *Sixth Review Report*, the Committee acknowledged that the MAA had raised the issue of measuring health outcomes as an indicator of Scheme performance and that the MAA understood the importance of improving health outcomes for people involved in the Scheme. The MAA advised the Committee that it was undertaking work in areas such as the treatment of whiplash to improve health outcomes for Scheme participants.<sup>28</sup>
- 2.25** In the *Seventh Review Report*, the Committee noted the ongoing efforts of the MAA to incorporate health outcomes for injured road users into the criteria used to assess the performance of the Scheme.<sup>29</sup> The Committee recommended that the MAA collaborate with interested stakeholders to promote improved health outcomes in the NSW Motor Accidents Scheme, in relation to a number of conditions including anxiety, chronic whiplash, spinal injury and brain injury.<sup>30</sup> The Government response to that recommendation stated that the

<sup>26</sup> Ms Frances O'Connor, Director, Injury Management IQ, Evidence, 17 October 2011, p 17.

<sup>27</sup> Ms Frances O'Connor, Evidence, 17 October 2011, p 20.

<sup>28</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Sixth Report*, Report 27, May 2005, pp 73-74.

<sup>29</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Seventh Report*, Report 31, September 2006, pp 99-100.

<sup>30</sup> Standing Committee on Law and Justice, Report 31, p 107.

MAA had contracted a consultant to facilitate the development of options to maximise a health outcomes approach to the Scheme.<sup>31</sup>

**2.26** In its *Eighth Review Report*, the Committee reiterated its support for the introduction of health outcome measures and in the *Ninth Review Report* noted the continuing work of the MAA to develop health outcome measures to be used as one of the key performance indicators for the Scheme.<sup>32</sup>

**2.27** In its *Tenth Review Report*, the Committee acknowledged the difficulties of developing and implementing health outcome measures for the Motor Accidents Scheme. The Committee commended the MAA for its collaborative approach to developing a range of health outcome measures that will allow the performance of the Scheme to be benchmarked over time, and against other jurisdictions.<sup>33</sup>

**2.28** In the current Review, the MAA updated the Committee on a number of inter-agency projects that it is involved with that relate to the measurement of health outcomes for injured people in the Scheme, including the following example of a study conducted by the University of Sydney:

[a] two year follow-up study conducted by the University of Sydney exploring health and social outcomes of injured people under the NSW CTP Scheme. Preliminary results have shown that injured people in the Scheme report high pain levels, significant limitation of activities and absence from work in the first three months following a motor vehicle crash. ...the Authority has also funded a series of focus groups with injured people in this study to explore their experiences with the CTP claims process following injury. The Authority will use the information from these studies to assist with planning future projects as well as improving the monitoring of insurer compliance with injury management guidelines, and to help improve the experience of injured people in the Scheme.<sup>34</sup>

**2.29** The MAA also advised that it has funded four metropolitan hospitals to investigate the benefits of early specialist rehabilitation assessment and a multi-disciplinary coordinated care rehabilitation service for people hospitalised after a motor vehicle crash. It also noted that it is committed, in partnership with WorkCover NSW and the Lifetime Care and Support Authority, to fund a specific research centre as a longer term strategy to enhance both research and educational capacity relevant to compensable injury within NSW.<sup>35</sup>

**2.30** During the course of the Inquiry the MAA published its Corporate Plan 2011 – 2015. The Plan stated that the Scheme's priorities, as reflected in its three Key Result Areas, included:

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<sup>31</sup> NSW Government, Government Response to the 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*, Report 31, September 2006, p 8.

<sup>32</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Eighth Report*, Report 34, November 2007, p 9; Standing Committee on Law and Justice, Report 36, pp 17-19.

<sup>33</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Tenth Report*, Report 43, October 2010, p 15.

<sup>34</sup> Motor Accidents Authority, Answers to pre-hearing questions on notice, p 6.

<sup>35</sup> Motor Accidents Authority, Answers to pre-hearing questions on notice, p 6.

... promoting better health and social outcomes for the injured, as this has benefits for the individual and the community whilst also helping reduce costs and lower premiums for vehicle owners.<sup>36</sup>

### Committee comment

- 2.31** The Committee acknowledges the importance of improving health outcomes for people involved in the Scheme, and congratulates the Authority for the work it is doing in this area. It is evident to the Committee that developing a health outcome measure of Scheme performance is challenging and we encourage the MAA to continue to actively support work in this field. Accordingly, the Committee recommends that the MAA identify the development of health outcomes performance measures as a priority work area.

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### Recommendation 1

That the Motor Accidents Authority identifies the development of health outcomes performance measures as a priority work area.

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## Medical Care and Injury Service Levy

### The MCIS levy

- 2.32** The MCIS levy is a levy on Green Slips, and has two components:
- The first component finances the Lifetime Care and Support Scheme, which covers the cost of medical treatment and care services for people who have been seriously injured in motor vehicle accidents. This component is set by the Board of the Lifetime Care and Support Authority.
  - The second component covers the costs of hospital and ambulance services for people injured in motor vehicle accidents, as well as the administration costs of the Motor Accidents Scheme. This component is set by the Board of the Motor Accidents Authority.
- 2.33** The levy is expressed as a percentage of the CTP Green Slip price, and insurers must add the levy to their premiums.
- 2.34** The percentage of the levy differs between vehicle classes and geographic zones based on accident and injury rates for the selected vehicle type and zone. Table 1 outlines the current MCIS levy for the three common vehicle types in each of the specified geographic zones.

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<sup>36</sup> Motor Accidents Authority, *Corporate Plan 2011-12*.

**Table 1 MCIS levy by vehicle class and geographic zone<sup>37</sup>**

Vehicle class	Sydney Metropolitan (% of CTP premium)	Outer Metropolitan (% of CTP premium)	Newcastle/Central Coast (% of CTP premium)	Wollongong (% of CTP premium)	Country (% of CTP premium)
Motor car	31%	36%	38.5%	35.3%	39.5%
Motor cycle (over 300cc)	43.9%	47.5%	48.3%	48.5%	47.5%
Light goods carrying vehicle (up to 4.5t GVM)	33.3%	33.3%	32.4%	30.9%	35.1%

### Examination of this issue in past reviews

**2.35** During the First Review of the Lifetime Care and Support Authority (LTCSA), specific concerns about the MCIS levy and CTP premiums were raised in the media and by the Motorcycle Council of NSW. A number of concerns were identified, including that:

- CTP premium prices had risen by substantially more than anticipated with the introduction of the LTCS Scheme
- the 'rating' of individual vehicles in determining the levy was inequitable and contrary to the 'no-fault' principles of the Scheme
- fully funding the Scheme through the MCIS could potentially lead to price fixing of base CTP premium prices or the approval of higher CTP premium prices for profit.<sup>38</sup>

**2.36** In relation to these concerns, the Motorcycle Council of NSW called for greater transparency of Green Slips, to ensure that the charges comprising the CTP premium, including the MCIS levy, were clear to all motorists upon purchasing the insurance policy.<sup>39</sup>

**2.37** Most of these concerns were addressed during the First Review of the LTSCA and the Committee concluded in its *First Review Report* on the LTSCA that the LTSCA had provided sufficient information to clarify the administration of the levy.<sup>40</sup>

**2.38** With regard to the issue of greater transparency and itemisation of Green Slips, the Committee investigated and addressed this issue in its Ninth Review of the MAA. In the Committee's *Ninth Review Report* on the MAA the Committee recommended that the MAA consider the advantages and feasibility of further itemisation of the MCIS levy on CTP Green Slips.<sup>41</sup>

<sup>37</sup> MAA, *What is the MCIS levy?*, accessed 9 November 2011, <[www.maa.nsw.gov.au/default.aspx?MenuID=344](http://www.maa.nsw.gov.au/default.aspx?MenuID=344)>.

<sup>38</sup> Standing Committee on Law and Justice, Report 37, pp 62-64.

<sup>39</sup> Standing Committee on Law and Justice, Report 37, p 64.

<sup>40</sup> Standing Committee on Law and Justice, Report 37, p 64.

<sup>41</sup> Standing Committee on Law and Justice, Report 37, p 64; Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Ninth Report*, Report 36, September 2008, p 85.

- 2.39** In response to the *Ninth Review Report* on the MAA, the NSW Government indicated its support for the Committee's recommendation and advised that a working party had been established to consider implementing the further itemisation of the MCIS levy.<sup>42</sup>
- 2.40** The issue was extensively canvassed in the *Tenth Review Report*. The Committee noted that whilst the MCIS levy is expressed on Green Slips as a separate item, it is not clear what proportion of the levy is used for the LTCS Scheme and what proportion is used for hospital and ambulance services and the administration costs of the Motor Accidents Scheme. The Committee recommended that the MAA publish its report on the investigations into the advantages and feasibility of the further itemization of each component of the MCIS levy, and if feasible the MAA should pursue doing so.
- 2.41** In the current Review the MAA advised that in consultation with the Motor Accidents Council, it had introduced a trial on the Authority's Green Slip calculator for motorists to obtain a breakdown of the insurer premium, the MAA levy and the LTCS levy when comparing Green Slip prices. An example taken from the Green Slip calculator of such an itemisation is shown in Table 2. It shows a base insurance premium price of \$334.26, the MAA levy (8% of premium) and the Lifetime Care and Support Levy (23% of premium). GST applies to the base insurance premium only.

**Table 2 Example of itemisation of a Green Slip<sup>43</sup>**

<b>Insurance Premium</b>	\$334.26
<b>MAA Levy (8% of premium)</b>	\$26.74
<b>Lifetime Care Levy (23% of premium)</b>	\$76.88
<b>GST (Applies only to insurance premium)</b>	\$33.43
<b>Total</b>	<b>\$471.30</b>

- 2.42** The MAA advised that the CTP insurers estimated that the technical and administrative work that would be required to itemise the levy on Green Slips would cost between \$80,000 and \$400,000 per insurer, a cost that would be passed on to motorists. It was also estimated to take up to six months to make the system changes. The MAA stated that the trial will be reviewed after one year in operation to consider the level of interest in going to the expense of applying this information on the Green Slip itself.<sup>44</sup>

<sup>42</sup> NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Ninth Report*, Report 36, September 2008, p 6.

<sup>43</sup> The MAA Green Slip calculator was accessed on 3/11/11 to produce the above example.

<sup>44</sup> MAA, Answers to pre-hearing questions on notice, p 7.

### Committee comment

- 2.43** The Committee is pleased to see that progress has been made in increasing the transparency of the MCIS levy. The inclusion of such information on the Green Slip calculator is a positive step, and should assist those who are interested in the itemisation of the levy. The Committee will be interested to hear the results from the MAA on its trial and feedback as to whether to apply this information to Green Slips themselves, and will revisit this issue in its next review.

### Motorcycle Council of NSW concerns

- 2.44** The *Tenth Review Report* discussed the concerns of the Motorcycle Council of NSW in relation to the perceived inequitable application of the MCIS levy. The Motorcycle Council argued that the levy impacted unfairly on motorcycle riders and that it should be calculated and applied in a more equitable manner across a broader cross-section of the community and vehicle class.<sup>45</sup> The *Tenth Review Report* noted the MAA response that the CTP Scheme does not cover injuries arising from either the use or operation of a motor vehicle or motorcycle that is not capable of registration or the use or operation of an unregistered/uninsured vehicle or motorcycle on private property. Similarly, the LTCS Scheme does not cover injuries arising from accidents under these circumstances.<sup>46</sup>
- 2.45** In the current Review, the Motorcycle Council again raised their concerns, and argued that the LTCS levy as currently applied is unfair to certain segments of the community which bear a disproportionate share of the burden.<sup>47</sup> To remedy the situation, the Motorcycle Council made five specific recommendations, including that the levy be a common flat fee across all vehicles or licence holders:

... To have the LTCS levy calculated and applied in a more equitable manner across a broader cross section of the community. [Recommendations include]

- 1/ That the LTCS levy reverts to a common flat fee across all registered vehicles in NSW.
- 2/ That the LTCS be shown as a discrete itemized line item on the CTP Greenslip presented to insured drivers / riders.
- 3/ That the calculation of the fee be freely available and simply explained to members of the motoring public.
- 4/ That consideration be given to applying the levy across all motorists (rather than just registered vehicle owners) given the significant coverage of the LTCS Scheme across more than just the drivers, riders or passengers of road registered vehicles. This may be a flat fee on licence holders.
- 5/ That the fundamental data set and subsequent calculations for CTP premiums reflect more closely the accident / injury performance of the pool of premium holders (ie. be based around registered vehicles only).<sup>48</sup>

- 2.46** Some of the areas of the Motorcycle Council's concerns, in particular vehicle crash data sets, are discussed in section 2.65. In pre-hearing questions on notice the Committee asked the

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<sup>45</sup> Law and Justice Committee, Report 43, p 20.

<sup>46</sup> Law and Justice Committee, Report 43, p 21.

<sup>47</sup> Motorcycle Council of NSW, Submission 2, p 9.

<sup>48</sup> Motorcycle Council of NSW, Submission 2, p 9.

Lifetime Care and Support Authority for its comment on the Motorcycle Council's recommendation to broaden the base of the LTCS levy, such as a flat fee on all registered vehicles or all licence holders. The LTCSA replied that such an approach would be contrary to the principle of pricing risk:

This would represent a move to good (low risk) drivers subsidising poor (low risk) drivers. This is against a long held general insurance principle to price risk.<sup>49</sup>

***Committee comment***

- 2.47** The Committee notes the concerns of the Motorcycle Council of NSW regarding the MCIS levy and CTP premiums. However, the Committee also acknowledges the long held principle that the cost of insurance should be priced to the commensurate risk, and agrees with the levy approach taken by the MAA and the LTCSA.

**Claims frequency and propensity to claim**

- 2.48** This section updates an issue that has been ongoing since the Committee's Seventh Review. The issue relates to claims frequency and the propensity to claim.
- 2.49** 'Claims frequency' refers to the number of notifications to the MAA made per 10,000 registered vehicles. The 'propensity to claim' is measured as a proportion of notifications arising from road casualties in NSW.<sup>50</sup> Claims frequency therefore reflects the number of actual claims made, while the propensity to claim reflects the tendency of people to claim.
- 2.50** Data for claims frequency and propensity to claim is shown in Table 3. It shows a decline in claim frequency from 41 (per 10,000 vehicles) in 2000/01 to a low of 23 in 2007/08. In the latest reporting year claim frequency had increased to 27. Similarly, the propensity to claim dropped from 51 per cent in 2000/01 to a low of 41 per cent in 2006/07, but has since risen to 47 per cent.

<sup>49</sup> Lifetime Care and Support Authority, Answers to pre-hearing questions on notice, p 4.

<sup>50</sup> MAA, *Annual Report 2009/10*, p 61.

**Table 3** Claims frequency and propensity to claim<sup>51</sup>

	Registered vehicles (000)	Claims / frequency 10,000 vehicles	NSW road casualties	Propensity to claim	Casualties/ 10,000 vehicles
<b>Accident year</b>					
2000/01	3,737	41	29,993	0.51	80
2001/02	3,829	36	30,080	0.46	79
2002/03	3,934	32	27,745	0.45	71
2003/04	4,054	30	26,961	0.46	67
2004/05	4,121	29	25,834	0.46	63
2005/06	4,231	26	25,947	0.43	61
2006/07	4,320	25	25,157	0.41	61
2007/08	4,416	23	24,823	0.41	56
2008/09	4,525	26	24,743	0.47	55

- 2.51** The *Ninth Review Report* noted there had been a consistent reduction in both claims frequency and propensity to claim from 2001 to 2007. The MAA maintained that the reduction appeared to have resulted from, or at least coincided with, a fall in traffic casualties over the same time period. However, the NSW Bar Association and the Law Society of NSW argued that the decline in claims frequency and propensity to claim was also partly attributable to accident victims being deterred from making a claim. The MAA refuted this suggestion and advised that reforms to the Scheme in October 2008 have in fact made it easier for accident victims to make a compensation claim. In its *Ninth Review Report*, the Committee expressed its ongoing concern about the potential barriers and undertook to monitor the issue in future reviews.<sup>52</sup>
- 2.52** In the Tenth Review the decline in claim frequency and propensity to claim was not raised as an issue by stakeholders in their submissions. During the Tenth Review the MAA advised that more recent data showed that there had been a *reversal* in the downward trends for both claims frequency and propensity to claim to September 2009.<sup>53</sup>
- 2.53** During the current Review the issue of claim frequency or propensity to claim was again not raised as an issue in the context of barriers to making a claim. However, it was raised in relation to the issue of insurer profits, and this is extensively discussed in Chapter 3.
- 2.54** The Committee asked the MAA if it could identify any factors that have led to the increase in claim frequency from 23 claims per 10,000 vehicles in 2007/08 to 26 vehicles/10,000 in 2008/09. The MAA advised that the increase in the Accident Notification Form threshold from \$500 to \$5000 is likely to have encouraged some small claims to have been lodged, but noted that full claims have also experienced an increase:

<sup>51</sup> Motor Accidents Authority, *Annual Report 2006/07*, p 81, and *Annual Report 2009/10*, p 61.

<sup>52</sup> Law and Justice Committee, Report No 36, p 91.

<sup>53</sup> Law and Justice Committee, Report No 43, p 12.

The MAA's Scheme actuary advises that the increase in the ANF threshold from \$500 to \$5000, and the inclusion of past economic loss in the compensation which can be claimed under an ANF, is likely to have encouraged some small claims to lodge an ANF in respect of accidents since 1 October 2008. However there has also been an increase in claim frequency and propensity to claim for full claims with a reported incurred cost of more than \$5000. These appear to be mostly claims with relatively lower injury severity.<sup>54</sup>

- 2.55** Mr Anthony Mobbs of the Insurance Council of Australia explained to the Committee that the reduction in claims frequency was unprecedented, and whilst there had been a significant amount of analysis to determine why it had occurred, no one has been able to identify a reason. Furthermore, he noted that no one can predict what will happen to claim frequency in the future:

If anyone could have predicted that claims frequency would have halved, ... No one foresaw it, no one predicted it. ... There has been a significant amount of analysis as to why that is the case—it could be better roads, the weather, it could be driver education. No one has been able to pinpoint the reason for the reduction in claims frequency. Because there is no explanation for it no one can predict where it will go to.<sup>55</sup>

### **Committee comment**

- 2.56** The Committee notes that the issue of potential barriers to making a CTP claim has not been raised as an issue for the last two Reviews. The Committee will, however, keep a watching brief on this issue. The Committee notes that the data in Table 3 shows that from 2000/01 to 2008/09 the number of cars registered in NSW increased by 21 per cent. In the corresponding period, the number of NSW road casualties dropped by 5,250 – a 17 per cent reduction. It is not clear to the Committee what factors have led to such a decrease, but the Committee welcomes such a decrease in people being injured in motor vehicle accidents.

### **Scheme awareness**

- 2.57** One of the main services provided by the MAA is the provision of information about the Scheme to stakeholders and the general public. It is important that people injured in a motor vehicle accident are aware of their rights and responsibilities. To do this the MAA operates a Claims Advisory Service, and also extensively advertises its Green Slip calculator.
- 2.58** The Claims Advisory Service provides information on making and managing claims to people who are injured in motor vehicle crashes, as well as to service providers such as doctors in the Scheme. The Claims Advisory Service also provides an Outreach Service to legally unrepresented claimants who have a dispute lodged with the Authority's medical and claims assessment services.<sup>56</sup>

<sup>54</sup> MAA, Answers to pre-hearing questions on notice, p 5.

<sup>55</sup> Mr Anthony Mobbs, Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia, Evidence, 10 October 2011, p 37.

<sup>56</sup> MAA, Annual Report 2009/10, p 14.

- 2.59** The MAA advised the Committee that the Claims Advisory Service answers approximately 8,000 calls each year from injured people or their relatives. In addition, the Authority's website provides information for injured people about making a claim, and the Authority has produced a fact sheet to help injured people understand the benefits available under the Scheme.<sup>57</sup>
- 2.60** The MAA noted that health professionals are the first point of contact for an injured person following a motor vehicle accident. Because of this, the MAA also conducts regular targeted communication campaigns for these professionals, including direct mail, workshops, advertising and editorial in a range of health professional journals and magazines.<sup>58</sup>

### ***Translation services***

- 2.61** To assist people from an ethnic or migrant background to seek information about the Scheme, the Authority also provides translation services. For instance, the Claims Advisory Service provides translation services to assist injured people to complete CTP claim forms. Each month, the MAA receives an average of two calls where the telephone interpreter is utilized and provides for translation services for approximately six claim forms. The CTP Scheme fact sheet is also available in four community languages: Arabic, Vietnamese, Korean and Chinese. As noted in the next section, the Green Slip advertising campaign targeted community media outlets to raise awareness of the Scheme. The community language component of the campaign comprised 12 per cent of the overall media budget and included print and radio advertising in Arabic, Chinese, Korean and Vietnamese media.<sup>59</sup>

### ***The Green Slip calculator***

- 2.62** The Authority provides an on-line Green Slip calculator and telephone Green Slip Helpline to assist motorists to access the best Green Slip price. These services allow motorists to quickly compare prices from all seven insurers based on their individual circumstances.
- 2.63** The Authority regularly conducts advertising campaigns to promote the price comparison service that the Green Slip calculator and Helpline provide. The MAA noted that during the course of an advertising campaign, demand for the price comparison service increased by 20 per cent to as many as 27,000 users per week. The Authority also estimates that since 2007 there has been an average of more than 30 per cent increase per annum in Green Slip calculator users. The Green Slip calculator remains one of the NSW Government's most visited websites and is usually in the top 25 websites visited.<sup>60</sup>

### **Committee comment**

- 2.64** The Committee is impressed with the efforts of the Motor Accidents Authority to publicise information about the CTP Scheme, including in several community languages. It is evident to the Committee that the Green Slip calculator is a valuable and useful tool for motor vehicle owners.

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<sup>57</sup> MAA, Answers to pre-hearing questions on notice, p 17.

<sup>58</sup> MAA, Answers to pre-hearing questions on notice, p 17.

<sup>59</sup> MAA, Answers to pre-hearing questions on notice, p 18.

<sup>60</sup> MAA, Answers to pre-hearing questions on notice, p 18.

## Vehicle crash data

**2.65** This section presents arguments put forward by the Motorcycle Council of NSW in relation to the adequacy of crash reporting data, and the response by the MAA.

**2.66** The Motorcycle Council of NSW stated its support for the Motor Accidents Authority, but argued that the Authority needed better tools at its disposal. The Council stated that 'one of those is a better crash data facility to give them better base information so that they can do their job more effectively.'<sup>61</sup>

**2.67** The Motorcycle Council expressed surprise at what it referred to as poor quality and incomplete motor vehicle accident injury data acquired by the MAA:

We are surprised that the MAA does not collect accurate or complete data on the at-fault driver / rider, vehicle type or crash type or location giving rise to a CTP or LTCS claim.

It would appear that a 'data snapshot' of generalized RTA crash data is used as the basis for calculating CTP premiums. This data may reflect a general exposure to risk by the population, but fails to differentiate between types of crashes and the injuries arising from those crashes.<sup>62</sup>

**2.68** The Motorcycle Council identified three main repercussions from this lack of data. The first related to an inability to target injury prevention strategies:

With no reliable data on crashes causing injury that have resulted in a CTP or LTCS claim there is little useful information for informing road safety programs to target injury prevention.<sup>63</sup>

**2.69** The second repercussion related to the inability of the MAA to determine with any accuracy the risk of any particular type of CTP claim arising across the NSW population, and that this has been left to individual insurers. The claimed result is that CTP premiums are set to satisfy individual companies risk ratings, rather than an even distribution of risk across the community:

Risk identification has been devolved to individual insurers, who rely upon their individual company experience of claims... The result is differing premiums based on different commercial experience with CTP claims and not an overall population risk factor being applied to premiums.

...Without a clear view of the circumstances of driver, vehicle type or crash type, it is difficult to see that these divisions used are for other than marketing purposes, for insurer profitability, rather than for ensuring an even distribution of risk costs across the community.<sup>64</sup>

<sup>61</sup> Mr Christopher Burns, Motorcycle Council of NSW, Evidence, 10 October 2011, UnT p 42.

<sup>62</sup> Motorcycle Council of NSW, Submission 2, p 3.

<sup>63</sup> Motorcycle Council of NSW, Submission 2, p 3.

<sup>64</sup> Motorcycle Council of NSW, Submission 2, p 4.

**2.70** The third repercussion identified by the Motorcycle Council related to vehicle crash data manipulation, before this information even got to the MAA. The Council argued that over 20 per cent of motorcycle crashes defined by NSW Police to include road conditions as a major contributing factor to the crash were redefined by the RTA as speeding being the major factor. According to the Motorcycle Council, data manipulation blinds authorities to the significance of road conditions and assigns blame to motorcycle riders, defining them 'at fault'. This then has repercussions on the price of a Green Slip for motorcyclists.<sup>65</sup>

**2.71** Mr Nicholls, Acting General Manager of the MAA, also told the Committee that vehicle accident and associated injury data are currently fragmented across several different agencies:

[vehicle crash] data was and is, in the case of New South Wales, fragmented so we have police report data sitting in one place, we have road crash data, hospital data and our own CTP data all sitting in different places.<sup>66</sup>

**2.72** To rectify the situation the Motorcycle Council suggested that NSW adopt a similar data collection scheme to that implemented in Western Australia. The Council stated that this 'would go a long way to giving the MAA the tools it requires to effectively do its job'.<sup>67</sup>

**2.73** The Committee put forward this solution to the MAA for their comment and analysis. The MAA noted that Western Australia is probably a world leader in this area, and explained that the Western Australian vehicle crash reporting system has been streamlined. This has led to many efficiencies, ranging from faster injury management to police spending less time filling out forms and more time on the 'front line':

In Western Australia when you have a road crash, instead of having to go to the police and provide a report to the police and then turn around and make a claim in the motor accidents system, ... you do all of that notification as part of one process. ... you can do it on line or you can do it at your local police station. The information that you fill out advising the police is also the trigger for your claim and provides the initial data that you need for your claim.

In Western Australia you will instantly get a claim reference number that will enable you to go and start expending for medical treatment and so on within 24 hours or so of first notifying the system. ... the benefits of that system in that it has got a lot of police back on to the front line, so instead of them being in police stations filling out paperwork, individuals are doing that at terminals themselves and it has created quite a robust crash database that sits behind the front end, which is very much the reporting and claim initiation process.

**2.74** Mr Nicholls informed the Committee that the Western Australian crash reporting system had led to efficiencies for insurance companies, and also provided reliable data for road authorities to target road safety initiatives:

In Western Australia now, ... they are finding that they have got really good data now on where the crashes are occurring, how they have occurred, what factors were involved. ...

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<sup>65</sup> Motorcycle Council of NSW, Submission 2, p 6.

<sup>66</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 46.

<sup>67</sup> Mr Christopher Burns, Motorcycle Council of NSW, Evidence, 10 October 2011, p 43.

In Western Australia now that data system has unified all of that information [police data, road crash data, hospital data, CTP data]. It means that the insurer has the police report really quickly, so there are no delays, as happens now in New South Wales. It is much less labour intensive. You can see the full history of a claim by looking at different interactions and there is a detailed database which helps the road authorities start to form a view about where risk is occurring, so a risk based evidence based approach can be taken in addressing black spots and high priority road safety initiatives.<sup>68</sup>

- 2.75** Mr Nicholls informed the Committee that it had recently arranged for the West Australian Insurance Commission to give a presentation about its crash reporting scheme to stakeholders, including insurance companies and government agencies such as the RTA and NSW Police. The end result was that the MAA commissioned a scoping study for a similar system to be implemented in NSW, which will need to go into a whole of government process:

Flowing out from that presentation it was agreed amongst the government agencies that were present ... that it would be useful for the Authority to commission a scoping study on what something like that would look like for New South Wales. We have recently finalised that scoping study and now that is something that would need to go into a government process.<sup>69</sup>

#### **Committee comment**

- 2.76** The Committee thanks the Motorcycle Council of NSW for raising the issue of vehicle accident data. The Committee believes that the Council's concerns are worthy of further investigation and analysis.
- 2.77** The Committee congratulates the MAA for taking a proactive approach in inviting the West Australian Insurance Commission to present their crash reporting model to NSW stakeholders and government agencies. It is evident that Western Australia is a leader in this area, and that it will be useful for the MAA to spend time studying their programs and determining if the basis of it can be adopted in NSW. The Committee considers this an important area of work, which can potentially contribute greatly to streamlining some facets of the CTP Scheme.
- 2.78** The Committee notes the MAA's advice that the consultation with the West Australian Insurance Commission led to the MAA commissioning a scoping study for a similar crash reporting scheme to be introduced in NSW. It was not made clear to the Committee as to whether the results of the scoping study were made public. The Committee believes that it would be beneficial for the MAA to release the results of the study, as well as the details of its recommendations in relation to implementing a similar model in NSW, in order to inform stakeholders and provide a mechanism for stakeholder comment.

<sup>68</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 46.

<sup>69</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 46.

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## Recommendation 2

That the Motor Accidents Authority publish the results of the scoping study that it commissioned into New South Wales adopting a similar crash reporting scheme as that in operation in West Australia. The Motor Accidents Authority should also publish the recommendations it made to government as a result of the scoping study in order to inform stakeholders, and provide a mechanism for stakeholder comment.

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## Injury prevention

- 2.79** The MAA derives its responsibility for injury prevention initiatives from section 206 of the *Motor Accidents Compensation Act 1999*. Under the Act, the MAA is required to provide funding for measures for preventing or minimising injuries from motor accidents, and safety education.<sup>70</sup>
- 2.80** The Committee notes that the MAA's injury prevention strategies have been a recurring theme in a number of its past reviews of the MAA, with the Committee encouraging the MAA to actively involve key stakeholder groups in the formation of any injury prevention strategies to increase their effectiveness.<sup>71</sup>
- 2.81** Previous reviews have explored the efforts of the MAA in developing and implementing a range of injury prevention strategies. For example, the *Seventh Review Report* explored a range of injury prevention strategies, such as the relationship between the MAA and other road safety agencies, targeted road safety initiatives for a range of road users, and rural and regional road safety.<sup>72</sup> The *Eighth Review Report* discussed issues relating to road safety research funding and targeted road safety initiatives for young people, children, pedestrians and motorcyclists.<sup>73</sup> In the *Ninth Review Report*, the Committee acknowledged the efforts made to decrease the number of road fatalities in NSW, and encouraged key stakeholders to continue to collaborating on this work.<sup>74</sup> The *Tenth Review Report* looked at injury prevention strategies targeting young people and motorcycle riders, and recommended that the MAA collaborate with Youthsafe to identify where improvements can be made to current and future youth injury prevention strategies.<sup>75</sup>

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<sup>70</sup> *Motor Accidents Compensation Act 1999*, s 206(2)(f).

<sup>71</sup> See for example NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Seventh Report*, Report 31, September 2006, p 97.

<sup>72</sup> Standing Committee on Law and Justice, Report 31, pp 87-98.

<sup>73</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Eighth Report*, Report 34, November 2007, pp 74-80.

<sup>74</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Eighth Report*, Report 36, September 2008, pp 88-89.

<sup>75</sup> Standing Committee on Law and Justice, Report 43, pp 70-76.

**2.82** Since the passage of the *Motor Accidents Compensation Act 1999*, there have been several developments in the field of road safety. One of the most important of these has been the creation of the NSW Centre for Road Safety in 2008. The MAA advised the Committee that the Centre for Road Safety has been the lead government agency for road safety in NSW since it was established.<sup>76</sup>

**2.83** With the formation of this road safety lead agency, the Committee wished to clarify the role of the MAA in relation to motor vehicle injury prevention programs. The MAA advised that it is committed to working closely with the Centre for Road Safety and will also continue to provide funding for road safety initiatives:

The MAA remains committed to working with the NSW Centre for Road Safety to provide a single, consistent and consolidated message on road safety for all users, including young people, and funding programs which promote this message.

... The Authority provides funding for initiatives and projects for road safety education to prevent and minimize injuries to people in road crashes. ... The Authority works with the Centre for Road Safety to ensure that its investment in road safety in NSW is delivered effectively and efficiently to target the most vulnerable road users.<sup>77</sup>

**2.84** The MAA's Annual Report outlined some of the expenditure over 2009/10 in regard to injury prevention as follows:

- \$20,000 for the promotion of revised child restraint laws
- \$86,000 for the promotion of motorcycle safety
- \$200,000 contributed towards improving the safety management of heavy vehicles

**2.85** In addition, the MAA noted the Arrive Alive program, which is a road safety program targeting drivers aged 17 to 25. Activities funded under this program included sponsorship of NSW Youth Week, Law Week and YouthRock, and a school visits program.<sup>78</sup>

**2.86** In its submission YouthSafe noted that the MAA *2009/10 Annual Report* stated that funding for 'Rehabilitation, road safety grants and sponsorships' had decreased from \$25,787,000 in 2008/09 to \$6,121,000 in 2009/10. YouthSafe questioned this reduction.<sup>79</sup> The Committee put this to the MAA, which replied that the reduction in expenditure related to a 'one-off' capital grant in relation to disability, rather than a reduction in road safety grants:

The Annual Report groups rehabilitation grants and sponsorships as well as road safety grants and sponsorships under the one heading. The difference between the 2009/10 expenditure for 'rehabilitation road safety grants and sponsorships' reflects 'one-off' capital grant payments in relation to disability and retrieval services within the injury management grants program during 2008/09. This was not at the expense

<sup>76</sup> MAA, Answers to pre-hearing questions on notice, p 16.

<sup>77</sup> MAA, Answers to pre-hearing questions on notice, p 16.

<sup>78</sup> MAA, Annual Report 2009/10, p 10.

<sup>79</sup> YouthSafe, Submission 6, p 5.

of the road safety program or funding. The level of expenditure on the road safety program in 2009/10 was consistent with that of 2007/08.<sup>80</sup>

- 2.87** In its submission YouthSafe noted the high proportion of young people injured in motor vehicle accidents. It noted that achieving change in young road user safety is complex, and requires a multi-strategic and co-ordinated approach to road safety for young people. YouthSafe considered that the MAA road safety programs for young people are too isolationist:

It would seem that reported MAA road safety programs for young people that focus on one off events and sponsorship of sports people to present to young people at schools about road safety do not adequately take into account the complexities, nor take full advantage of the potential for the MAA to influence road safety for young people.<sup>81</sup>

### **Committee comment**

- 2.88** The Committee is acutely aware that motor vehicle accidents can adversely affect people for the rest of their lives, and can be particularly devastating for young people and those who have had family members fatally injured.
- 2.89** The Committee notes that the NSW Centre for Road Safety is the lead agency for road safety programs and that the MAA remains committed to working with the Centre to provide a single, consistent and consolidated message on road safety for all road users. The MAA also provides funding for initiatives and projects for road safety education to prevent and minimize injuries to people in road crashes.
- 2.90** The Committee notes the difficulty in determining from the Authority's Annual Report the actual amount spent on road safety and motor vehicle injury prevention programs. Given the importance of road safety, the Committee considers that the Annual Report should itemise 'Road safety grants and sponsorships' as a separate line item.

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### **Recommendation 3**

That the Motor Accidents Authority include in its Annual Reports a separate line item[s] for reporting 'Road safety grants and sponsorships'.

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## **The Motor Accidents Council**

- 2.91** The Motor Accidents Council (MAC) is an advisory group appointed for a term of three years by the Minister for Finance. The role of the MAC is to facilitate input on the Motor Accidents

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<sup>80</sup> MAA, Answers to pre-hearing questions on notice, p 16.

<sup>81</sup> YouthSafe, Submission 6, p 5.

Scheme from relevant stakeholders and to consider issues referred by the MAA with a view to providing advice and recommendations.<sup>82</sup>

**2.92** The *Tenth Review Report* expressed concern that there had been a 16 month delay between the expiry of the term of members of the MAC and the appointment of a new MAC. The Committee noted that strong stakeholder relationships are essential to ensuring that the MAA and the Motor Accidents Scheme continue to meet the needs of participants by being aware of, and responsive to, changes in the operating environment. The Committee subsequently recommended that the Minister for Finance pursue an amendment to the *Motor Accidents Compensation Act 1999* so that membership of the MAC only lapses upon the appointment of a new membership group, or alternatively to allow interim membership. To date, nothing has come of this recommendation.

**2.93** The current members of the MAC were appointed as of 1 June 2010. During the course of the current Inquiry the Chair of the MAC, Ms Geniere Aplin was appointed as the General Manager of Workers Compensation Insurance Operation at WorkCover NSW. As such, she stood down as the Chair of the MAC.<sup>83</sup> Mr Ray Whitten was subsequently appointed by the Minister as the Chair.<sup>84</sup>

**2.94** Several stakeholders to the inquiry, who are also MAC members, expressed their satisfaction with the operation of the Council under the Chairing of Ms Aplin. For example, Mr Stone of the Bar Association told the Committee that the last 12 months have been very productive, and hoped that the future under the new chairing arrangements will be as equally fruitful:

As the Bar Association representative on the council let me say that the last 12 months have been the best in the past decade. The council has engaged in better debate, it has had a more robust approach to issues, it has set up a subcommittee, it has made some recommendations—which is a historic first for it—it is a lot closer to working in the way it ought to have worked for a long time. I have to say that a good deal of that has to be credited to the chairing of it by Ms Aplin, who did a terrific job. Unfortunately, she has moved on to a permanent position at WorkCover. We have a new chair, whom I have not yet met. I hope he continues in the same spirit and vein.<sup>85</sup>

**2.95** Ms Mary Maini of the Insurance Council of Australia also noted that the discussions in the MAC had been productive and robust. This had extended not only to stakeholder feedback but also to improving the design of the Scheme, including the formation of a sub-committee to look at issues dealing with whole person impairment:

... in the last 12 months the council has been quite robust. We have discussed and are still discussing a number of issues. An agenda has been put forward. Some of the items on the agenda involve structural or Scheme design principles. Others involve tweaking and operational issues. By and large, it has been quite successful. I have not been a member of the council before but some of the things I find are quite leading in the way we are structured.

<sup>82</sup> See Motor Accidents Compensation Act 1999, Part 8.2 and Schedule 2.

<sup>83</sup> Email from Mr Andrew Nicholls, Acting General Manager, MAA, to Principal Council Officer, 8 August 2011.

<sup>84</sup> Tabled document, MAA, *Motor Accidents Council*, p 1.

<sup>85</sup> Mr Andrew Stone, Bar Association of NSW, Evidence, 10 October 2011, p 17.

We have set up a subcommittee, which has representation of me as the insurance representative, Andrew Stone representing the Bar Association, two of the medical practitioners and some of the Motorcycle Council, looking at whole person impairment and the cases that potentially fall under the 10 per cent threshold. ...To me, that is one of the positives of being part of the Motor Accidents Council. It is not just looking at operational. We are actually looking at Scheme design issues as well.<sup>86</sup>

### **Committee comment**

- 2.96** The Committee welcomes the news that the Motor Accidents Council has been a forum for robust debate and discussion on both operational and Scheme design issues over the last 12 months. The Committee congratulates the previous Chair, Ms Aplin, and Council members for their contribution to this important forum. It is the hope of the Committee that the new Chair, Mr Whitten, continues this good work.

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<sup>86</sup> Ms Mary Maini, Insurance Council of Australia, Evidence, 10 October 2011, UnT p 40.

## Chapter 3 Insurer profits and other issues

This Chapter begins by examining the issue of the level of insurer profits under the Motor Accidents Scheme. As in previous reviews, participants in the Committee's Eleventh Review held widely divergent views on the appropriateness of the levels of insurer profits under the Scheme. This section of the Chapter is followed by a brief discussion of insurer solvency. The Chapter then discusses issues raised by stakeholders in relation to legal and medical costs and the Motor Accidents Compensation Regulation 2005. The Chapter concludes by considering issues associated with carers and the discount rate.

### Insurer profits

- 3.1 Concerns have been raised about the level of insurer profits under the Motor Accidents Scheme during each of the Committee's eleven reviews of the MAA and the MAC, including the current review.

#### Overview of insurer profits

- 3.2 This section provides an overview of insurer profits under the Motor Accidents Scheme. A more comprehensive overview can be found in the Committee's *Tenth Review Report*.<sup>87</sup>
- 3.3 There are seven insurers in the Motor Accidents Scheme, which has remained unchanged since 2004.<sup>88</sup> These insurers are: AAMI, Allianz, CIC Allianz, GIO, NRMA, QBE and Zurich. These seven insurers are owned by five corporations, which are: Suncorp Group (GIO and AAMI); Insurance Australia Group (NRMA); Allianz (Allianz and CIC Allianz), QBE; and Zurich.
- 3.4 Section 5(2)(d) of the *Motor Accidents Compensation Act 1999* stipulates 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>89</sup>
- 3.5 Insurers are required by the *Motor Accidents Compensation Act 1999* to report to the MAA the profit margin on which their premiums are based and the actuarial basis for calculating their profit margin.<sup>90</sup> It is important to note that CTP insurance is known as a 'long tail' insurance product, in that final costs to the insurers may not be known for up to ten years from the date of underwriting a premium.
- 3.6 Insurers report to the MAA on two types of profits, prospective and realised. Prospective profit is that which the insurer expects to achieve at the time of filing a premium, given assumptions about the number of claims it expects to have to pay out, investment returns and premium income. Realised profit is what the insurer actually made in profit in a given year

<sup>87</sup> Standing Committee on Law and Justice, Report 43, pp 31-48.

<sup>88</sup> MAA, *Annual Report 2007/08*, p 13; MAA, *Annual Report 2009/10*, p 12.

<sup>89</sup> *Motor Accidents Compensation Act 1999*, s 5(2)(d).

<sup>90</sup> *Motor Accidents Compensation Act 1999*, s 28(1).

once all costs and income have been accounted for. A good understanding of realised profit may not be known for at least five years after the underwriting year.

### *Prospective profit*

- 3.7** The MAA receives a premium filing from each insurer at least annually, and gives consideration to all of the factors that have gone into calculating the premium.<sup>91</sup> The MAA may reject a premium if that premium will not fully fund the insurers' liabilities, or if the prospective profit is considered to be 'excessive'.<sup>92</sup>
- 3.8** Section 27(8)(c) of the *Motor Accidents Compensation Act 1999* states that 'a premium will fully fund a liability referred to in this section if the premium is sufficient to provide 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>93</sup>
- 3.9** The MAA *2009/10 Annual Report* noted that prospective profit margins in the past six years ranged between four per cent and 11 per cent. The weighted average profit margin ranged from 6 and 8.7 per cent, with the most recent reporting year, 2009/10, at 8.6 per cent. The table below sets out the prospective profit margins in insurer filings approved by the MAA from 2004/05 to 2009/10.

**Table 4** Prospective profit margins in insurer filings<sup>94</sup>

Filing period	Range (%)	Weighted average (%)
2004/05	7.5 – 10.0	8.7
2005/06	7.5 – 10.0	8.7
2006/07	4.0 – 11.0	6.0
2007/08	5.0 – 9.3	7.7
2008/09	4.7 – 9.3	8.1
2009/10	5.0 – 9.3	8.6

- 3.10** When asked why the weighted average prospective margin had risen from 6.0% in 2006/07 to 8.6% in 2009/10, the MAA replied that a number of factors impact on prospective profit:

Each insurer filing is analysed on its merits by MAA analysts and the independent scheme actuaries. ...

There are a number of factors that impact on and result in changes to prospective profit including the allocation of capital, target internal rate of return, forecast return on investment, deteriorations in claims experience (both in the number and cost of

<sup>91</sup> MAA, *Annual Report 2009/10*, p 58.

<sup>92</sup> MAA, *Annual Report 2009/10*, p 58.

<sup>93</sup> *Motor Accidents Compensation Act 1999*, s 27(8)(c).

<sup>94</sup> MAA, *Annual Report 2009/10*, p 58.

claims). Unexpected events like the global financial crisis and the consequential impact on yields also have an impact.<sup>95</sup>

### ***Realised profit***

- 3.11** The assessment of the realised profit involves a review of the development of the underwriting year from the time of the premium filing. The actual profit or loss made by the insurer will be dependent on the extent that the assumptions made in the premium filing are fulfilled.<sup>96</sup>
- 3.12** Each year, the MAA's *Annual Report* details the level of realised profit expected to be made by the insurance industry. The reports list a number of factors such as the monetary value of premiums written during the year, the monetary amount of profits or loss made by insurers, and the percentage of premiums that this profit or loss represents.<sup>97</sup> Table 5 outlines the development of the Scheme by underwriting year, and presents the current estimates of insurer realised profit.

**Table 5** Scheme development by underwriting year<sup>98</sup>

Underwriting year ended 30 September	Premiums written during the year (\$millions)	Estimate of discounted value of profit or loss for the insurer (using central estimate of claims liabilities)	
		Amount (\$million)	% of premiums
2000	1,325	398	30%
2001	1,321	377	29%
2002	1,342	418	31%
2003	1,395	340	24%
2004	1,476	397	27%
2005	1,451	309	21%
2006	1,426	262	18%
2007	1,221	152	12%
2008	1,178	56	5%
2009	1,328	-16	-1

<sup>95</sup> MAA, Answers to pre-hearing questions on notice, p 10.

<sup>96</sup> MAA, *Annual Report 2009/2010*, p 59.

<sup>97</sup> See for example MAA, *Annual Report 2007/2008*, p 74 and MAA, *Annual Report 2008/2009*, p 75.

<sup>98</sup> MAA, *Annual Report 2009/2010*, p 59.

**3.13** It is important to note that the information contained in Table 3.2 provides only an estimate of what the realised profit will be if the current claims liability valuation is correct.<sup>99</sup> It shows that in the year 2000, insurance companies made a profit of \$398 million out of CTP Green Slips, which represented 30 per cent of the CTP premium price. The MAA's *Annual Report 2009/10* indicates that caution should be exercised when examining the estimated profit margin for recent years because '[e]stimates for recent underwriting years are much more sensitive to uncertain assumptions regarding future claims payments due to the large number of claims still to be finalised'.<sup>100</sup>

### Past Committee Reviews

**3.14** Insurer profits was one of the key issues discussed in the Committee's *First, Second, Third* and *Fourth Review Reports*, although no specific recommendations were made.<sup>101</sup>

**3.15** The Committee's *Fifth Review Report*, however, made a number of recommendations relating to the way in which the MAA reported on insurer profits. The Committee recommended that the MAA should, as required by section 28 of the *Motor Accidents Compensation Act 1999* present a separate and specific report on insurer profits annually to the Committee.

**3.16** The *Fifth Review Report* also examined the methodology relied upon by the MAA for determining the prospective profit margin. Under this methodology, developed by Taylor Fry Consulting Actuaries, prospective profits are developed using three components:

- determining a suitable quantum of total capital (net assets) for an insurer
- determining a suitable allocation of insurer capital
- calculating a profit loading that would service the allocated capital at a fair rate of return.<sup>102</sup>

**3.17** The Committee recommended that the MAA explore the trends in insurer profits since the 1999 amendments to the Scheme and include that information in the report on insurer profits.<sup>103</sup>

**3.18** The Government response to the *Fifth Review Report* advised that the MAA would include a statutory report on insurer profits in its future annual reports, commencing with the *Annual*

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<sup>99</sup> MAA, *Annual Report 2009/2010*, p 60.

<sup>100</sup> MAA, *Annual Report 2009/2010*, p 59.

<sup>101</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – First Report*, Report 13, June 2000, p 9; NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Second Report*, Report 16, February 2001, pp 12-17; NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Third Report*, Report 19, February 2002, pp 10-12; NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Fourth Report*, Report 24, December 2002, p 1.

<sup>102</sup> Standing Committee on Law and Justice, Report 25, pp 40-44.

<sup>103</sup> Standing Committee on Law and Justice, Report 25, p 44.

*Report 2002/03*. The response also included a detailed explanation of the objective criteria and methodology prepared by Taylor Fry and adopted by the MAA for assessing the profit component of a premium.<sup>104</sup>

- 3.19** In the Committee's Sixth Review, some stakeholders again expressed concern about the level of insurer profits under the Scheme.<sup>105</sup> The Committee's recommendations were similar to those from the *Fifth Review Report*, requesting that the MAA annually provide a separate and specific report on the level of insurer profits to the Committee.<sup>106</sup>
- 3.20** The Government response to the *Sixth Review Report* reiterated that the MAA would include its statutory report on insurer profit in annual reports, commencing with the *Annual Report 2002/03*. The response also noted that the MAA was satisfying its statutory obligations set out under section 28(1) and 28(2) of the *Motor Accidents Compensation Act 1999* by including an assessment of insurer profits in its annual reports.<sup>107</sup>
- 3.21** During the Seventh Review it was again argued by several stakeholders that insurers have earned excessive profits in each accident year since the introduction of the 1999 reforms.<sup>108</sup> The Committee's *Seventh Review Report* contained an extensive discussion of the issue of insurer profits.<sup>109</sup> The Committee noted the complexity of the issue of insurer profits. It concluded that its role as a parliamentary body, with a responsibility to oversee the performance of the MAA, was to determine if the MAA had exercised its functions under the *Motor Accidents Compensation Act 1999* in relation to insurer profits in a proper manner.<sup>110</sup> The Committee observed that its role did *not* require the Committee to act as an actuary in examining the issue of insurer profits.<sup>111</sup>
- 3.22** The Committee noted the difficulties of forecasting profits given the long tail nature of the Scheme, and acknowledged 'that it is highly likely that there will be significant discrepancy between profit margins in CTP premiums filed with the MAA and the profit that will be realised on those premiums.'<sup>112</sup>

<sup>104</sup> NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Fifth Report*, Report 25, April 2004, pp 2-5.

<sup>105</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Sixth Report*, Report 27, May 2005, p 27.

<sup>106</sup> Standing Committee on Law and Justice, Report 27, p 30.

<sup>107</sup> NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Sixth Report*, Report 27, May 2005, pp 2-3.

<sup>108</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Seventh Report*, Report 31, September 2006, pp 26-27.

<sup>109</sup> Standing Committee on Law and Justice, Report 31, pp 10-39.

<sup>110</sup> Standing Committee on Law and Justice, Report 31, p 12.

<sup>111</sup> Standing Committee on Law and Justice, Report 31, p 30.

<sup>112</sup> Standing Committee on Law and Justice, Report 31, p 30.

- 3.23** The Committee found, on the advice of the MAA, that the gap between estimated and realised insurer profits was attributable to a number of factors, including reductions in claims frequency, propensity to claim and the average cost per claim. With these issues in mind, the Committee concluded that it was '... satisfied that the profit estimates are sufficiently reliable for the Committee's purposes...' and that the MAA had 'acted reasonably' in the execution of its statutory role.<sup>113</sup>
- 3.24** The issue of insurer profits was not examined at length in either the *Eighth* or *Ninth Review Reports*, although stakeholders maintained their strong criticism about the level of insurer profits. During the Eighth Review, the MAA advised that the level of insurer profit fell within the range considered appropriate by the MAA.<sup>114</sup>
- 3.25** In the *Ninth Review Report*, the Committee noted the downward pressure on insurer profits since 2006/07, which was attributed to the introduction of the Lifetime Care and Support Scheme.<sup>115</sup> The MAA again advised the Committee that it considered the range of profit margins for the reporting year to be reasonable.<sup>116</sup>
- 3.26** In the *Tenth Review Report*, the Committee analysed the issue of insurer profit in depth, and the reader is referred to this report for its extensive discussion on this matter.<sup>117</sup> It is noteworthy that the Committee was sufficiently concerned about the issue of perceived excessive insurer profit to have considered whether it was appropriate to recommend that this matter be referred to the Independent Pricing and Regulatory Tribunal (IPART) to examine.
- 3.27** However, during the course of the Tenth Review, the MAA advised the Committee that it had commissioned an independent competition review of the Scheme. Hence the Committee preferred to await the outcome of the review process initiated by the MAA before considering whether a recommendation to refer the issue to IPART was warranted. In its *Tenth Review Report* the Committee recommended that the independent competition review involve extensive stakeholder consultation, including with those stakeholders who have made contributions to the Committee's review process, and that the results be made public as soon as possible. As noted in Chapter 1, the newly elected Government had not yet provided a response to the *Tenth Review Report*.

### **The current review**

- 3.28** During the Eleventh Review, as discussed in the preceding section, the Committee was keen to hear from the MAA about the results of the competition review. However, the MAA

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<sup>113</sup> Standing Committee on Law and Justice, Report 31, p 30 and p 38.

<sup>114</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Ninth Report*, November 2007, Report 34, p 51.

<sup>115</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Ninth Report*, Report 36, September 2008, p 16.

<sup>116</sup> Standing Committee on Law and Justice, Report 36, p 17.

<sup>117</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Tenth Report*, Report 43, October 2010, pp 31-48.

advised that it was considering the initial findings of the competition review in the context of a potential broader review, and hence could not provide any details.<sup>118</sup>

### *Scheme design and competition*

- 3.29** When asked to comment on the issue of insurer profits, the MAA placed the issue in the context of regulatory micro-economic reform of the 1990s. The operating model of the Scheme is that free competition between insurers is the main mechanism by which fair pricing of CTP is maintained. The role of the MAA is merely that of a watch dog. Mr Nicholls, Acting General Manager of the MAA, explained further:

The Scheme, as it is currently designed, was designed in the late 1990s which is when the micro economic reforms were at their height and there was a very strong emphasis on the market based delivery of public services. ... The CTP Scheme ... was designed as a model where competition between private insurers would be the primary mechanism by which pricing would be achieved and fair pricing would be achieved and out of that model, the Motor Accidents Authority has effectively a watch dog role. We do not set the prices. We do not even approve the prices. Our role is merely to look at premiums that insurers are proposing to charge and if we see that there is an element of their proposal that is not consistent with the legislation or the guidelines, then we have grounds to raise an objection.<sup>119</sup>

- 3.30** Mr Nicholls also noted that the Scheme was designed in the late 1990s when there were 14 licensed CTP insurers, creating a competitive market. However, as a result of industry consolidation in the first half of the 2000s, there are now only seven licensed insurers and the NSW CTP market is highly concentrated.<sup>120</sup> As noted in paragraph 3.3, these seven insurers are owned by five corporations. Mr Nicholls explained that, because of this concentrated CTP insurance market, promoting competitive pricing was a priority for the MAA:

Promoting competitive pricing remains a priority for the MAA, which will be considered in the review of CTP pricing, building on the work conducted in the competition review and which will now feed into the pricing review.<sup>121</sup>

- 3.31** Mr Stone of the Bar Association expressed the view that in relation to competition, the free market does not serve the CTP market very well. This is because insurance companies do not want to offer the lowest premium price on the market, because those who buy a premium based solely on price, such as younger drivers, are also the highest risk drivers. Mr Stone told the Committee that this was a fundamental flaw in the competitive model of the Scheme:

...the free market does not work very well in the Motor Accidents Scheme. The free market is driven by the competitive urge to have a lower price, outdo your competitors and gain the market share. But, by and large, the compulsory third-party

<sup>118</sup> Answers to pre-hearing questions on notice, MAA, p 11.

<sup>119</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 32.

<sup>120</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 22.

<sup>121</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 22.

insurers do not want to have the lowest price. That is a major barrier to the operation of a free-market...

What you really do not want is the 17 and 18-year-olds in the 10 or 15-year-old cars. If insurers could write a product that allows them to have none of those buying from them, they would all do it, because they are by far the worst risk. So, there is a fundamental flaw in the competitive model.<sup>122</sup>

- 3.32** Mr Nicholls of the MAA advised the Committee that, in response to this competition issue, the Authority has CTP premium determination guidelines that provide for a level of cross-subsidy between the better risks and the higher risk drivers, such as younger people. Without such a cross-subsidy, young drivers would be paying a premium some three times higher than a person over the age of 30:

We have premium determination guidelines in place that are deliberately designed to ensure that there is a level of cross-subsidy in terms of community risk rating between the better risks and those high risks, such as the 17 year old that you were referring to.

If young people were paying the full premium they would probably be paying something like three times the premium of somebody who was over 30 so clearly that would act as a disincentive for people to buy their insurance and remain insured on the road network.<sup>123</sup>

### *Criticisms of the level of insurer profit*

- 3.33** As in previous reviews, a number of Review participants were concerned about the size of the profits realised by insurers. For example, the NSW Bar Association noted that over several years of the Scheme's operation, insurers had retained profits well in excess of the prospective forecasts, and that there must be a fundamental flaw in the design of the Scheme:

It appears as if the MAA is unable to acknowledge a fundamental flaw in Scheme design. It may well be that the MAA thinks premiums are being set in anticipation of insurers keeping 8% of premium written, yet the insurers inevitably seem to end up with a profit in excess of 25% of premium written. For this to happen once or twice might be an understandable anomaly. For it to happen year after year points to systemic failure in the premium approval process.<sup>124</sup>

- 3.34** Mr Stone of the Bar Association was not only critical of the high profits made by the insurance companies, but also of the Motor Accidents Authority and its regulatory oversight of the Scheme. In particular, Mr Stone argued that the Authority's Annual Report did not adequately explain why realised insurer profits have been so high:

Look through the 100-plus pages of its Annual Report and try to find a single paragraph that says why this happened. What is our analysis, what are we now doing differently to make sure it does not happen again? Surely that is what responsible advice to government is, addressing the reality, not saying do not worry about it

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<sup>122</sup> Mr Stone, Evidence, 10 October 2011, p 11.

<sup>123</sup> Mr Nicholls, Evidence, 17 October 2011, p 27.

<sup>124</sup> Submission 10, NSW Bar Association, p 16.

anymore, we know that has happened in the past—although it does not even say that—but it is all right now because we know we have the current year right.<sup>125</sup>

- 3.35** Similarly, the Australian Lawyers Alliance argued that the insurers are making excessive profits and that the Scheme is not adequately compensating injured people:

The Scheme collects premiums to properly compensate the injured and adequately reward insurers for risk. The Scheme is not meeting these objectives. The injured are not being adequately compensated and insurers are making grossly excessive profits.<sup>126</sup>

- 3.36** Ms De Paoli, Member, Law Society of NSW Injury Compensation Committee, argued that insurance companies are making 'super profits' out of the CTP Scheme, and that these excessive insurer profits should be redirected to those injured in a motor vehicle accident.

...the Law Society does have an issue with is the super profits that are being made and the disparity and the gap between the premiums that are being written versus the ultimate outcome of the profits.

...The Law Society's view is that ... those profits should be better redirected into compensation for those that are actually injured rather than any discounting in premiums themselves. But the profits that are being made should be redirected to the actual injured people.<sup>127</sup>

### *Insurer's perspective*

- 3.37** In response to the suggestion that insurer profits under the Motor Accidents Scheme are excessive, the insurers identified a number of factors that impact on claim costs and hence insurer profits.

- 3.38** The insurance company Suncorp advised the Committee that an appropriate rate of return for its products, including CTP insurance, was at least 15 per cent. Suncorp noted that this target is required to ensure the long term viability of the company:

For any insurance product underwritten by Suncorp, the Group has a target of a return on capital of at least 15%. This target benchmark is to ensure that shareholders continue to invest in Suncorp and to underpin the long term viability of the company. Such a target is also appropriate for CTP, especially in light of the level of capital required to be put aside over many years to pay CTP claims and the volatility in key economic factors (average weekly earnings, super imposed inflation and interest rates) that can impact the size of open CTP claims and take many years to finalise.<sup>128</sup>

- 3.39** Suncorp also acknowledged that early on in the operation of the Scheme, above forecast profits were made by the insurance industry as a result of an unanticipated fall in claims frequency. Suncorp argued that since 1999 CTP premiums have remained stable in dollar terms, which represented a large fall in the cost of the Scheme to policy holders:

<sup>125</sup> Mr Stone, member of the Common Law Committee, New South Wales Bar Association, Evidence, 10 October 2011, p 13.

<sup>126</sup> Submission 5, Australian Lawyers Alliance, p 12.

<sup>127</sup> Ms Danielle De Paoli, Member, Law Society Injury Compensation Committee, Evidence, 10 October 2011, p 4.

<sup>128</sup> Submission 3, Suncorp, p 2.

We also acknowledge that for the early years of the new MACA Act in 1999, above forecast profits had developed due to an unanticipated fall in claims frequency (to a new low that was reached several years ago) and a period of gradual increases in interest rates up until the Global Financial Crises (GFC).

It should be noted that through this period CTP premiums remained stable in actual dollar terms (headline rates of around \$350), representing a large fall in real dollar terms whilst scheme benefits increased.<sup>129</sup>

- 3.40** Mr Anthony Mobbs, Member, Motor Accident Insurance Policy Committee of the Insurance Council of Australia, also explained to the Committee that insurance companies had benefitted from a fall in claim frequency, resulting in higher profit levels than forecast:

The Insurance Council contends that the profits over many years have been derived because there has been an unexpected, unexplained and unprecedented reduction in claims frequency over 10 years. That is highly unusual and insurers have benefitted from that.<sup>130</sup>

- 3.41** Mr Mobbs emphasised to the Committee that this reduction in claims frequency was unprecedented, and that if any insurer had foreseen it, insurers would have responded to it and reduced premiums:

If anyone could have predicted that claims frequency would have halved, through our competitive process insurers would have responded to that and reduced the premiums. No one foresaw it, no one predicted it. ... There has been a significant amount of analysis as to why that is the case—it could be better roads, the weather, it could be driver education. No one has been able to pinpoint the reason for the reduction in claims frequency. Because there is no explanation for it no one can predict where it will go to.<sup>131</sup>

- 3.42** The Insurance Council explained that the premium determination process is thorough and reviewed multiple times, and any bias or mistakes in the premium determination process would be identified. Hence any suggestion that insurance companies were deliberately forecasting that claim costs would be high, and prospective profits 'low', were false:

The process of premium setting at this time involves insurers having their own actuaries examine the information. We then have an external actuary review our numbers and that is a very robust process. Then we submit our rate filings to the authority and the authority has an independent actuary. There are already three stages of actuarial advice that oversee each and every rate filing.

Any suggestion that there is any form of bias or incorrectness in that process surely would be identified in that three-stage actuarial review at this time. There are already good processes in place.<sup>132</sup>

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<sup>129</sup> Submission 3, Suncorp, p 2.

<sup>130</sup> Mr Anthony Mobbs, Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia, Evidence, 10 October 2011, p 33.

<sup>131</sup> Mr Anthony Mobbs, Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia, Evidence, 10 October 2011, p 37.

<sup>132</sup> Mr Anthony Mobbs, Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia, Evidence, 10 October 2011, p 33.

**3.43** As noted in Chapter 2, claim frequency has risen over the last two years, and Suncorp argued that with this rise, together with a fall in interest rates, insurers will currently struggle to reach their profit targets:

Over the last two years there has been an unexpected increase in claim frequency, as seen in the 2009-10 period, and a significant fall in interest rates (triggered by the GFC). This has placed significant upward pressure on claims costs and resulted in a lift in CTP premiums. This increase in claims cost has also had a major impact on insurer profits and the prospect of insurers making their target profits in recent years has also been placed under significant pressure.<sup>133</sup>

**3.44** As noted in paragraph 3.26, the Committee had previously considered recommending that the issue of insurer profits be referred to the Independent Pricing and Regulatory Tribunal to examine. The Insurance Council was asked for its comment on this prospect, and in reply Mr Mobbs argued that existing processes are robust and sufficient:

The Insurance Council would contend that the existing processes are robust and the cause of the increased profit that we have experienced is well known and understood, being a reduction in claim frequency. The authority has made changes increasing our level of disclosure and there are three actuarial processes that consider our premium setting at the moment. We believe that to be sufficient; others may take a different view.<sup>134</sup>

**3.45** The Insurance Council was also asked for its comment on the idea of a levy on a proportion of 'super profits', that is, those profits greater than the prospectively filed eight per cent. Mr Mobbs argued that such a levy was not required, and that any such levy did not fit in with any economic theory about how capital is allocated within an insurance company:

I do not think it is required. I do not think it really fits in with any economic theory about how you allocate the capital within an insurance company. If you had any mechanism to claw back in one way, it would have to be mirrored by a claw back in the other way. I do not see it as holding merit; others may.<sup>135</sup>

### *MAA's perspective*

**3.46** In relation to the argument that CTP insurer profits are excessive, the MAA advised that it had taken steps to strengthen its regulatory oversight.

**3.47** Mr Nicholls confirmed to the Committee that for the early years of the Scheme, 'there is a large discrepancy between the level of file profit and the level of realised profit as reported by the Authority.'<sup>136</sup> Mr Nicholls also accepted that such discrepancies can call into question the fairness of the Scheme, but that insurance companies take the risk and have previously made a loss:

<sup>133</sup> Submission 3, Suncorp, p 2.

<sup>134</sup> Mr Anthony Mobbs, Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia, Evidence, 10 October 2011, p 36.

<sup>135</sup> Mr Anthony Mobbs, Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia, Evidence, 10 October 2011, p 39.

<sup>136</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 32.

The range of such variations and/or their consistency can call into question whether the scheme is achieving the right balance between affordability, viability and fairness.

Some Scheme stakeholders have taken a clear view that currently the Scheme has not got that balance right and that profits are consistently too high when viewed with the benefit of hindsight. Other stakeholders have pointed to the fact that insurance companies take the risk and thus take the good with the bad. We should not forget that for several years in the mid-90s CTP ran at a loss.<sup>137</sup>

**3.48** The MAA advised that it has also strengthened its approach to its regulatory or watch dog role. For instance, prior to 2006 the MAA's approach was to:

- Obtain periodic advice from actuarial advisers on estimates for the NSW CTP Scheme as a whole of prospective claims costs and average risk premium
- Review insurer's premium rate filings using its own in-house resources
- Only occasionally seek external actuarial advice concerning insurers' premium rate filings.<sup>138</sup>

**3.49** In contrast, since 2006 the MAA has decided to seek external actuarial review of, and advice on, all insurers' premium rate filings. The MAA actuary, Taylor Fry, uses the following practice to review and advise the MAA on insurers' rate filings:

- Comparison of Taylor Fry estimates of prospective average risk premium for the NSW CTP Scheme as a whole with corresponding estimates in each insurers' rate filing of prospective average risk premium
- Analysis of reasonableness of, and changes since the insurer's previous rate filing, in:
  - Allowance made for anticipated risk earnings;
  - Estimate of prospective risk premium;
  - Projected composition of vehicles insured;
  - Allowance for each of acquisition expenses, net cost of reinsurance, claims handling expenses and profit margin.
- Benchmarking comparisons of insurers' rate filings against each other and against previous rate filings; and
- Detailed advice to the MAA for each insurer's rate filing on:
  - The above items;
  - Overall reasonableness of the filing; and
  - A recommendation on whether the MAA should request more information from the insurer, reject the filing, or advise the insurer that the MAA does not object to the filing.<sup>139</sup>

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<sup>137</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 23.

<sup>138</sup> Letter from Mr Adrian Gould, Taylor Fry, dated 14 October 2011, to Mr A. Nicholls, Acting General Manager of the Motor Accidents Authority, Tabled by Mr Nicholls, 17 October 2011.

**3.50** Mr Nicholls explained that the Authority had been actively looking at the the rigour of the regulatory tools available to it within its legislative powers. It had produced new Premium Determination Guidelines that require greater disclosure of projected profit and rates of return by insurance companies. In addition, new MAA modelling tools should enable a more rigorous assessment of the assumptions used by insurers in setting target profit margins:

The Premiums Determination Guidelines have been revised to require greater insurer disclosure in regard to projected profit and rates of return. The authority has also developed a financial modelling tool to enable a more rigorous assessment of the assumptions used by insurers in setting target profit margins. This tool is being utilised in the authority's review of the current premium filings submitted by insurers for premium setting in January 2012.<sup>140</sup>

**3.51** In the context of the results of the competition review, the MAA advised the Committee that the Minister for Finance and Services Hon Greg Pearce MLC has initiated an internal review of CTP pricing, and has asked the MAA to consider:

- Insurer profits and costs
- Transparency in legal costs to ensure that injured people get to a fair level of their entitlement in their hand
- Fair and affordable CTP green slip pricing
- The Motor Accident Authority's operating model to ensure the agency has optimal regulatory powers.<sup>141</sup>

**3.52** Mr Nicholls told the Committee that it is the intent of the Authority that the CTP pricing review will involve consultation with stakeholders, including public consultation:

Our intention is that there will be full consultation with stakeholders on the issues arising from the competition review but it will be done within the context of the CTP pricing review.

...I think any consultation on the reforms in the Scheme is something that is a matter for the Minister and Government to agree to and the process that I have outlined will still involve public consultation. The intent is to still have public consultation.<sup>142</sup>

**3.53** The MAA did not advise the Committee of a time frame for the conduct of the CTP pricing review.

### **Committee comment**

**3.54** The Committee is acutely aware that the issue of the level of insurer profits has been raised as a concern in all of the Committee's reviews to date. The Committee notes that for the underwriting years from 2000 to 2006, insurer profits have significantly exceeded their

<sup>139</sup> Letter from Mr Adrian Gould, Taylor Fry, dated 14 October 2011, to Mr A. Nicholls, Acting General Manager of the Motor Accidents Authority, Tabled by Mr Nicholls, 17 October 2011.

<sup>140</sup> Mr Nicholls, Evidence, 17 October 2011, p 23.

<sup>141</sup> Answers to pre-hearing questions on notice, MAA, p 10.

<sup>142</sup> Mr Andrew Nicholls, Acting General Manager, MAA, Evidence, 17 October 2011, p 24.

prospective profit forecasts. A comparison of Tables 4 and 5 shows that the statistics are quite stark, particularly when the actual dollar amount of realised profits is considered. For example, for the premium year ending 30 September 2005 the prospective profit margin was 8.7%. However, the realised profit reported in 2009/10 for that same period was 21%, or \$309 million.

- 3.55** An initial consideration is the role of the Committee itself in relation to the MAA and the issue of insurer profits. The Committee's Seventh Review looked at this in detail, and concluded 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. The Committee also stated that it is not an independent umpire in the ongoing dispute between the MAA and the insurers in respect of profit levels, and that rather, the Committee is concerned to inquire into whether the MAA has properly performed its functions under the Act, including its market regulator functions.<sup>143</sup>
- 3.56** The Committee's Tenth Review agreed with the position adopted by the Committee in its Seventh Review, and concluded that 'its role is to inquire into whether the MAA has properly performed its functions under the Act in relation to the issue of insurer profit'.<sup>144</sup>
- 3.57** With the commencement of the 55<sup>th</sup> Parliament the Law and Justice Committee has a new membership and is keen to ensure that it effectively carries out its responsibilities to inquire into the exercise of the functions of the MAA and the MAC. One of the significant difficulties faced by the Committee in terms of assessing the effectiveness of the MAA in relation to insurer profits is the lack, and clarity, of information provided by the Authority on this issue.
- 3.58** In this regard, the Committee notes that section 28 of the *Motor Accidents Compensation Act 1999* requires the MAA to assess the insurers' CTP profit margin, and the actuarial basis for its calculation, and to present a report on that assessment annually to the Parliamentary Committee. Section 28 is as follows:

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.<sup>145</sup>

- 3.59** As noted in paragraphs 3.14-3.27, early Committee reviews examined this issue, and since 2002/03 the MAA has responded to this statutory requirement by way of including a section on insurer profits in its Annual Report.<sup>146</sup> However, the Committee is not satisfied that the MAA is adequately fulfilling its statutory obligation under Section 28 of the Act.

<sup>143</sup> Seventh Review of the Motor Accidents Authority and Motor Accidents Council, Report 31, September 2006, p 12.

<sup>144</sup> Tenth Review of the Motor Accidents Authority and Motor Accidents Council, Report 43, October 2010, p 32.

<sup>145</sup> *Motor Accidents Compensation Act 1999*, s 28.

<sup>146</sup> Government Response to the Law and Justice Committee, *Fourth Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council*, Report No 24, December 2002.

- 3.60** The Committee notes that the Annual Reports of the MAA provide only limited information on insurer profit and, in any case, including information in the Annual Report does not satisfy the requirement of section 28 to present a specific report to the Committee.
- 3.61** The Committee therefore recommends that the MAA present a report on its assessment of insurer profit margins and the actuarial basis for its calculation to the Committee on an annual basis in order to fulfil its statutory obligation under section 28 of the *Motor Accidents Compensation Act 1999*. The Committee would be pleased to meet with the MAA to discuss the content, form and timing of this report.

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#### **Recommendation 4**

That the Motor Accidents Authority present a report on its assessment of insurer profit margins and the actuarial basis for its calculation to the Committee, including an explanation for any material deviation on forecasted profit, on an annual basis in order to fulfil its statutory obligation under section 28 of the *Motor Accidents Compensation Act 1999*.

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- 3.62** The Committee acknowledges that since 2006 the MAA has strengthened the tools available to it to test assumptions and increase the level of disclosure by insurers in relation to projected profit.
- 3.63** The Committee also understands the difficulties faced by the MAA and insurers in forecasting prospective profits in a long tail scheme. It is acknowledged that external factors, which are beyond the control of both the MAA and insurers, will influence the level of realised profit over the life of the premium.
- 3.64** It is this very difficulty in forecasting realised profit that, on initial examination, makes it appealing to apply a levy on the CTP 'super profits' that are realised by insurance companies. However, the Committee acknowledges the arguments put forward by the Insurance Council that such a claw back mechanism would need to be mirrored for any 'super losses'.
- 3.65** The Committee notes that the *Tenth Review Report* concluded with the understanding that the MAA would respond to the issue of insurer profit with a competition review. Hence the Committee was somewhat surprised when the MAA advised the Committee this year that it could not provide any details of that review, and that a new CTP pricing review had commenced.
- 3.66** The Committee acknowledges that since the Committee's Tenth Review, there has been a change in government. Hence the Committee accepts that the new Minister responsible for the MAA, the Hon Greg Pearce MLC, has responded to the issue of insurer profits and other issues by commissioning this new CTP pricing review. However, it is unclear to the Committee what the terms of reference and timeframe of this review are. Whilst the Committee supports this course of action by the Minister, we are undertaking preliminary investigation into engaging an actuarial consultant to assist the Committee to further examine the issue of insurer profits and provide advice on certain aspects of the MAA Scheme. The Committee will review the outcome of this preliminary investigation and consider publishing a separate report if appropriate.

- 3.67** In order to better inform the Committee and stakeholders, the MAA should publish information about the CTP pricing review, such as its terms of reference and timeframe. The Committee considers that the new CTP pricing review should include consultation with the public and stakeholders, and to facilitate this, the MAA should publish a discussion paper on the issue to help direct stakeholders' feedback.

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**Recommendation 5**

That the Motor Accidents Authority promptly publish information about the CTP pricing review, including its terms of reference and timeframe. In addition, the Motor Accidents Authority should publish a discussion paper on the issues covered in the review, consult widely including with stakeholders and the public, and publish its findings.

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- 3.68** The Committee is aware that the CTP industry in NSW is highly concentrated, with seven licensed CTP insurers in NSW owned by just five corporations. Whilst the Committee received no evidence that there are barriers to enter the CTP market in NSW, we will keep a watching brief on the concentration of market ownership and its potential impact on consumers. We will consider the matter in future reviews.

**Insurer solvency**

- 3.69** The Australian Prudential Regulatory Authority (APRA), an Australian Government body, has the lead role to play in the prudential supervision and solvency of insurance companies. The solvency of licensed CTP insurers is also a key issue for the MAA and indeed the whole community, and the MAA is working closely with APRA in this regard.
- 3.70** The MAA advised the Committee that it has signed a Memorandum of Understanding (MOU) with APRA, which sets out a framework of cooperation between the two agencies. Under this MOU, the MAA requests and receives on approximately a six monthly basis:
- The CTP insurers' solvency coverage ratios which indicate the level of assets as against the capital required under APRA's prudential standards
  - APRA assessments of the insurer's viability using the Probability and Impact Rating System.<sup>147</sup>
- 3.71** In addition, the MAA advised that from this year, the MOU provides for MAA officers to attend meetings with APRA company analysts. The MAA noted that it is currently tendering for an actuary to assist the MAA in assessing APRA's reports and attending analyst's meetings, and that the MAA and APRA have also committed to reviewing the current MOU. The MAA also attends executive meetings with APRA and the Motor Accident Insurance Commission of Queensland, held approximately every six months, and that at this forum the MAA would be ordinarily informed of major issues concerning NSW CTP insurers.<sup>148</sup>

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<sup>147</sup> MAA, Answers to supplementary questions on notice, p 2.

<sup>148</sup> MAA, Answers to supplementary questions on notice, p 2.

- 3.72** If the MAA is advised by APRA of a threat to the solvency of a CTP insurer that may be unable to meet its insurance liabilities, section 177 of the *Motor Accidents Compensation Act 1999* allows the MAA to 'appoint an appropriately qualified person to audit or inspect, and report to the Authority on, the accounting and other records relating to the business or financial position of a licensed insurer...'. The MAA advised that on receipt of the inspector's report, the MAA would as soon as practicable thereafter advise the Minister of the potential impact on NSW Treasury.<sup>149</sup>

### Committee comment

- 3.73** The Committee is aware that the recent global financial crisis has impacted countries across the world, including Australia. The fact that no major Australian bank or insurance company has financially collapsed as a result of that crisis is reassuring. Nevertheless, the Committee welcomes the thoroughness with which the MAA approaches its role in relation to monitoring insurer solvency. The Committee will continue to monitor this issue in future reviews.

## Legal costs for injured persons

- 3.74** Legal costs under the Motor Accidents Scheme are regulated by the Motor Accidents Compensation Regulation 2005 (the Cost Regulation). The Cost Regulation governs, amongst other things, the maximum costs recoverable by legal practitioners for services provided to a claimant or an insurer in any motor accidents matter.<sup>150</sup> In practice, legal representatives set their own fees, which are paid by their clients. If the client's claim is successful, the insurer reimburses the claimant an amount according to the Cost Regulation, leaving the client liable for any difference between the fee charged and the recoverable cost.
- 3.75** Legal costs arose as a concern for participants during the current Review, as it has during the Committee's six previous reviews. Over the years participants in the Committee's reviews, such as the Law Society of NSW and the NSW Bar Association, have repeatedly expressed concerns that as a consequence of increasing legal fees, the Cost Regulation does not adequately provide for recoverable costs, which can leave claimants unfairly disadvantaged.<sup>151</sup>

### Past Committee Reviews

- 3.76** In its *Sixth Review Report*, which was tabled in May 2005, the Committee recommended that the MAA investigate methods to analyse the effects of the cost regulation and review the legal costs schedule.<sup>152</sup> The Government response to the *Sixth Review Report* advised that the effect

<sup>149</sup> MAA, Answers to supplementary questions on notice, p 2.

<sup>150</sup> Section 149(2) of the *Motor Accidents Compensation Act 1999* provides that a legal practitioner is not entitled to be paid or recover for a legal service or other matter an amount that exceeds any maximum costs fixed for the service or matter by regulations under section 149.

<sup>151</sup> See for example Standing Committee on Law and Justice, Report 27, pp 15-16; Standing Committee on Law and Justice, Report 31, pp 81-84; Standing Committee on Law and Justice, Report 34, pp 66-72; NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Ninth Report*, Report 36, September 2008, pp 68-72.

<sup>152</sup> Standing Committee on Law and Justice, Report 27, p 16.

of the legal costs regulation is regularly reviewed by the MAA. It noted that a detailed review of the options for regulating legal costs in motor accident matters was undertaken during the development of the Motor Accidents Compensation Regulation 2005.<sup>153</sup>

- 3.77** In the *Seventh Review Report*, the Committee recommended that the MAA analyse the impact of the Cost Regulation on claimants, with a view to determining if the regulation significantly disadvantaged claimants.<sup>154</sup> In its response to the *Seventh Review Report*, the Government noted the difficulties in obtaining information about lawyers' billing practices and undertook to seek the co-operation of the Law Society of NSW in ascertaining the impact of the Cost Regulation.<sup>155</sup>
- 3.78** In the *Eighth Review Report*, the Committee recommended that the MAA make its Study of the Impact of the Costs Regulation, conducted with the assistance of the Law Society of NSW, a priority project and allocate resources accordingly.<sup>156</sup> In its response to the *Eighth Review Report*, the Government indicated that it supported the recommendation and had engaged a consultant to undertake the study, which it anticipated would be completed in the second half of 2008.<sup>157</sup>
- 3.79** In the *Ninth Review Report*, the Committee recommended that the MAA continue to accord a high priority to the Study of the Impact of the Cost Regulation, with a view to having a revised regulation in place by 1 October 2008.<sup>158</sup> The Government response to the *Ninth Review Report*, received in March 2009, expressed support for this recommendation and advised that the MAA was considering the findings of the final report by FMRC Legal on the impact on legal costs for claimants of the Motor Accidents Compensation Regulation 2005. The Government further advised that the MAA was continuing to work on a revised costs schedule.<sup>159</sup>
- 3.80** In the *Tenth Review Report*, the issue of legal costs was extensively discussed. It was noted that a revised regulation had still not been gazetted. Information presented to the Committee confirmed that there was a significant gap between the fees charged to clients and the amount payable under the regulation. The MAA advised that the Motor Accidents Compensation Regulation 2005 was due to be automatically repealed on 1 September 2010, but had been extended to 1 September 2011. The MAA established a working party to review the regulation, and the then General Manager of the MAA, Ms Carmel Donnelly, told the Committee that the result was a very good package and she expected to put it to the Government for the remaking of the regulation.<sup>160</sup> The Committee supported this action and

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<sup>153</sup> Government Response to the Standing Committee on Law and Justice, Report 27, p 2.

<sup>154</sup> Standing Committee on Law and Justice, Report 31, p 84.

<sup>155</sup> NSW Government, Government Response to the 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*, Report 31, September 2006, p 6.

<sup>156</sup> Standing Committee on Law and Justice, Report 34, p 72.

<sup>157</sup> NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Eighth Report*, Report 34, November 2007, p 3.

<sup>158</sup> Standing Committee on Law and Justice, Report 36, p 72.

<sup>159</sup> Government Response to the Standing Committee on Law and Justice, Report 36, pp 4-5.

<sup>160</sup> Standing Committee on Law and Justice, Report 43, p 53.

recommended that the working party involve extensive consultation with relevant stakeholders.

- 3.81** Ms Donnelly further indicated that she would like to pursue a mechanism whereby legal practitioners notify the MAA of the amount of compensation that a claimant receives once their legal costs have been deducted, to allow the MAA to monitor legal costs in a way similar to how insurer profits and other costs are scrutinised.<sup>161</sup>

### The current review

- 3.82** The continuing importance of resolving the issue of legal costs was evident to the Committee, as during the course of the Review the MAA advised that the number of claimants engaging legal representation had increased by some 13 per cent since 2002, and now over half of all year one claims involved legal representation. In addition, the proportion of motor accident cases in the court system had also increased. Mr Nicholls told the Committee:

In 2002, 43.7 percent of year one claims involved legal representation. By 2010 this has increased to 56.2 percent. As well motor accidents pursuing litigation through the court system have risen from 11 to 14 percent of all claims. At the same time fewer matters are going through the alternative to court claims assessment process, declining from about 16 percent to 10 percent of claims. These trends not only incur additional costs for the scheme, but can also affect the amount of compensation actually received by the injured person at the settlement of their claim.<sup>162</sup>

- 3.83** The Australian Lawyers Alliance argued that the complexity of provisions of the *Motor Accidents Compensation Act 1999*, and in particular sections 89A-89E relating to pre-settlement conferences, drives the need for claimants to engage legal representation:

The complexity of these provisions are such that no legally unrepresented claimant could ever hope to navigate through them alone. The complexity of the claims system drives the need for legal representation.<sup>163</sup>

- 3.84** Mr Nicholls also noted that currently there is no transparency on the overall level of Scheme legal costs being met by injured people out of their settlements, or whether these payments are fair or reasonable to meet the needs of the injured person into the future. He advised the Committee that the Minister has also asked the MAA to examine transparency in legal costs whilst undertaking the review of CTP pricing.<sup>164</sup>

- 3.85** During the course of the Tenth Review, the Committee was of the understanding that the MAA would put the new cost regulation to Government and that it would be in place by the time of its expiry on 1 September 2011.<sup>165</sup> However, the MAA informed the Committee

<sup>161</sup> Standing Committee on Law and Justice, Report 43, p 53.

<sup>162</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 23.

<sup>163</sup> Australian Lawyers Alliance, Answers to questions on notice taken from evidence 10 October 2011.

<sup>164</sup> Mr Andrew Nicholls, Acting General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 23.

<sup>165</sup> Law and Justice Committee, Report 43, p 53.

during the current Review that the Motor Accidents Compensation Regulation 2005 had been extended again for another 12 months to 1 September 2012.<sup>166</sup>

- 3.86** Ms Danielle De Paoli of the Law Society of NSW explained to the Committee that amendments to the Scheme in 2007 created more up-front work, but the cost regulation has not been updated to reflect this:

The Act was rewritten back in 2007 to impose greater administrative changes to the Scheme. At the time that those changes were introduced we had been told that there would be changes made to the cost regulations. The predominant issue with the cost regulations is that for all claims made after 1 October 2008 we are required to have a compulsory settlement conference, a section 89A settlement conference.

...The biggest issue is that the system is now front-end loaded and the cost regulations do not reflect the front-end loading of the system in itself. One of the main challenges is going to be amending the regulations so that they actually reflect that the nature of the work that is done is done at the beginning and not at the end when it comes time for a Claims Assessment and Resolution Service assessment.<sup>167</sup>

- 3.87** Mr Stone of the NSW Bar Association informed the Committee that claimants are recovering about 40 per cent of their legal costs, which compares poorly compared to other court actions. He concluded that injured people are subsidising the operation of the Scheme:

[on] average, ... claimants [in the CTP Scheme] were recovering about 40 per cent of the actual legal costs. You take any other case to court and you are likely to recover 65 per cent, 70 percent of your legal costs as party-party costs, leaving a 30 per cent solicitor-client gap. Here we are talking about a scheme that has a 60 per cent solicitor-client gap. That is just straight up the injured subsidising the operation of the scheme.<sup>168</sup>

- 3.88** Mr Stone was critical of the MAA and the delay in the gazettal of an updated regulation, arguing that it should have been ready and in place when the Act was amended. He told the Committee that it has been over three years since the Act was amended, and despaired that the cost regulation will ever be updated:

Regulations should have been ready and in place when they did the extensive amendments to the Act in 2008 and started imposing a much higher bureaucratic burden on those preparing cases, including compliance with section 89A. They were not ready. They did a year of consulting with the Law Society. ... They got to the end of that year, had some ideas and then restarted the whole process the next year. So they spent another year consulting with the insurers and the Law Society. ... It has been over three years since the changes were brought in in 2008 and it has just taken too long. They have just, in fact, prorogued the regulation for another 12 months. We just despair that it will ever actually happen.<sup>169</sup>

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<sup>166</sup> MAA, Answers to pre-hearing questions on notice, p 12.

<sup>167</sup> Ms Danielle De Paoli, Member, Law Society Injury Compensation Committee, Law Society of NSW, Evidence, 10 October 2011, p 5.

<sup>168</sup> Mr Andrew Stone, Bar Association of NSW, Evidence, 10 October 2011, p 18.

<sup>169</sup> Mr Andrew Stone, Bar Association of NSW, Evidence, 10 October 2011, p 18.

**3.89** As noted, in 2010 the MAA established a working party to review the legal costs regulation. In response to pre-hearing questions on notice, the Authority reported that the working party had made a wide range of recommendations, including clarifying its wording and reviewing its regulated costs:

The working party made a wide range of recommendations from amended and clarified wording in the regulation and new price schedules to some of the more significant items as outlined below:

- Removal of legal fees for matters below \$5,000
- Removal of legal practitioners' option to 'contract out' of the regulated costs for matters up to \$20,000
- Increases in regulated legal and medico-legal costs
- Greater 'front end loading' of legal costs to encourage early settlement
- An introduction of transparency about what a claimant receives 'in hand'.<sup>170</sup>

**3.90** The MAA also stated that amendments to the *Motor Accidents Compensation Act 1999* would be required in order to provide the Authority with the power to permit disclosure to the MAA and claimants of the amount the claimant is expected to receive / receives once legal costs have been deducted.<sup>171</sup> However, the MAA did not advise if it was the intent of the Authority to go ahead with these amendments.

**3.91** Mr Nicholls explained to the Committee that the revised costs regulation is now subject to the government process:

The cost regulation recommendations are now something that are subject to a Government process. Obviously a regulation is something that a Minister makes on the recommendation of his or her agency and we are currently going through that internal process at the present time.<sup>172</sup>

### **Committee comment**

**3.92** The Committee notes that over a number of its reviews several stakeholders have repeatedly raised concerns over the adequacy of the maximum costs recoverable by legal practitioners for services provided to a claimant or an insurer in any motor accidents matter under the Motor Accidents Compensation Regulation 2005.

**3.93** The Committee is concerned that the proportion of injured people seeking legal representation in the first year of their claim has increased by some 13 per cent over the last ten years. The Committee received no evidence of why this increase is occurring, but can only speculate that it is an indication of the increasing complexity of the CTP Scheme. In addition, the Committee is concerned that the legal costs regulation has not kept up to date with contemporary legal fees. It is of concern to the Committee that whilst it has received evidence that insurance companies are making higher than forecast profits out of the Scheme, those injured in motor vehicle accidents effectively subsidise its operation.

<sup>170</sup> MAA, Answers to pre-hearing questions on notice, 2011, p 11.

<sup>171</sup> MAA, Answers to pre-hearing questions on notice, 2011, p 11.

<sup>172</sup> Mr Andrew Nicholls, Evidence, 17 October 2011, p 40.

- 3.94** It is clear to the Committee that the MAA has studied the impact of the cost regulation over many years, and has recognised its limitations, but the regulation has not been fixed in a timely manner.
- 3.95** The Committee is concerned that the costs regulation was not revised on 1 September this year, and recommends that it be revised as early as possible, and certainly earlier than when it is due for expiry on 1 September 2012.
- 3.96** The Committee also considers that an increase in transparency and understanding of costs in the Scheme is desirable, and recommends that the Government introduce amendments to the *Motor Accidents Compensation Act 1999* to provide the MAA with the authority to collect and disclose data on the amount of compensation that claimants receive once legal costs have been deducted.

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**Recommendation 6**

That the Minister expedite the remaking of the Motor Accidents Compensation Regulation 2005, rather than waiting until its expiry on 1 September 2012.

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**Recommendation 7**

That the New South Wales Government pursue amendments to the *Motor Accidents Compensation Act 1999* to provide the Motor Accidents Authority with the authority to collect and disclose data on the amount of compensation a claimant receives once legal costs have been deducted.

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**Medical costs**

- 3.97** This section of the Report examines the issue of medical costs, and the ability of those injured in a motor vehicle accident to recover their medical costs from an insurer.
- 3.98** As for legal costs, costs for services provided by a doctor under the Motor Accidents Scheme are regulated by the Motor Accidents Compensation Regulation 2005 (the Cost Regulation). The Australian Medical Association (AMA) NSW presented concerns to the Committee that are similar to that presented by the legal representatives, that is, the Cost Regulation has not kept up to date with contemporary fees.
- 3.99** The AMA NSW told the Committee that in January 2010 it had written to the MAA raising various concerns with the cost setting regime, and that 'in particular, AMA NSW believes that by setting medico legal fees at appropriate levels, you will ensure the quality of the contribution the treating doctor in particular is able to make.'<sup>173</sup> The AMA NSW noted that those issues remain unaddressed, and remain a concern to the Association.

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<sup>173</sup> Australian Medical Association (NSW), Answers to questions on notice taken during evidence 10 October 2011.

- 3.100** Ms Davies, Chief Executive Officer of the AMA NSW, told the Committee that the MAA's medical fee schedule has got to a level which is significantly behind other jurisdictions, and that it 'should more adequately address the time and professional input'.<sup>174</sup>
- 3.101** The AMA NSW also provided information on the AMA scheduled fee rate for various medical services, comparing them to that provided by WorkCover and the Motor Accidents Authority. A sample of these is shown in Table 6.

**Table 6 Comparison of scheduled medical fees**<sup>175</sup>

Service	AMA Schedule	WorkCover	Motor Accidents Authority
GP Level A consult	\$32.50	\$32.50	\$32.50
GP – treating doctors report. No further examination required	\$405	\$226.80 per hour	\$130
Specialist treating doctors report	\$800	\$324.10 per hour	\$260
Attendance at court for expert evidence	\$1,145 for first 1.5 hours, \$730 per hour thereafter		\$605 for first 1.5 hours, \$260 per hour thereafter
Specialist report by non treating doctor, examination of patient required	\$1,250 - \$1,550		\$400 - \$700

- 3.102** It can be seen from Table 6 that the MAA fee payable is considerably less than the AMA schedule fee rate. For example, the MAA schedule fee for a GP doctors reports is \$275 less than the AMA prescribed amount.
- 3.103** The Committee put the concerns of the AMA NSW to the Motor Accidents Authority in pre-hearing questions on notice. The Authority replied that it had consulted with the AMA NSW in the course of reviewing the Motor Accidents Compensation Regulation 2005, and that a revised regulation is being finalised for consideration by the Government.<sup>176</sup>

### Physiotherapy fees

- 3.104** The Motor Accidents Compensation Regulation includes only medical expenses from doctors. Other associated medical expenses, such as physiotherapist fees, are not regulated by the MAA. The MAA advised that the *Motor Accidents Compensation Act 1999* requires an insurer to make 'reasonable and necessary' payments in respect of treatment and rehabilitation expenses for motor accident claims on an 'as incurred basis', once liability for the claim has been admitted.<sup>177</sup>

<sup>174</sup> Ms Fiona Davies, Chief Executive Officer, Australian Medical Association NSW, Evidence, 10 October 2011, p 62.

<sup>175</sup> Australian Medical Association NSW, Answers to questions on notice taken during evidence 10 October 2011.

<sup>176</sup> MAA, Answers to pre-hearing questions on notice, p 9.

<sup>177</sup> MAA, Answers to pre-hearing questions on notice, p 9.

- 3.105** The Australian Physiotherapy Association noted that insurance companies make decisions about treatment offered to patients who have been injured in a motor vehicle accident, and that they can do this directly or indirectly with fees that they are willing to pay for treatment:

Insurance companies receive premiums and make decisions about the treatment offered to patients, including how much treatment and by whom. They have the opportunity to regulate these factors directly by approving or not approving treatment. They also have the ability to decide whether or not a patient is able to see any physiotherapist and the type of physiotherapist they are able to see. Insurance companies can do this directly or indirectly with the fees they are willing to pay for treatment. We should not forget that insurance companies are commercial businesses and they must make a profit.<sup>178</sup>

- 3.106** The Australian Physiotherapy Association noted that the reimbursement of fees varies between insurers. However, in the majority of cases, physiotherapists are paid at a lower rate than their normal rate of fees, despite the additional time and expertise required to treat motor vehicle accident patients:

In the overwhelming majority of MAA cases, physiotherapists are paid at a rate lower than their normal rate of fees. This is despite the fact that there is additional time and expertise involved in treating such patients, as they often require more extensive assessment and treatment modification to deal with psychosocial issues, and because of the additional documentation and reporting required when compared with treating private patients.<sup>179</sup>

- 3.107** The Australian Physiotherapy Association expressed concern to the Committee that some of the CTP insurers have produced their own fee schedules, which may be quite fixed and do not take into account the time and expertise of the physiotherapist involved:

This is one example, which is probably the biggest insurer in the Scheme, it is quite a rigid schedule that their agents will pay for physiotherapy fees. It is not an hourly schedule. There is no time basis on it. It talks about initial consultations and standard consultations. It does not differentiate by the expertise of the physiotherapist at all. It has been our members' experience in some instances that there has not been any negotiation entered into regardless of the extra expertise of the physiotherapist.<sup>180</sup>

- 3.108** The MAA advised the Committee that neither the Act, nor the Authority's *Claims Handling Guidelines*, prevent insurers from developing their own payment scales in respect of treatment.<sup>181</sup>

- 3.109** However, the Association concluded that this perceived failure of insurers to consider appropriately the needs of injured persons and their suggested treatment has the potential to create a dearth of physiotherapists willing to treat motor accident patients:

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<sup>178</sup> Mr Gary Rolls, President, NSW Branch, Australian Physiotherapy Association, Evidence, 10 October 2011, p 50.

<sup>179</sup> Submission 4, Australian Physiotherapy Association, p 1.

<sup>180</sup> Ms Paula Johnson, Senior Policy Officer, Australian Physiotherapy Association, Evidence, 10 October 2011, p 52.

<sup>181</sup> MAA, Answers to pre-hearing questions on notice, p 9.

We believe that the failure by insurers to consider appropriately the requirements of injured persons, expertise of the physiotherapists, and the suggested treatment needed to achieve meaningful outcomes, has the potential to create a dearth of physiotherapists willing to treat motor accident patients, and reduce the overall outcomes for such patients.<sup>182</sup>

- 3.110** The Association subsequently recommended that a review of the documentation submitted by physiotherapists to insurers is required – the Physiotherapy Notice of Commencement and the Physiotherapy Review Forms. It argued that these forms can be simplified whilst also including the physiotherapists type and level of expertise, so an appropriate level of remuneration can be provided for:

These documents can be further simplified to achieve the same result for the injured person while clearly articulating the problems, the outcome measures and goals, and proposed treatments. The addition of the physiotherapist's type and level of expertise can also be included in these Forms to better inform the insurer during their consideration of reasonable and necessary treatment, as well as their consideration of reasonable remuneration.<sup>183</sup>

#### **Committee comment**

- 3.111** The Committee acknowledges the arguments put forward by the Australian Medical Association and the Australian Physiotherapy Association. In regard to the cost issues raised by the AMA, the Committee repeats the comments made in relation to legal costs, that is, the Minister should make a revised cost regulation as soon as possible.
- 3.112** In regard to the concerns presented by the Australian Physiotherapy Association, the Committee accepts that patients injured in a motor accident can present with complex injuries that may take specialised care and treatment to heal. The Committee also understands that a 'flat fee approach' taken by an insurer towards remunerating health practitioners is neither fair nor reasonable. The Committee agrees with the proposal put forward by the Australian Physiotherapy Association, and recommends that the MAA, in consultation with appropriate stakeholders, review the Physiotherapy Notice of Commencement and Physiotherapy Review Forms.

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#### **Recommendation 8**

That the Motor Accidents Authority, in consultation with appropriate stakeholders, review the Physiotherapy Notice of Commencement and Physiotherapy Review Forms.

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<sup>182</sup> Australian Physiotherapy Association, Answers to questions on notice taken during evidence 10 October 2011, p 1.

<sup>183</sup> Australian Physiotherapy Association, Answers to questions on notice taken during evidence 10 October 2011, p 2.

## Carers

**3.113** In the Committee's Tenth Review, Carers NSW highlighted the importance of carers being able to access clear and relevant information on the services provided by the MAA. Carers NSW suggested that the MAA website should provide clearer information to assist family carers learn about and access appropriate services for their needs, which are different from those of the person for whom they care. Carers NSW also encouraged the use of the term 'carer' or 'family carer' instead of 'family member', in order to more clearly recognize the role that carers play in the support and rehabilitation of injured family members.<sup>184</sup> The Committee subsequently recommended that the MAA consult with carers' advocacy groups to examine the feasibility of modifying the language used on the Authority's website, and providing clear information on the support services available for carers.<sup>185</sup> As noted, the Government response to the *Tenth Review Report* has not yet been received.

**3.114** During the current review, Carers NSW again expressed concern about the above issues. Carers noted that the MAA's and the Lifetime Care and Support Authority's (LTCSA) websites have few references to carers, and has confused terminology between paid care workers and carers:

Currently both the MAA and LTCSA websites have few references to carers and there is confusion between paid care workers and carers. It is inappropriate to refer to paid care workers or volunteers who assist members of the community as carers. Greater consistency is also needed so that carers are uniformly referred to as carers, throughout the website and other publications.<sup>186</sup>

**3.115** Carers NSW also noted that there is limited information for carers provided on the MAA and LTCSA's website, and recommended that a page about information about services for carers be developed. It also suggested that a booklet explaining what to expect as a carer for a person with a severe injury due to a motor accident should be developed and distributed.<sup>187</sup>

**3.116** The Committee put these concerns to the MAA, and Mr Nicholls advised that as the Authority's website is being updated, its terminology in relation to carers is being changed to conform with Carers NSW recommendations:

I am pleased to advise the Committee that we have conducted a full review of our web site and all publications on our web site, to identify all documents that have 'carer' in it and we have in place a policy within the Authority that as those documents are replaced and updated, as the web site is updated, we are making the appropriate words...<sup>188</sup>

**3.117** The MAA also advised that the former General Manager of the MAA wrote to the Chief Executive Officer of Carers NSW in August 2010 seeking a meeting to discuss the issues raised in Carers NSW submission to the Committee's Tenth Review. The MAA advised 'that

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<sup>184</sup> Law and Justice Committee, *Report 43*, October 2010, p 68.

<sup>185</sup> Recommendation 9, Law and Justice Committee, *Report 43*, October 2010, p 70.

<sup>186</sup> Submission 1, Carers NSW, p 3.

<sup>187</sup> Submission 1, Carers NSW, p 3.

<sup>188</sup> Mr Nicholls, MAA, Evidence, 17 October 2011.

although no reply was received to the letter, the MAA would be happy to again contact Carers NSW concerning their submissions to the Law and Justice Committee.<sup>189</sup>

### Committee comment

- 3.118** The Committee acknowledges the vital role that carers provide in the community, and the important role of carer advocacy groups. The Committee notes that in its submission Carers NSW has raised two main issues – the nomenclature of carers and the provision of information on the MAA's website. The Committee acknowledges that the MAA is updating its references to carers on its website and in its publications. The Committee supports this approach.
- 3.119** However, it is also apparent to the Committee that greater support information for carers on the MAA's website would be useful, and recommends that the MAA produce and publish on its website information specifically for carers.

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### Recommendation 9

That the Motor Accidents Authority produce and publish on its website information specifically directed to assist carers.

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### Discount rate

- 3.120** When a lump sum payment is awarded to seriously injured people to compensate for future economic loss resulting from that injury, the present value of the future economic loss is qualified by adopting a prescribed discount rate. Under section 127 of the *Motor Accidents Compensation Act 1999*, that discount rate is set at five per cent.
- 3.121** The Committee's *Sixth Review Report* reported the concerns of the NSW Bar Association that this rate is inadequate, because a discount rate of five per cent can result in under-funding of the future needs of the seriously injured. The Bar Association expressed its preference for a lower discount rate, noting that the Australian High Court had set the common law discount rate for damages awards at three per cent, and that in the United Kingdom the discount rate applicable to awards for future care for personal injury cases is set at two per cent.<sup>190</sup> In response to these concerns, the MAA advised that it was unaware of any information or evidence to suggest that consideration should be given to revising the discount rate.<sup>191</sup> This issue was not taken up in either the *Seventh, Eighth or Ninth Reviews*.
- 3.122** The Committee's *Tenth Review Report* again discussed the issue of an appropriate discount rate. The Australian Lawyers Alliance argued that the five per cent discount rate was unrealistic, and may mean that seriously injured people receive inadequate compensation to meet their ongoing care needs. The MAA advised that other compensation schemes in NSW, and in

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<sup>189</sup> MAA, Answers to questions on notice taken during evidence 17 October 2011, question 11.

<sup>190</sup> Standing Committee on Law and Justice, Report 27, p 63.

<sup>191</sup> Standing Committee on Law and Justice, Report 27, p 63.

other Australian States and Territories, also use a discount rate of five per cent. The MAA also noted that since the establishment of the Lifetime Care and Support Scheme the effect of the discount rate has been reduced for the most severely injured people, as their care needs are fully funded for the rest of their lives. Due to the limited evidence that it received on the issue, the Committee did not draw any firm conclusions regarding the discount rate.<sup>192</sup>

- 3.123** During the current review the appropriate discount rate was again raised as an issue by the Australian Lawyers Alliance. The Alliance argued that the current rate of five per cent is inadequate:

The State Government has imposed a 5% discount rate for future losses. That assumes that a lump sum can be securely invested to return 5% after tax and inflation. We know from historical material and from good actuarial evidence that that is impossible.<sup>193</sup>

- 3.124** The Australian Lawyers Alliance argued that a rate of three per cent would be more appropriate, and that this rate had been supported by other inquiries.<sup>194</sup> However, Ms Gumbert, NSW Branch President, Australian Lawyers Alliance, did note that the issue of discount rate, whilst important to some, is less relevant now with the introduction of the Lifetime Care and Support Authority:

It is less relevant now in the Motor Accidents Scheme given that catastrophic injury cases are taken into the Lifetime Care and Support Scheme, but it is still of concern as it still affects damages over a person's lifetime and it also relates to the other systems as well where a 5 per cent discount rate is imposed.<sup>195</sup>

- 3.125** Nevertheless, Dr Morrison, Representative, Australian Lawyers Alliance, emphasised to the Committee that the discount rate impacts mostly on those who have suffered the most serious injuries:

The discount rate impacts primarily on those who have suffered the most serious injuries and whose needs and care and financial loss are greatest over a long period of time.<sup>196</sup>

- 3.126** Dr Morrison explained to the Committee that the five per cent discount rate was brought in for motor accidents only in 1983, at a time of 17 per cent inflation. Whilst the discount rate was meant to have been reviewed, it never has been, and Dr Morrison considered that there is political pressure on governments not to review it:

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<sup>192</sup> Standing Committee on Law and Justice, Report 43, p 55.

<sup>193</sup> Submission 5, Australian Lawyers Alliance, p 9.

<sup>194</sup> Submission 5, Australian Lawyers Alliance, p 9. The inquiries referred to were: *Review of the Law of Negligence Report*, 2 October 2002; NSW Legislative Council General Purpose Standing Committee No 1, *Personal Injury Compensation Legislation*, December 2005.

<sup>195</sup> Ms Jnana Gumbert, NSW Branch President, Australian Lawyers Alliance, Evidence, 10 October 2011, p 27.

<sup>196</sup> Dr Andrew Morrison, Representative, Australian Lawyers Alliance, Evidence, 10 October 2011, p 28.

It was brought in on the basis that it be reviewed regularly. It has never been reviewed, and there will always be political pressure on governments not to review it.<sup>197</sup>

**3.127** The Insurance Council advised the Committee that many different types of personal injury schemes in Australia have legislated the discount rate at five per cent, and argued that this consistency should remain in the CTP Scheme in NSW.<sup>198</sup>

**3.128** Mr Nicholls advised the Committee that the rate of five per cent is consistent to that used in other compensation schemes in the State. He also noted that whilst interest rates two years ago were the lowest in 50 years, back in the 1990s interest rates were up to 10 or 15 per cent. Hence the discount rate needs to be at a level to take into these fluctuations:

... variability in interests rates is something that the settlement that is made needs to withstand over a period of time and so five percent is seen in a number of jurisdictions, including our jurisdiction, as one that essentially is a reasonable rate, having regard to the level of volatility that might occur in interest rates over a period of time.<sup>199</sup>

#### **Committee comment**

**3.129** The Committee notes the concerns of the Australian Lawyers Alliance that the discount rate of five per cent may result in seriously injured people receiving inadequate compensation to meet their ongoing care needs. The Committee also acknowledges the advice from the MAA that a five per cent discount rate is used in other compensation schemes, and by other Australian States and Territories.

**3.130** The Committee notes that the introduction of the Lifetime Care and Support Scheme, which provides for the lifetime care needs of catastrophically injured persons, has reduced the overall impact of the discount rate on the Scheme. The discount rate was raised by only one stakeholder, and considering all of the above comments, the Committee will keep a watching brief on this issue.

<sup>197</sup> Dr Morrison, Evidence, 10 October 2011, p 27.

<sup>198</sup> Insurance Council of Australia, Answers to questions on notice taken during evidence 10 October 2011, p 8.

<sup>199</sup> Mr Nicholls, Evidence, 17 October 2011, p 34.



## Chapter 4 The Motor Accidents Assessment Service

The Motor Accidents Assessment Service of the MAA provides for the independent resolution of medical and claims disputes between claimants who have been injured in a motor vehicle accident and insurers. This is achieved through the provision of two separate services, the Medical Assessment Service and the Claims Assessment and Resolution Service (CARS).

The Chapter begins with a review of the functions of the Medical Assessment Service. The issue of whole person impairment is a focus of this section, and various reforms are proposed. Following from this, issues raised in relation to CARS are examined, including an analysis of the late claims process and pre-settlement conferences.

### The Medical Assessment Service

- 4.1** The Medical Assessment Service (MAS) determines disputes about medical treatment, including whether treatment is reasonable and necessary or related to an injury. The Service also determines disputes about the degree of permanent impairment of injuries. Assessment is by referral to health experts appointed under the *Motor Accidents Compensation Act 1999* as medical assessors. The parties must have first made some attempt to resolve the specific treatment dispute in question before the dispute will be assessed by MAS.
- 4.2** A dispute may be lodged with the MAS by either the claimant or an insurer. The claimant will generally be required to attend a medical examination, and the MAS Assessor will conduct a 'primary' assessment. Within 15 days of the medical examination the MAS Assessor is required to provide the MAS a certificate stating their decision as to the outcome of the assessment of the dispute, which includes the reasons for their decision. Either party may apply for a 'Review of a Medical Assessment' if the party can show grounds that the original assessment was incorrect in a material aspect.
- 4.3** In addition, either party to the dispute may apply for a further medical assessment if there is a deterioration of the injury or if they provide additional relevant information about the injury that may be capable of changing the outcome of the dispute. A CARS Assessor or a Court may also refer a matter that has already been assessed back to MAS for a further assessment. Such referrals for a further assessment may occur at any time and may occur more than once, even after a further assessment has already been conducted or a Review has been conducted.<sup>200</sup>
- 4.4** In 2009/10, 4,038 applications for dispute resolution were lodged with the MAS, and the Service finalised 4,104 applications.<sup>201</sup>

#### Time taken to finalise assessments and disputes

- 4.5** In its *Eighth Review Report*, the Committee examined in detail the matter of delays in assessments and disputes under the MAS system.<sup>202</sup> Stakeholders such as the Insurance

<sup>200</sup> MAA, *Medical Assessment Service*, <http://www.maa.nsw.gov.au/default.aspx?MenuID=272>, accessed 30 November 2011.

<sup>201</sup> MAA, *Annual Report 2009/10*, p 64.

Council of Australia and the NSW Bar Association noted that there was scope for improvement in the time taken to finalise assessments and disputes.<sup>203</sup>

- 4.6** In response to these concerns, the Committee recommended that the MAA conduct a study of MAS assessments and matters that took more than ten months to finalise, and report back to the Committee about the status of delays and current or future initiatives aimed at reducing delays.<sup>204</sup> The Government response to the *Eighth Review Report* expressed support for this recommendation, and advised that the MAAS was examining this matter.<sup>205</sup>
- 4.7** The Committee's *Ninth Review Report* noted that the lifecycle of MAS assessments had reduced to 93 days as of May 2008.<sup>206</sup> The MAA identified a number of factors that had contributed to this reduction, including:
- the implementation of the first stage of the MAAS Reform Agenda in May 2006, and the introduction of revised Medical Assessment Guidelines
  - reduced timeframes for MAAS administrative procedures
  - the earlier exchange of information between the parties, and in particular the earlier lodgement of MAS replies
  - improvements in the timeliness of MAS Assessors submitting their decisions to MAS.<sup>207</sup>
- 4.8** The MAA's *Annual Report 2007/08* advised that the average MAS application lifecycle in 2007/08 was 97 days.<sup>208</sup> It also noted that reforms introduced in October 2008 would assist to reduce the amount of time taken to finalise disputes by encouraging the early exchange of information between parties to facilitate quicker settlement.<sup>209</sup>
- 4.9** The Committee's *Tenth Review Report* noted that 90 per cent of MAS disputes (excluding reviews) were finalised within six months of lodgement. This was an increase from 31 per cent in 2002/03.<sup>210</sup>
- 4.10** In the current Review the MAA was asked why the median lifecycle for finalising medical disputes had risen to 101 working days in 2009/10, as reported in the Authority's Annual Report, from a record low of 78 days in 2007/08 (the record high was 177 days in 2002/03). The MAA advised that it continues to monitor the timeliness of finalisations of medical disputes, and that the increase in the number of days taken to finalise a medical assessment may be attributed to a number of factors:
- Multiple physical assessments needed – there is a trend towards an increasing proportion of medical disputes involving multiple injuries listed for assessments

<sup>202</sup> Standing Committee on Law and Justice, Report 34, pp 42-45.

<sup>203</sup> Standing Committee on Law and Justice, Report 34, pp 42-45.

<sup>204</sup> Standing Committee on Law and Justice, Report 34, p 45.

<sup>205</sup> Government Response to the Standing Committee on Law and Justice, Report 34, p 2.

<sup>206</sup> Standing Committee on Law and Justice, Report 36, pp 29-30.

<sup>207</sup> Standing Committee on Law and Justice, Report 36, p 30.

<sup>208</sup> MAA, *Annual Report 2007/08*, p 19.

<sup>209</sup> MAA, *Annual Report 2007/08*, p 19.

<sup>210</sup> MAA, *Annual Report 2009/10*, p 91.

- Care disputes requiring multiple assessments – an increasing number of treatment and care disputes require multiple assessments to assess clinical need and the extent of the need
- Acquired brain injury claims – these claims require multiple assessment appointments in both neurological and psychiatric which cannot be scheduled concurrently
- Clarification of issues in dispute to reduce the need for multiple further assessments – occasionally the MAS staff members clarify or seek additional information from the parties to avoid any irrelevant requests or rejection due to allocation to wrong medical specialist
- Medical assessors, when conducting an assessment, are more proactive in requesting additional information from the parties if in their opinion it is required to complete the assessment.<sup>211</sup>

**4.11** Ms de Paoli, from the Law Society of NSW, told the Committee that in her experience, the MAS could take up to six months to arrange appointments with medical assessors:

We prepared an application for the Medical Assessment Service back in February for a person's injuries to be assessed at greater than 10 per cent and just last week we received details of that appointment. So we are looking at six to seven months just waiting for medical appointments to be arranged by the Medical Assessment Service. It is nothing that either the insurer or we could do; it is purely bureaucracy and delays within the Medical Assessment Service itself.

... We are waiting usually four to five months for medical assessment to be arranged. Then obviously the appointment is a month or so later. So that entire process can take at least six months.<sup>212</sup>

### **Committee comment**

**4.12** The Committee is concerned that the median lifecycle for finalising a MAS dispute has increased some thirty per cent since 2007/08. In particular, it is disturbing to hear the Law Society of NSW report to the Committee that it takes an average of four to five months for the MAS to organise medical assessment appointments. This delay unnecessarily prolongs the resolution of disputes. The Committee acknowledges that the MAA has advanced a number of factors or reasons why the median lifecycle of MAS disputes has increased. However, it is not clear to the Committee how these reasons correspond to the experience and evidence put forward by the Law Society. The Committee will therefore keep a watching brief on this issue, and will take a keen interest in the issue for its next review.

## **Access to damages for non-economic loss**

**4.13** This section of the Chapter discusses the issue of access to damages for non-economic loss, that is, pain and suffering, for a person injured in a motor accident. The section begins by

<sup>211</sup> MAA, Answers to pre-hearing questions on notice, p 14.

<sup>212</sup> Ms Danielle de Paoli, Member, Law Society Compensation Committee, Law Society of NSW, Evidence, 10 October 2011, UnT p 5.

outlining the current legislative arrangements and the findings of previous Committee Reviews. It continues with a discussion on various reforms proposed by some stakeholders.

- 4.14** Under the Motor Accident Compensation Scheme, a person injured in a motor vehicle accident is not entitled to claim for damages for non-economic loss unless the degree of their permanent impairment as a result of the injury caused by the motor accident is greater than ten per cent.<sup>213</sup> This test is referred to as the ten per cent whole person impairment (WPI) threshold. The *Motor Accident Compensation Act* also stipulates that in the assessment of impairment, physical impairment cannot be combined with any psychological injury to determine the total impairment.<sup>214</sup> The maximum amount of damages that can be awarded for non-economic loss is \$450,000.
- 4.15** The assessment of the degree of impairment is to be made in accordance with the MAA Medical Guidelines issued for that purpose. The most recent guidelines to determine impairment were issued by the MAA in 2007.<sup>215</sup> They use the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition (AMA 4 Guides) as their basis. However, the MAA guidelines have made significant changes to the AMA 4 Guides to align them with Australian clinical practice and to better suit them to the purposes of the Act.
- 4.16** The Medical Assessment Service of the MAA determines disputes between an injured person and an insurer about the degree of permanent impairment of injuries. The MAA *Annual Report* notes that: 'Most medical disputes relate to the level of whole person impairment. This is expected given the significance of this assessment in determining whether or not a claimant is entitled to make a claim for damages for non-economic loss.'<sup>216</sup>
- 4.17** The ten per cent WPI threshold for non-economic loss was extensively examined in the Committee's *Eighth Review Report*. During the Eighth Review, some stakeholders criticised the threshold as being unfair because it excludes a significant proportion of those injured in motor accidents from receiving compensation for non-economic loss. Stakeholders were also concerned that the score for assessment of psychiatric injury could not be combined with the score for the assessment of physical impairment when determining the degree of WPI.<sup>217</sup> The Committee noted these concerns but did not comment on the appropriateness of the threshold, preferring instead to focus on identifying measures to improve the consistency of WPI assessments.<sup>218</sup>
- 4.18** The Committee also examined the threshold for WPI assessment in the *Ninth Review Report* and the *Tenth Review Report*. In the *Tenth Review Report*, the Committee recommended that the next review of the MAA and MAC by the Committee include a focus on the issue of the ten per cent whole person impairment threshold for non-economic loss.<sup>219</sup>

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<sup>213</sup> s. 131, *Motor Vehicles Compensation Act 1999*.

<sup>214</sup> Section 133 of the *Motor Accidents Compensation Act 1999*.

<sup>215</sup> Motor Accidents Authority, *Permanent Impairment Guidelines. Guidelines for the assessment of permanent impairment of a person injured as a result of a motor vehicle accident*. 1 October 2007.

<sup>216</sup> MAA, Annual Report 2009/10, p 65.

<sup>217</sup> Standing Committee on Law and Justice, Report 34, p 38.

<sup>218</sup> Standing Committee on Law and Justice, Report 34, pp 38-39.

<sup>219</sup> Standing Committee on Law and Justice, Report 43, p 83.

### Criticisms of the ten per cent WPI threshold

**4.19** This section looks at the concerns expressed by stakeholders during the current review of the ten per cent WPI threshold.

**4.20** The Australian Lawyers Alliance argued that the ten per cent WPI threshold is manifestly unjust, and noted that even if a person suffered multiple fractures in a motor vehicle accident and had been in severe pain, if the person eventually makes a good recovery there is no compensation for pain and suffering:

It means that if you have fractures of both arms and both legs, are off work for six months, require total care for most of that period and have been in severe pain, because you make a generally good recovery, you get nothing for pain and suffering. The impairment is not permanent. If the prognosis is five years of severe depression, because this is not permanent, you get nothing.<sup>220</sup>

**4.21** The Alliance was also critical of the fact that physical and psychological impairment could not be combined to determine if a claimant was over the ten per cent threshold:

...If you have a 10% permanent physical impairment and a 10% permanent psychological impairment, because the two cannot be aggregated together and neither exceeds 10%, you get nothing for pain and suffering. If pain in an arm or a leg (or both) is so severe that you do not use it but you have not lost the physical and theoretical capacity to use it, your permanent impairment is assessed at nothing.<sup>221</sup>

**4.22** The Committee asked the MAA why the legislation prohibited aggregating physical and psychological impairment to assess entitlement to non-economic loss. The MAA replied that the objective of the legislation is to ensure that compensation is directed primarily to those who have suffered permanent and severe injuries, and that allowing the two types of impairment to be assessed together may result in those less severely injured to be able to access compensation:

It is important to remember the measurement is not of the injury itself, but rather the permanent impairment that results from the injury. One of the stated legislative objectives, and the purpose of the 10% impairment threshold, is to ensure that compensation is directed primarily to those who have suffered permanent and severe injuries.

If one could aggregate physical and psychological impairment, the result could be that someone with a relatively minor physical injury and a relatively minor psychological injury could be entitled to non-economic loss.<sup>222</sup>

**4.23** The Committee received a submission from a person who suffered a back injury in a motor vehicle accident and was assessed at a whole person impairment of seven per cent. The person reported that, whilst his arms and legs are fine, the back injury has prevented him from engaging in day to day activities such as walking and carrying bags. The person argued that there was no common sense in the WPI guidelines regarding back injury:

<sup>220</sup> Submission 5, Australian Lawyers Alliance, p 3.

<sup>221</sup> Submission 5, Australian Lawyers Alliance, p 3.

<sup>222</sup> MAA, Answers to supplementary questions, p 5.

My back and neck injuries which have been assessed as permanent and stable result in a Whole Person Injury of 7% - according to the independent MAS doctor. I know the tables are devised by the Americans and I understand the reasoning behind the tables. Unfortunately, like many things now days, very little common sense goes into academic matters. My back and neck injury prevent me from doing almost all activities I used to do. My arms are fine and uninjured BUT I can't lift anything greater than about 6 kg because of the compression this causes on my spine which increases the pain to excruciating levels even with the pain medications (Tramadol and Oxicontin) I am taking. My legs are intact and uninjured; yet, I can no longer run and cannot walk far due to the impact these activities cause by again increasing the pain. I'd rather I'd lost my arm in the accident than have suffered the injury to my back I do have -it results in a higher WPI and is less debilitating. Where is the common sense in that?<sup>223</sup>

- 4.24** As discussed in Chapter 2, the MAA funds research projects that are looking at health outcomes of people involved in motor accidents. The MAA noted that preliminary results show that Scheme participants are suffering from high pain levels, limitation of activities and absence from work following a motor accident:

Preliminary results have shown that injured people in the Scheme report high pain levels, significant limitation of activities and absence from work in the first three months following a motor vehicle crash. These results provide the first snapshot of people with mild to moderate injuries in the Scheme.<sup>224</sup>

- 4.25** The NSW Bar Association argued that the ten per cent whole person impairment threshold was inequitable, and provided some case studies to illustrate its point. The Bar Association note that whilst individuals in the case studies have been de-identified, 'These are real people with real injuries and very legitimate grievances about the operation of the 10% WPI threshold, the AMA IV guides and the MAA Medical Assessment Guidelines.'<sup>225</sup> One of the case studies provided by the Bar Association is reproduced below:

#### **Case study Mr KF and his fractured leg**

Mr KF was knocked off his bicycle by a car in 2007. His injuries included a bi-malleolar fracture dislocation of the left ankle and a fracture to his left tibia and fibula. It took four rounds of fusion surgery over a lengthy period to get the ankle re-set in an anatomically correct alignment. The MAS assessor accepted that Mr KF continued to have pain and loss of function in his left ankle and restriction in mobility. He was restricted with walking (maximum distance of about 500 metres). He had been unable to return to riding a bicycle (which was particularly punishing - he did not hold a driver's licence). He needed to wear special boots with two pairs of socks to provide ankle support.

The MAS assessor observed that Mr KF had minimal movement in his left ankle, was unable to get on his heels or toes or perform a squat and had lost the spring off his left foot when ambulating.

The ankle fusion was properly assessed in accordance with AMA IV (page 80) and Table 3.1 on page 16 of the MAA Permanent Impairment Guidelines. An ankle fusion to optimum position attracts 4% WPI.

Mr KF's injury did not even get him halfway to the 10% WPI threshold. Members of the Standing

<sup>223</sup> Submission 8, Partially confidential, p 5.

<sup>224</sup> MAA, Answers to pre-hearing questions on notice, p 6.

<sup>225</sup> Submission 10, NSW Bar Association, p 7.

Committee are invited to consider how they would feel if following a motor vehicle accident, they could never again jog or run, could no longer squat, could no longer walk more than 500 metres, could no longer ride a bicycle and were told they got nowhere near the 10% WPI threshold such as to provide compensation for these life altering restrictions.

Members of the Standing Committee are encouraged to ask:

- *Did Mr KF really suffer a modest injury that is unworthy of compensation for pain and suffering?*
- *Should Mr KF and others who suffer similar injuries such as his go uncompensated for their pain and suffering so that green slips can be a few dollars cheaper?*

It is noteworthy that in this case, it took four operations (with the associated months of recovery after each operation) to get Mr KF's foot aligned in an anatomically correct position. Under the MAA Guidelines, it doesn't matter whether Mr. KF had four operations or forty - there is no allowance in the calculation of WPI for the number of surgical procedures endured in arriving at the final surgical result.

Submission 10, NSW Bar Association, p 7.

- 4.26** Ms De Paoli of the Law Society told the Committee that it was unjust that seriously injured people, who fall between the seven and ten per cent impairment threshold, cannot access non-economic loss damages:

There are people out there who are falling between that seven to ten per cent threshold who are seriously injured, who are not able to return to their pre-injury employment, whose lives are affected and their lives are in serious upheaval, and they are not entitled to anything for this particular head of damage. To receive zero dollars from a motor accident perspective as it stands at the moment is, in my view, completely unjust, and it is difficult to explain to somebody who is out there paying their premiums that they are just not entitled to anything for their pain and suffering because they do not get over this arbitrary threshold.<sup>226</sup>

### **Proposals for reform**

- 4.27** This section reviews proposals for reform to the Scheme as put forward by legal groups who were critical of the ten per cent WPI threshold for non-economic loss. Proposals for reform included lowering the WPI threshold, permitting the aggregation of physical and psychological injuries and replacing the ten per cent WPI threshold with alternatives, such as the threshold in section 16 of the *Civil Liability Act 2002*. In addition the legal groups referred to the deficiencies of the Motor Accidents Scheme, and in particular the limited access to damages for non-economic loss, in support of their proposal for a single system of compensation in NSW.

#### ***A single compensation system***

- 4.28** During this Review, the Australian Lawyers Alliance, the Bar Association and the Law Society of NSW all argued that there should be a single compensation system in NSW.

<sup>226</sup> Ms Danielle de Paoli, Member, Law Society Compensation Committee, Law Society of NSW, Evidence, 10 October 2011, UnT p 3.

- 4.29** The Australian Lawyers Alliance explained that there are four major compensation systems in the State, as follows:
- Public liability – claims governed by the *Civil Liability Act 2002*
  - Motor vehicle accidents – claims governed by the *Motor Accidents Compensation Act 1990*
  - Work accidents – claims governed by the *Workers Compensation Act 1987*
  - Intentional acts / assaults – claims excluded from the *Civil Liability Act* and the common law still applies.<sup>227</sup>
- 4.30** The Alliance noted that for each of these types of claims there are 'different thresholds, different methods of assessment of damages for pain and suffering, different heads of damages available and different caps on the amount which can be awarded.'<sup>228</sup>
- 4.31** The Australian Lawyers Alliance also made reference to the work of the Ipp Committee, which in July 2002 was tasked by the then Australian Minister for Revenue and Assistant Treasurer Senator, the Hon Helen Coonan, to review the law of negligence. The review was led by the Hon David Ipp.<sup>229</sup>
- 4.32** The Ipp Review found that the law relating to compensation for personal injury and death is different in every State and Territory of Australia. Not only are there significant differences between jurisdictions, but also within jurisdictions there are different regimes of assessment of damages for different classes of personal injury claims. Typically, there will be separate statutes dealing with motor accidents, civil liability generally, and workers compensation.<sup>230</sup>
- 4.33** The Ipp Review concluded that there is no principled reason why a person should receive different injury compensation damages depending on how they were injured:
- The differences between the law applicable in the various jurisdictions also give rise to perceptions of injustice. There is no principled reason, for example, why a person should receive less damages for an injury sustained in a motor accident than for one suffered while on holiday at the beach. There is also no principled reason why there should be large differences in damages awards from one jurisdiction to another.<sup>231</sup>
- 4.34** The Ipp Review subsequently recommended that a single statute, proposed as the Civil Liability (Personal Injuries and Death) Act be enacted in each jurisdiction. The proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.<sup>232</sup>

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<sup>227</sup> Submission 5, Australian Lawyers Alliance, p 2.

<sup>228</sup> Submission 5, Australian Lawyers Alliance, p 2.

<sup>229</sup> Commonwealth of Australia, *Review of the Law of Negligence, Final Report*. September 2002.

<sup>230</sup> Commonwealth of Australia, *Review of the Law of Negligence, Final Report*. September 2002, p 183.

<sup>231</sup> Commonwealth of Australia, *Review of the Law of Negligence, Final Report*. September 2002, p 184.

<sup>232</sup> Commonwealth of Australia, *Review of the Law of Negligence, Final Report*. September 2002, p 36.

### Committee comment

**4.35** The Committee notes the arguments presented that there should be one single system of compensation in operation in NSW. Indeed, the Committee accepts the premise that there is no principled reason why a person should receive different injury compensation damages depending on how they were injured. However, the Committee also notes that this Review is into how the Motor Accidents Authority has exercised its functions under the *Motor Accidents Compensation Act 1999*. As such, it is not within the terms of reference of the Committee to comment and make recommendations on other injury compensation schemes.

#### *A new threshold test - Civil Liability Act, s.16*

**4.36** In its submission to the Committee's Review, the Australian Lawyers Alliance proposed that, regardless of whether changes are made to introduce a single compensation system in NSW, the threshold test to access non-economic damages under the Motor Accidents Scheme should be the test contained in the *Civil Liability Act 2002*. In this Act, the threshold for entitlement to compensation for pain and suffering is 15 per cent of a 'most extreme case'.<sup>233</sup>

**4.37** Similarly, the Bar Association recommended that an independent inquiry be established to review the basis of the Medical Assessment Service system, and whether it should be replaced by provisions in the *Civil Liability Act* to determine damages for pain and suffering.<sup>234</sup>

**4.38** Under s.16 of the *Civil Liability Act 2002*, damages for non-economic loss are payable as follows:

- (1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.
- (2) The maximum amount of damages that may be awarded for non-economic loss is \$350,000, but the maximum amount is to be awarded only in a most extreme case.
- (3) If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, the damages for non-economic loss are to be determined in accordance with the following Table:

<sup>233</sup> Submission 5, Australian Lawyers Alliance, p 5.

<sup>234</sup> Submission 10, NSW Bar Association, p 15.

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)
15%	1%
16%	1.5%
17%	2%
18%	2.5%
19%	3%
20%	3.5%
21%	4%
22%	4.5%
23%	5%
24%	5.5%
25%	6.5%
26%	8%
27%	10%
28%	14%
29%	18%
30%	23%
31%	26%
32%	30%
33%	33%
34-100%	34-100% respectively

- (4) An amount determined in accordance with subsection (3) is to be rounded to the nearest \$500.

- 4.39** It is noted that a judge generally arrives at the percentage of ‘a most extreme case’ by considering the most extreme result possible given the plaintiff’s injuries. In many cases quadriplegia or gross traumatic brain injury will constitute the most extreme case.
- 4.40** The \$350,000 cap on non-economic loss damages under the *Civil Liability Act 2002* is indexed annually, and increased to \$520,000 from 1 October 2011.<sup>235</sup> This compares to a maximum amount of damages for non-economic loss under the *Motor Accidents Compensation Act 1999* of \$450,000 as from 1 October 2011.<sup>236</sup>
- 4.41** Ms de Paoli of the Law Society expressed support for using s.16 of the *Civil Liability Act* as a tool to determine compensation for pain and suffering from a motor accident, and noted that using this threshold will broaden the number of people who will be able to successfully claim for pain and suffering:

<sup>235</sup> See Civil Liability (Non-economic loss) Order 2011, <http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+606+2010+cd+0+N>, accessed 22 November 2011.

<sup>236</sup> See Motor Accidents (Determination of non-economic loss) Order 2011, <http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+488+2009+cd+0+N>, accessed 22 November 2011.

...using this particular threshold and it is actually spreading it out a little bit more broadly to more claimants so they are able to receive something for their pain and suffering as opposed to the vast majority not receiving anything.<sup>237</sup>

- 4.42** The Law Society argued that such an approach would make the Scheme more cost efficient and fairer. It would mean that the ten per cent whole person impairment threshold and the Medical Assessment Service could be abolished, and CARS assessors used to make the assessments under the Civil Liability regime:

The abolition of the 10% whole person impairment threshold and MAS would represent a significant cost saving and remove the current inefficiencies in its administration. Its replacement by a 15% of "a most extreme case" threshold would make the scheme fairer for the injured as more claimants would be entitled to damages for non-economic loss. CARS assessors are well experienced and more than capable of making assessments under the proposed 15% of "a most extreme case" threshold. Overall, such a threshold would render the scheme more effective, fair and efficient whilst maintaining its affordability through the dismantling of MAS and the associated administrative costs.<sup>238</sup>

- 4.43** However, the Committee did receive some conflicting views on this issue. In their submission, an informal group of seven doctors noted that the whole person impairment percentage threshold provides an objective evaluation, compared to the regime of the *Civil Liability Act*:

The whole person impairment percentage system based on the American Medical Association's Guides to the Evaluation of Permanent Impairment has ensured that there is objectivity in the evaluation of the long term effects of the injuries sustained in the motor vehicle accident. This system is far superior to the use of a threshold of a percentage of "a most extreme case" which has no objectivity, or scientific validity, and is a "pick a number" system that is not fair or equitable to injured people.<sup>239</sup>

- 4.44** Mr Nicholls of the MAA informed the Committee that the threshold in s.16 of the *Civil Liability Act* was used in relation to compensation for non-economic loss for motor accident injuries before reforms to the Scheme in 1999. Using that as a guide, approximately 40 per cent of claims were able to access the threshold under the *Civil Liability Act*. Mr Nicholls also reported that the ramification of re-introducing the Civil Liability threshold was last estimated in 2005, when it was concluded that it would result in an increase in the CTP premium of \$116.<sup>240</sup>

- 4.45** Mr Nicholls also explained that if the threshold for access to damages for non-economic loss was changed, this would likely increase the liability that an insurer would face, and have ramifications for the amount of capital that an insurer would need:

...if the Parliament were to decide to return to the civil liability type threshold, that would likely have the effect of increasing the amount of liability that an insurer would face. So when they make a filing with us they would apply a larger figure for the capital they would need to hold to pay for that particular head of damage. It does not follow then that the insurer would reduce some other element of their cost structure.

<sup>237</sup> Ms de Paoli, Evidence, 10 October 2011, p 4.

<sup>238</sup> Submission 11, Law Society of NSW, p 2.

<sup>239</sup> Submission 15, Messrs Cameron, Burke, Fearnside, Johnson, Burns, Dowda and Noll, p 1.

<sup>240</sup> Mr Nicholls, Evidence, 17 October 2011, p 39.

Profit would be one of them but there might be acquisition expenses or claims expenses to offset that payment unless there was a change in the regulatory model.<sup>241</sup>

### ***Proposals to reform the WPI threshold***

- 4.46 As noted in the previous section, the preferred option of the legal groups who contributed to the Review was to abolish the ten per cent WPI threshold as a tool for determining access to damages for non-economic loss and replace it with the test in the *Civil Liability Act*. Whilst the Bar Association ‘recommends against trying to patch up an unfair system’<sup>242</sup>, the Law Society and the Australian Lawyers Alliance provided to the Committee a ‘fall back’ option of proposals for reform if the WPI threshold was retained.
- 4.47 For instance, the Law Society concluded that if the WPI is to be retained as a method for determining a threshold for non-economic loss, then it ought to be reviewed for the purpose of setting a new lower threshold which is affordable, effective, fair and efficient.<sup>243</sup>
- 4.48 The Australian Lawyers Alliance submitted that if the WPI assessment is to be retained as the threshold of assessing entitlement to non-economic loss, changes should be made to the Act including allowing psychological injuries to be combined with physical injuries, and lowering the ten per cent threshold:
- a) Repeal s.133(3) of the Act so that impairment from psychological injuries can be combined with impairment from physical injuries.
  - b) Amend s.131 of the Act to lower the threshold for entitlements to non-economic loss. The ALA submits that a study should be conducted into the issue of whole person impairment before the threshold is revised, so that an appropriate and more just threshold can be set.<sup>244</sup>

### **Committee comment**

- 4.49 The Committee considered issues surrounding the WPI assessment in detail in its *Eighth Review Report*, including the fairness of the ten per cent threshold. The Committee concluded that as the threshold was a matter of policy for the Government, the Committee would focus on the operation of the MAS in relation to the threshold rather than the threshold itself.
- 4.50 However, the *Ninth Review Report* and the *Tenth Review Report* again reported stakeholder dissatisfaction with the ten per cent threshold, and this was confirmed once again during the current Review. Access to compensation for non-economic loss is clearly an important issue for a Scheme that is designed to fairly compensate those injured in motor vehicle accidents, and the Committee considers that it is the role of the MAA to provide advice to the Minister on Scheme issues.
- 4.51 The Committee acknowledges that the ten per cent whole person impairment threshold was introduced to help contain costs and maintain CTP premium affordability. However, the Committee is concerned that the current approach does not strike the right balance between

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<sup>241</sup> Mr Nicholls, Evidence, 17 October 2011, p 40.

<sup>242</sup> Submission 10, Bar Association of NSW, p 15.

<sup>243</sup> Submission 11, Law Society of NSW, p 3.

<sup>244</sup> Submission 5, Australian Lawyers Alliance, p 6.

Scheme efficiency and affordability and compensation for pain and suffering to those who are injured in a motor accident. The Committee is concerned that the ten per cent whole person impairment threshold has been set too high, and that people in the seven to ten per cent impairment have been seriously injured, but are not eligible for payment for non economic loss, particularly those who have suffered psychological as well as physical injuries.

**4.52** The Committee notes the proposal of the legal groups to replace the ten per cent whole person impairment threshold test to access non-economic loss with that of section 16 of the *Civil Liability Act*. While it is not clear to the Committee what the ramifications are of such a change for the Scheme as a whole, the Committee believes that this is an area worthy of further investigation.

**4.53** For these reasons, the Committee recommends that the NSW Government review the threshold for access to damages for non-economic loss under the Motor Accidents Scheme for it to achieve a better balance between Scheme efficiency and compensation. To assist this review, the Committee recommends that the Motor Accidents Authority publish a discussion paper outlining the issues. This discussion paper should include an actuarial analysis of the ramifications to the Scheme, claimants, CTP pricing and insurers of:

- changing the threshold to access non-economic damages to that of s.16 of the *Civil Liability Act*
- lowering the ten per cent whole person impairment threshold
- allowing both physical and psychological injuries to be aggregated to determine the whole person impairment threshold.

**4.54** The Authority should make this review a priority, and publish the discussion paper, invite comment and pursue any subsequent legislative amendment during 2012.

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### **Recommendation 10**

That the New South Wales Government review the threshold for access to damages for non-economic loss under the Motor Accidents Scheme in order to achieve a better balance between Scheme efficiency and compensation.

That the Motor Accidents Authority publish a discussion paper outlining the issues relating to access to non-economic loss damages. This discussion paper should include an actuarial analysis of the ramifications to the Scheme, claimants, CTP pricing and insurers of:

- changing the threshold to access non-economic damages to that of s.16 of the *Civil Liability Act*
- lowering the ten per cent whole person impairment threshold; and
- allowing both physical and psychological injuries to be aggregated to determine the whole person impairment threshold.

The Authority should make this review a priority, and publish the discussion paper, invite comment and pursue any subsequent legislative amendment during 2012.

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## Application of legal concept of causation

- 4.55** Another issue raised during the current review was the ability of MAS Assessors to make assessment about causation, i.e. whether the treatment provided to an injured person relates to the injury *caused* by the motor vehicle accident. This issue was raised for the first time during the Committee's Tenth Review.
- 4.56** Under sections 58 and 61 of the *Motor Accidents Compensation Act 1999*, certificates issued by a MAS Assessor in regards to certain matters are '... conclusive evidence, and are, therefore, binding on the parties, CARS and the courts'.<sup>245</sup> These matters include:
- whether the treatment provided, or to be provided, to the injured person was or is reasonable and necessary in the circumstances
  - whether any such treatment relates to the injury caused by the motor accident
  - whether, as a result of the motor accident, the degree of permanent impairment of the injured person is greater than ten per cent.<sup>246</sup>
- 4.57** The *Tenth Review Report* looked extensively at this issue, and the reader is invited to refer to that report for background. In the Tenth Review, it was argued by the legal representative groups that medical practitioners are not trained in the legal test of causation and are, therefore, ill-equipped to assess such matters. Despite the concerns raised, the MAA suggested that it would be unsuitable for a person other than an appropriately qualified medical or health specialist to make a binding determination on treatment, causation and impairment. The MAA also highlighted that if a party to a matter believes a material error in assessment has been made, it is possible to have the decision reviewed.<sup>247</sup>
- 4.58** During the current review, the issue of legal causation was raised again by legal groups in their submissions. For example, the Law Society argued that MAS Assessors are not the appropriate persons to determine any issue of causation. Because the test of causation is largely a legal one, the Law Society argued that CARS Assessors are the best persons to make such an assessment.<sup>248</sup>
- 4.59** During evidence Ms Paoli expanded on the Law Society's submission, and explained to the Committee that doctors in the Medical Assessment Service do not understand the legal causation issues and are making the wrong decisions. She provided a case study to illustrate her point:

... the majority of Medical Assessment Service doctors are simply getting it wrong. They do not understand the legal causation issues. There are medical causation issues which I accept, but there are also complicated legal causation issues. As an example: I have a client who has fractured his leg. He has an altered gait. He has had to have surgery. That in itself is not putting him over the 10 per cent threshold. That altered gait is causing lower back injuries. Medical Assessment Service doctors are considering that that lower back injury is not related to the motor accident because he sustained a

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<sup>245</sup> Answers to pre-hearing questions on notice, MAA, p 15.

<sup>246</sup> Answers to pre-hearing questions on notice, MAA, p 15.

<sup>247</sup> Law and Justice Committee, Report No 43, October 2010, pp 85-89.

<sup>248</sup> Submission 11, Law Society of NSW, p 3.

fractured leg in the motor accident. Common sense and a legal causation test would tell you that that back injury is actually related to the motor vehicle accident but doctors are not saying that it is.<sup>249</sup>

- 4.60** The Australian Lawyers Association also argued that MAS doctors are incapable of applying the legal ideas of causation, and that the issue of causation should be resolved by a Claims Assessment Service Assessor or a Judge rather than a single doctor:

It is submitted that MAS assessors (doctors) have shown themselves so incapable of applying legal ideas of causation that the 2008 amendment making their views binding should be rescinded and the old position in which they could express an opinion but not bind a subsequent assessor be restored. The ALA submits that the issue of causation should be determined by CARS Assessors and Judges, rather than MAS Assessors. The issue of the degree of whole person impairment should be the only issue that is assessable by MAS.<sup>250</sup>

- 4.61** In contrast, the Committee also received a submission from an informal group of seven medical specialists who provide assessments and treatment to people injured in a motor vehicle accident, who argued that medical specialists should apply the principal of causation:

The current system in which causation in the Motor Accidents Insurance Scheme is determined by the medical specialist is appropriate. The medical criteria for causation are clearly stated in the American Medical Association's Guides to the Evaluation of Permanent Impairment Fourth Edition and the Motor Accidents Authority Permanent Impairment Guidelines. These are well understood by suitably trained medical specialists and injured people. Injured people accept that medical specialists should apply these principles of causation as an essential component of the permanent impairment evaluation.<sup>251</sup>

- 4.62** During the Committee's hearing the concerns of the legal fraternity were put forward to Mr Nicholls, Acting General Manager of the MAA. He acknowledged the range of views, but commented that the MAA would be concerned to see a system return to a more adversarial nature:

There are a range of views about who is best qualified in relation to these matters. Clearly, there is a strong element of medical assessment that ought to be conducted by medical professionals, but I understand that there are views on some aspects of it, such as causation, that the legal professional is better able to deal with those. However, I would be concerned by any system that returns to a more adversarial scenario where injured people are put under more pressure and stress.<sup>252</sup>

- 4.63** Mr Nicholls concluded by stating that the assessment service is working effectively, backed up by a performance management system involving training and feedback, and where necessary an assessor may not be renewed on an assessment panel:

I think the evidence shows that the current assessment service is working effectively. We have a professional panel where the members of the panel need to be

<sup>249</sup> Ms Paoli, Law Society of NSW, Evidence, 10 October 2011, p 4.

<sup>250</sup> Submission 5, Australian Lawyers Alliance, p 6.

<sup>251</sup> Submission 15, Messrs Cameron, Burke, Fearnside, Johnson, Burns, Dowda and Noll, p 1.

<sup>252</sup> Mr Nicholls, Acting General Manager, MAA, Evidence, 17 October 2011, p 35.

professionally qualified with their relevant college, and we have a performance management system. That performance management system involves training and induction at the commencement of their term as an assessor; it involves regular monitoring of the assessment performance, including providing feedback and information when we think that there might be an issue; and, indeed, in instances where we are not satisfied with the performance of a medical assessor, they may not be renewed on our assessment panel.<sup>253</sup>

### ***Committee comment***

- 4.64** The Committee notes the competing views put forward by the various stakeholder groups in relation to the issue of legal causation. The Committee also notes the comments of the MAA that the Medical Assessment Service is working effectively. The Committee considers that it did not receive enough evidence to draw a conclusion as to whether legal or medical professionals should be responsible for determining the test of legal causation. As such, the Committee considers that this issue should be referred to the Motor Accidents Council for its careful analysis and review. The MAC has a wide representation of views, and is an appropriate forum for the stakeholders to work together in an attempt to find an acceptable solution to all parties.

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### **Recommendation 11**

That the Motor Accidents Council form a sub-committee to review, analyse and recommend a course of action to the Motor Accidents Authority on the issue of legal causation.

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## **Claims Assessment and Resolution Service**

- 4.65** The Claims Assessment and Resolution Service (CARS) provides a service to resolve disputes about claims, including procedural disputes and eligibility for exemptions from assessments, as well as undertaking general assessments of claims for damages. Applications are assessed by independent claims assessors who are legal practitioners with experience in the area of personal injury law and assessment of damages.<sup>254</sup>
- 4.66** All disputed claims must go to CARS, resulting in no direct access to court. CARS will either assess the claim or find the matter exempt from, or unsuitable for, assessment and issue a certificate allowing the matter to proceed to court. The CARS procedures are intended to be flexible with an emphasis upon dealing with matters ‘on the papers’ or with a conference, rather than formal hearings.
- 4.67** If the Insurer admits liability and the Claimant accepts the CARS assessment, the assessment of the amount of damages or compensation is binding on the Insurer. If the Claimant does not accept the assessment, they may proceed to court, however, cost penalties will apply if the Claimant does not do significantly better at court.<sup>255</sup>

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<sup>253</sup> Mr Nicholls, Acting General Manager, MAA, Evidence, 17 October 2011, p 34.

<sup>254</sup> MAA, *Annual Report 2009/10*, p16.

<sup>255</sup> MAA, *Assessment at CARS, Introduction*, p 4.  
<http://www.maa.nsw.gov.au/default.aspx?MenuID=351> Accessed 2 December 2011.

### Previous reviews

- 4.68** The operation of CARS was examined extensively by the Committee in its *Ninth Review Report*.<sup>256</sup> The Committee concluded that CARS was functioning well, although several issues were identified as requiring further attention. Accordingly, the Committee made a number of recommendations to facilitate improvements in CARS, including improving access to information for relevant stakeholders and assessing trends in claim behaviours.<sup>257</sup>
- 4.69** The *Tenth Review Report* covered several issues in relation to CARS, including:
- late claims
  - super imposed inflation, and
  - availability of treatment reports.
- 4.70** Superimposed inflation was a term phrased by the Insurance Council of Australia, referring to concerns that the level of compensation awarded by CARS assessors had been increasing. The Committee subsequently recommended that a consultant's report that was commissioned by the MAA analysing the issue, which was not made available to the Committee, be publicly released. The report is now available on the MAA website.<sup>258</sup> The issue of superimposed inflation was not raised during the current review.
- 4.71** During the Tenth Review the Insurance Council also expressed concern about the availability of treatment reports for use in the assessment process. In reply the MAA advised that the issue had been addressed by reforms in October 2008 which amended the *Motor Accidents Compensation Act 1999* to allow a CARS assessor to request that a person supply documents or specified material. The Insurance Council did not raise the issue of availability of treatment reports during the current review.
- 4.72** A claim must be made within six months of the date of the motor vehicle accident. However, under s.73 of the *Motor Accidents Compensation Act 1999*, a late claim may be made if the claimant provides a 'full and satisfactory' explanation. During the Tenth Review, the MAA noted that the additional requirement to explain a late claim was to encourage the early notification of claims, and in turn the early rehabilitation of claimant's injuries and the early resolution of claims. However, the Bar Association noted that the late claims process had become a 'mess', and what constitutes a 'full and satisfactory' explanation was open to interpretation.<sup>259</sup>
- 4.73** During the Committee's Tenth Review, the MAA responded to several of the above issues by announcing that it was undertaking preliminary work to establish terms of reference and a timetable for a review of CARS processes. Hence the Committee recommended that as part of its review of CARS, the MAA review the late claims process.

<sup>256</sup> Standing Committee on Law and Justice, Report 36, pp 33-80.

<sup>257</sup> Standing Committee on Law and Justice, Report 36, pp xi-xviii. The Government response to this report may also be found on the Committee's website:  
[http://www.parliament.nsw.gov.au/lawandjustice?open&refnavid=CO3\\_1](http://www.parliament.nsw.gov.au/lawandjustice?open&refnavid=CO3_1)

<sup>258</sup> See: <http://www.maa.nsw.gov.au/default.aspx?MenuID=329> Accessed 2 December 2011.

<sup>259</sup> Law and Justice Committee, *Report 43*, p 98.

### **The current review**

**4.74** During the current review the Committee sought information on the outcomes of the CARS review. However, the MAA advised that the CARS review recommendations were being considered as part of a wider review, and hence had not been publicly released.<sup>260</sup> The MAA did not provide any further information on this wider review.

**4.75** As noted above, the issues of superimposed inflation and availability of treatment reports were not raised during the Eleventh Review. However, the issue of late claims was again raised as an issue in submissions from the legal groups, and is discussed in the next section.

### ***Late claims***

**4.76** The Australian Lawyers Alliance argued that the requirement for claimants to provide a full and satisfactory explanation for the delay in lodging a claim has become 'an overwhelmingly difficult and time-consuming exercise'.<sup>261</sup> The Alliance argued that it was unconscionable that insurers could be able to deny claims altogether merely due to delay in lodgement.

**4.77** Mr Stone of the Bar Association of NSW accepted that early claim notification is beneficial, but explained that the late claims process is a costly and time consuming exercise:

I have seen insurers put in 10 pages of written submissions arguing why an explanation that is four months late is not full and satisfactory. It absorbs vast amounts of costs, it absorbs vast amounts of energy and it does not work. We accept there has to be some penalty imposed on people who bring their claim late, for the reason that early claims are good. We accept that too. Early notification leads to early treatment and better health outcomes.<sup>262</sup>

**4.78** The Insurance Council of Australia also argued that compliance with time limits allows injured persons to have early access to treatment. The Council noted that the benefits of early notification extend to access to accident witnesses and more certainty in setting premiums. The Insurance Council also stated that industry data indicates that some 16 per cent of claims (apart from workers compensation recovery claims) are lodged after the six month time limit.<sup>263</sup>

**4.79** The MAA estimated that around 20 per cent of claims are made late, and that most of them are not disputed, which means that the insurer accepts the person's explanation of why a claim is late. However, Ms Freeman, Deputy General Manager of the MAA, advised that 215 late claim disputes was lodged with CARS in 2010-11, and that the number of late claim disputes has risen over the last two years:

215 late claim disputes were lodged in 2010-11 and that is where the insurer does not accept the claimant's explanation for to why it is late and they then ask for an

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<sup>260</sup> MAA, Answers to pre-hearing questions on notice, p 15.

<sup>261</sup> Submission 5, Australian Lawyers Alliance, p 8.

<sup>262</sup> Mr Stone, Bar Association of NSW, Evidence, 10 October 2011, p 19.

<sup>263</sup> Insurance Council of Australia, Answers to questions on notice taken during evidence, 10 October 2011.

assessment as to whether the claim can be made. That has increased over the last two years. There was 177 the year before. It has been increasing over two years.<sup>264</sup>

**4.80** Ms Freeman also advised the Committee that of the 215 late claim disputes, in only 12 cases was it determined that the claim could not be made. Hence the vast majority of cases are being allowed to proceed.<sup>265</sup>

**4.81** Mr Nicholls concluded that with these statistics, the MAA agreed with the Bar Association that reform of the late claims process is required:

I think given those statistics, we agree with the Bar Association that is something we need to look at because there is a large number of people who, when a dispute is raised, in fact are deemed to have had reasonable grounds.<sup>266</sup>

**4.82** Mr Nicholls also advised the Committee that late claims was a key issue that the CARS review addressed, and that whilst a response to that review has not been released yet, it was something that the MAA has agreed it needs to look at:

It was a key issue that the CARS review addressed. It was an explicit part of the terms of reference. Although the review has not finally gone through all the processes, I can assure the Committee that late claims was certainly an area that was looked at and I reiterate my answer to the Committee that I agree that it is something we need to look at.<sup>267</sup>

### Committee comment

**4.83** The Committee understands that a claim lodged as early as possible is beneficial for all parties to the Scheme. The Committee notes that the vast majority of late claims are accepted by insurers, and agrees with the Bar Association that the current late claims process needs to be simplified. The Committee acknowledges that the issue of late claims was part of the CARS review, and that the MAA has advised that it is looking at the issue and developing an appropriate response. The Committee looks forward to assessing this response at its next review.

### Section 89A settlement conferences

**4.84** Section 89A of the *Motor Accidents Compensation Act 1999* was introduced in 2008, and provides for a compulsory settlement conference between the parties before proceedings to CARS. The MAA noted that one of the key objectives of the Scheme is to ensure that injured people receive early compensation for their injuries, and that the amendments introduced in 2008 were designed to improve opportunities for the early resolution of a claim:

<sup>264</sup> Ms Susan Freeman, Acting Deputy General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 44.

<sup>265</sup> Ms Susan Freeman, Acting Deputy General Manager, Motor Accidents Authority, Evidence, 17 October 2011, p 44.

<sup>266</sup> Mr Nicholls, MAA, Evidence, 17 October 2011, p 44.

<sup>267</sup> Mr Nicholls, MAA, Evidence, 17 October 2011, p 44.

One of the key objectives of the motor accidents Scheme is to ensure that injured people receive early and appropriate compensation for their injuries. Participation in compulsory settlement conferences formed part of a package of Scheme reforms introduced on 1 October 2008 which were developed in consultation with Authority's key stakeholder groups. The reforms introduced a number of process changes to the Authority's dispute resolution services in order to enhance transparency, improve opportunities for the early resolution of motor accident claims and improve scheme efficiency.<sup>268</sup>

**4.85** However, the Bar Association submitted to the Committee that complying with Section 89A of the Act has caused considerable expense for the parties, and that the insurers are taking technical points in almost every case. The Association argued that the result is that the requirements of the Act are difficult to comply with at reasonable cost.<sup>269</sup>

**4.86** Mr Stone of the Bar Association told the Committee that both claimant and insurer had to have a fully prepared case for a section 89A conference, and that it had become so cumbersome that parties are now having a 'pre s 89A conference'.

It is a massive amount of bureaucracy wrapped around what used to be as simple as, "Let's get together and talk settlement." It is so complex that you now have people holding pre-section 89A settlement conferences because you want to try to settle it before you have to have all the work with the section 89A conference.<sup>270</sup>

**4.87** The Insurance Council of Australia commented on these concerns by stating that it supports the use of settlement conferences and believes that they will reduce unnecessary litigation costs and facilitate settlement of claims in a timely manner. The Council noted:

We submit the early exchange of relevant information by the parties also encourages early resolution of claims. Our members' early experience with the regime indicates a significant increase in settlements prior to the holding of a conference. In this regard we submit that the objectives of the changes appear to be met.<sup>271</sup>

**4.88** Mr Nicholls of the MAA agreed that parties are in fact holding 'pre s.89A settlement conferences', but noted that an informal settlement process before a formal settlement process should be encouraged:

Based on advice that I am receiving from stakeholders, I believe that it is the case, that people in the ordinary course of settling a motor accident matter will have pre 89A discussions and indeed before the 89A provisions occurred, also had discussions prior to moving into the formal processes. I think the fact that there would be informal processes to aim to settle a matter before it moves into a formal process is something that you would expect and indeed would encourage in the scheme, to ensure you can move quickly to a settlement.<sup>272</sup>

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<sup>268</sup> MAA, Answers to pre-hearing questions on notice, p 21.

<sup>269</sup> Submission 10, Bar Association of NSW, p 18.

<sup>270</sup> Mr Stone, Bar Association of NSW, Evidence, 10 October 2011, p 16.

<sup>271</sup> Insurance Council of Australia, Answers to questions on notice taking during hearing 10 October 2011.

<sup>272</sup> Mr Nicholls, MAA, Evidence, 17 October 2011, p 43.

- 4.89 Mr Nicholls stated that perhaps there is more formality in the s.89A conference settlement than is required, and is happy to consider the views of stakeholders. He also noted that the CARS Review did consider the issue of pre-settlement conferences. However, Mr Nicholls concluded that the MAA would be concerned if parties were attending a settlement conference ill-prepared:

Potentially there is greater formality than needs to be in the 89A settlement conferences and that is something I am happy to look at. The purpose of it is to get to a point of early settlement of matters before it needs to go into the more formal processes. That was the intent of 89A and I am happy to take on board any views of stakeholders about ways that we can improve that process.

Part of the work of our CARS review, which is still going through an internal process of review, it is a significant review, does indeed touch on the matter of 89A settlements. What I would say, however, is that I am equally concerned if people who are attending settlements are doing so ill-prepared and I would expect that people who are going to settlement conferences, whether that is on the insurance side or on the claimant's side should nonetheless be across their briefs and be prepared for those matters, as they would if they were moving straight into a CARS assessment or straight into a court process.<sup>273</sup>

#### **Committee comment**

- 4.90 The Committee supports the rationale for encouraging the settlement of claims before the more formal processes such as a CARS determination or court case. However, we are somewhat concerned to hear that parties are resorting to “pre-s89A settlement conferences” to avoid the onerous burden of the formal ‘informal settlement’ conference.
- 4.91 The Committee acknowledges that the MAA looked at the issue of s.89A conferences as part of the CARS Review, but that as yet there have been no published outcomes of that Review. The Committee notes the preparedness of Mr Nicholls to look into the impact of section 89A settlement conferences and the concerns of the Bar Association. The Committee therefore recommends that the MAA meet with the Bar Association and other stakeholders as soon as practicable with a view to resolving the issue.

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#### **Recommendation 12**

That the Motor Accidents Authority meet with the New South Wales Bar Association and other stakeholders as soon as practicable with a view to finding a solution to the issue of pre-settlement conferences under section 89A of the *Motor Accidents Compensation Act 1999*.

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<sup>273</sup> Mr Nicholls, MAA, Evidence, 17 October 2011, p 43.



## Appendix 1 Submissions

No	Author
1	Carers NSW
2	Motorcycle Council of New South Wales Incorporated
3	Suncorp
4A	Australian Physiotherapy Association NSW
5	Australian Lawyers Alliance
6	Youthsafe
7	Insurance Council of Australia Limited
8	Name suppressed
9	National Disability Services NSW
10	NSW Bar Association
11	Law Society of New South Wales
12	Injury Management I.Q. Pty Ltd
13	Confidential
14	Confidential
15	Messrs Cameron, Burke, Fearnside, Johnson, Burns, Dowda and Noll
16	Mr Richard Talbot

## Appendix 2 Witnesses

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
Monday 10 October 2011 Macquarie Room, Parliament House	Ms Danielle De Paoli	Member, Law Society Injury Compensation Committee Law Society of NSW
	Mr Alastair McConnachie	Deputy Executive Director NSW Bar Association
	Mr Andrew Stone	Member, Common Law committee and Motor Accidents Council, NSW Bar Association
	Ms Jnana Gumbert	NSW Branch President, Australian Lawyers Alliance
	Dr Andrew Morrison SC	Member, Common Law Committee and Motor Accidents Council
	Ms Mary Maini	Chair, CTP Claims Managers Committee, Insurance Council of Australia
	Mr Tony Mobbs	Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia
	Mr Christopher Burns	Membership and Liaison Officer, Motorcycle Council of NSW
	Mr Guy Stanford	Advisor, Motorcycle Council of NSW
	Mr Gary Rolls	President, NSW Branch, Australian Physiotherapy Association
	Mr Tamer Sabet	Vice-President, NSW Branch, Australian Physiotherapy Association
	Mr Peter Magner	NSW Branch Councillor, Australian Physiotherapy Association
	Mr Chris Winston	NSW Branch Manager, Australian Physiotherapy Association
	Ms Paula Johnson	Senior Policy Officer, Australian Physiotherapy Association
Ms Fiona Davies	Chief Executive Officer, Australian Medical Association (NSW) Ltd	
Ms Sarah Dahlenburg	Director, Australian Medical Association (NSW) Ltd	
Monday 17 October 2011 Macquarie Room, Parliament House	Mr Andrew Nicholls	Acting General Manager, MAA & MAC
	Ms Susan Freeman	Acting Deputy General Manager, MAA & MAC
	Ms Frances O'Connor	Director, Injury Management IQ

## Appendix 3 Tabled documents

### Monday 10 October 2011

#### Public Hearing, Macquarie Room, Parliament House

1. Answers to pre-hearing questions, *tendered by Mr Andrew Stone, Member Common Law Committee and Motor Accidents Council.*
2. Document, 'Differences between CTP Insurance Statistics and Crash Statistics', *tendered by Mr G Stanford, Advisor, Motorcycle Council of NSW.*
3. Document, 'Traffic crash collection data', *tendered by Mr Chris Burns, Member ship and Liaison Officer, Motorcycle Council of NSW.*

### Monday 17 October 2011

#### Public Hearing, Macquarie Room, Parliament House

1. PowerPoint presentation, 'A fresh approach to an old problem', *tendered by Ms Frances O'Connor, Director, Injury Management IQ.*
2. Document, 'Motor Accidents Council forward program', *tendered by Mr Andrew Nicholls, Acting General Manager, MAA and MAC.*
3. Document, 'Motor Accidents Council Membership', *tendered by Mr Andrew Nicholls, Acting General Manager, MAA and MAC.*
4. Correspondence Taylor Fry, 'Hindsight estimates of insurers' profits referred to in submissions to the Inquiry', *tendered by Mr Andrew Nicholls, Acting General Manager, MAA and MAC.*

## **Appendix 4 Answers to questions on notice**

The Committee received answers to questions on notice from:

Australian Lawyers Alliance

Australian Medical Association

Australian Physiotherapy Association

Carers NSW

Injury Management IQ

Insurance Council of Australia

Law Society of NSW

Motor Accidents Authority

National Disability Services

## Appendix 5 Minutes

### Minutes No. 1

Wednesday 22 June 2011

Room 1153, Parliament House, Sydney at 10.05am

#### 1. Members Present

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmann

Mr Shoebridge

#### 2. Meeting declared open

The Chair declared the meeting open.

#### 3. Establishment of the Committee

The Chair tabled the resolution of the House of 9<sup>th</sup> May 2011 establishing the Committee.

#### 4. Committee membership

The Chair tabled the Minutes of the House of 24<sup>th</sup> May 2011 reporting the nominations for membership of the Committee.

#### 5. Procedural resolutions of the Committee.

Resolved, on the motion of Mr Shoebridge:

##### *Filming, broadcasting and still photography of public proceedings*

That the Committee authorises the filming, broadcasting and still photography of the public proceedings of the Committee, in accordance with the resolution of the Legislative Council of 18 October 2007.

##### *Publishing transcripts of evidence*

That, unless the Committee decides otherwise, the Committee authorises the publication of transcripts of evidence taken at public hearings.

##### *Publishing answers to questions on notice*

That, unless the Committee decides otherwise, the Committee authorises the publication of answers to questions on notice.

##### *Publishing submissions*

That, at the start of each inquiry, the Committee may decide to authorise the publication of all submissions to the inquiry, subject to the Committee Clerk checking for confidentiality, adverse mention and other issues.

##### *Media statements*

That, unless the Committee decides otherwise, media statements on behalf of the Committee may be made only by the Chair.

##### *Inviting witnesses*

That, unless the Committee decides otherwise, arrangements for inviting witness are to be left in the hands of the Chair and the Committee Clerk, after consultation with the Committee.

#### 6. Correspondence

\*\*\*

#### 7. Outstanding Government responses to previous inquiries

Resolved, on the motion of Mr Shoebridge: That the Committee write to the Leader of the Government in the House seeking the Government response to the following reports:

- \*\*\*
- Tenth Review of the Motor Accidents Authority and the Motor Accidents Council: due 28 April 2011.
- \*\*\*

**8. Review of the Motor Accidents Authority and the Motor Accidents Council**

Resolved, on the motion of Mr Primrose:

That the Committee commence its Eleventh Review of the exercise and functions of the MAA and MAC.

That the Committee seek a briefing from officers of the Motor Accidents Authority and the Motor Accidents Council, on a date to be confirmed by the Secretariat, after consultation with the Committee and the MAA.

That the commencement of the review be publicised on the Committee's web site and through a press release on 23 June 2011.

That the review and the call for submissions be advertised in The Sydney Morning Herald, The Daily Telegraph, the Land and Media Monitors as soon as practicable.

That the Secretariat distribute to the Committee for consideration and input a list of stakeholders to be invited to participate in the review, and that the stakeholders be invited to make a submission.

That the Committee hold at least one full day of hearings on a date to be confirmed by the Secretariat in consultation with the Chair and subject to the availability of members and witnesses.

That representatives of the MAA and the MAC be invited to appear as witnesses along with any other witnesses determined by the Secretariat in consultation with the Chair and the Committee.

That a questions on notice process be conducted prior to the hearings as has occurred in previous reviews of the MAA.

That the Committee authorises the publication of all submissions to the Inquiry, subject to the Committee Clerk checking for confidentiality, adverse mention and other issues.

**9. \*\*\***

**10. Adjournment**

The Committee adjourned at 10.35am *sine die*.

Rachel Callinan

**Clerk to the Committee**

**Minutes No. 2**

Monday 18 July 2011

Level 25, 580 George Street, Sydney at 4:30 pm

**1. Members Present**

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebidge

**2. Briefing from officers of the Motor Accidents Authority and the Lifetime Care and Support Authority**

The Committee attended the MAA Board Room, Level 25, 580 George Street, Sydney and was met by the following officers:

- Andrew Nicholls, Acting General Manager of the Motor Accidents Authority
- Carmel Donnelly, former General Manager of the Motor Accidents Authority
- David Bowen, Executive Director of the Lifetime Care and Support Authority

Mr Nicholls welcomed the Committee.

Mr Nicholls and Ms Donnelly provided a briefing on the Motor Accidents Scheme.

Mr Bowen provided a briefing on the Lifetime Care and Support Scheme.

### 3. **Adjournment**

The Committee adjourned at 5.15pm *sine die*.

Rachel Callinan

**Clerk to the Committee**

### **Minutes No. 3**

Monday 10 October 2011

Macquarie Room, Parliament House at 9.50 am

#### 1. **Members Present**

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmaine (from 10.43 am)

Mr Shoebridge (from 11.45 am)

#### 2. **Minutes**

Resolved, on the motion of Mrs Mitchell: That Draft Minutes Nos. 1 and 2 be confirmed.

#### 3. **Correspondence**

##### **Sent**

- 22 June 2011 from the Chair to the Hon Michael Gallacher MLC, Leader of the Government in the Legislative Council, seeking the Government's response to three Law and Justice Committee Reports;
- 22 June 2011 from the Chair to the Hon Greg Pearce MLC, Minister for Finance and Services, advising that the Standing Committee on Law and Justice has commenced its inquiries into the MAA and LTCSA;
- 7 July 2011 from the Chair to the Hon Greg Pearce MLC, Minister for Finance and Services, seeking a briefing with officers from the MAA and the LTCSA;
- \*\*\*
- 25 August 2011 from the Chair to the Hon Greg Pearce MLC, Minister for Finance and Services, with a list of pre-hearing questions on notice to the MAA and the LTCSA.

##### **Received**

- 9 August 2011 email from Mr Andrew Nicholls, Acting General Manager, MAA, to Principal Council Officer re publication of MAA Corporate Plan;
- 27 September 2011, email from Ms Elsa Leung, Executive Assistant to Mr Andrew Nicholls, MAA, to Principal Council Officer advising that Mr Raymond Whitten had been appointed Chair of the Motor Accidents Council and would appear as a witness before the Committee;
- 29 September 2011 letter from the Hon Greg Pearce MLC, Minister for Finance and Services, to the Chair re answers to pre hearing questions on notice from the MAA and LTCSA.

#### 4. **11<sup>th</sup> Review of the Motor Accidents Authority and 4<sup>th</sup> Review of the Lifetime Care and Support Authority**

##### **4.1 Submissions**

Resolved, on the motion of Mr MacDonald: That the Committee note that MAA Submission Nos. 1 to 7 and 9 to 12, and LTCSA submission Nos 1 to 18 were published by the Committee Clerk under the authorisation of an earlier resolution.

Resolved, on the motion of Mr MacDonald: That the Committee authorise the publication of MAA Submission No. 8 with the exception of the name and other identifying details of the author which are to remain confidential.

#### **4.2 Answers to pre-hearing questions on notice**

Resolved, on the motion of Mr MacDonald: That the Committee note that answers to pre-hearing questions on notice to the MAA and LTCSA were published by the Committee Clerk under the authorisation of an earlier resolution.

#### **4.3 Timeframe for return of answers to questions**

Resolved, on the motion of Mrs Mitchell: That witnesses be requested to return answers to questions on notice and / or supplementary questions from members within 21 days of the date on which questions are forwarded to the witnesses by the committee clerk.

#### **4.4 Public hearing**

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Ms Danielle De Paoli, member, Injury Compensation Committee, Law Society of NSW

The evidence concluded and the witness withdrew.

The following witnesses from the NSW Bar Association were sworn and examined:

- Mr Alastair McConnachie, Deputy Executive Director
- Mr Andrew Stone, Member, Common Law Committee

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Lawyers Alliance were sworn and examined:

- Ms Jnana Gumbert, NSW Branch President
- Dr Andrew Morrison SC, Representative

The evidence concluded and the witnesses withdrew.

The following witnesses from the Insurance Council of Australia were sworn and examined:

- Ms Mary Maini, Chair, CTP Claims Managers Committee
- Mr Tony Mobbs, Member, Motor Accident Insurance Policy Committee

The evidence concluded and the witnesses withdrew.

The following witnesses from the Motorcycle Council of NSW were sworn and examined:

- Mr Christopher Burns, Membership and Liaison Officer
- Mr Guy Stanford, Advisor

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Physiotherapy Association were sworn and examined:

- Mr Gary Rolls, President, NSW Branch,
- Mr Tamer Sabet, Vice President, NSW Branch
- Mr Peter Magner, NSW Branch Councillor
- Mr Chris Winston, NSW Branch Manager
- Ms Paula Johnson, Senior Policy Officer

The evidence concluded and the witnesses withdrew.

The following witnesses from The Children's Hospital Westmead were sworn and examined:

- Ms Helene Chew, Coordinator, Brain Injury Service,
- Ms Martine Simons, Senior Social Worker, Brain Injury Service

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Medical Association were sworn and examined:

- Ms Fiona Davies, Chief Executive Officer,
- Ms Sarah Dahlenburg, Director

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.15 pm. The public and the media withdrew.

#### 4.5 Tendered documents

Resolved, on the motion by Mr Shoebridge: That the Committee accept and publish the following documents tendered during the public hearing:

- Prepared answers to hearing questions by Mr Andrew Stone, Bar Association of NSW
- Prepared answers to hearing questions by Mr Christopher Burns, Motorcycle Council of NSW

Resolved, on the motion by Mr Shoebridge: That the Committee accept the following document tendered during the public hearing:

- 'Differences between CTP Insurance Statistics and Crash Statistics paper by Ross McColl', by Mr Christopher Burns, Motorcycle Council of NSW.

#### 5. Adjournment

The Committee adjourned at 4.25 pm until 9.50 am Monday 17 October 2011.

Rachel Callinan  
Clerk to the Committee

#### Minutes No. 4

Monday 17 October 2011

Macquarie Room, Parliament House at 9.50 am

##### 1. Members present

Mr Clarke (*Chair*)  
Mr Primrose (*Deputy Chair*)  
Mr MacDonald  
Mrs Mitchell  
Mr Shoebridge

##### 2. Apologies

Mr Moselmane

##### 3. Minutes

Resolved, on the motion of Mr Shoebridge: That Draft Minutes No. 3 be confirmed.

#### 4. 11<sup>th</sup> Review of the MAA and 4<sup>th</sup> Review of the LTCSA

##### 4.1 Correspondence received

- 13 October 2011 letter from the Hon Greg Pearce MLC, Minister for Finance and Services, to advise the Committee of persons who will appear as witnesses for the Motor Accidents Authority and the Motor Accidents Council as well as the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council at the public hearing to be held on 17 October 2011.

##### 4.2 Submissions

Resolved, on the motion of Mr Shoebridge: That Submission No. 13 remain confidential and, noting the detailed nature of the submission, that the Committee decline the author's request to appear as a witness.

#### **4.3 Timeframe for return of answers to questions**

Resolved, on the motion of Mrs Mitchell: That witnesses be requested to return answers to questions on notice and / or supplementary questions from members within 21 days of the date on which questions are forwarded to witnesses from the Committee Clerk.

#### **4.4 Public hearing**

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Dr Adeline Hodgkinson, Director, Brain Injury Rehabilitation Directorate
- Dr Joe Gurka, Director, Brain Injury Rehabilitation Service
- Associate Professor James Middleton, Director, State Spinal Cord Injury Service.

The evidence concluded and the witness withdrew.

The following witnesses from Spinal Cord Injuries Australia were sworn and examined:

- Mr Sean Lomas, Policy and Advocacy Manager
- Mr Tony Jones, Member, Policy and Advocacy Officer.

The evidence concluded and the witnesses withdrew.

The following witness from Injury Management IQ was sworn and examined:

- Ms Frances O'Connor, Director.

The evidence concluded and the witness withdrew.

The following witnesses from the Motor Accidents Authority were sworn and examined:

- Mr Andrew Nicholls, General Manager
- Ms Sue Freeman, Acting Deputy General Manager.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr David Bowen, Executive Director, Lifetime Care and Support Authority
- Ms Suzanne Lulham, Director, Service Delivery, Lifetime Care and Support Authority
- Mr Dougie Herd, Chair, Lifetime Care and Support Advisory Council.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.50 pm. The public and the media withdrew.

#### **4.5 Tended documents**

Resolved, on the motion by Mr MacDonald: That the Committee accept and publish the following document tendered during the public hearing:

- 'Injury management IQ: A Fresh Approach to an Old Problem' by Ms Frances O'Connor, Director, Injury Management IQ.

Resolved, on the motion by Mrs Mitchell: That the Committee accept the following document tendered during the public hearing:

- 'Motor Accidents Council forward program', by Mr Andrew Nicholls, General Manager.
- 'Motor Accidents Council' [membership], by Mr Andrew Nicholls, General Manager.
- 'Taylor Fry: Hindsight Estimates of Insurer Profits' by Mr Andrew Nicholls, General Manager.

**4.6 Independent actuarial advice**

Resolved on the motion of Mr Shoebridge: That the Secretariat scope the cost of engaging an independent actuary to review financial issues related to the MAA on the basis of terms of reference to be proposed by Mr Shoebridge and circulated to the Committee for comment.

**4.7 Additional questions on notice**

Resolved, on the motion of Mr Primrose: That the Committee provide any additional questions on notice to the Secretariat by 12.00 pm on Wednesday 19 October 2011.

**5. Other business**

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**6. Adjournment**

The Committee adjourned at 5.18 pm until a time to be decided on Wednesday 19 October 2011.

Rachel Callinan

**Clerk to the Committee**

**Minutes No. 5**

Thursday 20 October 2011

Room 1153, Parliament House at 1.05 pm

**1. Members present**

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Shoebridge

**2. Apologies**

Mr Moselmane

**3. Minutes**

Resolved, on the motion of Mr MacDonald: That Draft Minutes No. 4 be confirmed.

**4. 11<sup>th</sup> Review of the MAA and 4<sup>th</sup> Review of the LTCSA****4.1 Submissions**

Resolved, on the motion of Mrs Mitchell: That Submission No. 14 remain confidential.

**5. \*\*\*****6. 11<sup>th</sup> Review of the MAA and the MAC - Independent actuarial advice**

The Committee discussed Mr Shoebridge's proposal for the Committee to engage an actuary to provide advice in relation to certain financial issues relating to the MAA Review and the instructions to the actuary developed by Mr Shoebridge.

The Committee noted the advice of the Clerk Assistant-Committees as to the recommended process for engaging an actuary, which includes consultation with the Institute of Actuaries of Australia, refining the instructions if necessary, seeking interested parties to undertake the consultancy and obtaining the approval of the Clerk to an agreement to engage an actuary to assist the Committee.

Resolved, on the motion of Mr Shoebridge: That the Secretariat commence this process.

**7. Adjournment**

The Committee adjourned at 1.25 pm *sine die*.

Rachel Callinan

**Clerk to the Committee**

**Minutes No. 6**

Thursday 10 November 2011

Members Lounge, Parliament House at 1.05 pm

**1. Members present**

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmane (at 1.09 pm)

Mr Shoebridge

**2. Minutes**

Resolved, on the motion of Mr Shoebridge: That Draft Minutes No. 5 be confirmed.

**3. \*\*\***

**4. 11<sup>th</sup> Review of the MAA and 4<sup>th</sup> Review of the LTCSA**

**4.1 Late submissions**

Resolved, on the motion of Mr McDonald: That the Committee accept and publish late submissions to the 11<sup>th</sup> MAA Review from:

- Mr Ian Cameron, et al
- Mr Richard Talbot.

**4.2 Engaging an actuary**

The Committee considered the issue of whether to engage an actuary to provide advice on certain financial issues in relation to the MAA.

Debate ensued.

Resolved, on the motion of Mr Primrose: That the Committee meet again to further consider the issue of engaging an actuary on Thursday 24 November at 1pm in the Members Lounge.

**4.3 Chair's Report deliberative date**

Resolved, on the motion of Mr Primrose: That the Committee meet on Tuesday 13 December 2011 from 9.00am to 1.00pm to deliberate on the MAA and LTCSA reports.

**5. Adjournment**

The Committee adjourned at 1.35 pm until Friday 18 November 2011, at 8.30 am.

Teresa McMichael

**Clerk to the Committee**

**Minutes No. 7**

Thursday 24 November 2011

Members Lounge, Parliament House at 1.05 pm

**1. Members present**

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

**2. Minutes**

Resolved, on the motion of Mrs Mitchell: That Draft Minutes No. 6 be confirmed.

**3. Correspondence**

- \*\*\*

**4. \*\*\***

**5. 11<sup>th</sup> Review of the MAA and 4<sup>th</sup> Review of the LTCSA**

**5.1 Engaging an actuary**

The Committee deliberated on the issue of engaging an actuary to provide independent advice to the Committee on certain aspects of the MAA Scheme.

Resolved, on the motion of Mr Shoebridge: That the Committee engage an appropriately qualified actuary, or actuarial academic, to provide advice on the terms of reference that may be later used to commission another actuary to provide independent actuarial advice to the Committee on certain aspects of the MAA Scheme.

Resolved, on the motion of Mr Shoebridge: That the Chair write to the Minister for Finance and Services and the Motor Accidents Authority advising of the Committee's decision to engage an actuary to work on the terms of reference, and that the Chair consider publishing this letter on the Committee's website to inform stakeholders.

Resolved, on the motion of Mr Shoebridge: That the decision of the Committee to engage an actuary to provide advice on the terms of reference not delay the completion of the Committee's report on the 11<sup>th</sup> Review of the MAA, and that the report is to contain reference to the Committee's decision to undertake a preliminary investigation into engaging an actuary to provide advice on certain aspects of the MAA Scheme.

**6. Adjournment**

The Committee adjourned at 1.25 pm until Tuesday 13 December 2011 at 9.00 am.

Teresa McMichael

**Clerk to the Committee**

**Draft Minutes No. 8**

Tuesday 13 December 2011

Standing Committee on Law and Justice

Rm 1153, Parliament House, Sydney at 10.30am

**1. Members present**

Mr Clarke (Chair)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

**2. Previous minutes**

Resolved, on the motion of Mr MacDonald: That draft Minutes No. 7 be confirmed.

**3. Correspondence**

The Committee noted the following items of correspondence:

***Received***

**3.1 11<sup>th</sup> Review of the MAA and 4<sup>th</sup> Review of the LTCSA**

***Received***

- 17 October 2011 – From the AMA (NSW) Ltd, providing answers to QON
- 26 October 2011 – From Carers NSW, providing answers to supplementary questions
- \*\*\*
- 4 November 2011 – From the Australian Lawyers Alliance, providing answers to QON
- 7 November 2011 – From National Disability Services, providing answers to supp. questions

- 9 November 2011 – From Australian Physiotherapy Association, providing answers to QON
- 10 November 2011 – From the MAA, providing answers to QON
- 11 November 2011 – From the Insurance Council of Australia, providing answers to QON
- 15 November 2011 – From the Law Society of NSW, providing answers to QON
- 25 November 2011 – From IMIQ, providing answers to supplementary questions
- \*\*\*.

### 3.2 Consideration of the publication of the answers to supplementary questions, provided by IMIQ on 25 November 2011

Resolved, on the motion of Mr MacDonald: That the answers to supplementary questions provided by IMIQ remain partially confidential, at the author's request.

### 3.3 \*\*\*

4. \*\*\*

5. \*\*\*

## 6. 11<sup>th</sup> Review of the Motor Accidents Authority

The Chair submitted his draft report entitled Eleventh Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council, which, having been previously circulated, was taken as being read.

Chapter 1 read.

Moved, on the motion of Mr Primrose: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Primrose: That the first sentence in paragraph 2.22 be amended by omitting the words 'fairness and efficiency'.

Resolved, on the motion of Mr Primrose: That paragraph 2.23 be amended by omitting the word 'reasonable' and inserting instead 'efficient'.

Resolved, on the motion of Mr Primrose: That Recommendation 1 be adopted.

Resolved, on the motion of Mr Moselmann: That Recommendation 2 be adopted.

Resolved, on the motion of Mr Moselmann: That Recommendation 3 be amended by adding 's' at the end of the word item.

Resolved, on the motion of Mrs Mitchell: That Recommendation 3, as amended, be adopted.

Resolved, on the motion of Mr MacDonald: That Recommendation 4 which reads: 'That the Motor Accidents Council continues its works program, and continues to provide an important forum for robust debate and consideration of issues for the Motor Accidents Authority and Scheme participants.' be deleted.

Resolved, on the motion of Mr Shoebridge: That Chapter 2, as amended, be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.3 be amended by inserting the following sentence: 'These seven insurers are owned by five corporations, which are: Suncorp Group (GIO and AAMI); Insurance Australia Group (NRMA); Allianz (Allianz and CIC Allianz), QBE; and Zurich.' after the second sentence.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.30 be amended by inserting after the second sentence: 'As noted in paragraph 3.3, these seven insurers are owned by five corporations.'

Resolved, on the motion of Mr MacDonald: That Recommendation 5 be amended by inserting the words: 'including an explanation for any material deviation on forecasted profit' after the word Committee.

Resolved, on the motion of Mr Shoebridge: That Recommendation 5, as amended, be adopted.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.66 be amended by inserting after the last sentence the following sentence: 'The Committee will review the outcome of this preliminary investigation and consider publishing a separate report if appropriate.'

Resolved, on the motion of Mr Shoebridge: That Recommendation 6 be amended by inserting the word: 'promptly' after the word 'Authority' in the first sentence.

Resolved, on the motion of Mr Moselmann: That Recommendation 6, as amended, be adopted.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after Recommendation 6: 'The Committee is aware that the CTP industry in NSW is highly concentrated, with seven licensed CTP insurers in NSW owned by just five corporations. Whilst the Committee received no evidence that there are barriers to enter the CTP market in NSW, we will keep a watching brief on the level of concentration of market ownership.'

Resolved, on the motion of Mr MacDonald: That paragraph 3.72 be amended by omitting the words 'and congratulates' and 'on the thoroughness' in the third sentence and insert: 'the thoroughness with which the' before the word 'MAA' and insert after the last sentence: 'The Committee will continue to monitor this issue in future reviews.'

Resolved, on the motion of Mr Moselmann: That Recommendation 7, as amended, be adopted.

Resolved, on the motion of Mr Moselmann: That Recommendation 8, as amended, be adopted.

Resolved, on the motion of Mrs Mitchell: That Recommendation 9, as amended, be adopted.

Resolved, on the motion of Mr Shoebridge: That Recommendation 10, as amended, be adopted.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.128 be amended by omitting the words: 'importance of the discount rate as an issue' and inserting instead: 'overall impact of the discount rate on the Scheme.'

Resolved, on the motion of Mr MacDonald: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Moselmann: That Recommendation 11 be adopted.

Resolved, on the motion of Mr Primrose: That Recommendation 12 be adopted.

Resolved, on the motion of Mr Moselmann: That Recommendation 13 be adopted.

Resolved, on the motion of Mr Shoebridge: That Chapter 4, as amended, be adopted.

Resolved, on the motion of Mr Moselmann: That the Secretariat include in the report an Executive Summary that faithfully reflects the contents of the report.

Resolved, on the motion of Mr Moselmann: That the draft report, as amended, be the report of the Committee and that the Committee present the report to the House, together with transcripts of evidence, submissions, tabled documents, answers to questions on notice and to supplementary questions, minutes of proceedings and correspondence relating to the inquiry, except for any documents kept confidential by resolution of the Committee.

Resolved, on the motion of Mr Shoebridge: That the report be tabled with the Clerk on Tuesday 20<sup>th</sup> December 2011 and that the Chair issue a press release announcing the tabling.

## 7. Adjournment

The Committee adjourned at 12.55 pm until 9 am on Thursday 15 December 2011.

Rachel Callinan

**Clerk to the Committee**