

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

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## How to contact the Committee

Members of the Standing Committee on Law and Justice can be contacted through the Committee Secretariat. Written correspondence and enquiries should be directed to:

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The Director

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Standing Committee on Law and Justice

---

Legislative Council

---

Parliament House, Macquarie Street

---

Sydney New South Wales 2000

---

Internet [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au)

---

Email [Lawandjustice@parliament.nsw.gov.au](mailto:Lawandjustice@parliament.nsw.gov.au)

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Telephone 02 9230 3311

---

Facsimile 02 9230 3416

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## Terms of reference

1. That, in accordance with the provisions of section 210 of the *Motor Accidents Compensation Act 1999*, the Standing Committee on Law and Justice be designated as the Legislative Council committee to supervise the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council under the Act.
2. That the terms of reference of the committee in relation to these functions be:
  - (a) to monitor and review the exercise by the Authority and Council of their functions,
  - (b) to report to the House, with such comments as it thinks fit, on any matter appertaining to the Authority or Council or connected with the exercise of their functions to which, in the opinion of the committee, the attention of the House should be directed,
  - (c) to examine each annual or other report of the Authority and Council and report to the House on any matter appearing in, or arising out of, any such report,
  - (d) to examine trends and changes in motor accidents compensation, and report to the House any changes that the committee thinks desirable to the functions and procedures of the Authority or Council, 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 each year.
4. That nothing in this resolution authorises the committee to investigate a particular compensation claim under the *Motor Accidents Compensation Act 1999*.<sup>1</sup>

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<sup>1</sup> LC Minutes No 5, 30 May 2007, Item 4, pp 81-82

## Committee membership

<b>The Hon Christine Robertson MLC</b>	Australian Labor Party	<i>Chair</i>
<b>The Hon David Clarke MLC</b>	Liberal Party	<i>Deputy Chair</i>
<b>The Hon John Ajaka MLC</b>	Liberal Party	
<b>The Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>The Hon Amanda Fazio MLC</b>	Australian Labor Party	
<b>Ms Sylvia Hale MLC</b>	The Greens	

### Secretariat

Ms Madeleine Foley, A/Director  
Mr Simon Johnston, A/Director  
Ms Merrin Thompson, Principal Council Officer  
Mr Sam Griffith, Assistant Council Officer

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## Chair's foreword

This report marks a turning point in the Committee's annual reviews of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC). The Motor Accidents Compensation Scheme is now in its tenth year, and the Committee has undertaken nine reviews of the MAA and MAC.

Over the course of our reviews, the Committee has built a very effective working relationship with the MAA and its management team, as well as the MAC. The MAA has worked collaboratively with the Committee during each review, undertaking significant work and willingly sharing information to enable us to fulfil our role. Importantly, the MAA has also been open to the Committee's recommendations. At the same time, the Committee itself has sought to contribute constructively to the Scheme's improvement. I believe that ours is an excellent example of a productive oversight relationship, and that the Committee has been instrumental in the maturation and continuing improvement of both the Authority and Scheme.

The Committee's contribution, in turn, has relied upon the valuable input of review participants, particularly that of the key stakeholders, the Law Society of NSW, the NSW Bar Association and the Insurance Council of Australia. Their considered views have enabled us to thoroughly examine the issues affecting the Scheme and to develop meaningful recommendations for action. On behalf of the Committee I thank our review participants for their important contributions during this Review and each of those that preceded it.

As in previous reviews, during this Ninth Review the Committee has found that the Scheme and the MAA continue to perform in an effective manner. In addition, the Claims Assessment and Resolution Service (CARS), the focus of the current Review, is performing well. Key stakeholders report that it is fulfilling its role as an independent, inexpensive and efficient early dispute resolution service very effectively. The Committee has made a number of recommendations intended to further improve CARS' effectiveness. Additional recommendations have been made in relation to other aspects of the Scheme.

In light of the maturity and efficacy that the Scheme now enjoys, the Committee considers that annual reviews of the MAA and MAC are no longer necessary. Instead, we consider that biennial reviews will be sufficient to effectively monitor the exercise of the functions of the MAA and MAC, and we seek the agreement of the Legislative Council to amend the resolution designating this role to the Committee accordingly.

I express my thanks to my Committee colleagues for their thoughtful contributions to this year's Review, as in previous years. Our monitoring role has benefited as much from our individual perspectives as much as our cooperative approach. I also thank the staff of the Committee secretariat for their ongoing professional support.



Hon Christine Robertson MLC  
**Committee Chair**

## Executive summary

### Introduction (Chapter 1)

This is the Committee's Ninth Review of the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC). In our *Seventh Report* the Committee foreshadowed its intention to focus on particular aspects of the MAA's functions in future reviews, commencing with the administration of the Motor Accidents Assessment Service (MAAS). Our *Eighth Report* focused on the first of two services comprising MAAS, the Medical Assessments Service, and noted the Committee's intention to focus on the Claims Assessment and Resolution Service (CARS) in the current Review. In addition to examining CARS, the Committee has considered a number of other matters raised during the current Review, and has returned to several matters addressed in recommendations of our Eighth Review.

The current Review was conducted concurrently with the Committee's First Review of the Lifetime Care and Support Authority (LTCSA) and Lifetime Care and Support Advisory Council (LTCSAC). That Review will be the subject of its own report, to be published later in 2008.

The Committee received submissions from a number of stakeholders and heard evidence from representatives of the MAA and MAC including CARS, along with the Law Society of NSW, the NSW Bar Association and the Insurance Council of Australia. In addition, substantial 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.

### Past and future reviews (Chapter 2)

The Motor Accidents Compensation Scheme is now in its tenth year and has had time to mature. It has undergone significant consolidation and reform over that period, and at the present time is undergoing further reform intended to deliver greater improvements in efficiency and effectiveness. The Scheme is seen by its key stakeholders to be operating effectively; those stakeholders also attest to professional and productive relationships with the MAA and MAC.

Equally, the Committee's role in reviewing the MAA and MAC has evolved over the course of our nine reviews, and we have ourselves contributed to the effective functioning of the Authority and Scheme. At this point in time, the Committee considers that the Scheme has reached a level of maturation where an annual review is no longer necessary. Instead, we consider that a biennial review (taking into account two MAA *Annual Reports* at a time) will be sufficient to effectively monitor the exercise of the functions of the MAA and MAC. We seek the agreement of the Legislative Council to amend the resolution designating this role to the Committee accordingly.

### Scheme performance (Chapter 3)

As in previous reviews, the Committee concludes that the Scheme continues to function in an appropriate manner. The MAA has reported that its task in developing health outcomes measures of Scheme performance is continuing. The Committee reiterates its support for this work, appreciating that it is complex and challenging. Similarly, we encourage the MAA in its task of developing a new performance logic with the assistance of NSW Treasury as part of the Authority's forthcoming Results and Services Plan.

It is too early to judge the impact of the commencement of the LTCS Scheme on the Motor Accidents Compensation Scheme. The Committee will continue to watch this impact with interest as it unfolds.

#### **The Motor Accidents Assessment Service and Medical Assessment Service (Chapter 4)**

The MAAS, comprised of the two services MAS and CARS, was established in 1999 to resolve medical and claims disputes as they arise in the course of a compulsory third party (CTP) claim. MAS provides an independent forum for assessing disputes between insurers and injured people concerning an injured person's medical treatment and impairment, and is aimed at early resolution of medical disputes.

The Committee notes the increasing efficiency and effectiveness of MAS, achieved to a large extent through the implementation of the first phase of the MAAS Reform Agenda, and looks forward to observing further gains as the second phase of reform is rolled out. We also acknowledge the significant work and leadership of the MAA in implementing these reforms.

The Committee received evidence that the Claims Handling Guidelines place exacting requirements upon insurers, who contend that the level of detail required needs to be weighed against potential costs to the Scheme. We agree that these issues need to be balanced by the MAA, but consider that detailed guidelines are important for ensuring the integrity and consistency of the claims handling process.

Concerns about inconsistencies in some MAS assessments of Whole Person Impairment (WPI), explored in detail in our *Eighth Report*, were again raised during this Review. We acknowledge that the MAA has made consistency in MAS assessments a priority, and has implemented a quality assurance program and Assessor training with this in mind. Nevertheless, we reiterate the recommendation from our Eighth Review that the MAA undertake a review of WPI assessments to establish the extent of inconsistencies and to identify, if necessary, additional quality control mechanisms to improve consistency.

The Committee notes that the MAA has taken action with respect to two other recommendations concerning MAS in our previous Review. We are pleased that the Authority is reviewing its procedures to ensure the most appropriate systems are in place to prevent conflicts of interest on the part of MAS Assessors. Similarly, the MAA is conducting a review of lengthy assessments and has undertaken to report back to us, in particular on the status of delays.

#### **Performance of the Claims Assessment and Resolution Service (Chapter 5)**

CARS, the focus of this year's Review, is an independent dispute resolution service operating outside the court system. All disputed motor accident claims (where the insurer and injured person cannot agree on compensation) must be considered by CARS before they can proceed to court. In assessing a claim, CARS can determine liability or fault as well as the amount of compensation to be paid to the claimant. Assessments are made by legally qualified individual claims assessment experts who are appointed under the *Motor Accidents Compensation Act 1999*.

The Committee concludes that, on the basis of the MAA's *2006-2007 Annual Report*, as well as detailed information provided in answers to questions on notice, in broad terms, CARS is performing well. In particular, the data indicates that the revised Claims Handling Guidelines have had an important and positive impact on CARS' performance, most notably in that they facilitate the resolution of CARS matters via settlement (prior to assessment) as well as via assessment itself. This is consistent with the Scheme goals of early and fair dispute resolution, which in turn facilitate effective injury management.

## Issues in respect of the Claims Assessment and Resolution Service (Chapter 6)

CARS is seen by legal and insurer stakeholders to be operating effectively. In particular, the Law Society of NSW and Insurance Council of Australia consider that it is fulfilling its role as an independent, inexpensive and efficient early dispute resolution service very well. In respect of claimants' perceptions of the Service, we are pleased that the MAA is taking feedback from claimants seriously and has identified the need for them to be more informed about CARS processes. We recommend that the Authority make its strategies in this area a priority and allocate resources accordingly, and that it evaluate the effectiveness of those strategies in due course.

Participants raised a range of issues in respect of CARS. In response to concerns on the part of the NSW Bar Association about the increasing number of complex matters being considered by CARS, the Committee recommends that the MAA, in tandem with the MAAS Reference Group, formally consider ways to achieve a greater recognition of the circumstances where the complexity of a matter lodged with CARS is such that it could benefit from a different form of assessment.

In light of insurer concerns and preliminary data about the emergence of 'superimposed inflation' in the CARS system, we welcome the MAA's decision to conduct a new study to thoroughly investigate this issue. We consider that a comprehensive and well designed study will better establish whether comparable assessments are increasing over time, and if so, the factors that may be at work. This will in turn facilitate an informed discussion about the implications for the Scheme and any appropriate action. Noting the MAA's collaboration with insurers on this issue to date, we recommend that in undertaking the new study, the Authority continue to work collaboratively with all relevant stakeholders.

The Insurance Council also made a number of suggestions to improve transparency within CARS. The Committee considers that transparency is essential to the optimal functioning of CARS. We note the evidence presented to us that there is already a significant level of transparency in place within the Service's systems, as well as impending changes that will help to address the Insurance Council's concerns. In evidence, the MAA undertook to consider: publishing de-identified CARS decisions; reporting on additional data; and establishing a mechanism for ongoing feedback from insurers. The Committee also recommends that the MAA give further consideration to two other suggestions to improve transparency.

The issue of legal costs, as provided for in the Cost Regulation, arose as a concern for participants during our previous three reviews, and again in this Ninth Review. The Committee notes the lengthy period over which dissatisfaction with the present Cost Regulation has been raised with us, and is pleased that a review of the Regulation, previously recommended by us, is now well underway. We consider it highly desirable that the new Regulation be in place by 1 October 2008, in time for the commencement of the legislative tranche of the MAAS Reform Agenda, which will in turn have a significant bearing on the work of legal representatives participating in the CARS process. Accordingly, we encourage the MAA to ensure that it keeps to this timetable.

The NSW Bar Association raised concerns that there has been a marked increase in claims of contributory negligence by insurers in recent years as the basis for applications for discretionary exemptions, arguing that this unfairly penalises claimants. The Committee welcomes a commitment on the part of the MAA that provisions for costs in insurer-initiated proceedings will be considered as part of the review of the Cost Regulation. We consider it very important that any inappropriate incentives to initiate court proceedings be addressed and recommend that the MAA monitor trends in insurer claims of contributory negligence to determine whether legislative action is required.

The Law Society criticised the current process for matters before CARS where liability (or fault) is declined by the insurer. The Committee recommends that MAAS, in consultation with relevant stakeholders, consider the Law Society's proposal that in such matters, only the matter of liability be determined by the District Court, with the broader matter being remitted to CARS for assessment.

Having considered concerns on the part of CARS' Principal Claims Assessor about unnecessary claimant costs and procedural delays in respect of claims involving children, the Committee recommends that the Minister for Finance amend the legislation to give CARS Assessors the power to assess claims and approve the terms of settlement for persons under legal incapacity, including children.

Finally, on the basis of a submission from an individual reporting that his CARS assessment took eleven months to be determined, the Committee sought advice from the MAA about the timeliness of this decision and whether lengthy disputes are a systemic issue. The Committee is concerned by the delay in the individual matter raised with us, but is satisfied that the overall timeliness of CARS decisions, as reflected in the average length of the CARS lifecycle, is sound and appears to have improved significantly with the advent of the revised Claims Assessment Guidelines. Given the emotional, physical and financial impact that a lengthy dispute may have on a claimant, the Committee recommends that the MAA ensure that where an Assessor recognises that there will be a delay in a CARS assessment, the claimant understands the processes involved and is aware of the particular reasons for delay.

### **Other issues (Chapter 7)**

Several other matters relating to the Scheme or the MAA's operations more broadly were raised during the current Review. On the basis of a concern on the part of the Law Society that some communications with self-represented clients might give insurers an unfair advantage, the Committee welcomes the MAA's proposal to review this issue. We recommend that the review be conducted in tandem with the Motor Accidents Council and that it consider the need for existing guidelines to be reformulated.

In response to a proposal on the part of the Motorcycle Council of NSW, the Committee suggests that the MAA, in consultation with the MAC, consider the advantages and feasibility of further itemisation of the Medical Care and Injury Services Levy on CTP greenslips.

Having considered the MAA's response to concerns on the part of People With Disability Australia about a \$5 million capital grant for the redevelopment of Ferguson Lodge, an accommodation service for people with disability, the Committee is satisfied that the grant is appropriate.

The Committee acknowledges the gains made in respect of road crash fatalities in recent years and the contributions of government, industry and the community to these significant outcomes. We further acknowledge the complexity of this task and the imperative for all parties to continue to work to improve road safety. We are pleased to observe the proactive efforts of the MAA in respect of this important goal. We look forward to learning about the MAA's new, more evidence-based strategy for promoting road safety and will monitor its implementation and outcomes in future reviews.

Finally, the Committee returned to issues associated with the fall in claims frequency since the introduction of the new Scheme which were examined in detail in our Seventh and Eighth Reviews. We are concerned by reports that there are disincentives to claiming within the CTP Scheme. At the same time, we acknowledge the MAA's forthcoming initiatives to encourage earlier notification of claims, as well as the various services it provides to claimants, and the fact that the review of the Cost Regulation will address disincentives arising from legal costs. The NSW Bar Association has voiced concerns that

relative to insurers and motorists more broadly, injured persons have not gained as much from the Scheme. The Committee continues to consider that a fair balance in benefits to insurers, motorists and injured people is important, but believes that it is a matter of policy opinion as to how the benefits of the new Scheme should be shared most fairly. We consider that these issues may gain greater weight if claims continue to decrease and if so, whether the precise factors contributing to such falls become more apparent. The Committee will continue to monitor this issue with interest.

## Summary of recommendations

### Recommendation 1

*Page 12*

That the Legislative Council amend the resolution designating the Standing Committee on Law and Justice with responsibility for supervising the Motor Accidents Authority and Motor Accidents Council, so that the Committee be required to report to the House in relation to the exercise of its functions under that resolution at least once every two years.

### Recommendation 2

*Page 31*

That the Motor Accidents Authority, by 30 June 2009, act on the recommendation of our Eighth Review to undertake a review of Whole Person Impairment assessments to establish the extent of inconsistencies and to identify, if necessary, additional quality control mechanisms to improve consistency.

### Recommendation 3

*Page 48*

That the Motor Accidents Authority make its strategies to improve claimants' understanding of the Claims Assessment and Resolution Service a priority and allocate resources accordingly, and that it evaluate the effectiveness of those strategies by conducting a further study of claimants' perceptions of the Claims Assessment and Resolution Service.

### Recommendation 4

*Page 57*

That the Motor Accidents Authority, in tandem with the Motor Accidents Assessment Service Reference Group, formally consider, by 30 June 2009, ways to achieve a greater recognition of the circumstances where the complexity of a matter lodged with the Claims Assessment and Resolution Service is such that the matter could benefit from a different form of assessment. This should include consideration of:

- potential triggers to identify complex cases
- potential mechanisms for dealing with complex cases, including via expert individual Assessors, an Assessor panel, and referral to court via discretionary exemption
- whether any changes in practice or to the guidelines in relation to discretionary exemption are desirable or necessary.

### Recommendation 5

*Page 62*

That the Motor Accidents Authority, in undertaking the new PricewaterhouseCoopers study of Claims Assessment and Resolution Service assessments, including when the study's findings and implications are considered, continue to work collaboratively with all relevant stakeholders, and implement any necessary recommendations.

### Recommendation 6

*Page 68*

That the Motor Accidents Authority, in order to enhance transparency within the Claims Assessment and Resolution Service, fulfil its commitment to:

- investigate the potential to publish de-identified decisions in relation to individual CARS assessments
- consider regular reporting on lead indicators of superimposed inflation to arise out of PricewaterhouseCoopers' new study of such inflation in CARS assessments
- consider an ongoing mechanism for qualitative feedback from insurers to CARS Assessors.

**Recommendation 7***Page 68*

That the Motor Accidents Authority give consideration to publishing Claims Assessment and Resolution Service performance data on a quarterly basis, and to distributing this information at meetings of the Motor Accidents Assessment Service Reference Group.

**Recommendation 8***Page 68*

That the Motor Accidents Authority, in conjunction with the Motor Accidents Assessment Service Reference Group, explore the possibility of allowing external stakeholders, including insurers and the legal profession, access to its practice manual for Claims Assessment and Resolution Service Assessors, along with information contained in periodic electronic Assessor newsletters, where these resources contain advice to Assessors about the evidence they should take into account in making and documenting their assessments.

**Recommendation 9***Page 72*

That the Motor Accidents Authority, in liaison with the Law Society of NSW, continue to make the Study of the Impact of the Costs Regulation a high priority, with a view to having the revised Regulation in place by 1 October 2008.

**Recommendation 10***Page 74*

That the Motor Accidents Authority, in liaison with the Law Society of NSW, ensure that the Study of the Impact of the Cost Regulation, consider provisions for costs in insurer-initiated court proceedings so that claimants are not unfairly financially penalised for having to participate in such proceedings.

**Recommendation 11***Page 74*

That the Motor Accidents Authority monitor trends in insurer claims of contributory negligence to determine whether legislative action is required to address any inappropriate incentives to have Claims Assessment and Resolution Service assessments reheard in court.

**Recommendation 12***Page 75*

That the Motor Accidents Authority, in consultation with relevant stakeholders including court administrators and the judiciary, consider the proposal that in matters where liability has been declined, only the matter of liability be determined by the District Court, with the broader matter then remitted to the Claims Assessment and Resolution Service for assessment.

**Recommendation 13***Page 77*

That the Minister for Finance amend the legislation to give Claims Assessment and Resolution Service Assessors the power to assess claims and approve the terms of settlement for persons under legal incapacity, including children.

**Recommendation 14***Page 79*

That the Motor Accidents Authority ensure that where an Assessor recognises that there will be a delay in a Claims Assessment and Resolution Service assessment, the claimant is advised of the processes involved and is made aware of the particular reasons for delay.

**Recommendation 15***Page 82*

That the Motor Accidents Authority conduct its intended review of insurers' communication with self-represented claimants in tandem with the Motor Accidents Council, and that the review consider the need for the existing insurer guidelines to be reformulated and appropriate pro-forma letters developed.

**Recommendation 16**

*Page 85*

That the Motor Accidents Authority, in consultation with the Motor Accidents Council, consider by 30 June 2009 the advantages and feasibility of further itemisation of the Medical Care and Injury Services Levy on compulsory third party greenslips.

## Acronyms and abbreviations

<b>ANF</b>	Accident notification forms
<b>CARS</b>	Claims Assessment and Resolution Service
<b>CTP</b>	Compulsory third party
<b>LTCSA</b>	Lifetime Care and Support Authority
<b>LTCSAC</b>	Lifetime Care and Support Advisory Council
<b>LTCS Scheme</b>	Lifetime Care and Support Scheme
<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

In this chapter the Committee outlines its role in reviewing the Motor Accidents Authority (MAA) and Motor Accidents Council (MAC) and describes the process of this Ninth Review of the MAA and MAC.

### The Committee's role

- 1.1 The Standing Committee on Law and Justice is required by the Legislative Council under section 210 of the *Motor Accidents Compensation Act 1999* (NSW) to conduct an annual review of the MAA and MAC.<sup>2</sup> Provision for parliamentary oversight of the MAA and MAC was introduced as part of the 1999 reforms to the NSW Motor Accidents Scheme. This is the Committee's Ninth Review of the MAA and MAC.
- 1.2 Information about 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 inquiry

- 1.3 The Committee resolved to commence the Ninth Review on 5 March 2008.

#### Focus of this review

- 1.4 In our *Seventh Report*, the Committee foreshadowed its intention to focus on particular aspects of the MAA's functions, commencing with the administration of the Authority's dispute resolution function, the Motor Accidents Assessment Service (MAAS).<sup>3</sup> Our *Eighth Report* focused on one of the two services comprising MAAS, the Medical Assessment Service (MAS), and indicated the Committee's intention to focus on the other service, the Claims Assessment and Resolution Service (CARS), in the current Review.<sup>4</sup>
- 1.5 In addition to examining CARS, the Committee has considered a number of other matters raised during the current Review, and returned to several matters addressed through recommendations of our Eighth Review.
- 1.6 This Ninth Review was conducted concurrently with the Committee's First Review of the Lifetime Care and Support Authority (LTCSA) and Lifetime Care and Support Advisory Council (LTCSAC). The Lifetime Care and Support (LTCS) Scheme was established under the *Motor Accidents (Lifetime Care and Support) Act 2006* to provide reasonable and necessary

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<sup>2</sup> LC Minutes No 5, 30 May 2007, Item 4, pp 81-82

<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 Motor Accidents Council - Seventh Report*, Report 31, September 2006, p 6

<sup>4</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council - Eighth Report*, Report 34, p 4

treatment, rehabilitation and care to people catastrophically injured in motor accidents in New South Wales. That Act requires the Committee to review the LTCSA and LTCSAC annually. That Review will be the subject of its own report, to be published later in 2008.

### **Submissions**

- 1.7** The Committee continued the practice undertaken in the Seventh and Eighth Reviews to call for public submissions by way of advertisements in major metropolitan newspapers. As with all previous reviews, we also wrote directly to a number of stakeholders, inviting them to make a submission.
- 1.8** The Committee received 10 submissions. Those individuals and organisations who made a submission are listed in Appendix 1.

### **Public hearing**

- 1.9** The Committee held a public hearing on 20 June 2008 at which Mr David Bowen, General Manager of the MAA, Mr Richard Grellman, Chairman of the MAA Board and the MAC, and Ms Carmel Donnelly, Assistant General Manager of the MAA, gave evidence.
- 1.10** The Committee also heard from a panel of witnesses representing CARS: Mr Cameron Player, Assistant General Manager of MAAS, Ms Belinda Cassidy, Principal Claims Assessor, Ms Helen Wall, Assessor, and Mr Colin Stoten, Assessor.
- 1.11** Representatives of the Law Society of NSW, the NSW Bar Association and the Insurance Council of Australia also appeared. A full list of witnesses is provided in Appendix 2.

### **Questions on notice**

- 1.12** Following the practice developed over a number of previous reviews, the Committee forwarded a number of written questions on notice to the MAA prior to the hearing. The questions were based on the MAA's *Annual Report* 2006-2007, the Government Response to the Committee's *Eighth Report*, and issues raised in a number of submissions.
- 1.13** The MAA provided detailed responses to the Committee's questions, which other stakeholders, in turn, were asked to respond to in the hearing and in further questions on notice. Stakeholders were also asked to respond to aspects of each others' evidence, enabling significant depth of consideration of the issues.
- 1.14** The Committee expresses its thanks to all those who participated in this year's Review. As in previous years, participants' contributions have been considered and comprehensive and have greatly assisted the Committee in fulfilling its review role.

## Structure of the report

- 1.15** This report is comprised of seven chapters. This first chapter outlines the Committee's role in reviewing the MAA and MAC and sets out the process undertaken by the Committee during its Review.
- 1.16** Chapter 2 looks back at the life of the Motor Accidents Compensation Scheme and considers the Committee's past and future role in reviewing the exercise of the functions of the MAA and MAC.
- 1.17** Chapter 3 considers the MAA's assessment of the performance of the Scheme in 2006-2007 and the Authority's progress in developing new performance measures. It briefly considers the impact of the LTCS Scheme on the Motor Accidents Compensation Scheme to date, along with an issue that arose in relation to the MAC during the previous Review.
- 1.18** Chapter 4 focuses on MAAS and MAS. It provides a brief overview of the MAAS Reform Agenda which is currently being implemented, then notes the performance of MAAS in 2006-2007. In conclusion, it returns to a number of recommendations made in respect of MAS in our *Eighth Report*.
- 1.19** In Chapter 5 the Committee considers the performance of CARS. The chapter commences with an overview of the Service, a detailed outline of the lifecycle of a CARS assessment, and a discussion about the recruitment requirements of CARS Assessors. It then documents the performance of CARS in 2006-2007.
- 1.20** In Chapter 6 the Committee examines in detail the issues raised by stakeholders in respect of CARS during this Review. Specific issues include: a perception that some aspects of the Service are overly bureaucratic; the increasing complexity of some matters before CARS; concerns about 'superimposed inflation' in CARS assessments; the transparency of CARS processes; recoverable costs for legal representation; a reported increase in claims of contributory negligence by insurers; the process for matters referred to the District Court for assessment of liability; CARS' present inability to assess infants' claims or to approve settlements involving infants; and the timeliness of CARS assessments.
- 1.21** Chapter 6 examines a number of other matters raised during the Ninth Review including: insurer communication with self-represented clients; different thresholds for non-economic loss operating across different compensation jurisdictions in New South Wales; a proposal for itemisation of levies on greenslips; an accommodation service for people with disability; future trends in road safety; road safety initiatives targeting young people; and the fall in claims frequency in recent years.

## Future reviews

- 1.22** In the following chapter the Committee concludes that, on the basis of the maturity of the Motor Accidents Compensation Scheme and the effectiveness of the MAA in regulating it, an annual review by our Committee is no longer necessary. Recognising the valuable contribution of the Committee itself to the functioning of the Scheme to date, we suggest that biennial reviews will be sufficient to effectively monitor the exercise of the functions of the MAA and MAC, and recommend that the Legislative Council amend the resolution designating this role

to the Committee accordingly. Subject to the agreement of the House, we thus anticipate that our Tenth Review will occur in two years' time, and will take into account both the MAA's *2007-2008* and *2009-2010 Annual Reports*.

## Chapter 2 Past and future reviews

This chapter looks back at the life of the Motor Accidents Compensation Scheme and the Committee's role to date in reviewing the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC). The chapter concludes that the Scheme has reached a level of maturation where an annual review of the MAA and MAC is no longer necessary. The Committee recommends that the Legislative Council, in accordance with section 210 of the *Motor Accidents Compensation Act 1999*, change the resolution designating the Committee its role, to instead require the Committee to report biennially on the exercise of the functions of the MAA and MAC.

### Brief overview and history of the Scheme

- 2.1** The primary role of the Motor Accidents Compensation Scheme is to provide third party compensation to victims of motor accidents. Compensation is available to people killed or injured as a result of an accident, regardless of the financial means of the owner or driver of a motor vehicle, and can be paid for economic or non-economic loss.<sup>5</sup>
- 2.2** In NSW it is compulsory to have third party motor vehicle insurance.<sup>6</sup> Initially established under the *Motor Accidents Act 1988*, the Motor Accidents Authority is funded by a levy on compulsory third party (CTP) premiums.
- 2.3** The primary functions of the MAA, under the *Motor Accidents Compensation Act 1999 (NSW)*, are to regulate the Scheme and its participants, to provide education and information to stakeholders and service providers, and to operate an independent assessment and dispute resolution service. The MAA is also responsible for monitoring the operation of the Scheme.<sup>7</sup>

#### *Motor Accidents Act 1988 (NSW)*

- 2.4** The CTP scheme was initially established under the *Motor Accidents Act 1988*. This Act reinstated a common law based scheme under which damages could only be awarded after a finding of negligence.<sup>8</sup> This Act also reopened the market to private insurers.<sup>9</sup>
- 2.5** In 1995, to reduce costs, the Act was significantly amended to limit access to non-economic loss benefits on minor claims. The success of these amendments was short lived, however, as premiums and claim costs increased.<sup>10</sup>

<sup>5</sup> Green Slip NSW, *About green slips: third party insurance scheme*, accessed 31 July 2008, <<http://www.greenslips.com.au/third-party-insurance.html>>

<sup>6</sup> MAA, *About the MAA*, accessed 31 July 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=93>>

<sup>7</sup> MAA, *About the MAA*, accessed 31 July 2008, <http://www.maa.nsw.gov.au/default.aspx?MenuID=93>; *Motor Accidents Compensation Act 1999 (NSW)*, s 206 (2)

<sup>8</sup> *Motor Accidents Act 1988 (NSW)*, s 2A (1b)

<sup>9</sup> MAA, *Scheme history*, accessed 31 July 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=134>>

### Initial Law and Justice Committee inquiry

- 2.6 On 12 December 1995 the Law and Justice Committee received a reference from the House to inquire into the Scheme, and in particular, to examine the role of insurers, the accountability and oversight mechanisms of insurers and concerns of insureds in regards to claims, compensation and legal fees.<sup>11</sup>
- 2.7 The Committee comprehensively reviewed the Scheme over the next few years, producing a paper from the proceedings of a public seminar on the Scheme<sup>12</sup>, two interim reports<sup>13</sup>, a report on Scheme legal costs<sup>14</sup> and a final report<sup>15</sup>.
- 2.8 The final report highlighted two important issues: the need to substantially reduce the rates of litigation and the need for better information and assessment of trends and developments.<sup>16</sup> The report helped instigate major reform to the system and its recommendations formed the basis of the *Motor Accidents Compensation Act 1999*.

### *Motor Accidents Compensation Act 1999 (NSW)*

- 2.9 The *Motor Accidents Compensation Act 1999* (the Act) embodied significant reforms to the motor accidents compensation scheme in New South Wales. The Act has three key objectives, as stated by the then Minister for Finance, the Hon John Della Bosca MLC:

to provide motorists with cheaper green slips, to improve access to early treatment and rehabilitation expenses for people injured in a motor vehicle accident, and to increase the proportion of the premium dollar going to injured people ... by reducing scheme administrative costs.<sup>17</sup>

- 2.10 Key elements of reform included the establishment of systems for:

- early notification of claims and treatment of injuries

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<sup>10</sup> MAA, *Scheme history*, accessed 31 July 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=134>>

<sup>11</sup> The Hon JP Hannaford MLC, Leader of the Opposition, Motor Vehicle Insurance, General Business Notice of Motion, 12 December 1995, pp 4646-4649

<sup>12</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Proceedings of the Public Seminar on the Motor Accidents Scheme (Compulsory Third Party Insurance)*, Report 2, April 1996

<sup>13</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Motor Accidents Scheme (Compulsory Third Party Insurance) Interim Report*, Report 3, December 1996 and NSW Legislative Council, Committee on Law and Justice, *Motor Accidents Scheme (Compulsory Third Party Insurance) Second Interim Report*, Report 7, December 1997

<sup>14</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Motor Accidents Scheme (Legal Costs)*, Report 5, June 1997

<sup>15</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Motor Accidents Scheme (Compulsory Third Party Insurance) - Final Report*, Report 9, November 1998

<sup>16</sup> Standing Committee on Law and Justice, Report 9, pp iii-iv

<sup>17</sup> The Hon John Della Bosca MLC, Minister for Finance, Motor Accidents Compensation Amendment Bill, Second Reading Speech, 4 April 2006, p 21905

- early resolution of claims
- alternate dispute resolution
- the independent assessment of treatment, rehabilitation and care needs
- preservation of the principles of full compensation for the seriously injured
- the regulation of fees and costs.<sup>18</sup>

**2.11** The Act also established the MAC, whose role is to facilitate input from key Scheme stakeholders. The MAC ‘considers issues referred to it by the board or the MAA with a view to providing advice and recommendations. The MAC may also consider issues of interest raised by their constituents’.<sup>19</sup>

**2.12** Section 210 of the Act specifies that a committee be appointed to supervise the exercise of the functions of the MAA and MAC.<sup>20</sup> On 30 November 1999 the Law and Justice Committee was appointed to fulfil this ongoing statutory obligation. The resolution of the House setting out the terms of reference for the Committee’s reviews established that the Committee would monitor and review the MAA and MAC and report to the House at least once each year.<sup>21</sup>

## Major developments during the life of the current Scheme

**2.13** Numerous legislative changes have been implemented to improve the effectiveness of Scheme since 1999. The Committee’s reviews of the MAA and MAC have played a significant role in bringing about certain amendments. In this section three key developments of the Scheme are noted:

- the establishment of the Lifetime Care and Support Authority under the *Motor Accidents (Lifetime Care and Support) Act 2006*
- changes enshrined in the *Motor Accidents Compensation Amendment Act 2006*
- reforms contained in the Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill.

<sup>18</sup> MAA, *Scheme history*, accessed 31 July 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=134>>

<sup>19</sup> MAA, *Scheme history*, accessed 31 July 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=134>>

<sup>20</sup> *Motor Accidents Compensation Act 1999*, s 210

<sup>21</sup> The Hon John Della Bosca MLC, Minister for Finance, Motor Accidents Authority and Motor Accidents Council, Motion, 30 November 1999, p 3781

***Motor Accidents (Lifetime Care and Support) Act 2006 (NSW)***

- 2.14** Recommendation 12 from the Committee's Sixth Review of the MAA and MAC called for further research into damages for people catastrophically injured in motor accidents, and the possible benefits for introducing structured damages for these victims.<sup>22</sup>
- 2.15** This resulted in the 2006 legislation that established the Lifetime Care and Support Authority, the Lifetime Care and Support Scheme and the Lifetime Care and Support Advisory Council. Participants are eligible to join this Scheme if their injuries satisfy certain Guidelines and may take part on a lifetime or interim basis.<sup>23</sup>
- 2.16** Treatment and care in regards to this Act can refer to anything from medical treatment and rehabilitation to domestic assistance, workplace modifications and educational and vocational training.<sup>24</sup>

***Motor Accidents Compensation Amendment Act 2006 (NSW)***

- 2.17** The *Motor Accidents Compensation Amendment Act 2006* amended the 1999 Act to include provisions relating to no fault recovery by children, blameless motor accidents, insurance premiums, claims against the nominal defendant and caps on insurer liability.<sup>25</sup>

**Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill**

- 2.18** The Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill passed both Houses of parliament in late 2006 and is expected to be proclaimed to commence on 1 October 2008. The Bill amends the 1999 Act with the purpose of improving the efficiency and effectiveness of motor accident claims and dispute resolution processes.<sup>26</sup> It embodies the legislative reforms of the Motor Accidents Assessment Service Reform Agenda explored in detail in Chapters 4 and 6.
- 2.19** The amendments will simplify the claims process for victims with more minor injuries, and extend early payment provisions to include payment for lost earnings in addition to treatment expenses.<sup>27</sup>

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<sup>22</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 xv

<sup>23</sup> *Motor Accidents (Lifetime Care and Support) Act 2006 (NSW)*, s 7

<sup>24</sup> *Motor Accidents (Lifetime Care and Support) Act 2006 (NSW)*, s 6

<sup>25</sup> The Hon John Della Bosca MLC, Minister for Finance, Motor Accidents (Care and Support) Bill and Motor Accidents Compensation Amendment Bill, Second Reading speech, 4 April 2006, p 21904-21905; *Motor Accidents Compensation Amendment Act 2006 (NSW)*

<sup>26</sup> The Hon John Della Bosca MLC, Minister for Finance, Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill, Second Reading speech, 4 December 2007, p 4914

<sup>27</sup> *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Act 2007 (NSW)*, Pt III

## The Committee's annual reviews of the MAA and MAC

**2.20** This section provides a brief overview of the Committee's annual reviews of the MAA and MAC to date, beginning in 2000.

### First to Fourth Reviews

**2.21** The Law and Justice Committee's First Review of the MAA and MAC was conducted in 2000.<sup>28</sup> In these early years the role of the Committee was substantially different as the new Scheme was still in its very early days. The Committee felt it would be difficult to determine the Scheme's effectiveness at that stage, and that expressing any firm views about its operation would have been premature.<sup>29</sup>

**2.22** Primarily, these early reviews gathered evidence from representatives of the MAA and MAC. Other stakeholders mainly participated through submissions.

**2.23** Few recommendations were made in the first four reviews. Key issues discussed included the annual assessment of insurer profit margins, claims relating to whiplash injuries,<sup>30</sup> Treatment, Rehabilitation and Attendant Care Guidelines for CTP insurers<sup>31</sup> and non-economic loss.<sup>32</sup>

### Fifth to Ninth Reviews

**2.24** As the Scheme has matured, the Committee's more recent reviews have moved away from a comparison between the new and old Schemes and have concentrated on examining trends within the years of the current Scheme.<sup>33</sup> During these years the insurance market has been healthy and competitive and there has been a broad decrease in average annual premiums in all CTP ratings districts.<sup>34</sup>

**2.25** The Fifth and Sixth Reviews focused on the functions of the MAA and MAC in relation to insurance, insurers and the claims process, payment of claims and injury management and rehabilitation.<sup>35</sup>

**2.26** The Committee's Seventh Review focused mainly on insurer profits.<sup>36</sup> This marked a shift in the review process with a broad public call for submissions and a detailed question on notice

<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 – First Report*, Report 13, June 2000

<sup>29</sup> *First Report*, p viii

<sup>30</sup> *First Report*, pp 9 and 55

<sup>31</sup> *Second Report*, p 18

<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 – Third Report*, Report 19, February 2002

<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 – Fifth Report*, Report 25, April 2004, p ix

<sup>34</sup> *Sixth Report*, p xi.

<sup>35</sup> *Fifth Report; Sixth Report*

process. In addition, insurance industry and legal representatives were invited to give evidence at the public hearing.<sup>37</sup> As a result the review was able to examine a broader range of issues relating to the Scheme, and in greater detail.

- 2.27** During the Eighth and Ninth Reviews the Committee has chosen to focus on specific functions of the MAA, first on the Medical Assessment Service (MAS),<sup>38</sup> and now in the current Ninth Review, on the Claims Assessment and Resolution Service (CARS).

## Key stakeholder views

- 2.28** During the course of the reviews the Committee has received valuable information from many participants, in particular the Law Society of NSW, the NSW Bar Association and the Insurance Council of Australia. These stakeholders have watched the Scheme mature and have themselves contributed to its development and further improvement. Their views about the functioning of the Scheme, almost a decade after its establishment, are outlined below.

### Law Society of NSW

- 2.29** In this year's review, Mr Hugh Macken, the President of the Law Society of NSW, commented in regards to the Scheme that:

[T]he system is a cheap system which manages treatment, rehabilitation and claims assessment very quickly. It provides funding for a body to develop road safety programs, funded by road users, which is very effective and can provide some assistance in respect of reducing the incident of injury. These combine to lower the premiums, which have allowed them to take on at-fault persons injured, even people injured through their own stupidity, and indeed even people who are injured whilst committing crimes. This coverage is to be applauded ... [I]nsurers ought be happy with this system because it is cheap. They therefore are able to manage most of the claims in-house. They have the capacity to develop their own systems for the provision of rehabilitation and treatment expenses, which allows them to manage the day-to-day control of claimants. The more assistance they can give claimants early in respect of treatment and rehabilitation, the smaller the claim is, and to that extent they are the masters of their own destiny. This will assist in seeing smaller claims. The viability of the scheme and the low cost of the scheme will ensure and guarantee profit return.<sup>39</sup>

- 2.30** Mr Scott Roulstone of the Law Society of NSW advised the Committee that the Society has an excellent relationship with the MAA. He further stated that the Scheme 'has been

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<sup>36</sup> *First Report*, p 10

<sup>37</sup> *Seventh Report*, p 135

<sup>38</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

<sup>39</sup> Mr Hugh Macken, President, Law Society of NSW, Evidence, 20 June 2008, p 20

streamlined to a large degree to enable claims to proceed expeditiously, cost effectively and satisfactorily to motor vehicle accident injury victims'.<sup>40</sup>

### **NSW Bar Association**

- 2.31** The NSW Bar Association, while having many issues with the establishment of the MAA and MAC, has always maintained an effective working relationship with the Authority. Its views remain much the same as those expressed during the Seventh Review, when the Executive Director of the NSW Bar Association, Mr Philip Selth, commented that:

You asked about our relationship with the MAA. Well, we do not like the legislation that they administer, we do not like some of their policies, but I think we have a professional relationship with them and it is a very good one and I would make no criticism of the officers at all.<sup>41</sup>

- 2.32** Despite these differences the NSW Bar Association has remained a valuable contributor to reviews of the MAA and MAC.

### **Insurance Council of Australia**

- 2.33** Mr Philip Cooper of the Insurance Council of Australia commented on the Scheme by saying that on the whole it 'is performing well. The current operation of the CTP scheme in New South Wales is largely achieving the aims of the reforms in 1999'.<sup>42</sup>

- 2.34** He went on to state that the Scheme:

... is meeting public expectations ... and we wish to ensure that more of the compensation dollar is going to meet the needs of injured people, whilst providing a high degree of affordability... We submit that the scheme is on the whole working well. As a stakeholder, we value our relationship with the MAA and the ability to provide information and assistance over a wide range of areas.<sup>43</sup>

### **Committee comment**

- 2.35** The current Scheme is now in its tenth year and has had time to mature. It has undergone significant consolidation and reform over that period, and at the present time is undergoing further reforms intended to deliver additional improvements in efficiency and effectiveness. The Scheme is seen by its key stakeholders to be operating effectively and those stakeholders attest to professional and productive relationships with the MAA and MAC.

<sup>40</sup> Mr Scott Roulstone, Chair, Injury Compensation Committee, Law Society of NSW, Evidence, 20 June 2008, p 21

<sup>41</sup> Mr Philip Selth, Executive Director, NSW Bar Association, Evidence, 31 March 2006, p 44.

<sup>42</sup> Mr Phillip Cooper, Chair, Motor Accidents Insurance Standing Committee, Evidence, 20 June 2008, p 32

<sup>43</sup> Mr Cooper, Evidence, 20 June 2008, p 33

- 2.36** Equally, the Committee's role in reviewing the MAA and MAC has evolved over the course of its nine reviews. In addition, the Committee itself has contributed significantly to the effective functioning of the Authority and Scheme. At this point in time, the Committee considers that the Scheme has reached a level of maturation where an annual review is no longer necessary. Instead, we consider that a biennial review will be sufficient to effectively monitor the exercise of the functions of the MAA and MAC. We seek the agreement of the Legislative Council to amend the resolution designating this role to the Committee accordingly. In doing so, we recognise that biennial reviews will necessarily consider two of the Authority's *Annual Reports* at a time.

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### **Recommendation 1**

That the Legislative Council amend the resolution designating the Standing Committee on Law and Justice with responsibility for supervising the Motor Accidents Authority and Motor Accidents Council, so that the Committee be required to report to the House in relation to the exercise of its functions under that resolution at least once every two years.

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## Chapter 3 Scheme performance

In this chapter the Committee considers the Motor Accidents Authority's (MAA's) assessment of the performance of the Motor Accidents Compensation Scheme for 2006-2007. It then examines the MAA's progress in developing a new basis for reporting on Scheme performance and in developing health outcomes measures of performance. The chapter concludes with a discussion of the impact of the Lifetime Care and Support Scheme (LTCS) on the Motor Accidents Compensation Scheme to date, before returning to an issue about the Motor Accidents Council that arose during our Eighth Review.

### Report on Scheme performance in 2006-2007

- 3.1** This section draws on information provided in the MAA's *2006-2007 Annual Report*, along with written answers to Committee questions, to consider the Scheme's performance in the current reporting period.
- 3.2** As in previous Annual Reports, the MAA has reported on the performance of the Compulsory Third Party (CTP) Scheme in terms of four key indicators:
- affordability
  - effectiveness
  - fairness
  - efficiency.

#### Affordability

- 3.3** Affordability is assessed in terms of the price of CTP premiums.
- 3.4** The *2006-2007 Annual Report* indicated that the average premium for a Sydney metropolitan car rose from \$314 in the June 2006 quarter to \$322 in the June 2007 quarter, excluding GST. The average NSW premium rose from \$309 to \$318.<sup>44</sup>
- 3.5** This slight increase in average premiums was attributed to the introduction of the LTCS Scheme in October 2006. The new Scheme extended the scope of the CTP Scheme to cover catastrophically injured persons irrespective of fault. Previously, those who could not prove fault were not covered.<sup>45</sup>
- 3.6** At the same time the *Annual Report* stated that the commencement of the LTCS Scheme has helped to increase competition between insurers, who have continued to re-file premiums with the MAA. The best price for premiums was revised downwards on at least five occasions from \$326 in October 2006 to \$313 in June 2007.<sup>46</sup>

<sup>44</sup> MAA, *Annual Report*, 2006-2007, p 8

<sup>45</sup> MAA, *Annual Report*, 2006-2007, p 76

<sup>46</sup> MAA, *Annual Report*, 2006-2007, p 8 and 77

- 3.7** The Committee sought more information from the MAA on the impact of the LTCS Scheme on premiums. The Authority advised:

The introduction of the Lifetime Care and Support Scheme coincided with a period of strong competition on price between the Compulsory Third Party insurers. Between September 2006 and March 2008, the Motor Accidents Authority observed a period of frequent partial refiling by insurers to change prices. This meant that, although it was expected that the average impact of the introduction of the Lifetime Care and Support Scheme was an average increase of \$20 in the total Greenslip price, the competitive environment meant that it took until March 2008 for the average premium to increase by \$9 dollars compared to September 2006.<sup>47</sup>

- 3.8** The Committee also asked whether premiums have increased more markedly for certain groups of motorists, and if so, for which ones. The MAA advised:

Comparing average premiums between September 2006 and March 2008, the types of vehicles experiencing the largest increases were goods vehicles, primary producer vehicles, buses, rental cars and larger motorcycles.

These increases reflected a combination of increases in the Medical Care and Injury Services levy, changes in the Compulsory Third Party scheme relativities (which vary between vehicle types and parts of New South Wales) and insurer application of loadings or bonuses based on other risk factors such as the age of the driver, age of vehicle and safe driving, claims or insurance history.<sup>48</sup>

- 3.9** Expressing premium affordability as a proportion of average weekly earnings, the MAA reported that the market share weighted best price for premiums continued to fall from 50 per cent before the 1999 Motor Accidents Compensation Scheme reforms to below 28% in June 2007.<sup>49</sup>

### **Effectiveness**

- 3.10** Effectiveness is measured in terms of the speed and cost of the claims handling process.

- 3.11** As in previous years, the *2006-2007 Annual Report* highlighted the role of accident notification forms (ANFs) in improving claimants' access to early payments for treatment since the establishment of the new Scheme in 1999. ANFs enable claimants to make a claim more quickly and easily, ensuring faster payments by the insurer, and thereby improving their recovery outcomes.<sup>50</sup>

- 3.12** The *Annual Report* also stated:

The average time taken by insurers to make the first compensation payment, dropped by 12 per cent ... there is an improving trend in the time to first payments and time taken to reduce liability. These trends indicate that injured people now lodge claims

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<sup>47</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 3-4

<sup>48</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 4

<sup>49</sup> MAA, *Annual Report*, 2006-2007, p 76

<sup>50</sup> MAA, *Annual Report*, 2006-2007, p 83

more quickly and access funds for the treatment of their injuries more quickly. Insurers make liability decisions sooner and settle claims more quickly.<sup>51</sup>

**3.13** When asked about the reasons for these trends, the MAA responded:

The 1999 Compulsory Third Party scheme changes have now been in place for sufficient time for insurers, legal practitioners, clinicians and the Motor Accidents Authority to have established solid expertise in the system, effective networks for consultation, clarification and education in the claims handling and capability for high quality advice to claimants. The Motor Accidents Authority has also continued to audit insurer performance and refine guidelines.

The most recent amendment legislation passed by the New South Wales Parliament will further build on the lessons from the early years of the scheme to further facilitate just and expeditious resolution of claims.<sup>52</sup>

**3.14** The MAA also highlighted the improved effectiveness arising from the first stage of the Motor Accidents Assessment Service (MAAS) Reform Agenda that commenced in May 2006. The key element of the reforms was the revised Medical and Claims Assessment Guidelines specifically designed to facilitate early dispute resolution.<sup>53</sup> These reforms, and the details of performance improvements in this area, are discussed in detail in Chapters 4 and 6 which examine MAAS and the two services which comprise it, the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS).

### Fairness

**3.15** Fairness refers to whether the most seriously injured are receiving adequate compensation.

**3.16** The *Annual Report* notes that the Motor Accidents Compensation Scheme is intended to provide a fair and equitable system for claimants by ensuring that those most seriously injured receive maximum compensation. This is measured by examining damages paid to claimants as a result of serious brain injury and comparing the first accident year of the new Scheme at the end of June 2007 with the last accident year of the old Scheme at the end of June 2006.<sup>54</sup>

**3.17** The MAA reported:

There were 63 new scheme claims finalised with liability fully accepted (38%) compared to 45 (28%) old scheme claims. The rate of litigation was 37% of finalised new scheme claims compared to 76% of old scheme finalised claims. The average payment (excluding legal and investigation costs) increased by 72% to \$935,400. Non-economic loss payments were made on 49 finalised new scheme claims and 42 finalised old scheme claims. The average non-economic loss payments on new scheme claims was \$176,800, 43% higher than the average on old scheme claims.<sup>55</sup>

<sup>51</sup> MAA, *Annual Report, 2006-2007*, p 83

<sup>52</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 5

<sup>53</sup> MAA, *Annual Report, 2006-2007*, p 15

<sup>54</sup> MAA, *Annual Report, 2006-2007*, p 85

<sup>55</sup> MAA, *Annual Report, 2006-2007*, p 85

## Efficiency

- 3.18** Efficiency is measured in terms of the proportion of the CTP premium dollar paid to claimants.
- 3.19** The *Annual Report* stated that in the filing period commencing 1 July 2008 the projected return to claimants is 63.2 per cent of total premiums, as compared to 59 percent under the pre-1999 CTP Scheme. It went on to state:

This result is largely due to the introduction of the Lifetime Care scheme, which has resulted in a transfer of liability for catastrophic claims under the CTP scheme, to the Lifetime Care scheme. Generally, the return to the claimant has been greater under the new [CTP] scheme averaging 61 per cent compared to an average of 58 per cent under the old scheme.<sup>56</sup>

## Insurer profitability

- 3.20** The issue of insurer profits is another indicator of Scheme performance and has been examined in a number of the Committee's past reviews, particularly in our *Seventh Report*.<sup>57</sup> The Committee does not intend to explore profitability in detail this year as it did not emerge as a salient issue among review participants.
- 3.21** The profit realised by insurers is derived from the profit margin component of a premium filing and from the difference between the amount allowed in a premium filing for the paying out of all claims and the actual amount that is ultimately paid out.<sup>58</sup> Mr Philip Cooper, Chair of Insurance Council of Australia's Motor Accidents Insurance Standing Committee, explained the logic of insurer costs and profits and the role of the MAA in this area:

In terms of costs and profit levels, the CTP insurance is a long-tail scheme; that is, premiums collected today have to be kept in reserve for future claims. Almost all claims cannot be paid out in full immediately. On average, it takes three years, and sometimes longer, to finalise complex claims. The Motor Accidents Authority ensures that the CTP scheme is fully funded from year to year, and that insurers are in a financial position to meet all claims costs as they arise and for the full duration of the claim.<sup>59</sup>

- 3.22** In terms of prospective profit, the *Annual Report* indicated that between 1999-2000 and 2005-2006, profit margins have ranged from 7.5 to 10 per cent for individual insurers, with an industry average of between 7.7 and 8.7 per cent. In 2006-2007 most insurers' profit margins dropped, with an estimated industry average of 6 per cent. According to the MAA, this resulted from the introduction of the LTCS Scheme, in that insurers now require less capital

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<sup>56</sup> MAA, *Annual Report*, 2006-2007, p 78

<sup>57</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, p 73.

<sup>58</sup> MAA, *Annual Report*, 2006-2007, p 79

<sup>59</sup> Mr Philip Cooper, Chair, Motor Accidents Insurance Standing Committee, Insurance Council of Australia, Evidence, 20 June 2008, p 33

to underwrite CTP insurance because a significant portion of the risk is carried by the LTCS fund. In turn, insurers require a lower amount of profit from CTP.<sup>60</sup> The *Annual Report* stated:

The MAA considers this range of profit margins to be reasonable and [will] be consulting with CTP insurers regarding the methodology for assessing what constitutes adequate profit.<sup>61</sup>

- 3.23** The Committee sought information on such consultation to date, with the MAA advising that it has begun to investigate potential refinements to the methodology but has not yet commenced formal consultation with stakeholders including insurers.<sup>62</sup>
- 3.24** In terms of realised profit, the *Annual Report* provided detailed information on estimates of claims liabilities for each underwriting year, as at June 2007, and the estimated profit as a percentage of the written premium. It noted that actual claims payments during the year ending June 2007 were 14 per cent more than projected overall, using data as at 30 June 2006. In addition, actual reported incurred costs (claims paid plus estimates) were 13 per cent less than projected overall using data as at 30 June 2006.<sup>63</sup>

### **New basis for reporting on performance**

- 3.25** In our previous review the Committee noted that the General Manager of the MAA, Mr David Bowen, flagged that as a result of the introduction of the LTCS Scheme, the MAA will use a new basis for reporting on its performance, commencing in the current period. The Committee sought information from the MAA on any progress on this matter to date.
- 3.26** The MAA indicated in response:

The Motor Accidents Authority has been working with New South Wales Treasury to adopt a “results logic” approach to performance reporting as part of the development of the Authority’s Results and Services Plan. Elements of this new approach are expected to be incorporated into the Motor Accidents Authority’s 2007-2008 Annual Report.<sup>64</sup>

### **Health outcomes measures**

- 3.27** During the Committee’s Sixth Review, the MAA advised that it was working on incorporating health outcomes for injured road users into its assessment of Scheme performance.<sup>65</sup> The Committee expressed its support for such measures in both its *Sixth* and *Eighth Reports*.<sup>66</sup>

<sup>60</sup> MAA, *Annual Report*, 2006-2007, p 79

<sup>61</sup> MAA, *Annual Report*, 2006-2007, p 79

<sup>62</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 6

<sup>63</sup> MAA, *Annual Report*, 2006-2007, pp 79-80

<sup>64</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 1

<sup>65</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 73

<sup>66</sup> *Sixth Report*, p 73; *Seventh Report*, p 9

- 3.28** The *2006-2007 Annual Report* stated that the MAA engaged KPMG to facilitate a workshop in October 2006 with stakeholders to develop a way forward for introducing health outcomes measures in the CTP Scheme. A report with suggested options for further development was produced as a result.
- 3.29** The preferred option was to run a small pilot to test how effectively health outcomes tools could be administered by service providers, with the *Annual Report* indicating that a proposal to commission a pilot was being developed. It further indicated that the potential for using population level trauma data to provide health outcomes indicators was also being discussed.<sup>67</sup>
- 3.30** The Committee sought an update on the MAA's actions in this area, with the Authority reporting:
- The Motor Accidents Authority has found that other compensation schemes from other jurisdictions have not made significant progress with health outcome measures and, as a result, there are no health outcome measures which could be readily adopted by the Authority and used for comparative assessment between compensation schemes.
- However, the Motor Accidents Authority does support development of New South Wales Compulsory Third Party measures in concert with other schemes so that comparative performance measurement will be possible in future.<sup>68</sup>
- 3.31** It went on to report that to that end, during 2006-2007, the Authority:
- collaborated with the Australian and New Zealand Heads of Compulsory Third Party to establish a joint working party to progress health outcomes initiatives, with a report on strategic direction finalised in late 2007 and plans underway for an Australian and New Zealand Compulsory Third Party health outcomes conference
  - held detailed discussion with each of the CTP insurers in NSW on health outcomes initiatives, capability and priorities
  - hosted a collaborative workshop with all insurers to identify barriers to improving health outcomes for CTP compensable injured people.<sup>69</sup>
- 3.32** Finally, the MAA indicated that it is currently developing a strategy 'to build further capability for health outcomes evaluation' within CTP insurers and the Authority. To assist in this process it has received advice on selection of health outcomes measures from Professor Jan Sansoni, Director of the Australian Health Outcomes Collaboration and Principal Research Fellow at the Centre for Health Service Development at the University of Wollongong. The MAA has also participated in a number of relevant conferences.<sup>70</sup>
- 3.33** In evidence, Ms Carmel Donnelly, Assistant General Manager of the MAA, emphasised how complex the task of developing such indicators has been. She reported that some types of

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<sup>67</sup> MAA, *Annual Report*, 2006-2007, p 85

<sup>68</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 2-3

<sup>69</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 2-3

<sup>70</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 2-3

claims have been identified as a priority because they have higher costs associated with them, for example claims associated with whiplash, lower limb fractures, moderate brain injury, and those where co-morbidity (that is, psychological issues) is present.

- 3.34** Ms Donnelly stated that a key task will be to identify appropriate ‘broadly-based’ survey instruments which measure outcomes across populations, enabling individuals with different sorts of injuries to be effectively compared. In addition, there may need to be specific measures that are appropriate for priority injury groups.<sup>71</sup> She advised the Committee:

So there is a process of meeting to consult with both academics who can tell us which are the most reliable of those measures, and with health practitioners, because we would be asking health practitioners to use them; and there may be a training burden and accreditation issue, and so on. Often, there are a number of measures in common use, and we need to evaluate which of those we would prefer. The other issue is how often to subject someone to additional assessment, and how we can fit that into normal operations so that it is not intrusive on the injured person. So those are the types of analyses that we have going on at the moment.<sup>72</sup>

- 3.35** Providing more explanation of the MAA’s recent work with insurers in this area, and the MAA’s future plans, Ms Donnelly stated:

So, in probably the last six months or more, we have had some quite in-depth bilateral discussions with each of the insurers to understand where they are placed, what they require from their health providers in terms of measures and data, and to understand their ability to be analysing that sort of data. We will be bringing forward a strategy on that, but it has been identified that we will probably need to work with the insurers and also health practitioners and the various professional associations to develop some pilot tests to ensure that those measures are feasible for the settings that they should be in, and whereby we give some assistance in developing those studies. So that is really where we are positioned now.<sup>73</sup>

## **Impact of the Lifetime Care and Support Scheme on the Motor Accidents Compensation Scheme to date**

- 3.36** It is very early in the life of the Lifetime Care and Support Scheme, and perhaps too early to effectively judge its impact. Nevertheless, in light of the significant change in the landscape heralded by that Scheme, as well as specific effects already observed and reported in the *2006-2007 Annual Report* (such as on premium prices),<sup>74</sup> the Committee sought information from the MAA on the impact that the advent of the LTCS Scheme has had on the MAC Scheme to date.

- 3.37** In its response, the MAA reported that there has been considerable interest from other jurisdictions in the LTCS Scheme. The MAA went on to state:

<sup>71</sup> Ms Carmel Donnelly, Assistant General Manager, Motor Accidents Authority, Evidence, 20 June 2008, p 5

<sup>72</sup> Ms Donnelly, Evidence, 20 June 2008, pp 5-6

<sup>73</sup> Ms Donnelly, Evidence, 20 June 2008, p 6

<sup>74</sup> MAA, *Annual Report, 2006-2007*, p 8

Within the Compulsory Third Party Scheme, the coordination processes of the Lifetime Care and Support Scheme appear to be assisting in the early identification of catastrophically injured people who may be also eligible for Compulsory Third Party compensation.

The Motor Accidents Authority has recently coordinated a workshop involving claims managers from all the licensed Compulsory Third Party insurers and representatives of both the Authority and Lifetime Care and Support Authority, in order to identify any coordination issues. This resulted in identification of a small number of areas where processes can continue to be clarified, but overall the impact appears to have been minimal in relation to Compulsory Third Party insurance operations.<sup>75</sup>

- 3.38** As noted in Chapter 1, the Committee conducted this Tenth Review of the MAA and MAC in conjunction with its First Review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council. A separate report arising from that Review will be published later in 2008.

## Motor Accidents Council

- 3.39** Very little evidence was taken in respect of the Motor Accidents Council during this review. In our previous report the Committee noted the generally positive perceptions of the MAC as a representative forum in which information can be shared and differing views expressed. At the same time, we noted our concern about the comments of a representative of the NSW Bar Association about the Council's effectiveness and its role in providing advice to the Minister, and we recommended that the Chair of the Council provide a response to those comments.<sup>76</sup>

- 3.40** The Chair of the Council, Mr Richard Grellman, wrote to the Committee as part of the Government Response to the Eighth Review, noting that the diverse composition of the Council 'provides an interesting dynamic [and] creates a robust environment for the discussion of matters.' The letter went on to affirm the function of the Motor Accidents Council as a consultation forum, in developing significant policy proposals that have resulted in important improvements to the Scheme, and in working collaboratively with the Board of Directors and the MAA.<sup>77</sup> It also stated:

There are occasions where a member of the Council raises an issue for proposal for the Council to consider. Whether a particular issue or perceived problem merits a recommendation to the Minister on behalf of the Council is ultimately in the hands of the Council. Given however the Council's diverse composition, achieving a consensus view on some matters may be problematic.<sup>78</sup>

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<sup>75</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 1-2

<sup>76</sup> NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council: Eighth Report*, Report 34, 8 November 2007, p 9

<sup>77</sup> Letter to the Chair, Standing Committee on Law and Justice, from Mr Richard Grellman, Chairman, Motor Accidents Authority Board and Motor Accidents Council, Appendix 1 to the Government Response to 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*

<sup>78</sup> Letter to the Chair from Mr Grellman, Appendix 1 to the Government Response to Eighth Report

- 3.41** When he appeared before the Committee, Mr Grellman again noted the diverse make up of the Council and the opportunity for its members to put forward their points of view, as well as to receive timely information from the Authority. He went on to state:

I think there was a concern that some particular issues that one or two individuals on the Council thought ought to be dealt with, and changes made, did not result in any changes or recommendations going through the Board to the Minister. Primarily, those suggestions might have been in areas where some of the natural oppositional forces had different points of view. It is not uncommon, for example, for the insurers and the legal profession to agree on a number of issues, but occasionally they do not agree. If one party puts a point of view and it is not accepted by the other party, the Council is not a forum where you would decide something on a show of hands, for example, because there are a number of neutral observers, like the medical profession and the like. So I take the view that the council is a very good forum for concerns to be tabled.

There are three Motor Accidents Authority directors who are Council members—myself, David Bowen, and the deputy chair of the Motor Accidents Authority, Penny Le Couteur. So we have got a very good opportunity to hear these concerns. We would usually take them through to the board, to let them know that there is an issue out there, and the board may or may not deal with that issue in the way requested by the individual. But I think the important thing to note is that it is a forum for concerns to be aired, and we try very hard to listen carefully and ensure that we understand what is being said, and we are very thoughtful then as to whether or not we think changes might be appropriate in light of those concerns.<sup>79</sup>

### Committee comment

- 3.42** On the basis of the information presented in the MAA's *2006-2007 Annual Report*, the Committee considers that the Motor Accidents Compensation Scheme continued to function in an appropriate manner when assessed against the performance indicators of affordability, effectiveness, efficiency and fairness.
- 3.43** The Committee appreciates the complex and challenging task of developing health outcomes measures of performance, and reiterates its support for this work. Similarly, we encourage the MAA in its task of developing a new performance logic with the assistance of NSW Treasury as part of the Authority's forthcoming Results and Services Plan. We look forward to both the Plan and the new approach to performance reporting.
- 3.44** The Committee will specifically consider the functioning of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council in our formal annual reviews of those bodies. In addition, as part of our oversight role in relation to the MAA we will continue to watch with interest the impact of the Lifetime Care Scheme on the MAC Scheme as it unfolds.
- 3.45** Finally, the Committee is satisfied with the response of the Chair of the MAA Board and Motor Accidents Council to the recommendation in our Eighth Review in respect of the Council.

<sup>79</sup> Mr Richard Grellman, Chairman, Motor Accidents Authority Board and Motor Accidents Council, Evidence, 20 June 2008, pp 6-7



## Chapter 4      **The Motor Accidents Assessment Service and Medical Assessment Service**

The Medical Assessment Service (MAS), which is one of two dispute resolution services comprising the Motor Accidents Assessment Service (MAAS), was the focus of the Committee's last review. The second service, the Claims Assessment and Resolution Service (CARS) is the focus of the current review and is the subject of detailed discussion in the following two chapters.

This chapter begins with a brief overview of MAAS and the MAAS Reform Agenda which is currently being implemented. It then briefly considers the performance of MAS in 2006-2007, before following up on the Motor Accidents Authority's actions in respect of the Committee's recommendations concerning MAS.

### **Overview of MAAS**

- 4.1**      The MAAS was established as part of the 1999 Scheme reforms to resolve medical and claims disputes as they arise in the course of a compulsory third party (CTP) insurance claim. It consists of two separate, complementary dispute resolution services, MAS and CARS.

#### **Medical Assessment Service**

- 4.2**      MAS provides an independent forum for assessing disputes between insurers and injured people concerning an injured person's medical treatment and impairment, and is aimed at early resolution of medical disputes. Assessment is by way of referral to expert medical specialists and other health care professionals appointed under the *Motor Accidents Compensation Act 1999*. Decisions by MAS Assessors about past and future treatment, permanent impairment and stabilisation of injuries are binding on insurers, claimants, CARS and the courts.<sup>80</sup>
- 4.3**      Under the old motor accidents insurance scheme claimants and insurers engaged and paid for their own expert medical witnesses. Under the current Scheme medical issues are resolved through the MAS by a medical practitioner independent of both the claimant and the insurer. The cost of the medical assessment is borne by the MAA and ultimately by CTP policyholders through the CTP levy.
- 4.4**      The purpose of medical assessment is to determine disputed questions of fact relating to medical injuries suffered in a motor accident. MAS assesses medical disputes about:
- reasonable and necessary treatment – was or is treatment reasonable and necessary in the circumstances?
  - related treatment – was or is treatment related to the injury caused by the motor vehicle accident?

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<sup>80</sup> MAA, *Annual Report, 2006-2007*, p 88

- stabilisation of injuries – have the claimant’s injuries stabilised?
- permanent impairment – have the claimant’s injuries caused a greater than 10 per cent whole person permanent impairment?
- earning capacity impairment – is the claimant’s earning capacity impaired as a result of the injury sustained in the motor vehicle accident?<sup>81</sup>

### **Claims Assessment and Resolution Service**

4.5 While the role of MAS is to assess disputes concerning medical treatment and impairment, the role of CARS is to determine liability or fault as well as the amount of compensation to be paid. All disputed motor accident claims (where the insurer and injured person cannot agree on the amount of compensation to be paid) must be considered by CARS before they can proceed to court. CARS is discussed at length in the following two chapters.

### **MAAS Reform Agenda**

4.6 The MAAS Reform Agenda is a package of legislative, guideline, regulation, policy, procedural and administrative components intended to improve the culture of dispute resolution within the Motor Accidents Compensation Scheme. Reforms are being implemented within both the MAS and CARS.<sup>82</sup>

#### **Stage 1**

4.7 The first stage of the implementation of the MAAS Reform Agenda commenced in May 2006 with the introduction of new Medical Assessment and Claims Assessment Guidelines and accompanying forms.<sup>83</sup>

4.8 According to the MAA, the benefits arising from these changes include:

- MAS and CARS forms were made more precise, shorter and easier to complete and use
- significantly reduced timeframes in MAS and CARS’ registration, file review and assessment phases
- earlier exchange of all information by parties to disputes lodged with MAS and CARS
- earlier lodgement by parties of MAS whole person impairment disputes required before CARS general assessments

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<sup>81</sup> MAA, *Medical Assessment Service (MAS)*, accessed 31 July 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=272>>

<sup>82</sup> MAA, *MAAS Reform Agenda*, accessed 31 July 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=169>>

<sup>83</sup> MAA, *MAAS Reform Agenda*, accessed 31 July 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=169>>

- more thorough preparation of CARS claims
- greater timeliness in MAS assessments.<sup>84</sup>

## Stage 2

**4.9** The second stage of reforms includes legislative, regulation and guideline components, along with changes to the Claims Handling Guidelines for insurers.

**4.10** The legislative aspects are contained in the Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill. The bill passed through both Houses in late 2007 and is expected to be proclaimed to commence on 1 October 2008.<sup>85</sup> According to the Hon John Della Bosca, then Minister for Finance, who introduced the bill:

The bill expands the early notification and payment process to provide claimants with more minor injuries the option of a simplified process for the recovery of up to \$5000 in treatment expenses and lost earnings. This initiative will provide a fast-track process for more efficiently resolving small claims.

The bill also introduces processes to promote the earlier resolution of motor accident injury claims in disputed cases by requiring claimants and Green Slip insurers to co-operate with each other in exchanging information about claims and to participate in settlement conferences before claims can be referred for dispute resolution.

In cases where settlement is unable to be achieved through these new processes, these negotiations will assist the parties to narrow the issues in dispute prior to referring the matter for dispute resolution.

The bill also streamlines processes relating to the operation of the Motor Accidents Authority's Motor Accidents Assessment Service ...<sup>86</sup>

**4.11** The MAA advised the Committee that in the lead-up to the second tranche of reforms:

The Motor Accidents Authority has set up project groups to develop revised guidelines for medical and claims assessment, a new Accident Notification Form and the revised regulatory framework to accompany implementation of the legislative reforms.

Preliminary consultation on revised assessment guidelines has been undertaken. Further consultation on the assessment guidelines, approved forms and other regulatory changes will occur in July or August this year.

A working party to review regulated legal costs, which includes representatives of the Law Society and licensed Compulsory Third Party insurers has also been established.<sup>87</sup>

<sup>84</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 9-10

<sup>85</sup> MAA, *MAAS Reform Agenda*, accessed 31 July 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=169>>

<sup>86</sup> The Hon John Della Bosca MLC, Minister for Finance, Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill, Second Reading Speech, 4 December 2007, p 4914

### Claims Handling Guidelines for insurers

**4.12** Revised Claims Handling Guidelines for insurers came into effect on 1 July 2008. The changes include:

- a requirement for insurers to provide information and assistance regarding Nominal Defendant claims
- clarification by insurers of a claimant's entitlement to non economic loss
- the application of Motor Accidents Authority Regulatory and Enforcement Policy for insurer breaches of the Guidelines.<sup>88</sup>

**4.13** In addition, the MAA advised that it is considering further changes to the Claims Handling Guidelines to coincide with the legislative amendments commencing on 1 October 2008 in relation to:

- a revised accident notification form scheme
- a compulsory document exchange and settlement conference
- a time limit for payment of CARS awards.<sup>89</sup>

**4.14** During the Committee's current review the Insurance Council of Australia voiced some concern about the revised guidelines for insurers. At the Committee's hearing, Mr Philip Cooper, Chair of the Insurance Council's Motor Accidents Insurance Standing Committee, stated:

In respect of claim handling guidelines, we confirm that, whilst CTP insurers largely supported the revised claims handling guidelines, we are however concerned that the increased level of regulation in the scheme leads to increased costs in complying with those requirements, which in turn of course leads to increased scheme costs overall. That is a balance that has to be taken.<sup>90</sup>

**4.15** Mr Cooper's colleague, Ms Mary Maini, Chair of the Insurance Council's CTP Claims Managers Committee, pointed out that in order to comply with the pre-July 2008 Guidelines, insurers necessarily undertake a total of 178 steps. The new Guidelines add another 22 steps.<sup>91</sup>

**4.16** Mr Cooper stated in turn:

I do not think the Insurance Council is saying that any of these steps are not achieving an end. They all do, and they were all quite good ideas when they were put up. It is

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<sup>87</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 10-11

<sup>88</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 11

<sup>89</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 11

<sup>90</sup> Mr Philip Cooper, Chair, Motor Accidents Insurance Standing Committee, Insurance Council of Australia, Evidence, 20 June 2008, p 33

<sup>91</sup> Mrs Mary Maini, Chair, NSW CTP Claims Managers Committee, Insurance Council of Australia, Evidence, 20 June 2008, p 36

just that there has to be a trade-off at some point about the amount of information that is provided versus the cost to the scheme. That is part of the problem.<sup>92</sup>

- 4.17** In information provided to the Committee following the hearing, the Insurance Council suggested that:

By their very nature that number of requirements must have an impact on claims duration and impact [on] all stakeholders' desire for early resolution.

However we are concerned that the increased level of regulation in the scheme leads to increased costs in complying with those requirements, which in turn of course leads to increased scheme costs overall. In these circumstances a balance between efficiency and increasing scheme costs needs to be struck.<sup>93</sup>

## Performance of MAS

- 4.18** The Authority's *2006-2007 Annual Report* contains detailed performance data on MAS, including in respect of MAS lodgements and finalisations, treatment disputes, whole person impairment disputes, earnings capacity disputes, further assessments and reviews of medical assessments.<sup>94</sup>
- 4.19** The *Annual Report* indicated that the average lifecycle of MAS disputes reduced from 132 working days as of 30 June 2006 to 107 working days as of 30 June 2007. The average lifecycle of rejected review applications fell from 47 to 42 days, while the average lifecycle of review applications that went to a panel was reduced from 119 to 114 days.<sup>95</sup>
- 4.20** The Committee sought information from the MAA on quality assurance initiatives within the MAS, with the MAA responding:

The Medical Assessment Service continues to develop and refine its Quality Assurance plan to improve the effectiveness and efficiency of both the Service and appointed Medical Assessors. The Medical Assessment Service incorporates ongoing education, feedback and professional development within its Quality Assurance plan.

The effectiveness and efficiency of the Medical Assessment Service is measured by, timeliness of decisions, lifecycle, and review application rate are provided to the Assessor body on a regular basis. This has certainly contributed to the improved efficiency and effectiveness of the service, as the Medical Assessment Service lifecycle is currently 93 days, on average. Timeliness is a key measure in the efficiency of Medical Assessment Service and has continued to improve over the past year.

The recruitment of the medical Assessor panel in 2007 and the resulting increasing utility of Assessors, in assessing a variety of disputes, have contributed to both

<sup>92</sup> Mr Cooper, Evidence, 20 June 2008, p 36

<sup>93</sup> Insurance Council of Australia, Answers to question taken on notice during evidence, 22 July 2008, pp 4-5

<sup>94</sup> MAA, *Annual Report*, 2006-2007, pp 88-93

<sup>95</sup> MAA, *Annual Report*, 2006-2007, p 14

improved effectiveness and efficiency of the Medical Assessment Service which is reflected in the lifecycle figure.<sup>96</sup>

## Issues in relation to the MAS

**4.21** In our previous review the Committee made a number of recommendations in respect of the MAS. These concerned assessments of whole person impairment, potential conflicts of interest on the part of MAS Assessors, and the length of MAS assessments. The Government's Response to each of these, and any action taken, is discussed below.

### Inconsistencies in whole person impairment

**4.22** 'Whole person impairment' (WPI) disputes involve an assessment of the degree of permanent impairment resulting from the injuries caused in a motor accident. Claimants are entitled to damages for non-economic loss (that is, pain and suffering) in respect of personal injury only if their degree of WPI exceeds 10 percent and is permanent.<sup>97</sup>

**4.23** During our Eighth Review, both the Law Society of NSW and the NSW Bar Association expressed concern about inconsistencies in the assessment of WPI, suggesting that medical Assessors seem to differ in the assessments that they make.<sup>98</sup> The MAA pointed to a number of legitimate factors that may give rise to differences in assessments, but agreed that consistency is important to the integrity of the Scheme and advised that ensuring a high level of consistency and accuracy in assessments was a priority. The Authority noted a number of quality assurance measures it had put in place aimed at ensuring consistency in assessments, including bimonthly training for Assessors.<sup>99</sup>

**4.24** In light of this evidence the Committee recommended that the MAA undertake a review of WPI assessments to establish the extent of inconsistencies and to identify, if necessary, additional quality control mechanisms to improve consistency.<sup>100</sup>

**4.25** In reply, the Government Response to our *Eighth Report* stated:

The Medical Assessment Service has implemented a medical assessment quality assurance program and Assessor training and development program which addresses the issues raised in the recommendation. The Medical Assessment Service will report on current program activities in the Motor Accident Authority's 2007-08 Annual Report.<sup>101</sup>

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<sup>96</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 12

<sup>97</sup> MAA, *Annual Report, 2006-2007*, p 90

<sup>98</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 33-36.

<sup>99</sup> Mr Cameron Player, Assistant General Manager, MAAS, Motor Accidents Authority, Evidence, 27 August 2007, pp 28

<sup>100</sup> *Eighth Report*, p 39

<sup>101</sup> *Eighth Report*, p 1

- 4.26 In its submission to the current Review, the Law Society reiterated its concern about inconsistencies in decisions about WPI,<sup>102</sup> and in its answers to questions on notice, stated that additional work is required in relation to WPI generally.<sup>103</sup>

#### **Potential conflicts of interest**

- 4.27 Another issue raised in the Eighth Review was the potential for conflicts of interest to arise where a MAS medical Assessor also undertakes private medical assessments for claimants and/or insurers.<sup>104</sup> The Committee recommended that the MAA review its procedures and rules in relation to Medical Assessors to ensure that the most appropriate monitoring systems and rules are in place to prevent conflicts of interest.

- 4.28 The Government Response stated:

This recommendation is supported. The Motor Accidents Assessment Service has undertaken consultation on this issue with Service stakeholders and is reviewing procedures and rules in light of feedback received. The Motor Accidents Authority expects to finalise this review by December 2008 and will report back to the Committee on actions arising from the review.<sup>105</sup>

#### **Length of MAS assessments**

- 4.29 A further issue raised during last year's Review was about delays within the MAS system, particularly in relation to disputes involving reviews and reassessments. Both the Insurance Council of Australia and the NSW Bar Association expressed concern about this.<sup>106</sup>
- 4.30 The Committee recommended that the MAA conduct a study of MAS assessments and matters that have taken ten months or more to finalise and report back to the Committee about the status of delays and any current or future initiatives to reduce them.<sup>107</sup>
- 4.31 The Government Response also supported this recommendation and undertook to report back to the Committee by the end of 2008.<sup>108</sup>
- 4.32 As noted above in paragraphs 4.19 to 4.20, the average lifecycle of MAS assessments has reduced significantly during 2006-2007, falling from 132 days to 107 days, and as of May 2008

<sup>102</sup> Submission 4, Law Society of NSW, p 3

<sup>103</sup> Law Society of NSW, Answers to questions taken on notice during evidence, 9 July 2008, p 4

<sup>104</sup> *Eighth Report*, pp 39-42

<sup>105</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*, p 1

<sup>106</sup> *Eighth Report*, pp 42-43

<sup>107</sup> *Eighth Report*, p 45

<sup>108</sup> Government Response to Eighth Report, p 2

was at an average of 93 days.<sup>109</sup> According to the MAA, this is the lowest figure achieved to date.

**4.33** In written questions prior to the hearing, the Committee asked the MAA to what it attributed the significant reductions in the MAS lifecycle.

**4.34** The Authority identified a number of contributory factors:

- the implementation of the first stage of the MAAS Reform Agenda in May 2006, and the introduction of revised Medical Assessment Guidelines and associated forms
- reduced timeframes for MAAS administrative procedures
- the earlier exchange of information between the parties, and in particular the earlier lodgement of MAS replies, which has a flow-on effect in that the allocation review of a matter by MAAS staff can now generally be conducted on time, if not before the due date
- the ability of MAS and its Assessors to offer earlier medical appointments for the resolution of disputes
- improvements in the timeliness of Assessors submitting their decisions to MAS, which in turn can be attributed to a variety of initiatives including MAS accepting decisions in electronic formats
- the increased awareness of Assessors in regards to their contribution and responsibilities towards the MAS lifecycles, facilitated through feedback on performance statistics, in particular with regard to timeliness
- the provision of training in WPI modules to enhance Assessor utility, which reduces the need for multiple appointments during which assessments occur.<sup>110</sup>

## Committee comment

**4.35** The Committee acknowledges the increasing efficiency and effectiveness of MAS, achieved to a significant extent through the implementation of the first phase of the MAAS Reform Agenda, and looks forward to observing further improvements as the second phase is rolled out. We also acknowledge the significant work and leadership of the MAA in implementing the reforms.

**4.36** In relation to the Claims Handling Guidelines for insurers, we note insurers' concerns about the exacting requirements the Guidelines place upon them, as well as their observation that that at some point there comes a trade-off between the level of detail and the costs to the Scheme. The Committee agrees that these considerations need to be weighed by the MAA, but considers that detailed guidelines are important for ensuring the integrity and consistency of the claims handling process.

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<sup>109</sup> MAA, *Annual Report*, 2006-2007, p 14; MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 12

<sup>110</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 17-19

- 4.37** In relation to the issue of reported inconsistencies in MAS assessments of WPI, the Committee notes the MAA's advice that it has made ensuring consistency in MAS assessments a priority, and that it has instituted a quality assurance program and Assessor training with this in mind. Nevertheless, in light of evidence suggesting continuing concerns about the issue, the Committee reiterates its recommendation from our Eighth Review that the MAA undertake a review of WPI assessments to establish the extent of inconsistencies and to identify, if necessary, additional quality control mechanisms to improve consistency.
- 4.38** In relation to the MAA's actions in response to our recommendation to address potential conflicts of interest among MAS Assessors, the Committee is pleased that the MAA is reviewing its procedures in light of feedback documented during our Eighth Review, and looks forward to the MAA's report on actions arising from its review.
- 4.39** Similarly, we are pleased that the MAA has taken on board our recommendation to conduct a study of lengthy MAS assessments and report back to us on the status of delays, as well as actions arising from the study. Again we look forward to receiving the report in due course. At the same time, the Committee acknowledges the significant improvements in MAS lifecycles that the MAA has achieved to date, and the various actions it has taken to achieve these improvements.

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**Recommendation 2**

That the Motor Accidents Authority, by 30 June 2009, act on the recommendation of our Eighth Review to undertake a review of Whole Person Impairment assessments to establish the extent of inconsistencies and to identify, if necessary, additional quality control mechanisms to improve consistency.

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## Chapter 5 Performance of the Claims Assessment and Resolution Service

This chapter examines the performance of the Claims and Assessment and Referral Service (CARS), which was the focus of this year's Review. It begins with an overview of the service, then provides a detailed outline of the lifecycle of a CARS assessment, before discussing recruitment requirements of CARS Assessors. The chapter then documents the performance of CARS in 2006-2007. It sets the scene for the following chapter, which examines a number of matters raised in evidence in respect of CARS.

### Overview of CARS

- 5.1 CARS was established within the Motor Accidents Authority (MAA) as one element of the 1999 Motor Accident Scheme reforms intended to facilitate the earlier resolution of motor accident claims without the need for litigation.
- 5.2 CARS is an independent dispute resolution service operating outside the court system. All disputed motor accident claims (where the insurer and injured person cannot agree on the amount of compensation to be paid) must be considered by CARS before they can proceed to court.<sup>111</sup> Once received by CARS, a claim is either exempted from assessment and can proceed straight to court, or is referred to an Assessor for general assessment. CARS also assesses procedural disputes about claims as they arise by way of special assessments. Assessments are made by individual claims assessment experts who are appointed under the *Motor Accidents Compensation Act 1999*.<sup>112</sup>
- 5.3 While the Medical Assessment Service (MAS), discussed at length in the Committee's Eighth Review of the MAA,<sup>113</sup> provides an independent forum for assessing disputes concerning medical treatment and impairment, the focus of CARS is compensation. Together the two Services comprise the Motor Accidents Assessment Service (MAAS).
- 5.4 According to the MAA, CARS procedures are intended to be flexible, with an emphasis on dealing with matters on the papers or in a conference, as opposed to a formal hearing. Either the injured person or the insurer may refer a dispute to CARS.
- 5.5 If the insurer has admitted liability, the CARS assessment is binding on them. While the claimant can reject the assessment and proceed to court, cost penalties apply if he or she does

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<sup>111</sup> MAA, *Claims Assessment and Resolution Service (CARS)*, accessed 17 April 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=278>>

<sup>112</sup> MAA, Answers to questions on notice taken during evidence: Appendix A, 22 July 2008, p 1 and 17

<sup>113</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, Chapter 3

not achieve a significantly better outcome in court. If the insurer disputes liability both the insurer and the claimant may reject the CARS general assessment and proceed to court.<sup>114</sup>

**5.6** In assessing a claim, CARS can determine liability or fault as well as the amount of damages or compensation to be paid to the claimant or injured person. CARS can also determine whether:

- a claim is exempt from assessment and can proceed straight to court
- a claimant may make a late claim
- it was reasonable for a claimant to delay reporting the accident to the police and may or may not make a claim
- the claim form complied with the requirements of the Act and is therefore valid
- the insurer is correct in delaying making an offer of settlement pending further information
- a medical payment should be made and whether the cost is appropriate.<sup>115</sup>

**5.7** According to the MAA, it is important to appreciate that not all claims have disputes that need to be referred to CARS, and that only a minority of claims with claims disputes are referred to CARS.<sup>116</sup>

**5.8** In its response to questions forwarded prior to the hearing, the MAA explained that the objects of CARS are:

- to provide a timely, fair and cost effective system for the assessment of claims under the Motor Accidents Compensation Act 1999 that is accessible, transparent, independent and professional;
- to assess claims fairly and according to the substantial merits of the application with as little formality and technicality as is practicable and minimising the cost to the parties;
- to ensure the quality and consistency of CARS decision making;
- to make appropriate use of the knowledge and experience of CARS Assessors; and
- to establish effective communication and liaison with stakeholders concerning the role of CARS.<sup>117</sup>

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<sup>114</sup> MAA, *Claims Assessment and Resolution Service (CARS)*, accessed 17 April 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=278>>; MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, pp 16-17

<sup>115</sup> MAA, *Claims Assessment and Resolution Service (CARS)*, accessed 17 April 2008, <<http://www.maa.nsw.gov.au/default.aspx?MenuID=278>>.

<sup>116</sup> MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, p 1

<sup>117</sup> Motor Accidents Assessment Service, Claims Assessment and Resolution Service, MAA, *Claims Assessment Guidelines: Consultation Draft*, 21 April 2008, pp 7-8

## The lifecycle of a CARS assessment

**5.9** The Committee sought an overview of the lifecycle of a CARS assessment from the MAA. This was provided in answers to question on notice forwarded prior to the hearing on 20 June 2008. The Claims Assessment Guidelines, revised in 2006, set out the processes and requirements at each phase.

### Phase 1: Registration

**5.10** An application is registered by CARS within five days of receipt, and a reply may be lodged within 20 days of the application for general or special assessment. If received, the reply is also registered within five days.

**5.11** Detailed information is required to be provided as attachments to the application at the time of lodgement. The revised Guidelines placed a much greater emphasis on this, in order to facilitate exchange of information between the parties at the earliest opportunity.<sup>118</sup> Mr Cameron Player, Assistant General Manager of MAAS, explained at the hearing:

The whole point of the system that we brought in in May 2006 was to get all of the documents on the table at that stage so that the case has the opportunity to settle as early as it can, either before it goes to the Assessor or straight after that first preliminary conference.<sup>119</sup>

**5.12** According to the MAA, factors that may affect the lifecycle at this point include:

- the rejection of the application
- requests by CARS for information
- requests by the respondent for an extension of time to lodge a reply.<sup>120</sup>

### Phase 2: Allocation

**5.13** A CARS case manager undertakes an allocation review within five days of the date the reply form is due. This file review determines if the application is valid, if the claim is exemptible, if it is ready to be assessed or if a deferral of the allocation review is required.

**5.14** If the application is invalid it is dismissed, or if the claim is exemptible a certificate is prepared and forwarded to the parties. If the matter needs to be deferred the new date is diarised and the parties are notified of the next review date and what additional information is required.

**5.15** If the claim is ready to be allocated, the case manager selects an appropriate Assessor (subject to the location of the assessment, the nature of the dispute etc) and arranges a preliminary conference time and date with the Assessor. The file is forwarded to the Assessor and the

<sup>118</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 19

<sup>119</sup> Mr Cameron Player, Assistant General Manager, Motor Accidents Assessment Service, Evidence, 20 June 2008, p 55

<sup>120</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 19

parties are notified within ten days of the time and date of the preliminary conference. The Guidelines provide that the first preliminary conference must take place within 15 days of the notification of the outcome of the allocation review.

**5.16** According to the MAA, factors that may affect the lifecycle at this point include:

- the presence of outstanding medical disputes (for example if whole person impairment is not yet determined, CARS will not allocate the claim as the claims Assessor cannot determine non-economic loss)
- the parties are otherwise not ready as more information is required, the claimant may be unavailable etc
- the date selected for the preliminary conference may be unsuitable to one or other of the parties.<sup>121</sup>

### **Phase 3: Assessment**

**5.17** The CARS Assessor conducts the first preliminary conference via telephone with both parties and/or their legal representatives. The Assessor asks about the claim, what is being claimed and what is in dispute, then makes some attempt to conciliate the claim. Suitability and readiness are discussed and the Assessor may issue directions and set a timetable for the further preparation of the claim. If the matter is ready to be assessed, the Assessor determines whether it will be assessed on the papers or at a conference and, if a conference is to occur, decides with input from the parties, where and when it will take place.

**5.18** The Claims Assessment Guidelines provide that an assessment conference should take place within 25 days of the date of the last teleconference or the last date one of the parties has to comply with the Assessor's directions. The Assessor's reasons and certificate are due within 15 days of the assessment conference.

**5.19** According to the MAA, factors that may affect the lifecycle at this point include:

- the claim is not ready for assessment because the claimant's injuries are yet to stabilise
- the claims Assessor may request additional information
- the parties may be arranging further medico-legal appointments
- the claimant may be unavailable for any number of reasons
- additional matters may arise at the conference that require further investigation or information, such that the matter cannot be concluded at the conference.<sup>122</sup>

**5.20** During the hearing, Ms Belinda Cassidy, CARS Principal Claims Assessor, gave a detailed explanation of what happens when a 'typical' matter reaches an Assessor such as herself:

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<sup>121</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 20-21

<sup>122</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 19-22

The file hits my desk, I look at it, I read it, and I check to make sure I am not in conflict with any of the parties. A preliminary teleconference date has already been set. When that day arrives I telephone the parties. You get both of them on the phone, so you are having a three-way teleconference with them. All of the cases that I have had have been with persons who were represented. I think I have only ever had one unrepresented claimant before me.

At the first teleconference I go through the claim in detail with the legal practitioners. They are invariably solicitors ... At the teleconference it is my goal to work out what is in issue between the parties ... One of the fundamental differences I think between CARS and the court is that a CARS assessment is inquisitorial in nature. It is not an adversarial trial-by-ambush situation. It is very much an inquisitorial role that I take.

So I will look at the claim and I will look at all the material before me, and I will talk to the parties about what the claim is about. Is there an issue of contributory negligence? If so, what is that issue? Is it a failure to wear a seatbelt? What is the evidence in support of that? Does anybody need more time to get information about that? If there is an issue of quantum, there may be an issue of causation of the injury—for example, the claimant may have had a previous accident, or a subsequent accident, or had a pre-existing condition—and you try to tease that out at the preliminary conference.<sup>123</sup>

**5.21** Ms Cassidy explained that the aims of the teleconference are to enable the parties to focus on the relevant issues, and for the Assessor to decide whether the claim is ready to proceed to assessment. Once the teleconference occurs the Assessor decides whether the matter warrants an assessment conference or can be dealt with on the papers, having regard to the sufficiency of the information and the preference of the parties.<sup>124</sup> She went on to explain her approach to assessment conferences:

My method of approach is again that I am very inquisitorial. I have read all the material beforehand. I have taken it out of the paper files that CARS gives it to me in; I put it into a folder; I have dividers and post-it notes everywhere, with everything having been read and highlighted, and I have worked out what my questions are going to be, and I will question the parties.

I start with an introduction, with the claimant sitting before me, and I will always address my introduction to the claimant, because they are the injured person. Legal practitioners may have been there twenty times or more, but the claimant has only ever been there once, and so I will explain the process to the claimant, I will explain who I am and what the CARS process is, and what is going to happen during the course of the assessment conference. Once that is done, I will often give the parties the opportunity to explore settlement, if they have not fully explored settlement. I may give an indication of how I view the information that is in front of me. If they settle, they settle. If they do not, the matters runs.

I ask questions first, and then I ask the claimant's representative if they have any questions, and then I ask the insurance company if they have got any questions. That goes on with all the witnesses. Once the evidence has been given, I will then ask for submissions. I will usually engage in a debate or a discussion about the quantum of

<sup>123</sup> Ms Belinda Cassidy, Principal Claims Assessor, Motor Accidents Authority, Evidence, 20 June 2008, pp 46

<sup>124</sup> Ms Cassidy, Evidence, 20 June 2008, pp 46

the claimant's submissions with the practitioners who are present—again in the sight and hearing of the claimant, because it is their claim. If everybody has finished off, within 15 working days, but usually faster than that, I will turn out a decision and it is sent to the parties.<sup>125</sup>

## CARS Assessors

**5.22** The Committee was informed that CARS currently has 37 Assessors, each of whom was appointed in June 2006 for three years. Expressions of interest were sought from members of the legal profession with a current practising certificate issued in New South Wales. Selection was conducted by a panel comprising a subcommittee of the MAAS Reference Group and employees of the MAA, with recommendations for appointment made to the General Manager of the MAA.<sup>126</sup> The vast majority of Assessors are engaged on a part time basis and have other private practitioner roles in the area.<sup>127</sup>

**5.23** The MAA advised the Committee that the essential criteria for CARS Assessors are:

- At least seven years experience as a legal practitioner in handling personal injury claims. For solicitors, specialist accreditation in personal injury law is preferable.
- Experience of the Motor Accidents Compensation Act 1999 NSW, the Motor Accidents Authority's dispute resolution services and an understanding of the Claims Assessment Guidelines and the Motor Accidents Compensation Regulation 2005.
- Experience in calculating or estimating common law damages.
- Excellent written and verbal skills, including the capacity to write clear and understandable reasons for decisions.
- Demonstrable impartiality.
- Computer literacy, the ability to communicate effectively via email and the ability to learn to navigate the Motor Accidents Authority's computerised case management system.
- Professional integrity and credibility within the legal community.
- Evidence of commitment to continuing professional development.
- Ability to comply with deadlines and strict timeframes.<sup>128</sup>

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<sup>125</sup> Ms Cassidy, Evidence, 20 June 2008, pp 46-47

<sup>126</sup> Mr Player, Evidence, 20 June 2008, p 50; MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 22

<sup>127</sup> Ms Cassidy, Evidence, 20 June 2008, p 8

<sup>128</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 22-3

**5.24** Mr Player reported that feedback from all CARS stakeholders on the quality of Assessors has been very positive. He further contended that the quality of decision making is superior to that under the previous court-based system:

[T]his was a novel system when it was created. The policy idea of having coalface experienced, expert practitioners as decision-makers in this area is really paying off and showing some dividends, because the quality of the decision-making, I would contend, is better than it has been in the past.<sup>129</sup>

**5.25** When questioned by Committee members, the two CARS Assessors who appeared at the hearing, Ms Helen Wall and Mr Colin Stoten, acknowledged that the role of Assessor is comparatively less rewarding financially than their other legal roles, but not less professionally rewarding. Ms Wall told the Committee:

Financially, yes, your income drops; you get less for a CARS assessment than you would as a barrister. I speak from a barrister's point of view. But the advantage is that you keep up your knowledge base; you are in the ring, and you know what is going on in that area of law ... and you have colleagues and a fantastic principal claims Assessor for guidance. So it is a camaraderie thing, and that is very important if you practice in the area.<sup>130</sup>

**5.26** In relation to the coverage of Assessors across the State, Ms Cassidy reported that there are presently seven Assessors located in regional areas: one in Byron Bay, Wagga Wagga, Orange and Wollongong respectively, and four in Newcastle. Applications for assessment from people in those areas, and surrounding areas, are allocated to those Assessors. She further noted that the CARS system is not bound by circuits, as are courts, so that Assessors are able to travel as the need arises.<sup>131</sup>

## Performance of CARS

**5.27** In this section the Committee considers the MAA's account of the performance of CARS as set out in the MAA's *2006-2007 Annual Report* and the MAA's answers to questions on notice.<sup>132</sup>

### Number of applications

**5.28** In 2006-2007, a total of 2,663 applications were lodged with CARS, comprising:

- 1,340 applications for exemptions (50%)
- 1,163 applications for general assessment (44%)

<sup>129</sup> Mr Player, Evidence, 20 June 2008, p 50

<sup>130</sup> Ms Helen Wall, Assessor, Motor Accidents Authority, Evidence, 20 June 2008, p 53

<sup>131</sup> Ms Cassidy, Evidence, 20 June 2008, p 55

<sup>132</sup> The MAA provided detailed information on the performance of CARS in Appendix A to its answers to pre-hearing questions on notice. The document is available for downloading from the Committee's Inquiry website at [www.parliament.nsw.gov.au/lawandjustice](http://www.parliament.nsw.gov.au/lawandjustice).

- 4 applications for further assessment (0%)
- 156 applications for special assessment (6%).<sup>133</sup>

**5.29** The *Annual Report* indicates a marked decrease in lodgements compared to the previous year, when a total of 4,480 applications were received, comprising:

- 1,662 applications for exemptions (37%)
- 2,534 applications for general assessment (57%)
- 7 applications for further assessment (0%)
- 277 applications for special assessment (6%).<sup>134</sup>

**5.30** The *Annual Report* indicates that the 41% decrease in lodgements between 2005-2006 and 2006-2007 was driven by significant decreases in general assessment applications (54%), more so than in special assessment applications (44%) and exemption applications (19%). It notes that as a result, exemption applications now comprise the largest category of applications lodged with CARS, accounting for more than 50% of applications in 2006-2007.<sup>135</sup>

**5.31** The MAA attributes the significant decrease in applications primarily to the introduction of the revised Claims Assessment Guidelines in May 2006, in particular the revised CARS applications forms and their requirement for detailed evidentiary information.<sup>136</sup> The *Annual Report* states that, 'It is assumed that as cases were better prepared before lodgement, they have settled before being referred to CARS.'<sup>137</sup>

### **Number of finalisations**

**5.32** In 2006-2007 a total of 3,966 CARS applications were finalised. The total number of finalisations was greater than the total number of lodgements, and this was consistent across assessment types. The finalisations comprised:

- 1,421 exemptions (36%)
- 2,341 general assessments (59%)
- 6 further assessments (0%)
- 198 special assessments (5%).<sup>138</sup>

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<sup>133</sup> MAA, *Annual Report*, 2006-2007, p 94

<sup>134</sup> MAA, *Annual Report*, 2006-2007, p 94; MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 10

<sup>135</sup> MAA, *Annual Report*, 2006-2007, p 94

<sup>136</sup> MAA, *Annual Report*, 2006-2007, p 94; MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 10

<sup>137</sup> MAA, *Annual Report*, 2006-2007, p 94

<sup>138</sup> MAA, *Annual Report*, 2006-2007, p 94

- 5.33** The information provided to the Committee by the MAA prior to the hearing indicated that CARS' rate of finalisation in 2006-2007 continued to rise, as in previous years, to a rate of 1.49. Again this was attributed primarily to the reduction in applications for general assessment lodged with CARS since the revised Guidelines.<sup>139</sup>

### Exemptions

- 5.34** As indicated above, a party cannot commence proceedings in court unless the claim has either been exempted from CARS assessment or has been assessed at CARS. The Act provides for two types of exemptions: mandatory and discretionary. Mandatory exemptions are made by the Principal Claims Assessor in specific circumstances such as when the insurer denies fault, alleges that the claimant is more than 25% responsible for the accident, the claimant lacks legal capacity, or the claim is made against a party who is not a CTP insurer. Discretionary exemptions occur when a claims Assessor finds that a claim is 'unsuitable for assessment', subject to the endorsement of the Principal Claims Assessor.<sup>140</sup>
- 5.35** In 2006-2007 a total of 1,421 exemption applications were finalised. Of these, 1,305 proceeded to determination, while the remaining 116 were either withdrawn, settled or dismissed. Of those that were determined, 1,267 (97%) were exempted and 38 (3%) were not exempted.<sup>141</sup>
- 5.36** The *Annual Report* states that the proportion of matters exempted has increased significantly from 86% in the previous year, and attributes this primarily to a clarification of the mandatory grounds for exemption in the May 2006 Guidelines.<sup>142</sup>

### Outcomes of general and further general assessments

- 5.37** Table 1 on the following page sets out the outcomes of general and further assessments in 2006-2007 and the four years prior.
- 5.38** The assessment process is explained in paragraphs 5.10 to 5.21 above. If a matter proceeds to court after a CARS assessment and then new evidence is adduced that was not before the original claims Assessor, the matter may be remitted back to CARS for a further general assessment.
- 5.39** The *Annual Report* indicates that of the 2,341 matters finalised in 2006-2007, 461 (or 20%) were assessed by a CARS Assessor. Of these, 444 (96%) were assessed at conference and only 17 (4%) were assessed on the papers.
- 5.40** Of the 1,880 that were not assessed (80% of all matters finalised), 92 (4% of all matters) were dismissed, 32 (1% of all matters) were withdrawn, 104 (5% of all matters) were exempt (that

<sup>139</sup> MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, p 8

<sup>140</sup> MAA, *Annual Report*, 2006-2007, p 95

<sup>141</sup> MAA, *Annual Report*, 2006-2007, p 95; MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, p 12

<sup>142</sup> MAA, *Annual Report*, 2006-2007, p 95

is, mandatory exemptions and ‘unsuitable’ exemptions) and 1,652 (70% of all matters) were settled.

**Table 5.1: Outcomes of finalised applications for CARS general assessment<sup>143</sup>**

<b>General and Further General Assessments</b>	<b>02-03</b>	<b>%</b>	<b>03-04</b>	<b>%</b>	<b>04-05</b>	<b>%</b>	<b>05-06</b>	<b>%</b>	<b>06-07</b>	<b>%</b>
Assessed at conference	37	6	193	9	397	16	493	17	444	19
Assessed on papers	103	17	203	10	154	6	57	2	17	1
Subtotal assessed	140	23	396	19	551	22	550	19	461	20
Dismissed	31	5	95	4	56	2	95	3	92	4
Withdrawn	35	6	86	4	120	5	101	4	32	1
Exempt (mandatory exemptions and ‘unsuitable’ exemptions)	16	3	187	9	188	8	219	8	104	5
Settled	379	63	1,353	64	1,588	63	1,855	66	1,652	70
Subtotal not assessed	461	77	1,721	81	1,952	78	2,270	81	1,880	80
<b>Total finalised</b>	<b>601</b>	<b>100</b>	<b>2,117</b>	<b>100</b>	<b>2,503</b>	<b>100</b>	<b>2,820</b>	<b>100</b>	<b>2,341</b>	<b>100</b>

**5.41** According to the MAA, in 2006-2007 the proportion of matters requiring assessment remained stable at 20 per cent of claims, while settlements increased by 5 percent to 70 per cent.<sup>144</sup>

### Timing of settlement

**5.42** In its response to pre-hearing questions the MAA suggested that given the substantial number of CARS applications that reach settlement prior to assessment, it is valuable to consider the timing of settlement.

**5.43** Of the 1,652 general assessments settled in 2006-2007:

- 168 settled between the time of lodgement and allocation to an Assessor (10%)
- 162 settled between the time of allocation and the time of first preliminary conference (10%)
- 904 settled after the first preliminary conference but prior to the assessment conference (55%)
- 391 settled at the assessment conference (24%)
- 27 settled after the assessment conference (1%).<sup>145</sup>

<sup>143</sup> MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, p 17

<sup>144</sup> MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, p 18

<sup>145</sup> MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, p 20

5.44 The MAA has pointed out that the trend data on timing of settlement indicates that the first preliminary conference held by the CARS Assessor is an increasingly important catalyst to the resolution of most disputes at CARS.<sup>146</sup>

### Special assessments

5.45 If a procedural dispute arising in a claim is a dispute listed in s96 of the Act, it may be referred for a CARS special assessment.<sup>147</sup>

5.46 The *Annual Report* indicates that of the total of 156 special assessment dispute lodgements in 2006-2007:

- 114 concerned late claims (73%)
- 15 concerned claims not lodged with the police (10%)
- 5 related to claim forms not complying with requirements (3%)
- 20 involved whether an insurer could delay making an offer (13%)
- 2 concerned whether a payment for treatment or rehabilitation must be made (1%).<sup>148</sup>

5.47 Of the 198 applications for special assessment which were finalised in 2006-2007:

- 89 concerned late claims (71%)
- 11 concerned claims not lodged with police (9%)
- 4 related to claim forms not complying with requirements (3%)
- 4 involved whether an insurer could delay making an offer (13%)
- 5 concerned whether a payment for treatment or rehabilitation must be made (4%).<sup>149</sup>

### Quality assurance initiatives

5.48 The Committee sought information from the MAA prior to the hearing on CARS' quality assurance initiatives and the impact they are having on efficiency and effectiveness.

5.49 The MAA indicated that its quality assurance initiatives include:

- the CARS Assessors' Practice Manual, published in February 2008, which provides information about the scheme, the MAAS and pre-assessment procedures within CARS, along with comprehensive guides to assessment procedure, decision writing and exemptions

<sup>146</sup> MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, p 20

<sup>147</sup> MAA, *Annual Report*, 2006-2007, p 96

<sup>148</sup> MAA, *Annual Report*, 2006-2007, p 96

<sup>149</sup> MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, p 27

- regular provision of updated information relevant to assessment practice and procedure through an Assessor extranet, electronic newsletters, regular Assessor briefing sessions and an annual conference for Assessors.<sup>150</sup>

**5.50** The MAA's response also stated:

The earlier preparation of claims being lodged and the timeliness of claims Assessors' decisions are improving and the accuracy of decisions is consistently high. The number of complaints in relation to claims assessments has remained consistently low, as have been challenges to Assessor decisions, with 13 matters since 2005 being the subject of an administrative law challenge.<sup>151</sup>

## **Committee comment**

**5.51** The information presented above on the performance of CARS, drawn from the MAA's *2006-2007 Annual Report* as well as detailed answers to question on notice, suggests that in broad terms, CARS is performing well. The data indicates – and as has been highlighted by the MAA – that the revised Claims Handling Guidelines have had an important and positive impact on CARS' performance, most notably in that they facilitate the resolution of CARS matters via settlement (prior to assessment) as well as via assessment itself. This is consistent with the Motor Accidents Compensation Scheme goals of early and fair dispute resolution, which in turn facilitate effective injury management.

**5.52** In the following chapter the Committee examines in detail numerous issues raised by review participants in respect of CARS.

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<sup>150</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 12-13

<sup>151</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 13

## Chapter 6 Issues in respect of the Claims Assessment and Resolution Service

In this chapter the Committee explores a number of issues raised by review participants in relation to the Claims Assessment and Resolution Service (CARS). It commences with a discussion of stakeholders' perceptions of the Service, before examining a number of specific issues including: the level of bureaucracy in some aspects of the Service; the increasing complexity of some matters before CARS; concerns about 'superimposed inflation' in the damages determined in CARS assessments; the transparency of CARS processes; recoverable costs for legal representation; an apparent increase in claims of contributory negligence by insurers; alternative processes for the handling of matters referred to the District Court for assessment of liability; CARS' present inability to assess infants' claims or to approve settlements involving infants; and the timeliness of CARS assessments.

### Stakeholder perceptions

- 6.1 The Committee was interested in stakeholders' perceptions of the CARS system.
- 6.2 In information provided to the Committee after the hearing, the Insurance Council of Australia stated:

On the whole the Insurance Council believes that the CARS process is working well and provides a quick and efficient method of assessing non complex motor vehicle injuries without the added expense of court procedures.<sup>152</sup>

- 6.3 At the hearing, Mr Hugh Macken, President of the Law Society of NSW, praised the Scheme as a whole as 'the ant's pants'. He went on to say:

The Claims Assessment and Resolution System created by the *Motor Accident Compensation Act* is a fantastic alternative dispute resolution system for assessing motor vehicle claims. It has the wholehearted support of the Law Society. It is fair, it is fast, it is efficient, it is cost effective, it is flexible, it is supremely well managed, and it is well understood. It is widely acclaimed as a template for how non-litigious claims assessment ought occur. The legal profession respects and supports the system. It was considered controversial and visionary at the time. It remains the preferred option for alternative dispute resolution.<sup>153</sup>

- 6.4 Mr Macken further stated in respect of claimants:

The system is wonderful for claimants. It allows access to medical and rehabilitation support very early. This provides top-level care and support, which reduces the impact of their injuries. It is a claims friendly system. The informal procedures obviate the stress and anxiety and concerns associated with litigation. The parties do not wear wigs and gowns; they are not stuck with or inhibited by the operation of the Evidence

<sup>152</sup> Insurance Council of Australia, Answers to questions on notice taken during evidence, 18 July 2008, p 6

<sup>153</sup> Mr Hugh Macken, President, Law Society of NSW, Evidence, 20 June 2008, pp 19-20. Mr Macken declared in evidence that he is a CARS Assessor.

Act. It is a cordial environment. There is an enormous amount of information widely accessible to the public and the profession explaining the steps that the system goes through in a very user-friendly way. The capacity for free interpreters, the prompt decisions, and the way in which parties can manage the progress of their case are all to be commended and all work to the benefit of the claimants.<sup>154</sup>

**6.5** By contrast, the NSW Bar Association’s submission made its philosophical position clear:

The Association’s primary position remains that substantive rights should be determined by independent judicial decision makers rather than through a process of bureaucratic assessment.<sup>155</sup>

**6.6** Notwithstanding this objection, as well as what it sees as a number of ‘administrative flaws and the overly bureaucratic nature of the system’, the Bar Association stated that it has few complaints about CARS Assessors and the quality of their decision-making.<sup>156</sup>

**6.7** The MAA has examined the perception of stakeholders of both CARS and MAS by commissioning a series of evaluation studies conducted by the Justice Policy Research Centre (JPRC) at the University of Newcastle. The JPRC reported in September 2006.<sup>157</sup>

**6.8** In respect of CARS, the studies ascertained the perceptions of CARS Assessors, CTP insurers, solicitors and CARS claimants in relation to the operations and processes of the Service.<sup>158</sup>

**6.9** Prior to the hearing, the Committee sought information from the MAA on the key findings and recommendations of the JPRC Report, and the action that the MAA is taking in response. The MAA provided information on the scope and timeframe of the six individual studies making up the evaluation, noting that no specific recommendations were made.<sup>159</sup>

**6.10** In evidence, Mr Bowen noted that it has been some time since the JPRC studies were conducted, and that a number of systemic improvements have since been made.<sup>160</sup> With these caveats in mind, Mr Bowen spoke about the JPRC’s broad findings in respect of CARS:

The lawyers like the Claims Assessment and Resolution Service; it is quick and easy to get into. In particular, the Law Society and the solicitors’ branch of the legal profession like [it]. In fact, the feedback generally is fairly positive in respect of CARS. I think the insurers have some concerns over elements of CARS that have to do with its statutory basis, and the fact that they have no right to challenge decisions of CARS that are accepted by claimants. They are very critical of that component of it, and they have some other criticisms that are outcome-based. But, generally, the feedback is that

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<sup>154</sup> Mr Macken, Evidence, 20 June 2008, p 20

<sup>155</sup> Submission 8, NSW Bar Association, p 2

<sup>156</sup> Submission 8, p 2

<sup>157</sup> MAA, *Annual Report, 2006-2007*, p 15

<sup>158</sup> MAA, *Annual Report, 2006-2007*, p 15

<sup>159</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 13-14

<sup>160</sup> Mr David Bowen, General Manager, Motor Accidents Authority, Evidence, 20 June 2008, p 4

it is quicker to get into, it is much more flexible and much more responsive than running the whole case at court, and obviously cheaper in that sense.<sup>161</sup>

**6.11** In respect of claimants' perceptions, Mr Bowen went on to tell the Committee:

Generally, it led us to the conclusion that we need to be providing more information to claimants about what happens. There is a lot of information that goes to the claimants, and there is an expectation also from us that, given most people are represented at CARS, they will be told by their solicitor what to expect. But, despite all of the information out there, they are probably not as prepared for what goes on, how it is conducted, and what rights and responsibilities they have before the CARS hearing. That is something that we are taking on board, to try and provide a little bit more of customer care, if you like, to assist people on the way through.<sup>162</sup>

**6.12** Mr Bowen further indicated that the MAA planned to evaluate user satisfaction again in the future, particularly the satisfaction of claimants:

Yes, we will do it again—not in the same level of detail. This was a major review. It was to make sure things were working fine. We have now very robust feedback systems through practice groups with the legal profession and insurance representatives. So we are getting much more immediate feedback. But we will do a further review that also assesses feedback from the claimants, who are the key users of the system.<sup>163</sup>

**6.13** Mr Bowen also undertook to provide the Committee with a summary of the evaluation's findings in terms of stakeholders' perceptions about the usability, accessibility and speed of MAS and CARS. This was later forwarded to the Committee.

#### **Committee comment**

**6.14** The Committee has concluded that notwithstanding the NSW Bar Association's philosophical objection to CARS, the Service is seen to be operating effectively by both insurer and legal stakeholders. In particular, the Law Society and Insurance Council consider that it is fulfilling its role as an independent, inexpensive and efficient early dispute resolution service very well. The Committee is aware that not all dispute resolution services enjoy this level of respect among such stakeholders.

**6.15** We are also mindful that as a Committee we have been less able to gauge the perceptions of claimants – key stakeholders of CARS – who have tended not to participate in our reviews, including this one. The Committee notes that only one submission was received from a CARS applicant; their concern about the timeliness of CARS' decisions is addressed later in this chapter.

**6.16** The MAA has undertaken a detailed evaluation of CARS stakeholders' perceptions and accept its assertions that it has been some time since the JPRC's surveys were conducted, with a

<sup>161</sup> Mr Bowen, Evidence, 20 June 2008, p 5

<sup>162</sup> Mr Bowen, Evidence, 20 June 2008, p 5

<sup>163</sup> Mr Bowen, Evidence, 20 June 2008, p 4

number of systemic improvements having since been made, and that there are now robust systems for regular feedback from industry and legal stakeholders in place.

- 6.17** The Committee was pleased to hear that the MAA is taking the feedback from claimants seriously, particularly the desirability of claimants being more informed about CARS processes. We note that being informed is an important platform for exercising one's rights. We encourage the MAA to make its actions in this area a priority, and to fulfil its commitment to conduct a further survey of user perceptions to gauge the effectiveness of its actions in this area.

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### **Recommendation 3**

That the Motor Accidents Authority make its strategies to improve claimants' understanding of the Claims Assessment and Resolution Service a priority and allocate resources accordingly, and that it evaluate the effectiveness of those strategies by conducting a further study of claimants' perceptions of the Claims Assessment and Resolution Service.

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## **Perceived bureaucracy**

- 6.18** In its submission the NSW Bar Association argued that the CARS process is 'intensely bureaucratic', requiring extensive claims preparation and readily rejecting any applications deemed deficient. The Association contended that this complexity means that parties find it easier to settle than to proceed through CARS, and that this has contributed to the significant reduction in both claims lodged with the Service and in claims processing times.<sup>164</sup>

- 6.19** In information provided after the hearing, the Association expanded on this position, stating:

There is a very significant amount of preparatory work required to lodge an application with CARS. An application for general assessment has to be accompanied by a detailed statement from the claimant, statements from care providers, statements from co-workers, a schedule of damages and detailed submissions in support of that schedule. It isn't surprising that many solicitors attempt to settle a case before undertaking this expensive initial work.

CARS was intended to be a system for assessing simple cases, with the more complex cases being dealt with by the court system. A simple system of assessment should not require such complex and detailed preparation. Rather than incorporating more forms, more rules and more requirements in respect of the process, the MAA should be set the task of reviewing the CARS to see how it could be streamlined, simplified and made less rather than more complex.<sup>165</sup>

- 6.20** In relation to its concerns about ready rejection of applications, the Bar Association pointed to cases where applications had been rejected because of the absence of a single document, and

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<sup>164</sup> Submission 8, p 2

<sup>165</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, pp 1-2

asserted that the MAA should take a less technical and more accepting position in respect of lodgements.<sup>166</sup>

- 6.21** The Bar Association also pointed to unnecessary bureaucracy in relation to exemptions, specifically the obligation to lodge an application for exemption where liability is denied. A separate concern about the number of discretionary exemptions being granted is noted in paragraph 6.35. The Association stated:

As the Principal Claims Assessor must grant an exemption in these circumstances pursuant to Chapter 7.1 of the Claims Assessment Guidelines, the MAA is simply requiring parties to waste time, effort and costs in lodging a form when the outcome of the application is predetermined.<sup>167</sup>

- 6.22** The Committee sought the response of the MAA, the Law Society and the Insurance Council to the Bar Association's concerns in this area.
- 6.23** In relation to the issue of extensive preparation of evidence, in its answers to questions on notice prior to the hearing, the MAA defended the requirement for more thorough preparation of claims prior to application as having achieved significant benefits for parties to disputes by facilitating settlement of CARS matters.<sup>168</sup>
- 6.24** In addition, the MAA did not agree with the perception that CARS readily rejects applications. The Authority rejected possibility that the process is intended to make the system quicker and easier for CARS rather than participants, stating, 'Applications are only rejected if they are clearly non-compliant.'<sup>169</sup> It explained that Clause 3.21 of the May 2006 Claims Assessment Guidelines empowers registry officers to reject applications that are procedurally non-compliant, for example where compulsory documents are not attached to the application the documents attached are not listed. It reported that CARS has issued guidance to registry officers in relation to the application of the rejection test in order to ensure consistency and fairness, and that for example, if the only problem is that the application is not signed, registry officers will not reject the application but telephone the party lodging it and request a signed page be faxed or emailed.<sup>170</sup>
- 6.25** The MAA went on to report that in 2006-2007 approximately 14 per cent of incoming applications were rejected, equating to about 40 matters per month. The most frequent reasons were that compulsory documents were not attached, that time limits were not satisfied, that some questions were not answered or that the application was not signed.<sup>171</sup> The MAA subsequently also pointed out that 'rejection' of an application does not necessarily

<sup>166</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, p 2

<sup>167</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, p 2

<sup>168</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 9-10; Mr Cameron Player, Assistant General Manager, Motor Accidents Assessment Service, Evidence, 20 June 2008, p 55

<sup>169</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 25

<sup>170</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 24-25

<sup>171</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 24-5

mean outright refusal, but rather that it is handed back to the applicant for its problems to be addressed and the application resubmitted.<sup>172</sup>

- 6.26** The Law Society of NSW did not share the Bar Association's view that the CARS system is especially bureaucratic.<sup>173</sup> Mr Scott Roulstone, Junior Vice President, stated in evidence:

The Law Society position is that the system is not overly bureaucratic. Perhaps one could say historically that it started out that way. That was from the point of inception in 1999. However, we see vast improvements in relation to the streamlining of the systems, particularly in the last few years. We see the focus on alternative dispute resolution as being a positive insofar as it does eliminate or seeks to resolve smaller claims at a very early stage. There is certainly no doubt that a lot of the claims are being resolved prior to the matter going through the CARS system.<sup>174</sup>

- 6.27** Similarly, representatives of the Insurance Council of Australia told the Committee that they thought that the way that the system encouraged early settlement was positive, facilitated by the early exchange of detailed information. Mr Philip Cooper, Chair of the Insurance Council's Motor Accidents Insurance Standing Committee stated in evidence:

As for the complexity of the process deterring people from going to CARS, we actually have the opposite opinion. We think that the fact that people are not going to CARS means that the process is actually working quite well. In other words, to a large extent, we have a common understanding of what the likely outcome is going to be, and we are avoiding the cost for the claimants, the injured parties, going into a CARS hearing because we can agree on what the outcome should be before we even go there. That is in large part why claims are now settling prior to CARS ... So, to the extent that that has become transparent, it obviates the need to go to CARS in the first place.<sup>175</sup>

- 6.28** The NSW Bar Association responded in turn to the MAA's reply to its concerns. In relation to the rejection of applications issue, the Bar Association contended that a rejection rate of 14 percent was notably high.<sup>176</sup> In relation to the MAA's response that the requirement for greater documentation of applications prior to lodgement had intentionally led to a reduction in CARS matters by facilitating settlement, the Bar Association maintained that CARS is seen as overly bureaucratic:

The Association agrees that as a consequence of earlier information exchange and better preparation of disputes there are more settlements occurring before the CARS process is entered into. However, this is not the only reason that there are more settlements occurring pre CARS. This settlement rate can be partly attributed to concern by both claimants and insurers about the amount of time and effort involved in the CARS process. That time and effort is such a deterrent that both sides will

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<sup>172</sup> Telephone conversation between Mr Player and Principal Council Officer, 23 July 2008

<sup>173</sup> Law Society of NSW, Answers to questions on notice taken during evidence, 9 July 2008, p 1

<sup>174</sup> Mr Scott Roulstone, Junior Vice President, Law Society of NSW, Evidence, 20 June 2008, p 23

<sup>175</sup> Mr Philip Cooper, Chair, MAISC Executive Committee, Insurance Council of Australia, Evidence, 20 June 2008, p 37

<sup>176</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, pp 2 and 4

compromise more readily rather than incur the costs of the CARS process. By deterring parties from pursuing disputes the system is not really providing justice at all.<sup>177</sup>

### Committee comment

- 6.29** On balance, the Committee accepts that the requirement to provide extensive documentation prior to lodgement of CARS applications is valid and has helped to encourage settlement by facilitating the exchange of detailed information between parties. We agree that this is a desirable outcome. We also accept that reasonably strict standards about applications and accompanying documents are necessary to help achieve this outcome, and note the MAA's assurance that measures are in place to ensure that registry officers apply the rejection test fairly and consistently.
- 6.30** It may be the case that the Bar Association's concerns about time-intensive preparatory work, and ready rejection of applications, will to some extent be addressed through MAA actions in relation to the Cost Regulation governing recovery of costs for legal representation in respect of compulsory third party (CTP) claims. The MAA has acknowledged that current provisions do not adequately recompense the extensive preparatory work required by CARS applications, and that greater incentives for this work are desirable.<sup>178</sup> The view that the Cost Regulation should better reflect the volume of work required by CARS is discussed in detail in paragraphs 6.97 to 6.116.

### Complex matters considered by CARS

- 6.31** The NSW Bar Association also raised a concern about the increasing number of particularly complex matters being considered by CARS, and the capacity of the Service to determine them appropriately. Its submission stated:

The CARS system was originally designed to handle short, simple and straightforward matters. On this basis, the assumption was that the average CARS assessment would last for about two hours. It was anticipated that assessments could be conducted on the papers. However, because of the difficulty in obtaining an exemption for complexity ... CARS now regularly handles claims worth hundreds of thousands and even millions of dollars. Such cases cannot be fairly dealt with on the shortened basis on which the CARS system was designed to operate.<sup>179</sup>

- 6.32** Linking this issue to the perception that CARS is overly bureaucratic discussed above, the Bar Association went on to state:

The Association is of the view that CARS Assessors are largely well qualified and experienced personal injury practitioners. However, this does not mean that the CARS Assessors are just as well positioned as a judge to determine large and complex cases. Rather than constituting a quick and simple mechanism for resolving claims, it

<sup>177</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, pp 3-4

<sup>178</sup> Mr Player, Evidence, 20 June 2008, p 56

<sup>179</sup> Submission 8, p 3

appears that CARS is developing into a highly involved, complicated and bureaucratic alternative.<sup>180</sup>

- 6.33** In evidence, Mr Andrew Stone, a member of the Association's Common Law Committee, pointed to figures provided to the Committee by the MAA in relation to CARS general assessments:

For example, in the 2003-04 year, there were 12 general assessments awarded at greater than \$100,000, or 8 per cent of all claims. In the 2007 year, there were 250 general assessments awarded at beyond \$100,000, or 54 per cent of all claims. In fact, there are 48 general assessments in the 2006-07 year at between \$500,000 and \$1 million, and a number over \$1 million. I myself have run several multimillion dollar cases as CARS assessments, and I can say that the system is simply not designed to do it. It is not fair to either side. It is a very broad-brush system. To run a multimillion dollar case literally in an hour or an hour and a half is a very strange experience. It requires a very broad-brush approach.<sup>181</sup>

- 6.34** Mr Stone noted that in comparable areas of law, for example defamation, sums of \$80,000 or \$150,000 are routinely considered by judges.<sup>182</sup> He went on to state:

The problem is that as CARS has become more self-confident, it no longer regards anything as complex, because complex is in effect an admission of defeat, that we are not up to it.

It is not complex because the people are not skilled enough; it is complex because the forum does not allow the matter to be properly ventilated and dealt with.<sup>183</sup>

- 6.35** In relation to discretionary exemptions, which as noted in the previous chapter (see paragraph 5.34) are granted by CARS and enable a matter to proceed straight to court, the Bar Association reported that there is anecdotal evidence from a number of its members that discretionary exemptions are becoming increasingly difficult to obtain. It noted that grounds for discretionary exemption may include complexity of legal issues, factual issues, causation issues and quantum damages issues, and voiced concern that these are granted at the sole discretion of the Principal Claims Assessor.<sup>184</sup>

- 6.36** In evidence, Mr Stone explained that part of the problem is the limited time allocated for an assessment, which might be two hours. He further contended that it was also a matter of not being able to take sworn evidence or to summons witnesses to appear at CARS conferences, and the inability to hear from experts.<sup>185</sup> He stated:

There are a whole series of reasons why. In what are very important [decisions] financially for people, once you get into million-dollar cases, it ought not to be done on best guess, based on having to judge two experts' reports, when they have

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<sup>180</sup> Submission 8, p 5

<sup>181</sup> Mr Stone, Evidence, 20 June 2008, pp 26-27

<sup>182</sup> Mr Stone, Evidence, 20 June 2008, p 27

<sup>183</sup> Mr Stone, Evidence, 20 June 2008, p 27

<sup>184</sup> Submission 8, pp 4-5

<sup>185</sup> Mr Stone, Evidence, 20 June 2008, p 28

conflicting views, without hearing from each of them in order to try and reach a sound determination as to which one to believe.<sup>186</sup>

**6.37** Mr Stone also explained that it was not as simple as introducing a monetary threshold above which all matters should proceed straight to court. He pointed out that some large cases may be very simple, with little in dispute. Instead, he called for greater use of discretionary exemptions, saying, ‘We would like the discretion to be better used than it is at the moment, and in a less “we can do everything” fashion’.<sup>187</sup>

**6.38** The Committee sought the views of the MAA, the Law Society and the Insurance Council on the Bar Association’s concerns.

**6.39** Mr Scott Roulstone, Chair of the Law Society’s Injury Compensation Committee, argued that the extensive experience of claims Assessors means that they are ‘completely and absolutely qualified’ to hear matters of high complexity, and that they were often equally as qualified as District Court or Supreme Court judges, if not more so, given their level of specialisation.<sup>188</sup>

**6.40** On the other hand, the Insurance Council of Australia agreed with the Bar Association that the complexity of an increasing proportion of CARS matters is an issue, and expressed similar concern that CARS may not be an appropriate forum to consider some complex matters. Mr Cooper explained:

We are particularly talking about complex legal matters, such as negligence. It is just an inappropriate forum to deal with those in the CARS process. Typically, we have very technical, complex expert evidence that needs to be examined and cross-examined, and that is not an appropriate forum in which to do that. It was never designed to do so.<sup>189</sup>

**6.41** Mr Cooper went on to say that he too did not think a simple monetary threshold was desirable:

Quite often there will be a very large claim where the only point of contention might be one small head of damage that might be worth \$10,000, in a \$2 million claim. It would be inappropriate to send that off to court because it is a very large claim. It is really the complexity of the matter that should be the determinant of whether it goes through the CARS process or courts process. It is a very difficult thing to create criteria ...<sup>190</sup>

**6.42** In information provided to the Committee following the hearing, the Insurance Council offered to give further consideration to the criteria for complexity:

We are keen to work with the MAA through the [MARS Reference Group] to consider the criteria which may assist in determining whether or not a claim is complex. We suggest that we review the existing factors of complexity that are the

<sup>186</sup> Mr Stone, Evidence, 20 June 2008, p 28

<sup>187</sup> Mr Stone, Evidence, 20 June 2008, p 27

<sup>188</sup> Mr Roulstone, Evidence, 20 June 2008, p 23

<sup>189</sup> Mr Cooper, Evidence, 20 June 2007, p 52

<sup>190</sup> Mr Cooper, Evidence, 20 June 2007, p 52

basis of a discretionary exemption in the CARS Guidelines and as a stakeholder, determine whether these existing factors need to be expanded any further.<sup>191</sup>

- 6.43** In evidence, Ms Cassidy, CARS Principal Claims Assessor, defended the capacity of CARS Assessors, who have been selected on the basis of their expertise in dealing with motor accidents claims, to determine complex matters.<sup>192</sup> She also reported that CARS Assessors receive substantial training, stating:

Where does a judge get a judge's experience? From being a judge, I guess. I think we have gone down the road of having personal injury practitioners trained to be decision-makers, rather than picking people who we think would be good decision-makers and training them to understand motor accident claims and assessing damages. We have undertaken a lot of training with CARS Assessors, from the day they were first appointed, in case management, in decision-making, in decision-writing, with similar training to the training that is offered, as I understand it, to Local Court magistrates, AAT tribunal members, and even District Court judges I understand have had the same fellow give them training on writing decisions as we have had. So I think that we have given plenty of training to the CARS Assessors on being "judges".<sup>193</sup>

- 6.44** When asked about how large claims are allocated at present, Ms Cassidy acknowledged that the process is somewhat 'ad hoc'.<sup>194</sup> She explained:

I am aware of the practitioners who have the expertise, but it is not regimented in any way, and it is not set down in any procedure. I know there are some claims Assessors who have, over the last year for example, demonstrated an ability to be able to deal with complex causation cases—simply because I have read their decisions, and I have read their preliminary conference reports, and they have talked to me about the way they handle things. So I have got an idea of some of these Assessors who seem to be better at dealing with causation cases.<sup>195</sup>

- 6.45** Her colleague Mr Player noted that the CARS process is flexible, with the ability to allocate more conference time for complex matters, but suggested that these could still be dealt with in less than a day. He reported that he was surprised to hear a perception that the process might be rushed, and that this was not consistent with feedback to the Service.<sup>196</sup>

- 6.46** In answers to questions prior to the hearing, the MAA addressed the suggestion that discretionary exemptions are becoming increasingly difficult to obtain:

Section 92(1)(b) of the Motor Accidents Compensation Act 1999 provides that a claim is exempt from assessment if a claims Assessor has made a preliminary

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<sup>191</sup> Insurance Council of Australia, Answers to questions on notice taken during evidence, 18 July 2008, p2

<sup>192</sup> Ms Belinda Cassidy, Principal Claims Assessor, Motor Accidents Authority, Evidence, 20 June 2008, p 47

<sup>193</sup> Ms Cassidy, Evidence, 20 June 2008, p 47

<sup>194</sup> Ms Cassidy, Evidence, 20 June 2008, p 48

<sup>195</sup> Ms Cassidy, Evidence, 20 June 2008, p 48

<sup>196</sup> Mr Player, Evidence, 20 June 2008, p 52

assessment of the claim and has determined (with the approval of the Principal Claims Assessor) that it is not suitable for assessment under this Part.

This therefore requires a claim to be allocated to a claims Assessor, the claims Assessor to determine it is not suitable and for the Principal Claims Assessor to approve the claims Assessor's decision. As there are 37 claims Assessors, the approval of the Principal Claims Assessor is a necessary step to ensure consistency and avoid 'Assessor shopping'.

Before May 2006 applications for exemption on the basis that the claim was not suitable for assessment could be made on an interlocutory basis, that is, before allocation, however during the course of argument in Supreme Court challenges to exemption decisions at least two judges of the Supreme Court have suggested that it must be the claims Assessor to whom the claim is allocated that makes the decision and therefore it cannot be done by the Principal Claims Assessor 'in house' before allocation (which used to be done to speed up the process and exempt clearly exemptible matters quickly before delay and the expense of allocating to an Assessor – who charges a fee for doing so).

...

As time has progressed and the experience of the claims Assessors has increased so too has their capability and it is true that more claims are being considered to be suitable for assessment at the Claims Assessment and Resolution Service. Also the impact of the four Supreme Court decisions in 2006 has been important – in all four cases, the Court has given the Claims Assessment and Resolution Service Assessors valuable guidance on what considerations must be taken into account when determining exemptions.<sup>197</sup>

**6.47** Ms Cassidy gave further information about the bearing of the Supreme Court decisions on the issue of complexity:

But, certainly, on the issue of complexity, the Supreme Court has given us some very good guidance on what is not complex and what is complex, and it was Justice Sully in a decision of Lorusso who said: Complex is anything that a CARS Assessor does not think they can deal with. A subsequent Supreme Court decision, affirmed by the Court of Appeal, said that a CARS Assessor was entitled to bring their experience into the decision-making process. So, effectively, if a CARS Assessor thinks they can deal with it, they should deal with it.<sup>198</sup>

**6.48** Mr Colin Stoten, a CARS Assessor, told that Committee that the CARS system does have the capacity to allow cross-examination in complex cases:

I had a complex psychiatric case last year where the parties were poles apart and the issue was whether the claimant had an accident-based psychiatric impairment, or whether it was due to some other reason, and that assessment conference, which took place over only three hours, took place in the presence of the claimant and the competing psychiatrists involved. It was dealt with in the fashion that the claimant gave some evidence about what his problems were. I then invited the psychiatrists to express an opinion based on what they knew from the material and what they had

<sup>197</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 25-6

<sup>198</sup> Ms Cassidy, Evidence, 20 June 2008, p 48

heard from the claimant. I made a decision. I found out subsequently that the claimant accepted that decision and that the insurer was happy with the decision as well. That is a case that would have taken, I would think, at least three days of court hearing time.<sup>199</sup>

**6.49** Ms Cassidy told the Committee that the possibility of formally enabling Assessors to specialise in ‘large’ cases had recently arisen at CARS, and that she supported the idea. She indicated that she and Mr Player would work with the MAAS Reference Group to develop a selection process for Assessors specialising in complex cases.<sup>200</sup> She also indicated that she was open to considering a panel approach to the consideration of complex matters, whilst noting that this would require legislative change.<sup>201</sup>

**6.50** In reply to the MAA’s evidence and its answers to pre-hearing questions on notice, the Bar Association maintained its concern that a relatively brief CARS conference cannot properly consider certain complex matters, and that the outcome is not fair to either party. It further noted that the Insurance Council shared its concerns. In terms of potential remedies, the Bar Association stated:

The Association would strongly prefer an approach involving the more liberal use of the power to grant discretionary exemptions. The current system provides for complex cases to be exempt if only the discretion to grant exemptions was being applied.

The Association is loath to recommend thresholds or caps as this removes flexibility from the system. There may be the odd large case that has few issues in dispute. There may be small cases that raise very complex issues. The current system has all the flexibility it needs if only that flexibility is properly applied. The Association does suggest that consideration could be given to providing for a compulsory exemption where both parties agree.<sup>202</sup>

### **Committee comment**

**6.51** The Committee acknowledges the high level of expertise among CARS Assessors and the flexibility of the CARS process. We also note the Principal Claims Assessor’s evidence that Supreme Court decisions have affirmed the capacity of CARS Assessors to determine whether they can deal with a matter. At the same time, we consider that at this stage in the life of CARS it would be worthwhile for the MAA to give further thought to the optimal arrangements for consideration of complex disputes. We note the difficulty of the issues identified by stakeholders, particularly that complex matters that may warrant a different kind of assessment may not actually be defined by the dollar figure associated with a claim.

**6.52** Representatives of the MAA have already signalled their openness to considering this issue, specifically, the potential to make use of panel assessments and Assessors who would specialise in large matters. The Committee believes that it would be valuable for such

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<sup>199</sup> Mr Colin Stoten, Claims Assessor, Motor Accidents Authority, Evidence, 20 June 2008, p 51

<sup>200</sup> Ms Cassidy, Evidence, 20 June 2008, p 48

<sup>201</sup> Ms Cassidy, Evidence, 20 June 2008, p 53

<sup>202</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, p 3

consideration to be formalised and conducted in consultation with key stakeholders. It also appears that further discussion between the MAA and the Bar Association, as well as other stakeholders, about the use of discretionary exemptions is desirable.

- 6.53** We believe it would be valuable for the MAA, in tandem with the MAAS Reference Group, to formally consider ways to achieve a greater recognition of the circumstances where the complexity of a matter is such that it could benefit from a different form of assessment. It might also be valuable to seek the input of individual Assessors, for example by way of a survey. In examining this issue, the MAA should consider potential ‘triggers’ by which to identify complex cases, as well as potential mechanisms for dealing with them, including via ‘expert Assessors’, a panel of Assessors, and referral to court via discretionary exemptions. It should also consider whether any change in practice or to the guidelines in relation to discretionary exemptions is desirable or necessary.

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#### **Recommendation 4**

That the Motor Accidents Authority, in tandem with the Motor Accidents Assessment Service Reference Group, formally consider, by 30 June 2009, ways to achieve a greater recognition of the circumstances where the complexity of a matter lodged with the Claims Assessment and Resolution Service is such that the matter could benefit from a different form of assessment. This should include consideration of:

- potential triggers to identify complex cases
  - potential mechanisms for dealing with complex cases, including via expert individual Assessors, an Assessor panel, and referral to court via discretionary exemption
  - whether any changes in practice or to the guidelines in relation to discretionary exemption are desirable or necessary.
- 

#### **Damages determined in CARS assessments: ‘superimposed inflation’**

- 6.54** In its submission, the Insurance Council of Australia presented data from its members to argue that the levels of CARS assessments (that is, the amounts of compensation determined by CARS Assessors) have increased over time. The Insurance Council referred to this as ‘superimposed inflation’ and contended that if left unchecked, this trend could place upward pressure on premiums and erode the benefits of the scheme.<sup>203</sup>
- 6.55** Specifically, the Insurance Council examined CARS decisions in respect of severity 1 whiplash injuries, suggesting that these were indicative of trends across the whole CTP scheme.<sup>204</sup> Mr Philip Cooper explained in evidence:

In initiating the study that we did we took particular care to make sure we picked a cohort of claims that would be similar across all areas that we were looking at. They

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<sup>203</sup> Submission 6, Insurance Council of Australia, p 6

<sup>204</sup> Submission 6, p 6

are also very high frequency claims, which are the whiplash claims. We made sure also that they were, in both non-CARS settlements and CARS decisions, legally represented. So we took as much care as we could to ensure that we were comparing like with like.<sup>205</sup>

- 6.56** The data analysis also suggested that there was a significant difference between CARS and non-CARS assessments, with CARS claims resulting in substantially higher assessments than those settled outside CARS.<sup>206</sup> The Insurance Council's submission stated:

[S]ome claimants are willing to trade off earlier receipt of settlement monies for the chance of a higher assessment at a later date. However the level of settlement has remained relatively steady over the period. Nevertheless, claimants proceeding to CARS assessment are receiving substantially more per head of damage (and particularly [future economic loss]) in 2007 than claims settled prior to this stage. This trend is inconsistent with the goals of the scheme, which are to encourage early claim resolution. The Insurance Council submits that claimants who resolve their claims earlier have better [injury] outcomes than those whose claims linger in the system unresolved.<sup>207</sup>

- 6.57** Mr Cooper told the Committee:

Our concern is that if this were to lead into the non-CARS settlements, it would be a significant increase in the costs of the scheme, and those costs have to be borne by road users. Therefore we think it is the beginning of what might be called superimposed inflation, and we wished to bring that to the MAA's attention as soon as we could.<sup>208</sup>

- 6.58** The Committee sought the views of the Law Society, Bar Association and MAA on the Insurance Council's concerns. Both the Law Society and Bar Association viewed the data cautiously. The Law Society suggested that CARS leads to higher compensation for two valid reasons: that it deals with more serious and catastrophic injuries, and that claimants go to CARS when they don't settle with an insurer, on the basis that they expect CARS will deliver a higher amount.<sup>209</sup> It also stated:

It should be remembered that the ICA membership has a statutory obligation to reduce the size of claims and to reduce the amount of compensation paid to insured people, together with a duty to shareholders. The ICA submission reflects that duty.<sup>210</sup>

- 6.59** The Bar Association urged caution in considering the Insurance Council's findings, given the small sample size of the data it employed. It went on to suggest that some of the increase in awards documented by the Insurance Council could be accounted for by the fact that as the CARS system has matured, claims for certain awards such as domestic assistance are better

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<sup>205</sup> Mr Cooper, Evidence, 20 June 2008, p37

<sup>206</sup> Submission 6, p 13

<sup>207</sup> Submission 6, p 13

<sup>208</sup> Mr Cooper, Evidence, 20 June 2008, p 37

<sup>209</sup> Law Society of NSW, Answers to questions on notice taken during evidence, 9 July 2008, p3

<sup>210</sup> Law Society of NSW, Answers to questions on notice taken during evidence, 9 July 2008, p2

prepared.<sup>211</sup> It stated, ‘The insurers pushed to have claims better proven. They are now reaping their reward – higher awards based on better evidence.’<sup>212</sup>

**6.60** The Association further commented that it was ‘not the least surprised’ that CARS Assessors award higher damages for soft tissue injuries than insurers usually pay in settlements, and proposed a number of reasons why:

- insurers do not pay the full value of claims at early settlement, and if claimants want full value they proceed to assessment
- insurers’ offers of settlement are based on their own review of the case and the information provide by the claimant, whereas in a CARS assessment both the insurer’s and claimant’s cases are considered by a neutral, highly qualified Assessor
- cases proceeding to CARS are fully prepared, with each and every head of damage substantiated, and are thus more likely to produce a higher and fairer award than a settlement involving compromise at an earlier stage
- in most cases proceeding to CARS the claimant is legally represented, enabling them to fully assert their legal rights.<sup>213</sup>

**6.61** At the Committee’s request, the MAA provided data on the size of damages awarded in assessed matters, and confirmed that the size of damages assessed at CARS has increased over time.

**6.62** Table 6.1 on the following page sets out the general assessment damages awarded in assessed matters between 2002-2003 and 2006-2007.

**6.63** According to the MAA, the increase in CARS damages has resulted in part from larger claims reaching maturity:

As would be expected, as the scheme has matured a number of the larger claims that require a longer period before they are ready to be assessed have begun reaching the assessment stage at Claims Assessment Resolution Service over the last two years, with 57 cases being assessed this financial year with damages awarded of more than \$500,000.<sup>214</sup>

<sup>211</sup> Tabled document, NSW Bar Association, *Response to submission by the Insurance Council of Australia*, 20 June 2008, p 1

<sup>212</sup> NSW Bar Association, *Response to submission by the Insurance Council of Australia*, p 2

<sup>213</sup> NSW Bar Association, *Response to submission by the Insurance Council of Australia*, pp 2-3

<sup>214</sup> MAA, Answers to pre-hearing questions on notice, Appendix A, 19 June 2008, p 22

**Table 6.1 General assessment damages awarded in assessed matters<sup>215</sup>**

<b>CARS Assessment Damages* Ranges</b>	<b>02-03</b>	<b>%</b>	<b>03-04</b>	<b>%</b>	<b>04-05</b>	<b>%</b>	<b>05-06</b>	<b>%</b>	<b>06-07</b>	<b>%</b>
Assessed at under \$5k	36	26	58	15	47	9	18	3	11	2
Assessed at \$5k to \$25k	50	36	120	30	137	25	101	18	50	11
Assessed at \$25k to \$50k	19	14	60	15	99	18	88	16	63	14
Assessed at \$50k to \$100k	23	16	68	17	92	17	110	20	87	19
Assessed at \$100k to \$250k	7	5	68	17	110	20	118	22	120	26
Assessed at \$250k to \$500k	3	2	14	4	47	9	73	13	73	16
Assessed at \$500k to \$1M	2	1	6	2	17	3	42	8	48	10
Assessed at over \$1M	0	0	2	1	2	0	0	0	9	2
<b>Total assessments</b>	<b>140</b>	<b>100</b>	<b>396</b>	<b>100</b>	<b>551</b>	<b>100</b>	<b>550</b>	<b>100</b>	<b>461</b>	<b>100</b>

(\* Excluding the assessment of legal costs and disbursements.)

**6.64** In responding to the Insurance Council's concerns about superimposed inflation, Mr David Bowen, General Manager of the MAA, stated in evidence:

The MAA accepts that the average claim size has increased above the rate of inflation. We believe the primary explanation for that is the drop in frequency of taking out smaller cost claims, so that the residual claims that are left will naturally be larger. However, when we last reviewed this, in 2006, we had an assessment by PricewaterhouseCoopers which built up a review of the whole scheme. We are proposing at this stage to re-undertake that review.

The issue as to whether or not the increase in heads of damages being driven by CARS is difficult to extract from the nature of claims that were reviewed by the Insurance Council and, generally, the operation of the scheme. It is our expectation that CARS [matters] will be more complex and necessarily have a higher value, because they are the ones that are disputed and will go there.<sup>216</sup>

**6.65** In material provided to the Committee prior to the hearing, the MAA indicated that the earlier review by PricewaterhouseCoopers did not identify superimposed inflation within the CTP scheme. The MAA reported that the new study will consider all claims, rather than a particular subset, and will thus enable more definitive conclusions than the preliminary study conducted by the Insurance Council. It will also include analysis of not only CARS matters, but also

<sup>215</sup> MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, p 22

<sup>216</sup> Mr Bowen, Evidence, 20 June 2008, p 4

those which proceed to Court and those resolved with neither CARS nor Court involvement.<sup>217</sup>

**6.66** The MAA also indicated that it will gain advice from PricewaterhouseCoopers, through the course of the study, on potential improvements to the MAA's monitoring systems to enable early warning through lead indicators of superimposed inflation. The Authority will then consider reporting on these indicators on a regular basis.<sup>218</sup>

**6.67** In evidence, Ms Carmel Donnelly, Assistant General Manager of the MAA, gave further information on the PricewaterhouseCoopers study's aims and its preliminary findings:

The process is to look at, basically, a lot of hypotheses about what might be the factors that increase costs, and to try to look at like-and-like claims over time and see whether they are increasing more than inflation. So there are quite a range of factors. That research is continuing. As part of that, I have had the consultant from PricewaterhouseCoopers come and meeting claims managers from all the insurers, and hear what their concerns are so that the research can look at those.

I have seen some very early data. The research will take a number of stages. The first is a high-level pass across the analysis that was done for 2006, to see whether there are any changes. I have asked that it look particularly at differences between cases that are referred to CARS, cases that go to court and cases that do not go to either but settle. The early data does now show a clear pattern along the lines of what the Insurance Council of Australia has suggested, but I think we need to keep looking at it in more detail, and we will.<sup>219</sup>

**6.68** At the hearing the Insurance Council welcomed the MAA's decision to undertake the new study.<sup>220</sup>

### **Committee comment**

**6.69** The Committee welcomes the MAA's decision to conduct a new study to investigate the Insurance Council's concerns about the emergence of superimposed inflation within the CARS system. We appreciate the Insurance Council's apprehension that if superimposed inflation does exist, it may place upward pressure on CTP premiums and also work against the goals of the Scheme, in particular the goal of encouraging earlier claims resolution.

**6.70** That being said, the Committee is mindful that there may well be valid reasons for any trend towards increasing damages arising from CARS assessments, just as there may be valid reasons why damages awarded through CARS tend to be higher than those arrived at in settlements.

<sup>217</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 30

<sup>218</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 30

<sup>219</sup> Ms Carmel Donnelly, Assistant General Manager, Motor Accidents Authority, Evidence, 20 June 2008, p 4

<sup>220</sup> Mr Cooper, Evidence, 20 June 2008, p 37

- 6.71** We consider that a comprehensive and well designed study such as the one being commissioned by the MAA will better establish whether comparable assessments are increasing over time and if this is the case, will identify the factors that may be contributing to any increasing costs. This will facilitate informed discussion about the implications for the scheme and its goals, and about any appropriate action to be taken.
- 6.72** The Committee notes that the MAA has sought the input of insurers in designing the new study. We consider that it will continue to be important for the MAA to work collaboratively with all relevant stakeholders as the study proceeds, and then when its findings and implications are considered. We look forward to considering the findings of the study.

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### **Recommendation 5**

That the Motor Accidents Authority, in undertaking the new PricewaterhouseCoopers study of Claims Assessment and Resolution Service assessments, including when the study's findings and implications are considered, continue to work collaboratively with all relevant stakeholders, and implement any necessary recommendations.

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## **Transparency**

- 6.73** The Insurance Council of Australia's submission argued that the escalation in the level of CARS assessments is partly the result of a lack of transparency in the CARS process, in that individual Assessors are allowed to make determinations without providing evidence-based reasons for their assessments.<sup>221</sup> According to Mr Cooper:

One of the Insurance Council's concerns is that as the CARS Assessors' decisions are not published there is no real mechanism for peer review of the nature and size of those decisions. Also, there is no opportunity for insurers to understand the guidelines and practice notes which the CARS Assessors apply in making their determinations, and their reliance on the actual evidence presented. In other words, it is very difficult for us to know the basis on which some decisions are made. If we had an understanding of that, we would be aided in the resolution of claims and avoid greater disputes.

In addition, we are saying that the claims Assessors' determinations should be based on actual evidence presented, rather than on assertions; so, real evidence as to why these decisions were made. However, we consider that many of the latest reforms which provide for medical evidence to be provided prior to the lodgement of CARS applications will in fact help this process and lead to greater transparency. In practical terms, insurers are concerned that some CARS Assessors have made CARS decisions for future medical, economic loss and care needs without the appropriate medical evidence to support those decisions. And, yes, we have raised these concerns with the Motor Accidents Authority, and there are ongoing discussions about those.<sup>222</sup>

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<sup>221</sup> Submission 6, p 16

<sup>222</sup> Mr Cooper, Evidence, 20 June 2008, p 33

**6.74** In order to improve transparency and facilitate a greater understanding of CARS assessments, the Insurance Council proposed:

- greater use of treatment reports and treatment provider records
- reinforcement of the requirement that all CARS assessments state clearly the evidence which forms the basis for findings of future economic loss in respect of clients who are working at the time of assessment – and thus apparently not suffering from any economic loss
- all stakeholders be given access to CARS Assessor practice notes prepared by the Principal Claims Assessor, thereby enabling all stakeholders to have a clear understanding of the issues taken into account in CARS assessments
- the establishment of an annual qualitative monitoring and feedback system for all stakeholders, based on the process piloted by the MAAS Reference Group
- quarterly presentation of MAA performance reports to all stakeholders and more frequent provision of data on the status of the CTP scheme to stakeholders, for example, in conjunction with regular MAAS Reference Group meetings, to facilitate monitoring of superimposed inflation and identification of solutions to emerging issues.<sup>223</sup>

**6.75** When asked about the issue of transparency in the hearing, Mrs Mary Maini, Chair of the Insurance Council's CTP Claims Managers Committee, highlighted the area of decisions about future heads of damages. She reported that there had been cases where future care was decided on the basis of statements made by family members, rather than on a medical assessment of need.<sup>224</sup>

**6.76** Mrs Maini and Mr Cooper asked for insurers to have access to the guidelines and practice notes which inform CARS Assessor decisions. They explained that having access to that material will enable insurers to determine the likely outcome of an assessment, and that it would help to ensure consistency in decisions and avoid disputes.<sup>225</sup>

**6.77** In material provided after the hearing, the Insurance Council indicated that it considers that contemporaneous treatment notes from hospitals and medical practitioners can provide more accurate information about the nature and extent of a claimant's injuries than do medico-legal reports, which are obtained on the basis of one consultation. The Insurance Council went on to state that insurers have reported ongoing difficulties in gaining access to these contemporaneous documents due to failure or delays in claimants' legal representatives providing valid authorities to the insurer. It further suggested that this problem is exacerbated by section 85A of the *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Act 2007*, which only obliges claimants to disclose information about their current, and not pre-existing, injuries.<sup>226</sup>

<sup>223</sup> Submission 6, p 16

<sup>224</sup> Mrs Mary Maini, Chair, CTP Claims Managers Committee, Insurance Council of Australia, Evidence, 20 June 2008, p 34

<sup>225</sup> Mrs Maini, Evidence, 20 June 2008, p 34; Mr Cooper, Evidence, 20 June 2008, p 34

<sup>226</sup> Insurance Council of Australia, Answers to questions on notice taken during evidence, 18 July 2008, pp 4-5

**6.78** In relation to the proposal to establish an ongoing monitoring and feedback system, Mrs Maini advised the Committee:

At the moment the system works quite well in that there are various elements on which you can provide feedback to a medical Assessor or a medical assessment. In relation to CARS, the main feedback is through a complaint. We are suggesting that, if you look at it from a continuous improvement perspective, then there should be other elements taken into account, because with some assessments that I have seen we have not necessarily disagreed with the assessment but sometimes we are disappointed with the way that the Assessors have communicated that assessment.<sup>227</sup>

**6.79** In its answers to questions taken on notice, the Insurance Council stated:

We believe that the [MAAS Reference Group] can be utilised to provide more qualitative feedback to the CARS Assessors. This monitoring and feedback system would allow a quick identification and response to issues as they arise. From a continuous improvement perspective, it would also be useful information when the MAA is reviewing the appointment of MAS and CARS Assessors. Such feedback may include:

- Timeliness – in conducting the Assessment, ensuring adherence to CARS timetable etc
- Communication – to ensure that the reasons given for the assessment are clear and there is medical evidence in support of the assessment etc
- Feedback – positive, complaints, etc
- Other relevant issues (to be determined in consultation with the [MAAS Reference Group]).<sup>228</sup>

**6.80** Mrs Maini advised the Committee that the Insurance Council had raised this proposal in the MAAS Reference Group, and that the MAA had indicated a preparedness to consider such a mechanism.<sup>229</sup>

**6.81** The Committee sought the opinion of the Law Society, Bar Association and MAA in relation to the Insurance Council's concerns about transparency and its proposed improvements.

**6.82** Both the Law Society and Bar Association asserted that CARS is already very transparent.<sup>230</sup>

**6.83** In relation to the issue of whether CARS Assessors are making sufficiently evidence-based decisions, the Law Society stated:

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<sup>227</sup> Mrs Maini, Evidence, 20 June 2008, p 35

<sup>228</sup> Insurance Council of Australia, Answers to questions on notice taken during evidence, 18 July 2008, pp 5-6

<sup>229</sup> Mrs Maini, Evidence, 20 June 2008, pp 35-36

<sup>230</sup> Law Society of NSW, Answers to questions on notice taken during evidence, 9 July 2008, p 2; NSW Bar Association, *Response to submission by the Insurance Council of Australia*, p 3

All information is exchanged and parties must attempt to come to a resolution. All parties can seek specific orders and directions, and where parties require medical information etc it can be obtained ... The assertion that the process allows individual Assessors to make determinations without providing evidence-based decisions is disputed ... With respect to the greater use of treatment reports and records, it should be noted that the reports of treating doctors are crucial and always have been. In this way, their use in the system is no different to that of courts.<sup>231</sup>

**6.84** Similarly, the Bar Association reported that every CARS Assessor provides a written rationale in support of their award of damages, referring to the evidence in support of the claim, just as a judge would in a court process. It went on to note the current capacity within the system for insurers to have access to clinical records and reports, and stated that there is 'no evidence whatsoever that CARS assessments currently want for relevant factual information.'<sup>232</sup>

**6.85** However, the Bar Association did suggest that the publication of CARS decisions would improve public confidence in, and the consistency of, CARS decision-making.<sup>233</sup>

**6.86** In responding to the Insurance Council's assertions about the desirability of more evidence-based decisions on the part of CARS Assessors, the MAA pointed to the extensive training of Assessors on how to document their decisions and make sure they are evidence-based.<sup>234</sup> In response to the suggestion that CARS decisions be published, the MAA stated:

The Claims Assessment and Resolution Service supports, in principle, the publication of claims assessment decisions, provided that the injured person's privacy is protected. The Motor Accidents Authority will investigate the resourcing impact of publication options.<sup>235</sup>

**6.87** Ms Cassidy explained the background to the current position of not publishing decisions whilst indicating her openness to this form of transparency:

At the moment, we do not have in our Act or in our guidelines anything about that, so we have taken the approach that they are private and CARS assessments can only be done in the presence of the parties to the assessment, as a result of which we cannot publish the decisions at large.

What we have done in the past is circulate, certainly within the Assessors, de-identified decisions. So we take out the claimant's name, and we take out any reference to their doctors, so that there is essentially no breach of privacy. So, yes, I have got no problem with publishing decisions. We would have to have some form of de-identification check. I understand the Motor Accidents Authority is looking at upgrading its Internet web site, and I suspect that is probably where they will lie and where they will be placed.<sup>236</sup>

<sup>231</sup> Law Society of NSW, Answers to questions on notice taken during evidence, 9 July 2008, p 2

<sup>232</sup> NSW Bar Association, *Response to submission by the Insurance Council of Australia*, p 3

<sup>233</sup> Submission 8, p 6

<sup>234</sup> Mr Stoten, Evidence, 20 June 2008, p 51

<sup>235</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 27

<sup>236</sup> Ms Cassidy, Evidence, 20 June 2008, p 49

**6.88** In respect of the use of treatment reports and records, the MAA stated that it considers that for the majority of claims, sufficient mechanisms already exist for such material to be obtained and provided:

In most claims the claimant signs an Authority included in their Compulsory Third Party claim form that enables an insurer to request access to the claimant's treatment provider's records and to obtain reports from the claimant's treatment providers. In some cases separate additional forms of Authorities are required for specific types of treatment providers which are requested by Insurers from claimants as needed. Insurers are required by the provisions to address them.<sup>237</sup>

**6.89** The MAA acknowledged, however, that in some circumstances the current provisions are not sufficient to enable access to all of the relevant materials. It noted that the second stage of the MAAS Reform Agenda includes a number of additional legislative mechanisms to help improve access to such information. It reported that Section 100 of the *Motor Accidents Compensation Act 1999* has always included a power for CARS Assessors to direct a party to produce documents in their possession or to furnish information that the Assessor has determined is relevant to the assessment. In addition:

The new section 100(c) of the Motor Accidents Compensation Act 1999 will add a new power enabling a Claims Assessment and Resolution Service Assessor to direct a party to give any authority or consent required to a third party (a person who is not a party to the assessment), who may then be required to produce documents or furnish information to the Assessor. The new section 100(1A) of the Motor Accidents Compensation Act 1999 will provide that a Claims Assessment and Resolution Service Assessor may direct a person who is not a party to the assessment to produce documents or furnish information to the Assessor, and a failure by the third party to comply will also be an offence, subject to the potential maximum penalty of 50 penalty units.<sup>238</sup>

**6.90** After the hearing the Insurance Council indicated that it expected that these reforms will lead to greater transparency and help to address its concerns. At the same time, it noted that the provisions are as yet untested and it is not sure how the new powers will be exercised by CARS Assessors.<sup>239</sup>

**6.91** In respect of the Insurance Council's proposal that insurers be given access to CARS Assessors' practice notes, Mr Player noted that such practice notes are currently publicly available. However, Ms Cassidy also advised that a practice manual for Assessors, akin to a judicial bench book, is not publicly available. In addition, she indicated that as Principal Claims Assessor she periodically issues an electronic newsletter to Assessors with more incidental advice which is also not available to other stakeholders.<sup>240</sup>

**6.92** The Insurance Council subsequently clarified that it was this material, particularly that which informed the decisions of CARS Assessors, which other stakeholders would like access to:

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<sup>237</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 15-16

<sup>238</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 15-16

<sup>239</sup> Insurance Council of Australia, Answers to questions on notice taken during evidence, 18 July 2008, p 3

<sup>240</sup> Ms Cassidy, Evidence, 20 June 2008, p 49

If this [‘bench book’ and newsletters] contains writing tips for CARS Assessors on the assessment of particular heads of damage and what evidence they should take into account, then, in the Insurance Council’s submission, this material should be available to all stakeholders.

Once all stakeholders have a greater understanding of how CARS Assessors arrive at their decisions, this transparency will achieve, in our submission, greater consistency in results, as well as earlier resolution of claims and the avoidance of unnecessary disputes.<sup>241</sup>

- 6.93** Finally, in relation to the Insurance Council’s proposal for quarterly publication of CARS data, as noted in paragraph 6.66 above, the MAA has indicated that it will consider regular reporting on lead indicators of superimposed inflation to arise out of PricewaterhouseCoopers’ new study of such inflation in CARS assessments.<sup>242</sup>

#### **Committee comment**

- 6.94** The Committee considers that transparency is essential to the optimal functioning of CARS, and to all stakeholders’ understanding of the process and outcomes of individual CARS assessments. We also note the evidence presented to us that there is already a significant level of transparency in place within the CARS system, along with the important changes about to come into effect that will enable greater access to treatment reports and other documents, which the Insurance Council has acknowledged will partly address its concerns in this area. In addition, the MAA has indicated its willingness to:

- investigate the potential to publish de-identified decisions in relation to individual CARS assessments
- consider regular reporting on lead indicators of superimposed inflation to arise out of PricewaterhouseCoopers’ new study of such inflation in CARS assessments
- consider an ongoing mechanism for qualitative feedback from insurers to CARS Assessors.

- 6.95** The Committee believes that it would be valuable for the MAA to consider publication of data on CARS performance on a quarterly basis and to distributing this information at MAAS Reference Group meetings. The Committee agrees with the Insurance Council that this would further improve transparency and facilitate monitoring of superimposed inflation, as well as the development of solutions to emerging issues.

- 6.96** The only other outstanding proposal for greater transparency is in respect of insurers’ access to the practice manual for Assessors and the Principal Claims Assessor’s newsletter with incidental advice to Assessors. The Committee believes that, where these resources contain advice to CARS Assessors about the evidence they should take into account in making and documenting assessments, it may be fair for insurers and other stakeholders to have access to their contents. On the other hand, it may be appropriate for such information to remain for internal CARS use only. The Committee suggests that the MAA, in conjunction with the

<sup>241</sup> Insurance Council of Australia, Answers to questions on notice taken during evidence, 18 July 2008, p 3

<sup>242</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 30

MAAS Reference Group, should explore the possibility of making such resources available to external stakeholders.

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**Recommendation 6**

That the Motor Accidents Authority, in order to enhance transparency within the Claims Assessment and Resolution Service, fulfil its commitment to:

- investigate the potential to publish de-identified decisions in relation to individual CARS assessments
- consider regular reporting on lead indicators of superimposed inflation to arise out of PricewaterhouseCoopers' new study of such inflation in CARS assessments
- consider an ongoing mechanism for qualitative feedback from insurers to CARS Assessors.

**Recommendation 7**

That the Motor Accidents Authority give consideration to publishing Claims Assessment and Resolution Service performance data on a quarterly basis, and to distributing this information at meetings of the Motor Accidents Assessment Service Reference Group.

**Recommendation 8**

That the Motor Accidents Authority, in conjunction with the Motor Accidents Assessment Service Reference Group, explore the possibility of allowing external stakeholders, including insurers and the legal profession, access to its practice manual for Claims Assessment and Resolution Service Assessors, along with information contained in periodic electronic Assessor newsletters, where these resources contain advice to Assessors about the evidence they should take into account in making and documenting their assessments.

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**Recoverable costs for legal representation**

- 6.97** We note that the issue of legal costs, as provided for in the Cost Regulation, was also considered in some detail in each of the Committee's last three reviews of the MAA.<sup>243</sup>
- 6.98** The Cost Regulation refers to the Motor Accidents Compensation Regulation 2005 which 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>244</sup> In practice, legal

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<sup>243</sup> 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 15-16; 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 81-84; 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 70-72

<sup>244</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.

representatives set their own fees, which are paid by their clients, and if the client is a claimant and their claim is successful, the insurer reimburses the claimant an amount according to the Cost Regulation and the client is liable for any difference between the fee charged and the recoverable cost.

**6.99** In our Eighth Review,<sup>245</sup> 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.

**6.100** In its response to our Eighth Review, the Government indicated that it supported the Committee's recommendation and had engaged a consultant to undertake the study, which it anticipated would be completed in the second half of 2008. The MAA also undertook to report back to the Committee on the outcomes of the study.<sup>246</sup>

**6.101** In the meantime, in submissions to the Committee's present Review, both the NSW Bar Association and the Law Society again voiced their concerns about recoverable costs for legal representatives in CARS assessment conferences.

**6.102** Whilst the Law Society noted its collaboration with the MAA in the review of the impact of the Cost Regulation, it stated:

[T]he Law Society wishes to express its concern in relation to perceived delays in the revision of costs as a result of the 2007 legislative amendments to claims and dispute resolution procedures. It is understood that this legislation will be proclaimed to commence on 1 October 2008. The creation of the "front-end loading system" will require substantial further early work for solicitors in the preparation of claims. However, there has been no amendment of the Cost Regulation to adequately compensate solicitors for the extra work. Legal costs were indexed in 2005, and there has been no review by way of indexing since that date.

Apart from the Cost Study which is currently on foot ... the Society commends ... with some urgency, that legal costs require commensurate increases as a result of the changed system. This is over and above the indexation issue, last attended to in 2005.<sup>247</sup>

**6.103** Mr Hugh Macken, President of the Law Society, stated in evidence:

There are three aspects to costs that concern the Law Society. Firstly, there has not been a significant increase in respect of costs since 2005. If nothing else, inflation has eroded the capacity of those costs, so a review is timely. Secondly, there are restructures that have occurred in respect of the threshold at which costs are calculated, what are called stages in which costs are calculated for each party. Because of what is loosely called in the game front-end loading, which is the provision of information at a very early stage to try and resolve the cases, that provisions shifts

<sup>245</sup> *Eighth Report*, p 84

<sup>246</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*, p 3

<sup>247</sup> Submission 4, Law Society of NSW, p 2

work which is normally done at the end of the matter before the claims assessment hearing, to well before the matter goes to the claims assessment hearing.

The consequence of this is that the costs thresholds need to be brought forward to compensate the more labour-intensive work which occurs before the matter is referred to CARS. Thirdly, the glaring anomaly in respect to costs is the amount payable to counsel, that is, barristers who appear at the hearing of a matter. To consider that you are going to get a good, capable barrister to put aside a day for \$475 is simply not reflective of the reality of the world. In terms of the disbursements aspect of it, that is the most glaring difficulty that it has, and that is something that the Law Society will say simply creates a vast gulf between what can be recovered and the reality of the charges that will be made to the client.<sup>248</sup>

- 6.104** Similarly, the Bar Association's answers to questions on notice also noted the extensive work required by solicitors in preparing an application for lodgement with CARS.<sup>249</sup>
- 6.105** In addition, the Bar Association explained that at present a claimant can recover \$475 (plus GST) for the first two hours of representation at an assessment conference plus \$150 for any additional hour. It noted that for complex CARS matters, claimants are generally represented by counsel with an instructing solicitor, both of whom charge around \$300 per hour. In such cases a claimant would be \$450 out of pocket for each hour that the conference extends over two hours. Accordingly the Bar Association described this as 'an unwarranted subsidisation of the scheme by the claimant'.<sup>250</sup>
- 6.106** In material provided to the Committee prior to the hearing, the MAA advised that the scale for the regulation of legal costs was most recently indexed to take account of inflation in May 2008,<sup>251</sup> that is, around the time that submissions were being made to the Committee's Review.
- 6.107** The MAA's General Manager, Mr Bowen advised the Committee on the scope of the review of the Cost Regulation:

The current review was intended to serve two purposes: one, to identify whether there was a gap in what claimants were paying for legal costs, as distinct from what they recovered from the insurer under the regulated fees; and, secondly, to look at an alternative basis for setting the fees to take into account the scheme changes and procedural changes that are intended to operate from 1 October this year whereby a lot of the work has been front-end loaded. We recognise that solicitors in particular will need to do a lot of their work earlier in the hope of quicker resolution of matters. But that should be reflected in the fees.<sup>252</sup>

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<sup>248</sup> Mr Macken, Evidence, 20 June 2008, p 21

<sup>249</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, p 1

<sup>250</sup> Submission 8, p 5

<sup>251</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 26

<sup>252</sup> Mr Bowen, Evidence, 20 June 2008, p 6

- 6.108** Responding on behalf of the MAA to the concerns of the Law Society and Bar Association, Mr Player acknowledged the important role that counsel play in the CARS process, implying that this should be reflected in their representation fee.<sup>253</sup> He went on to say:

I would absolutely agree that we need to better recognise the front-end loading of preparation of work, and we should have been doing that since May 2006 ... The reason that that has not happened is that the reform process that we are going through was split into two stages; the first stage came on board in May 2006 and the second needed legislative reform. We had hoped that that would come close after the other reforms, but it looks like it will be October 2008 that it kicks in ... I have been involved with setting up the study jointly with the Law Society to look at the gap between solicitor/client and party/party costs, and then on the working party to review the costs. We would agree that that is definitely a factor that needs to be reviewed, because we want to make sure that the costs regulations and the stages and the way they are structured do not create disincentives to early settlement and also that they adequately compensate people for the work that they do. I think everybody in this scheme recognises that.<sup>254</sup>

- 6.109** Mr Bowen advised that a consultant had been selected and that he and the President of the Law Society had jointly written to a number of legal firms inviting them to participate in the review.<sup>255</sup>
- 6.110** Mr Roulstone, representing the Law Society, indicated that the consultants would review files provided by participating firms in relation to the determination of matters from the year 2007, and that this would be both a quantitative and qualitative process.<sup>256</sup>
- 6.111** Mr Bowen advised the Committee that ideally the consultant would report back to the MAA in time for the regulation to be reset with the Minister's approval and in place from the beginning of October 2008.<sup>257</sup>
- 6.112** In evidence the Committee asked Law Society representatives about a separate but related issue of payment of amounts for medical reports by claimants, noting that claimants are required to obtain one, two or three medical reports to be able to establish their entitlement, each of which they are charged for. They then find that they are only entitled to a portion of those costs and are out of pocket for the remainder.
- 6.113** Mr Roulstone advised that this remains an issue in the CTP scheme, particularly in relation to specialist reports.<sup>258</sup> Mr Macken indicated that the Law Society considers that the rate of reimbursement for medical reports ought to increase. He advised caution, however, that doctors might simply increase their rate accordingly such that the gap between what is paid for reports and what is recovered could remain substantial.<sup>259</sup>

<sup>253</sup> Mr Player, Evidence, 20 June 2008, p 52

<sup>254</sup> Mr Player, Evidence, 20 June 2008, p 56

<sup>255</sup> Mr Bowen, Evidence, 20 June 2008, p 6

<sup>256</sup> Mr Roulstone, Evidence, 20 June 2008, p 21

<sup>257</sup> Mr Bowen, Evidence, 20 June 2008, p 6

<sup>258</sup> Mr Roulstone, Evidence, 20 June 2008, p 24

<sup>259</sup> Mr Roulstone and Mr Macken, Evidence, 20 June 2008, pp 24-25

- 6.114** Mr Stoten, representing the MAA, subsequently advised that a 2001 MAAS bulletin stated that medico-legal report fees are unregulated unless the matter has been the subject of a MAS or CARS application. On this basis, claimants can apply to recover the full costs of those report fees up until the date of lodgement of a CARS or a MAS application. He further stated, ‘With the front-end loading system of course, that should solve that problem.’<sup>260</sup>

#### **Committee comment**

- 6.115** The Committee considers that the issues to be addressed by the MAA’s review of the Cost Regulation are very important, primarily because of the impact that the outdated costings have on claimants, who are often out of pocket due to the apparently substantial difference between market rates for legal services and the amounts they can recover.
- 6.116** The Committee notes the lengthy period over which dissatisfaction with the present Cost Regulation has been raised with us, and is pleased to note that the review is now well underway. Like the General Manager of the MAA, we consider it highly desirable that the new regulation be in place by 1 October 2008, in time for the commencement of the legislative tranche of the MAAS reform agenda, which will in turn have a significant bearing on the work of legal representatives participating in the CARS process. Accordingly, we encourage the MAA to ensure that it keeps to this timetable.

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#### **Recommendation 9**

That the Motor Accidents Authority, in liaison with the Law Society of NSW, continue to make the Study of the Impact of the Costs Regulation a high priority, with a view to having the revised Regulation in place by 1 October 2008.

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#### **Claims of contributory negligence**

- 6.117** A separate issue which relates to the Cost Regulation was raised by the NSW Bar Association, who suggested that there has been a marked increase in claims of contributory negligence by insurers in recent years as the basis for applications for discretionary exemptions. In such claims an insurer alleges that an injured person contributed to the cause of an accident for which they are claiming compensation. The Association noted that Section 95 of the *Motor Accidents Compensation Act 1999* provides that where an insurer alleges contributory negligence, it is entitled to reject the CARS Assessor’s determination. It suggested that this increase is linked to the decision of the NSW Court of Appeal decision in *Lee v Yang* [2006] NSWCA 214 which effectively allows the insurer to bring about a rehearing in such matters.<sup>261</sup> The Bar Association went on to state:

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<sup>260</sup> Mr Stoten, Evidence, 20 June 2008, p 56

<sup>261</sup> Submission 8, pp 7-8

There is now a clear incentive for insurers to allege contributory negligence in as many cases as possible: it procures them the right to force a rehearing they would otherwise not be entitled to.<sup>262</sup>

**6.118** The Committee sought information from the MAA on this issue. The MAA indicated that the number and proportion of cases exempted due to an allegation of contributory negligence of greater than 25 per cent rose from 6 per cent (125) in 2005-2006 to 11 per cent (136) in 2006-2007.<sup>263</sup>

**6.119** The MAA also advised that:

[P]artial admissions of liability (contributory negligence) were made in 6.1 per cent of claims under the Motor Accidents Compensation Act 1999. This compares with 5.4 per cent of claims where liability was partially admitted under the Motor Accidents Act 1988.

In the 12 months prior to the decision in *Lee v Yang* [2006] NSWCA 214 liability was admitted in part in 5.25 per cent of claims, compared with 5.9 per cent of claims where liability was partially admitted in the 12 months following the decision.<sup>264</sup>

...

Allowing for a court to fully consider claims involving contributory negligence, is consistent with the existing exemption regime which enables claims with more contentious features to by-pass claims assessment and proceed directly to court.<sup>265</sup>

**6.120** In response to a question about the potential impact for the claimant of an insurer claiming contributory negligence and bringing about a rehearing, and the measures that the MAA has taken to address this impact, the MAA advised:

While each party will incur additional legal costs as a consequence of a claim progressing on to court, liability for legal costs will fall to the unsuccessful party. The pursuit of unmeritorious claims through the courts is discouraged by the allocation of costs, as noted by the court in *Lee v Yang* [2006] NSWCA 214 (2 August 2006) by Giles JA at [28].

Section 153(1) of the Motor Accidents Compensation Act 1999 which deals with court orders on costs enables the court to make variations to orders in an exceptional case and for the avoidance of substantial injustice.

The question of whether the legal costs regime should make specific provision for costs in insurer initiated court hearings will be considered by the Legal Costs Working Party.<sup>266</sup>

<sup>262</sup> Submission 8, p 7

<sup>263</sup> MAA, Answers to pre-hearing questions on notice: Appendix A, 19 June 2008, pp 14-15

<sup>264</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 27-8

<sup>265</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 28

<sup>266</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 28-9

- 6.121** In information provided to the Committee after the hearing, the Bar Association recommended two mechanisms to resolve this issue. First, it suggested that in the short term, the Cost Regulation should be amended so that where an insurer forces a CARS case to be reheard, the claimant at least recovers the reasonable costs of such a process so that they are not financially penalised for the gap in costs arising from the insurer's actions. Second, the Association suggested that the Act be amended so that insurer allegations of contributory negligence are no longer able to trigger a rehearing on damages, but rather, that CARS Assessor's determination on damages be binding.<sup>267</sup>

#### **Committee comment**

- 6.122** The Committee welcomes the MAA's commitment that provisions for costs in insurer-initiated court proceedings will be considered during the review of the Cost Regulation which is now underway, as this has the potential to address any unfair penalty on claimants.
- 6.123** The Committee also considers it very important that any inappropriate incentives for parties to initiate court proceedings be addressed. While the figures provided by the MAA on the frequency of exemptions arising from claims of contributory negligence before and after *Lee v Yang* to not appear to indicate a substantial rise to date, a trend in this direction may become more apparent over time. The Committee considers that it would be valuable for the MAA to monitor this issue in order to determine whether legislative action is required to address any inappropriate incentives.

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#### **Recommendation 10**

That the Motor Accidents Authority, in liaison with the Law Society of NSW, ensure that the Study of the Impact of the Cost Regulation, consider provisions for costs in insurer-initiated court proceedings so that claimants are not unfairly financially penalised for having to participate in such proceedings.

#### **Recommendation 11**

That the Motor Accidents Authority monitor trends in insurer claims of contributory negligence to determine whether legislative action is required to address any inappropriate incentives to have Claims Assessment and Resolution Service assessments reheard in court.

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### **Matters referred to the District Court for assessment of liability**

- 6.124** A similar but separate issue was raised in evidence by Mr Macken of the Law Society. His concern related to the process for matters before CARS where liability (or fault) has been declined by the insurer, which must then proceed to the District Court for liability to be determined. At present, the entire matter, including quantum damages, is assessed by the District Court. Correspondingly, the losing party may be liable for the cost of a one or two

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<sup>267</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, p 4

week long case if the Court so decides. In addition to placing the claimant in a vulnerable position, Mr Macken reported that this requirement creates unnecessary delays.<sup>268</sup>

- 6.125** Mr Macken argued that it would be preferable for liability to be immediately dealt with by the District Court and the matter then remitted to CARS for quantum assessment. He explained:

You can avoid that problem by creating a neutral position whereby as soon as liability is declined, if the client considers they can prove negligence in the party, they go to the District Court, a simple hearing on liability only, and then if liability is found in favour of the claimant, even with some large amount of contributory negligence, it is then remitted back to the Claims Assessment and Resolution Service so that they are not disenfranchised from CARS and they can have their matter quantified with the same benefits, entitlements and protections that anyone who can prove negligence against another driver can have their claims assessed by ... It also acknowledges that CARS is a preferred method of claims assessment ...<sup>269</sup>

- 6.126** The Committee received little further evidence on this issue. At the hearing the Committee sought the view of the NSW Bar Association in relation to Mr Macken's proposal. The Association indicated that it did not support the proposal on the basis that it would 'add further complexity, cost and delay to the process.'<sup>270</sup>

### **Committee comment**

- 6.127** The Committee considers that there may be some merit in the Law Society's proposal that in matters where liability has been declined, only the matter of liability be determined by the District Court, with the broader matter then remitted to CARS for assessment. As Mr Macken has suggested, this could help to ensure that claimants enjoy parity of process and are protected from the possibility of having substantial costs awarded against them. At the same time, we are conscious that we received limited evidence on this issue and that further consultation on the matter, which would require legislative change, is desirable. We believe that it would be valuable for the MAA to consider this proposal in consultation with relevant stakeholders including court administrators and the judiciary.

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## **Recommendation 12**

That the Motor Accidents Authority, in consultation with relevant stakeholders including court administrators and the judiciary, consider the proposal that in matters where liability has been declined, only the matter of liability be determined by the District Court, with the broader matter then remitted to the Claims Assessment and Resolution Service for assessment.

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<sup>268</sup> Mr Macken, Evidence, 20 June 2008, p 22

<sup>269</sup> Mr Macken, Evidence, 20 June 2008, p 22

<sup>270</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, p 7

## Infants' claims

- 6.128** A further issue raised with the Committee in relation to CARS, this time by the MAA itself, concerned infants' claims. At present if an infant's claim reaches settlement, the settlement must be approved by a court.<sup>271</sup>
- 6.129** Section 75 of the *Civil Procedure Act 2005 (NSW)* sets out that if a claim made on behalf of a 'person under legal incapacity' reaches settlement prior to any commencement of litigation, the settlement is to be approved or disapproved by a court. Where litigation has commenced, section 76 sets out that any settlement is also to be approved by a court.<sup>272</sup> These procedures are in place as a protection for persons lacking legal capacity including children and people with brain injury, with the court acting *in loco parentis*. In effect, the provisions mean that the parents of children must commence legal proceedings in order to have settlement approved.
- 6.130** In evidence, Ms Cassidy highlighted the unnecessary procedural complexity and costs these provisions entail, particularly in respect of small claims affecting children:

[A]t the top of my wish list is that we need power to approve infants' claims. There are obviously some big infants claims that need to go to court, but we have no power to approve infants' terms of settlement ... There are many very small claims involving children; for instance, the child has had some psychological or behavioural delay because of an accident that happened when the child was five years old and goes back to bedwetting or something like that. Then there are significant and serious infants claims. A lot of the smaller ones the parties tend to settle, and they have to get an exemption to go off to court to get the court to approve the settlement. Wouldn't it be wonderful if they could come to CARS with their settlement, to have it approved there, rather than having that extra step?<sup>273</sup>

- 6.131** Following the hearing, Ms Cassidy reported that in respect of many such claims, the costs for the claimant and their family of going to court far outweigh the value of the claim itself.<sup>274</sup> She also pointed to the significant costs arising from court administration procedures. Ms Cassidy suggested that the issue could be addressed by amending the *Civil Procedures Act* or the *Motor Accidents Compensation Act* to empower CARS Assessors to approve the terms of settlement for persons under a legal incapacity. Ms Cassidy further explained that while this broad group would include both children and people with brain injury, claims in respect of the latter group, in addition to more complex claims in respect of children, are generally exempted from CARS assessment and would continue to proceed to court regardless of changes to CARS powers to approve settlements.
- 6.132** Ms Cassidy further suggested that it would be desirable for CARS Assessors to be able to assess claims involving people under legal incapacity, again on the basis of procedural efficiency. At present such claims must proceed to court under mandatory exemption.<sup>275</sup>

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<sup>271</sup> Ms Cassidy, 20 June 2008, p 53

<sup>272</sup> ss 75 and 76, *Civil Procedure Act 2005 (NSW)*

<sup>273</sup> Ms Cassidy, 20 June 2008, p 53

<sup>274</sup> Telephone conversation between Ms Cassidy and Principal Council Officer, 13 August 2008

<sup>275</sup> Telephone conversation between Ms Cassidy and Principal Council Officer, 13 August 2008

### Committee comment

- 6.133** The Committee agrees that it is desirable to address unnecessary costs and procedural delays in respect of small claims involving children, and that approval of terms of settlement by a CARS Assessor may provide adequate procedural protection to persons without legal capacity. Similarly, there appears to be some value in CARS Assessors being able to assess claims involving people with legal incapacity. We consider that it would be valuable for the appropriate legislation to be amended to give CARS Assessors the power to approve the terms of settlement for persons under legal incapacity and to undertake assessment of claims involving such persons.

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### Recommendation 13

That the Minister for Finance amend the legislation to give Claims Assessment and Resolution Service Assessors the power to assess claims and approve the terms of settlement for persons under legal incapacity, including children.

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### Timeliness of assessments

- 6.134** The Committee received a submission from a CARS claimant, Mr Bruce Saunders, who reported that his CARS assessment took eleven months to be determined.<sup>276</sup> The Committee sought advice from the MAA about the timeliness of this decision, and whether lengthy disputes were a systemic issue.
- 6.135** The MAA advised:
- The Motor Accidents Authority does not consider that this is a systemic issue. The matter referred to in the submission involved a determination of a preliminary question of whether a claim made outside the statutory time limit could proceed. Due to circumstances beyond the control of the Claims Assessment and Resolution Service, this dispute had to be re-allocated when the Assessor initially allocated the matter did not seek re-appointment as an Assessor.<sup>277</sup>
- 6.136** In information provided prior to the hearing, the MAA explained that CARS assessments have a 'long tail', and that while the bulk of matters can be assessed in a timely fashion, there are others that necessarily take longer, such as those with complexities or medical issues. It offered an example of where a claimant requires surgery to an injured part of their body, the MAS Assessor may be unable to assess whole person impairment, which in turn prevents a CARS assessment of damages because the issue of entitlement to non-economic loss is not yet finalised.<sup>278</sup>
- 6.137** Table 6.2 below sets out the proportion of CARS matters resolved within one, two and more than two years, in each year between 2001 and 2007.

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<sup>276</sup> Submission 1, Mr Bruce Saunders, p 1

<sup>277</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 31

<sup>278</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 23

**Table 6.2: Timeliness of CARS assessments: the proportion of CARS matters resolved within 12 months, 12-24 months and more than 24 months<sup>279</sup>**

Application year	CARS matters resolved in less than 12 months	CARS matters resolved in 12-24 months	CARS matters resolved in 24 months+	Pending
2001	69%	26%	5%	0%
2002	56%	34%	10%	0%
2003	52%	34%	13%	1% (5 matters)
2004	55%	33%	10%	1% (30 matters)
2005	62%	29%	6%	3% (79 matters)
2006	69%	23%	1%	7% (130 matters)
2007	71%	2%	0%	26% (441 matters)

**6.138** The MAA offered a comparison with the time it takes to resolve matters in the comparable jurisdiction of the District Court. It reported that 2006 data published on Lawlink indicates that 53 per cent of Court actions are resolved in less than 12 months and 82 per cent in less than 24 months.<sup>280</sup>

**6.139** According to the *2006-2007 Annual Report*, the introduction of the revised Claims Assessment Guidelines in May 2006 has had a significant impact on the average lifecycle of CARS assessments. The CARS lifecycle for general assessment matters rose by 20 days from an average of 325 days in 2005-2006 to 345 days in 2006-2007. When this is broken down according to claims lodged pre-and post May 2006, the lifecycle is as follows:

- claims lodged before May 2006 which were assessed in 2006-2007 had an average lifecycle of 368 working days
- claims lodged after May 2006 which were assessed in 2006-2007 had an average lifecycle of 124 working days.<sup>281</sup>

**6.140** Mr Player advised that timeliness had also improved as a result of resourcing changes within MAAS:

In the early days, when I started at the MAA, the assessment services were running on about half the staff and they had a huge pile of work and they were really struggling, and there were delays in the system. People were horribly overworked. I think the resourcing has been sorted out impeccably. The team structures that we have in place now seem to be working very well. The life cycle of disputes, particularly since the ones since May 2006 is coming down. There are going to be outliers. There will be cases in any system that will take a long time. There are a lot of others that we can get through quite quickly. The allocation is working faster than it ever has. We are seeing that the quality of disputes that we are reviewing to allocate to Assessors after the

<sup>279</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 23

<sup>280</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 23

<sup>281</sup> MAA, *Annual Report*, 2006-2007, p15

application replies, I think we have ten days to review then, and when we reviewed them at that point, in the past we had been deferring a lot of cases because they were not ready. Most of them now are being allocated straight to the Assessors.<sup>282</sup>

**6.141** Ms Cassidy also spoke of the emphasis placed on timeliness of CARS processes:

We have timeliness measures. We measure timeliness of their preliminary conferences, preliminary conference reports, the assessment conferences, the assessment conference reports. We have a case management system that regularly reports on the number of overdue assessments, and I keep an eye on that and try to jump on it before it becomes a problem ... The most important thing is to get a decision out for the people who are waiting for it. Certainly since 30 June, I have not had a complaint about a delay in a decision. Our timeliness rate we have reported on in the appendix. The timeliness of decisions themselves is something like 80 or 70-something per cent. And, even when they are late, they are only a couple of days late.<sup>283</sup>

### **Committee comment**

- 6.142** The Committee is satisfied that the timeliness of CARS decisions, as reflected in the average length of the CARS lifecycle, is sound and appears to have improved significantly with the advent of the revised Claims Assessment Guidelines. We accept that some matters will necessarily take longer than others.
- 6.143** Whilst the Committee is concerned by the delay in the individual matter raised by Mr Saunders, we have only limited information about that matter and no details of how it proceeded through CARS. We take at face value the MAA's assertion that this case did not reflect systemic issues.
- 6.144** Given the emotional, physical and financial impact that a lengthy dispute may have on a claimant, and in light of our comments at the start of this chapter about the imperative for claimants to be informed about the CARS process, the Committee encourages the MAA to ensure that where an Assessor recognises that there will be a delay in a CARS assessment, the claimant understands the processes involved and is aware of the particular reasons for delay.

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### **Recommendation 14**

That the Motor Accidents Authority ensure that where an Assessor recognises that there will be a delay in a Claims Assessment and Resolution Service assessment, the claimant is advised of the processes involved and is made aware of the particular reasons for delay.

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<sup>282</sup> Mr Player, Evidence, 20 June 2008, p 56

<sup>283</sup> Ms Cassidy, Evidence, 20 June 2008, p 54



## Chapter 7 Other issues

This chapter considers a number of issues raised during the Committee's *Ninth Review* that do not pertain directly to the Motor Accidents Assessment Service (MAAS) or Claims Assessment and Resolution Service (CARS), or which concern the Motor Accidents Compensation Scheme or Motor Accidents Authority's operations more broadly. The issues include: insurer communications with self-represented clients; different thresholds for non-economic loss operating across different compensation jurisdictions in New South Wales; a proposal to itemise levies on greenslips; an accommodation service for people with disability funded through the Injury Management Grants Program; future trends in road safety; road safety initiatives targeting young people, and the fall in claims frequency since the commencement of the new Scheme.

### Insurer communications with self-represented clients

**7.1** In its submission the Law Society of NSW raised a concern about insurers' communications with self-represented clients, reporting that its Injury Compensation Committee was aware of a number of examples where such communications were perceived to be giving an unfair advantage to the insurer.<sup>284</sup>

**7.2** The Society proposed the existing Guidelines be reformulated to allow only certain statements to be made by insurers to self-represented claimants concerning procedures, attendances at medical appointments, offers of settlement and associated matters. It further suggested that the Guidelines should provide an appropriate pro-forma letter which would ensure that self-represented claimants were not disadvantaged by such communications.<sup>285</sup>

**7.3** Following the hearing, the Law Society expanded on its concerns:

The only way lawyers come into contact with claimants is when they seek legal advice. Given that approximately 43% of claims are finalised without the assistance of lawyers ... there is concern that certain claimants may be disadvantaged in dealing directly with insurers. The Law Society is particularly concerned about unrepresented claimants who are commercially inexperienced, vulnerable or where there is some indication that capacity may be an issue.<sup>286</sup>

**7.4** The Law Society went on to state:

Some material provided by insurers to potential claimants is selective in the information it provides about heads of damage, entitlements, resolving disputes and the availability and cost of obtaining legal advice. The Law Society has attempted to address a number of concerns raised by legal practitioners [with the MAA and insurers] ... However, it is the Law Society's view that industry-wide pro-forma documents, developed in consultation between the MAA, insurers and legal

<sup>284</sup> Submission 4, Law Society of NSW, p 2

<sup>285</sup> Submission 4, p 2

<sup>286</sup> Law Society of NSW, Answers to questions taken on notice during evidence, 9 July 2008, p 2

representatives would assist in providing claimants with consistent information about their entitlements and rights.<sup>287</sup>

- 7.5 The Committee sought a response from the MAA on this matter. The MAA indicated that it ‘expects that any generic information about making and resolving claims that an insurer sends to a claimant is clear, accurate and appropriate’<sup>288</sup> and that:

The Motor Accidents Authority proposes to conduct a review in the second half of 2008 to ensure insurers’ generic information about making and resolving claims that is sent to a self-represented claimant is clear, accurate and appropriate.<sup>289</sup>

- 7.6 The MAA further invited the Law Society to forward any examples of insurers’ communications with claimants which it considered may disadvantage claimants.<sup>290</sup>
- 7.7 The Law Society subsequently indicated that it would be pleased to participate in the proposed review and suggested that the MAAS Reference Group may be an appropriate forum for it.<sup>291</sup>

#### **Committee comment**

- 7.8 The Committee considers it very important that all communication on the part of insurers with potential and actual claimants is accurate and fair. We welcome the MAA’s commitment to conduct a review of insurer communications with self-represented claimants and suggest that the review should consider the need for existing Guidelines to be reformulated and appropriate pro-forma letters developed. We further suggest that given that this issue extends beyond the operations of MAAS, it would be appropriate that the review be conducted in tandem with the Motor Accidents Council (MAC). We note that the MAC’s membership includes not only insurer and legal representatives, but also consumer representatives.

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#### **Recommendation 15**

That the Motor Accidents Authority conduct its intended review of insurers’ communication with self-represented claimants in tandem with the Motor Accidents Council, and that the review consider the need for the existing insurer guidelines to be reformulated and appropriate pro-forma letters developed.

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<sup>287</sup> Law Society of NSW, Answers to questions taken on notice during evidence, 9 July 2008, p 2

<sup>288</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 31

<sup>289</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 32

<sup>290</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 32

<sup>291</sup> Law Society of NSW, Answers to questions taken on notice during evidence, 9 July 2008, p 4

## Different thresholds for non-economic loss

- 7.9 Mr Hugh Macken, President of the Law Society of NSW, reported a broad concern about the different thresholds for non-economic loss operating across different compensation jurisdictions in New South Wales:

It remains a difficulty for the profession and for the community generally to have so many different thresholds before you can qualify for non-economic loss. The Motor Accidents [Compensation] Act has a threshold system, the Workers Compensation Act has a different threshold system, ComCare legislation creates a different threshold system, the Civil Liabilities Act has again a different means of assessing non-economic loss, and the common law and the damages available at common law are again different to how non-economic loss is assessed. We would like to see uniformity across the board in respect of the assessment of non-economic loss for peoples injured in this State.<sup>292</sup>

- 7.10 Mr Ross Letherbarrow SC, Chair of the NSW Bar Association's Common Law Committee, agreed that the different thresholds were problematic.<sup>293</sup>

### Committee comment

- 7.11 The Committee notes the issue of the inconsistency of thresholds for non-economic loss operating across different compensation jurisdictions in New South Wales. As the Committee and both of these stakeholders acknowledged at the time, this is a matter that extends beyond the scope of this Review.

## Itemisation of levies on greenslips

- 7.12 In its submission to the Committee's concurrent review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council, the Motorcycle Council of NSW expressed concern that there is currently a lack of transparency in relation to the composition of the Medical Care and Injury Services Levy which comprises the Lifetime Care Levy and Motor Accidents Authority Levy.<sup>294</sup> The latter, in turn is comprised of a payment for ambulance and hospital services, the Roads and Traffic Authority and the MAA.<sup>295</sup> The Motorcycle Council, motivated by a concern that motorcyclists are required to pay especially high levies relative to other motorists, called for the levies to be itemised on all compulsory third party (CTP) greenslips.<sup>296</sup>

<sup>292</sup> Mr Hugh Macken, President, Law Society of NSW, Evidence, 20 June 2008, p 20

<sup>293</sup> Mr Ross Letherbarrow SC, Chair, Common Law Committee, NSW Bar Association, Evidence, 20 June 2008, p 26

<sup>294</sup> Submission 5 to the First Review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council, NSW Motorcycle Council, p 4

<sup>295</sup> Mr Bowen, General Manager, Motor Accidents Authority, Evidence, 20 June 2008, p 7

<sup>296</sup> Submission 5 to the First Review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council, NSW Motorcycle Council, p 4

**7.13** Mr David Bowen, General Manager of the Motor Accidents Authority, responded to the Motorcycle Council's suggestion in evidence:

The only reason [the Medical Care and Injury Services Levy] is listed as a single levy is that we have a GST exemption from the Taxation Office, so that levy is not subject to GST in the name of that levy, rather than break it down into constituent points. The other element—and the insurers might be able to comment on this—is that the green slip is actually chock-a-block full of information. We do not hide this. The breakdown of it is certainly publicly available both through Motor Accidents and Lifetime Care information. It is really just how much more we can fit on the green slip ... This is the first time the question has been raised.<sup>297</sup>

**7.14** Mr Bowen went on to say that the levy has appeared on greenslips since the advent of the Lifetime Care and Support Scheme in October 2006. Prior to that, all of the other payments simply formed part of the insurance premium and were not disclosed in any way. As a result, he suggested that progress in relation to transparency was already being made. He further reported that a mandatory information sheet provided by the MAA which describes all the components of the levy, has been provided to consumers with their renewal notices; it is just not listed on the greenslip.<sup>298</sup> He then stated:

If we can fit it in, there is certainly no objection to breaking it down. I think it is in the interests of people to know how much they are paying as part of their green slip that goes to fund that acute care phase, for example.<sup>299</sup>

**7.15** The Committee sought the view of the Insurance Council of Australia on the Motorcycle Council's proposal. Mr Philip Cooper, Chair of the Motor Accidents Insurance Standing Committee, indicated that the Insurance Council had no firm position on the matter. Whilst affirming the value of transparency, he indicated that it might require substantial information to be exchanged between insurers and the MAA.<sup>300</sup> In addition, his colleague, Mrs Mary Maini, Chair of the Insurance Council's CTP Claims Managers Committee suggested that insurers would require some lead time to achieve this change as they would need to modify their systems to enable it.<sup>301</sup>

### **Committee comment**

**7.16** The Committee considers that there may be value in further itemisation of the Medical Care and Injury Services Levy on greenslips in the interests of transparency. At the same time, the Committee acknowledges that there is already a significant amount of information on greenslips and that the proposal would require systems changes on the part of insurers. The Committee considers that it would be valuable for the Motor Accidents Authority to consider,

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<sup>297</sup> Mr Bowen, Evidence, 20 June 2008, pp 7-8

<sup>298</sup> Mr Bowen, Evidence, 20 June 2008, p 8

<sup>299</sup> Mr Bowen, Evidence, 20 June 2008, p 8

<sup>300</sup> Mr Philip Cooper, Chair, Motor Accidents Insurance Standing Committee, Insurance Council of Australia, Evidence, 20 June 2008, p 35

<sup>301</sup> Ms Mary Maini, Chair, CTP Claims Managers Committee, Insurance Council of Australia, Evidence, 20 June 2008, p 35

in consultation with the Motor Accidents Council, the advantages and feasibility of such a proposal.

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### **Recommendation 16**

That the Motor Accidents Authority, in consultation with the Motor Accidents Council, consider by 30 June 2009 the advantages and feasibility of further itemisation of the Medical Care and Injury Services Levy on compulsory third party greenslips.

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### **Accommodation for people with disability**

- 7.17** In its submission People with Disability Australia (PWD) raised concerns about the MAA's decision to provide \$5 million in capital funding from the Injury Management Grants Program toward the redevelopment of the accommodation facility in Western Sydney known as Ferguson Lodge.
- 7.18** PWD suggested that the decision goes against the MAA's Injury Management Sponsorship Guidelines, which state that service development projects are not eligible for sponsorship funding. It further contended that the redevelopment, which will provide congregate rather than community based care, does not satisfy the Guidelines' aim to promote 'best practice through evidence based treatment, rehabilitation and attendant care services'.<sup>302</sup>
- 7.19** In response to PWD's claims, Mr Bowen stated in evidence:

The Motor Accidents Authority has always had a major capital funding program. In fact, the great bulk of MAA funds that have gone external have been through that capital program. The MAA funded the Brain Injury Rehabilitation Program in the early to mid-90s in an amount that added up to around about \$55 million to \$60 million. We have funded major spinal units. We have funded the brain injury rebuild at Westmead Hospital. We have funded a whole lot of similar types of services. This is exactly in keeping with that.

Spinal injury and brain injury are the really high-cost claims within this scheme, as would be seen from the figures from the Lifetime Care, and the board has always looked favourably upon providing capital funding to put bricks and mortar in place. For example, we funded throughout the late 90s and early 2000s a whole range of community facilities for people with brain injury, and I think the rebuild of Ferguson Lodge is exactly in that vein.<sup>303</sup>

- 7.20** The MAA subsequently advised the Committee that the decision to provide the \$5 million capital grant to the Paraplegic and Quadriplegic Association of New South Wales (ParaQuad) for the redevelopment of Ferguson Lodge was approved by the Authority's Board of Directors. According to the MAA, the grant is one of ten major capital grants that it has made to various organisations over the last five years.<sup>304</sup>

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<sup>302</sup> Submission 10, People with Disability Australia, p 4

<sup>303</sup> Mr Bowen, Evidence, 20 June 2008, p 8

<sup>304</sup> MAA, Answers to questions taken on notice during evidence, 22 July 2008, pp 1-2

**7.21** The MAA went on to explain that the MAA's Injury Management Sponsorship Guidelines do not apply to capital grants, which are considered on a case by case basis. It noted that the Authority's website states that the sponsorship Guidelines relate principally to education/information activities such as conferences and seminars generally funded up to \$5,000.<sup>305</sup>

**7.22** Further, the MAA advised the Committee that:

The Department of Disability, Ageing and Home Care has also committed significant funding to the Ferguson Lodge redevelopment. It is our understanding that the Department has discussed the proposed plans with ParaQuad and revisions have been made, in order to meet the former's requirements while at the same time endeavouring to meet the strongly expressed preferences of the residents themselves.

The Authority has also required that the site be redeveloped with maximum flexibility to accommodate divergent needs. The current plans include provision for a number of fully accessible, self-contained cottages suitable for short-term periods as interim or transitional accommodation for individuals and families, or for the longer term.

The Authority acknowledges the rights of people with disabilities to exercise choice and control over their lives. We understand that the current residents of Ferguson Lodge have been presented with various housing options and models, and have had considerable input into the development of an agreed plan. It is also our understanding that the current residents have expressed a very strong preference to be housed as a group at the same site as the current Ferguson Lodge.<sup>306</sup>

### **Committee comment**

**7.23** The Committee is satisfied that the capital grant provided by the MAA for the redevelopment of Ferguson Lodge is appropriate. The Committee urges the MAA to continue to work towards achieving best-practice outcomes for people with disability.

### **Future trends in road safety**

**7.24** As noted in previous reports, the MAA's road safety functions derive from the *Motor Accidents Compensation Act 1999*, which states that the MAA is to provide funding for measures to prevent or minimise injuries from motor accidents and for safety information.

**7.25** The *2006-2007 Annual Report* states that the MAA had an approved funding commitment as at 30 June 2007 of \$6.202 million (\$4.716 million in 2006) for road safety grants.<sup>307</sup> The *Annual Report* lists initiatives and achievements in relation to four identified goals:

- to reduce the number of child road crash injuries and claims
- to reduce the number and cost of crashes caused by young drivers

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<sup>305</sup> MAA, Answers to questions taken on notice during evidence, 22 July 2008, p 2

<sup>306</sup> MAA, Answers to questions taken on notice during evidence, 22 July 2008, p 2

<sup>307</sup> MAA, *Annual Report*, 2006-2007, p 44

- to reduce the number of road crash injuries sustained by pedestrians and motorcyclists
- working with other organisations to support road safety.<sup>308</sup>

**7.26** Prior to the hearing the Committee asked whether the MAA had any observations or comments to make about trends in road safety in New South Wales.

**7.27** The MAA responded:

It is clear from New South Wales Health admission data and Roads and Traffic Authority crash data that the number and rate of deaths on New South Wales roads are substantially decreasing. The first broad strategic road safety plan for New South Wales was introduced in 1995 under the name “Road Safety 2000”. At this point, it is important to note that traditionally, road safety has tended to be measured publicly by the number of annual fatalities. While fatalities can be seen as the worst ultimate human outcome, they are also a somewhat limited measure of the real cost of crashes both in human and financial terms. In general there are around 10 serious casualties for every fatality, and 100 times as many minor to moderate injury crashes.

Road crash death toll alone, is not an adequate measure for the Motor Accidents Authority. Serious injury presents the biggest financial burden to the Motor Accidents Authority, and New South Wales stakeholders.

Other key indicators of interest to the Motor Accidents Authority are the fact that the hospitalisation rates for older pedestrians are not reducing but remaining stagnant. Accepting that New South Wales is about to have a substantial increase in the proportion of the population over 65 years, it appears that New South Wales may see a substantial increase in claims from older pedestrians in the future. Another issue of some concern would be an increase in the rate of hospitalisation of pedal cyclists, particularly males aged 5-14 years. While alcohol attributed injury deaths have reduced in NSW the rate of hospitalisation, particularly among males, is climbing fairly rapidly. The rate of hospitalisations for motorcyclists is rising and for motor vehicle occupants has stabilised (and is not reducing).

The potential for increased cyclists, pedestrians, motorcyclists and scooter drivers on the roads, perhaps associated with the rising price of petrol, presents the Motor Accidents Authority with a substantial challenge as these groups of road users are relatively more vulnerable to injury than motor vehicle occupants. The Authority expects to undertake research over coming years to identify emerging trends in vulnerability to road crash injury.<sup>309</sup>

### Committee comment

**7.28** The Committee acknowledges the gains made in respect of road crash fatalities in recent years and the contributions of government, industry and the community to these significant outcomes. We further acknowledge the complexity of this task, and at the same time, the

<sup>308</sup> MAA, *Annual Report*, 2006-2007, p 20

<sup>309</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 33-34

imperative for all parties to continue to work to improve road safety. We are pleased to observe the proactive efforts of the MAA in respect of this important goal.

## Road safety initiatives targeting young people

**7.29** The *2006-2007 Annual Report* notes that young drivers and passengers are an MAA priority area, and lists various initiatives over the reporting year including:

- fourteen Arrive Alive youth safety awareness projects
- the On the Road Aboriginal Young Driver Program 2007-2008
- sponsorship of the West Sydney Tigers and St George Illawarra Dragons, Newcastle Knights, Penrith Panthers and Manly Sea Eagles, with players visiting 67 high schools and addressing 4,800 school students
- the Arrive Alive website where most of the Authority's youth initiatives are promoted.<sup>310</sup>

**7.30** The Committee asked the MAA what outcomes have been observed to date as a result of its initiatives targeting young people. The MAA stated in response:

When the various programs referred to were initiated, there was a view that each program or grant initiated safety awareness among younger drivers and that this would all contribute to a safer environment and lead to safe behaviour among an "at risk" group. Many of the programs were initiated and undertaken by local community groups.

When the Motor Accidents Authority attempted to measure the results of these investments it became apparent that there was substantial demonstrable evidence that people recognised the safety messages and were able to feed back much of the information to the evaluators. Unfortunately, there was insufficient evidence of outcome measures available from the evaluation.

The Motor Accidents Authority acknowledges that investments, such as those mentioned above, have substantial benefits for local organisations, and young people. The Motor Accidents Authority further acknowledges that it needs to focus future investments based on sound evidence of benefit, and those which can also be measured in terms of outcomes.<sup>311</sup>

**7.31** In its submission, Youthsafe suggested that the MAA's injury prevention initiatives targeting young people are overly focused on professional sportspeople visiting schools. Whilst calling for young people to remain a high priority for injury prevention initiatives, it asserted:

MAA's approach should be multi-strategic, co-ordinated with other stakeholders and incorporate 'whole of community' principles to comprehensively address the range of risk factors for young people on the roads and the complexity of road safety for this age group.

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<sup>310</sup> MAA, *Annual Report*, 2006-2007, p 20

<sup>311</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 32

Intervention strategies should be evidence based and considered, taking into account up to date research in the field and issues associated with practical application.<sup>312</sup>

**7.32** The MAA responded to Youthsafe's suggestions by stating:

The Youthsafe submission is noted. When the program was initiated, there was strong support for this type of investment. In the past 12 months the Motor Accidents Authority has been engaged in the development of a new strategy, focussed on a sound evidence base, which is focussed on partnerships with the Roads and Traffic Authority, Police Force, Ambulance Service and key groups such as Youthsafe. This strategy will encompass issues around vehicle design, education, alcohol management strategies, the road environment, protective behaviours, enhancing data capacity, areas of New South Wales impacted heavily by claims, motorcycle and scooter safety, pedestrian behaviours and rights etc. The Motor Accidents Authority will also be developing an evaluation plan to reflect on the outcomes from the strategy. Over the next two months the Motor Accidents Authority will be consulting closely with a broad range of stakeholders over the contents of this strategy and its evaluation plan, including Youthsafe.<sup>313</sup>

**Committee comment**

**7.33** The Committee looks forward to learning about the MAA's new, more evidence-based strategy for promoting road safety and will monitor the implementation and outcomes of this strategy in future reviews.

**Fall in claims frequency**

**7.34** Issues in respect of the fall in claims frequency since the introduction of the new Scheme were examined in detail during the Committee's Seventh and Eighth Reviews.<sup>314</sup>

**7.35** The Committee was concerned by the absence of clarity about the precise causes of this fall, as well as its implications for both insurer profits and injured people's propensity to claim. On this basis, we recommended in our *Seventh Report* that the MAA prepare a report on the impact of the 1999 reforms on the propensity to claim, and the impact of the fall in the propensity to claim on the profitability of insurers. Our recommendation also requested that the MAA provide a copy of the report to the Committee.<sup>315</sup>

<sup>312</sup> Submission 3, Youthsafe, p 7

<sup>313</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 33

<sup>314</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 32-38; 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, pp 54-57

<sup>315</sup> *Seventh Report*, p 39

- 7.36** In response, the MAA commissioned Taylor Fry Consulting Actuaries to conduct a review in line with our recommendation, and undertook to provide a copy of the review report to the Committee.<sup>316</sup>
- 7.37** Our *Eighth Report* noted a continuing concern on the part of the Bar Association that while falling claim numbers have led to significant profit increases for insurers, and to reduced premiums for motorists, quantum benefits to injured people have been reduced under the new Scheme. The Association suggested that the *Motor Accidents Compensation Act* has been much more effective in reducing benefits to the injured than was anticipated.<sup>317</sup> Similarly, the Law Society contended that the Scheme discourages people from making claims, highlighting legal costs as a significant deterrent.<sup>318</sup> Whilst noting these concerns, at that time the Committee made no further recommendations with respect to this issue, on the basis that the recommendations from the *Seventh Report* were still current.<sup>319</sup>
- 7.38** In questions forwarded to the MAA prior to the hearing for the current Review, the Committee sought information on the findings of the Taylor Fry Actuaries review.
- 7.39** The MAA's response quoted the unpublished Taylor Fry Actuaries report, stating that its review of recent trends in claims frequency found that:

“From 2001 to 2007 claim frequency continued to decrease, to about 0.25% p.a. and 0.21% p.a. of registered vehicles for all claims and full claims only respectively. However:

- Much of the decrease in claim frequency appears to be a consequence of (or at least simultaneous with) a decreasing traffic casualty frequency over the same period, and
- The rate of decrease in claim frequency has reduced over time...

... The decrease in full claim frequency since 1999 has been predominantly in the lower severity claims, with average size up to around \$100,000. Depending on the definition of severity used, more severe claims have remained reasonably constant over the same period although there is evidence of an increasing trend for severe claims up to late 2005. We noted in our previous draft report concerning claim frequency that this trend appears to have levelled off since 2005. With the addition of two quarters of data to December 2007 since our previous draft report was prepared, the frequency of severe claims remains at a similar level to that of 2006 and early 2007.”<sup>320</sup>

- 7.40** Asked about what the Taylor Fry Actuaries review revealed about the reasons behind the fall in claims frequency, and any action the MAA was planning in response, the MAA responded:

<sup>316</sup> Government Response to Seventh Report, p 2

<sup>317</sup> *Eighth Report*, p 55

<sup>318</sup> *Eighth Report*, p 56

<sup>319</sup> *Eighth Report*, p 56

<sup>320</sup> Taylor Fry Consulting Actuaries, *Motor Accidents Authority: recent trends in claim frequency* unpublished report, 2008, page 2, quoted in MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 7

The Taylor Fry report does confirm that claim frequency “was reasonably constant between 1996 and 1999, until the commencement of the [Motor Accidents Compensation Act] ... but started to decrease about a year after its commencement.”<sup>321</sup>

- 7.41** At the same time, the MAA reiterated the report’s conclusion that much of the fall in claims frequency appears to have resulted from, or has at least coincided with, a fall in traffic casualties over the same period.<sup>322</sup> The Authority went on to state:

The Motor Accidents Authority considers the reduction in traffic casualty frequency in New South Wales to be a welcome result of road safety initiatives by New South Wales Government, including the Authority, the community and business sectors in New South Wales and safe road use behaviour by the people of New South Wales. The reduced social costs, including reduced claims costs are welcome.<sup>323</sup>

- 7.42** Asked specifically whether the Scheme creates barriers to people making accident claims, the MAA responded:

The Motor Accidents Authority acknowledges the need to ensure equitable and easy access to the Compulsory Third Party scheme for potential claimants and to this end, provides a community assistance service to assist people injured in road crashes and their families to make a claim. The Authority also monitors insurer compliance with claims handling guidelines and provides a dispute resolution service.

In October 2008, reforms to the Accident Notification Form process will be implemented to make it easier for people with Compulsory Third Party claims requiring up to \$5000 compensation for medical treatment and lost income, to have these resolved claims quickly. As part of the implementation, a communication strategy to ensure awareness of the importance of lodging an Accident Notification Form as soon as possible will be delivered to hospitals, general practitioners and other clinicians and legal practitioners as well as the general public.<sup>324</sup>

- 7.43** In its own answers to questions on notice, the Bar Association responded in turn to the MAA’s statements:

The Association accepts that some of the decrease in claim frequency can be attributed to decreasing accident rates. However, the experience of the Association’s members is that part of the decrease in claims can be attributed to accident victims being deterred from pursuing a claim. In particular, those with statutory workers compensation rights are now more frequently choosing to rely on those rights rather than pursue a motor accidents claim.<sup>325</sup>

<sup>321</sup> Taylor Fry Consulting Actuaries, unpublished report, 2008, page 2, quoted in MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 7

<sup>322</sup> Taylor Fry Consulting Actuaries, unpublished report, 2008, page 2, quoted in MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 7

<sup>323</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, p 8

<sup>324</sup> MAA, Answers to pre-hearing questions on notice, 19 June 2008, pp 8-9

<sup>325</sup> NSW Bar Association, Answers to questions on notice taken during evidence, 15 July 2008, p 5

- 7.44 The Law Society also responded to the MAA’s statements. Its comments addressed the views of both the MAA and the Bar Association, stating that as concluded in the Taylor Fry report, the Law Society does not know whether the decrease in claim frequency is either a consequence of, or simultaneous with, decreasing traffic casualty frequency. At the same time, the Law Society affirmed the Bar Association’s position ‘that injured claimants should also be granted some advantage from the road safety dividend and that benefits should be increased.’<sup>326</sup>

#### **Committee comment**

- 7.45 The Committee only recently received a copy of the Taylor Fry Actuaries report and has had limited time to review its content and findings.
- 7.46 We are concerned about reports that there are disincentives to claiming within the Motor Accidents Compensation Scheme. We acknowledge the MAA’s forthcoming initiatives to encourage earlier notification of accidents and resolution of small claims, as well as the various other services it provides to assist claimants. We also note that disincentives arising from legal costs, as highlighted by the Law Society, are expected to be significantly addressed through the review of the Cost Regulation which is currently underway, as discussed in detail in Chapter 6.
- 7.47 Beyond these considerations, the question of the extent to which the Act has – and should have – reduced benefits to injured people perhaps goes to a debate about the fundamental goals of the Scheme. In this sense it is a matter of policy opinion as to how the benefits of the Scheme, including the unexpected cost savings arising from the legislation itself and/or from a fall in motor accidents, should be shared most fairly. In our *Eighth Report* the Committee stated that while lower premiums are welcome, they are not the sole factor by which the success of the Scheme should be judged. We went on to suggest that given the current affordability of greenslips, it would be reasonable to accept no further decreases, or even accept an increase, in CTP premiums if it means that accident victims receive valid increases in compensation. We continue to consider that a fair balance in benefits to insurers, motorists and injured people is important.
- 7.48 These issues may gain greater weight if claims continue to decrease and if so, whether the precise factors contributing to such falls become more apparent. The Committee will continue to monitor this issue with interest.

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<sup>326</sup> Law Society of NSW, Answers to questions taken on notice during evidence, 9 July 2008, p 3

## Appendix 1 Submissions

No	Author
1	Mr Bruce SAUNDERS
2	Ms Elena KATRAKIS (Carers NSW)
3	Ms Anne DEANS (Youthsafe)
4	Mr Hugh MACKEN (Law Society of NSW)
5	Hon David CAMPBELL MP (Minister for Police, Minister for the Illawarra)
6	Ms Kerrie KELLY (Insurance Council of Australia)
7	Mr Andrew BUCHANAN (Disability Council of NSW)
8	Ms Anna KATZMANN SC (NSW Bar Association)
9	Mr Les WIELINGA (NSW Roads and Traffic Authority)
10	Mr Matthew BOWDEN (People with Disability Australia Incorporated)

## Appendix 2 Witnesses

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
<b>20 June 2008, Room 814-815 Parliament House</b>	Mr David BOWEN	General Manager, Motor Accidents Authority
	Mr Richard GRELLMAN AO	Chairman, Motor Accidents Authority Board and Motor Accidents Council
	Ms Carmel DONNELLY	Deputy General Manager, Motor Accidents Authority
	Mr Hugh MACKEN	President, Law Society of NSW
	Mr Scott ROULSTONE	Junior Vice President and Chair, Injury Compensation Committee, Law Society of NSW
	Mr Ross LETHERBARROW SC	Chair, Common Law Committee, NSW Bar Association
	Mr Andrew STONE	Member, Common Law Committee, NSW Bar Association
	Mr Philip COOPER	Chair, Motor Accidents Insurance Standing Committee, Insurance Council of Australia
	Mrs Mary MAINI	Chair, CTP Claims Managers Committee, Insurance Council of Australia
	Mr Cameron PLAYER	Assistant General Manager, Motor Accidents Assessment Service
	Ms Belinda CASSIDY	Principal Claims Assessor, Claims Assessment and Resolution Service
	Mr Colin STOTEN	Assessor, Claims Assessment and Resolution Service
Ms Helen WALL	Assessor, Claims Assessment and Resolution Service	

## Appendix 3 Tabled documents

**Friday 20 June 2008**

**Public hearing, Parliament House**

1. PowerPoint presentation entitled 'Premium composition before and after LTC', tabled by Mr David Bowen, General Manager, Motor Accidents Authority.
2. Report entitled 'Compulsory Third Party Insurance Review of Premium Relativities from 1 July 2008' prepared for the MAA by Finity consultants, tabled by Mr David Bowen, General Manager, Motor Accidents Authority.
3. 'Response to submissions made by Insurance Council of Australia', tabled by Mr Ross Letherbarrow SC, Chair, Common Law Committee, NSW Bar Association.

## Appendix 4 Minutes

### Minutes No 10

Wednesday 5 March 2008

Members' Lounge, Parliament House, Sydney at 2:15 pm

#### 1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Mr Ajaka

Ms Hale

Ms Fazio

#### 2. \*\*\*

#### 3. Ninth review of the Motor Accidents Authority and Motor Accidents Council and first review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council

Resolved, on the motion of Mr Donnelly: That the Committee commence arrangements for the conduct of its ninth review of the exercise of the functions of the MAA and MAC and its first review of the exercise of the functions of the LTCSA and LTCSAC.

Resolved, on the motion of Mr Clarke: That the reviews and the call for submissions be advertised in the *Sydney Morning Herald* and the *Daily Telegraph* on a date to be confirmed by the Secretariat after consultation with the Chair.

Resolved, on the motion of Ms Fazio: That the Secretariat distribute to the Committee for their consideration a list of stakeholders to be invited to participate in the reviews, and that, after input from the Committee received by 12 March 2008, the stakeholders be invited to make submissions to the reviews.

Resolved, on the motion of Mr Ajaka: That the reviews be held concurrently.

Resolved, on the motion of Mr Clarke: That the Committee seek a briefing from officers of the MAA, MAC, LTCSA and LTCSAC on a date to be confirmed by the Secretariat after consultation with the Committee, the MAA and the LTCSA.

Resolved, on the motion of Ms Fazio: That the Committee hold public hearings on a full day and half day to be confirmed by the Secretariat in consultation with the Chair and subject to the availability of members and witnesses and that the following be invited to appear as witnesses: representatives of the MAA, MAC, LTCSA, LTCSAC, Law Society of NSW, NSW Bar Association, Insurance Council of Australia and any other witnesses determined by the Chair.

Resolved, on the motion of Mr Ajaka: That a questions on notice process be conducted prior to the hearings as has occurred in previous reviews of the MAA and MAC.

#### 4. Inquiry into the prohibition on naming of children involved in criminal proceedings

The Committee discussed the proposed date for a deliberative meeting to consider the inquiry report.

#### 5. Adjournment

The Committee adjourned at 2.28 pm until 10.00 am, Friday 11 April 2008.

Merrin Thompson  
**Clerk to the Committee**

**Minutes No 12**

Thursday 15 May 2008

Member's Lounge, Parliament House, Sydney at 2:15 pm

**1. Members present**

Ms Robertson (*Chair*)  
 Mr Clarke (*Deputy Chair*)  
 Mr Donnelly  
 Mr Ajaka  
 Ms Fazio

**2. Apologies**

Ms Hale

**3. \*\*\***

**4. Publication of correspondence**

The Committee noted the following items of correspondence received and sent:

**Received**

- 18 April 2008, letter to Committee Secretariat from Ms Helen Rowell, General Manager, Diversified Institutions Division, Australian Prudential Regulation Authority (APRA), indicating APRA will not be making a submission to the ninth review of the Motor Accidents Authority and Motor Accidents Council and first review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council.
- 30 April 2008, letter to Chair from Mr John Driscoll, General Manager Policy, Consumer Directorate, Insurance Council of Australia, indicating that the Insurance Council of Australia will not be making a submission to the first review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council.
- 15 May 2008, letter to Chair from Mr Hugh Macken, President, NSW Law Society, supporting the recommendations of the Committee's report on the Inquiry into the prohibition on the publication of names of children involved in criminal proceedings.

**Sent**

- 7 March 2008, 42 letters from the Committee Chair to various stakeholders inviting them to make a submission to the ninth review of the Motor Accidents Authority and Motor Accidents Council and first review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council.

Resolved, on the motion of Mr Ajaka: That the correspondence of Mr Rouvenitis, received 30 April 2008, be forwarded to the Minister of Police for his consideration.

Resolved, on the motion of Mr Ajaka: That the correspondence of Mr Hugh Macken, President, NSW Law Society, received 15 May 2008, be published on the Committee website.

**5. Ninth review of the Motor Accidents Authority and Motor Accidents Council and first review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council**

**a. Publication of submissions**

The Committee considered submissions 1-7 of the MAA review and 1-6 of the LTCSA review.

Resolved, on the motion of Ms Fazio: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publications of Submission Nos 2 to 7 to the MAA Review and Submission Nos 1 – 6 to the LTCSA Review, and that they be placed on the Inquiry website.

Resolved, on the motion of Ms Fazio: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of Submission No 1 to the MAA Review and that it be placed on the Inquiry website, subject to the Committee secretariat confirming the intention of the author regarding the confidentiality status of the submission.

Resolved on the motion of Ms Fazio: That the Committee secretariat develop, in collaboration with the Chair, a list of potential witnesses for the public hearing to be held 20 June 2008 and circulate the list to members for information and suggested additions.

## 6. General Business

The Chair noted the comments of NSW Attorney General John Hatzistergos made in the House on 15 May 2008 in relation to the Sentencing Council report. Committee secretariat to circulate copies of the Sentencing Council Report to members.

## 7. Adjournment

The Committee adjourned at 2:25pm until 9:30 am, 20 June 2008, in the Jubilee Room, Parliament House

Simon Johnston

**Clerk to the Committee**

## Minutes No 13

Tuesday 3 June 2008

Member's Lounge, Parliament House, Sydney at 2:25 pm

### 1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

### 2. Minutes

Resolved, on the motion of Mr Donnelly: That draft Minutes No 12 be confirmed.

### 3. Publication of correspondence

The Committee noted the following items of correspondence sent:

#### Sent

- 16 May 2008, letter from the Secretariat to the author of Submission 1 to the MAA/MAC Review asking him to advise if he wishes his submission to be wholly or partially confidential.
- 21 May 2008, letter from the Chair to the Hon John Della Bosca MLC, Minister for Finance, forwarding written questions on notice for the MAA/MAC and LTCSA/LTCSAC Reviews and inviting witnesses to attend the public hearing on 20 June 2008.

## 4. Ninth review of the Motor Accidents Authority and Motor Accidents Council and first review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council

### 4.1 Publication of submissions

The Committee considered Submission Nos 8 and 9 to the MAA review and Submission Nos 7 and 8 to the LTCSA review.

Resolved, on the motion of Mr Clarke: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publications of Submission Nos 8 and 9 to the MAA Review, and that they be placed on the Inquiry website.

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publications of Submission Nos 7 and 8 to the LTCSA Review, and that they be placed on the Inquiry website.

## 5. Adjournment

The Committee adjourned at 2:27pm until 9:30 am, 20 June 2008, in the Jubilee Room, Parliament House

Simon Johnston  
Clerk to the Committee

## Minutes No 14

Friday 20 June 2008

Room 814/815, Parliament House, Sydney at 9.20am

### 1. Members present

Ms Robertson (*Chair*)  
Mr Clarke (*Deputy Chair*)  
Mr Donnelly  
Mr Ajaka  
Ms Hale

### 2. Apologies

Ms Fazio

### 3. Minutes

Resolved, on the motion of Mr Donnelly: That draft Minutes No 13 be confirmed.

### 4. Correspondence

#### Received

- 19 June 2008, letter from Mr David Bowen, General Manager, Motor Accidents Authority and Chief Executive Officer, Lifetime Care and Support Authority, attaching answers to written questions on notice provided on 21 May 2008.

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of answers to written questions on notice received from the Motor Accidents Authority and Lifetime Care and Support Authority on 19 June 2008, and that they be placed on the Inquiry website.

### 5. Ninth review of the Motor Accidents Authority and Motor Accidents Council and first review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council

#### 5.1 Publication of submissions

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication

of Submission No 10 to the MAA/MAC Review and Submission No 9 to the LTCSA/LTCSAC Review, and that they be placed on the Inquiry website.

### **5.2 Return of answers to questions on notice**

Resolved, on the motion of Mr Clarke: That the Committee request witnesses to return answers to questions taken on notice at the public hearing of 20 June 2008 by Friday 11 July 2008.

### **5.3 Allocation of question time for witnesses**

Resolved, on the motion of Ms Hale: That the Committee hear evidence relating to the ninth review of the MAA and MAC in the first part of each hearing session, and subsequently hear evidence relating to the first review of the LTCSA and LTCSAC in the second part of each session, as appropriate.

## **6. Public hearing - ninth review of the Motor Accidents Authority and Motor Accidents Council and first review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council**

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:

- Mr David Bowen, General Manager, MAA and MAC
- Mr Richard Grellman, Chairman, MAA Board and MAC, MAA and MAC
- Ms Carmel Donnelly, Assistant General Manager, MAA and MAC.

Mr Bowen tendered the following documents:

- PowerPoint presentation entitled 'Premium composition before and after LTC'
- Report entitled 'Compulsory Third Party Insurance Review of Premium Relativities from 1 July 2008' prepared for the MAA by Finity consultants

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Dougie Herd, Chairman, LTCSAC
- Mr Neil Mackinnon, A/Director, Service Delivery, LTCSA
- Mr Stephen Payne, Director, Corporate Services and Chief Financial Officer, Office of the MAA

The following witnesses were examined on former oath:

- Mr David Bowen, Chief Executive Officer, LTCSA and LTCSAC
- Mr Richard Grellman, Chairman, LTCSA Board

Mr Bowen tabled a PowerPoint presentation entitled 'Lifetime Care & Support Authority'.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Hugh Macken, President, Law Society of NSW
- Mr Scott Roulstone, Junior Vice President, Law Society of NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Ross Letherbarrow SC, Chair, Common Law Committee, NSW Bar Association
- Mr Andrew Stone, Member, Common Law Committee and Member, NSW Bar Association.

Mr Letherbarrow tabled a document entitled 'Response to submissions made by Insurance Council of Australia'.

The evidence concluded and the witnesses withdrew.

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and standing order 224, the Committee authorises the Clerk to the Committee to publish the documents tendered during the public hearing:

- PowerPoint presentation entitled 'Premium composition before and after LTC', tabled by Mr David Bowen, General Manager, MAA and MAC
- PowerPoint presentation entitled 'Lifetime Care & Support Authority', tabled by Mr David Bowen, Chief Executive Officer, LTCSA and LTCSAC
- 'Response to submissions made by Insurance Council of Australia', tabled by Mr Ross Letherbarrow SC, Chair, Common Law Committee, NSW Bar Association.

The following witnesses were sworn and examined:

- Mr Philip Cooper, Chair, MAISC Executive Committee, Insurance Council of Australia.
- Ms Mary Maini, Chair, CTP Claims Managers Committee, Insurance Council of Australia.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Adeline Hodgkinson, Director, Brain Injury Rehabilitation Unit, Liverpool Hospital and Chair, Greater Metropolitan Clinical Taskforce Brain Injury Rehabilitation Directorate
- Mr Jeremy Gilchrist, Manager, Southern Area Brain Injury Rehabilitation Service and Member, Greater Metropolitan Clinical Taskforce Brain Injury Rehabilitation Directorate
- Dr Joe Gurka, Staff Specialist and Medical Director, Westmead Brain Injury Rehabilitation Unit and Member, Greater Metropolitan Clinical Taskforce Brain Injury Rehabilitation Directorate
- Mr Matthew Frith, Team Leader, Kaleidoscope Hunter Children's Network Paediatric Brain Injury Rehabilitation Team and Member, Greater Metropolitan Clinical Taskforce Brain Injury Rehabilitation Directorate.

Dr Hodgkinson tabled a document containing two case studies of rehabilitation patients participating in the LTCS scheme.

Mr Frith tabled a document containing one case study of a child rehabilitation patient participating in the LTCS scheme.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Cameron Player, Assistant General Manager, Motor Accidents Assessment Service, MAA
- Ms Belinda Cassidy, Principal Claims Assessor, Claims Assessment and Resolution Service, MAA
- Ms Helen Wall, Assessor, Claims Assessment and Resolution Service, MAA
- Mr Colin Stoten, Assessor, Claims Assessment and Resolution Service, MAA.

The evidence concluded and the witnesses withdrew.

The public and the media withdrew.

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and standing order 224, the Committee authorises the Clerk to the Committee to publish the documents tendered during the public hearing:

- Two case studies of rehabilitation patients participating in the LTCS scheme, tabled by Dr Adeline Hodgkinson, Director, Brain Injury Rehabilitation Unit, Liverpool Hospital and Chair, Greater Metropolitan Clinical Taskforce Brain Injury Rehabilitation Directorate
- One case study of a child who is a rehabilitation patient participating in the LTCS scheme, tabled by Mr Matthew Frith, Team Leader, Kaleidoscope Hunter Children's Network Paediatric Brain Injury Rehabilitation Team and Member, Greater Metropolitan Clinical Taskforce Brain Injury Rehabilitation Directorate.

#### 7. **Adjournment**

The Committee adjourned at 3:36pm.

Merrin Thompson  
Clerk to the Committee

#### **Minutes No 15**

Monday 4 August 2008

Room 1102, Parliament House, Sydney at 11am

#### 1. **Members present**

Ms Robertson (*Chair*)  
Mr Clarke (*Deputy Chair*)  
Mr Ajaka  
Mr Donnelly  
Ms Fazio

#### 2. **Apologies**

Ms Hale

#### 3. **Minutes**

Resolved, on the motion of Mr Ajaka: That draft Minutes No. 14 be confirmed.

#### 4. **Correspondence**

The Committee noted the following items of correspondence:

##### ***Received***

Responses to questions on notice arising from the 20 June evidence to the ninth review of the Motor Accidents Authority and the Motor Accidents Council and the first review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council:

- 9 July 2008, letter to Committee Secretariat from Mr Hugh Macken, President, The Law Society of New South Wales.
- 15 July 2008, letter to Committee Secretariat from Mr Alistair McConnachie, Director, The New South Wales Bar Association.
- 22 July 2008, letter to Committee Chair from Mr David Bowen, General Manager, Motor Accidents Authority and Chief Executive Officer, Lifetime Care and Support Authority.
- 22 July 2008, letter to Committee Chair from Mr John Driscoll, General Manager Policy, Insurance Council of Australia.

Proposed terms of reference:

- 31 July 2008 – From the Hon John Hatzistergos MLC, Attorney General, to the Chair, proposing terms of reference in regard to legislation on altruistic surrogacy in NSW.

***Sent***

- 27 June 2008, Letters from the Secretariat to The Law Society of New South Wales, The New South Wales Bar Association, Insurance Council of Australia, the Greater Metropolitan Clinical Taskforce, the Motor Accidents Authority and the Lifetime Care and Support Authority requesting the return of answers to questions taken on notice by 11 July.

**5. Ninth Review of the Motor Accidents Authority and Motor Accidents Council; 1st Review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council**

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of the following answers to written questions on notice:

- The Law Society of New South Wales
- The New South Wales Bar Association
- Insurance Council of Australia
- Motor Accidents Authority
- Lifetime Care and Support Authority.

6. \*\*\*

7. \*\*\*

**8. Adjournment**

The Committee adjourned at 11.25am.

Madeleine Foley  
Clerk to the Committee

**Draft Minutes No 16**

Thursday 28 August 2008

Room 1102, Parliament House, Sydney at 8:35 am

**1. Members present**

Ms Robertson (*Chair*)  
Mr Clarke (*Deputy Chair*)  
Mr Donnelly  
Mr Ajaka  
Ms Fazio

**2. Apologies**

Ms Hale

**3. Minutes**

Resolved, on the motion of Mr Donnelly: That draft Minutes No 15 be confirmed.

**4. Publication of correspondence**

The Committee noted the following items of correspondence received:

- August 2008, Ms Grainne Murphy, Communications Manager of the Law and Justice Foundation, to the Committee, providing the *Justice Issues* report titled ‘Taking justice into custody: the legal needs of prisoners – summary report’.
- 18 August 2008, Ms Nadine King, Principal Policy Officer of the Motor Accidents Authority, to the Committee Secretariat, providing the June 2008 Taylor Fry Consulting Actuaries report titled ‘Motor Accidents Authority: recent trends in claim frequency’.
- 27 August 2008, Dr Adeline Hodgkinson, Director, Brain Injury Rehabilitation Unit, Greater Metropolitan Clinical Taskforce to the Committee secretariat, providing answers to questions on notice for the first review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council.

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of the June 2008 Taylor Fry Consulting Actuaries report titled ‘Motor Accidents Authority: recent trends in claim frequency’.

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of answers to questions on notice provided by Dr Adeline Hodgkinson, Director, Brain Injury Rehabilitation Unit, Greater Metropolitan Clinical Taskforce.

## **5. Ninth Review of the Motor Accidents Authority and Motor Accidents Council**

### **5.1 Consideration of the Chair’s Draft Report**

The Chair submitted her draft report titled ‘Ninth Review of the Motor Accidents Authority and Motor Accidents Council’, Report 36, which, having been circulated was taken as being read.

The Committee proceeded to consider the draft report in detail.

Chapter 1 read.

Resolved, on the motion of Mr Ajaka: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Ajaka: That recommendation 1 be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 2 be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Clarke: That Chapter 3 be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Ajaka: That recommendation 2 be amended by inserting the words ‘by 30 June 2009,’ immediately after the words ‘That the Motor Accidents Authority,’.

Resolved, on the motion of Mr Ajaka: That recommendation 2, as amended, be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 4, as amended, be adopted.

Chapter 5 read.

Resolved, on the motion of Ms Fazio: That Chapter 5 be adopted.

Chapter 6 read.

Resolved, on the motion of Mr Clarke: That recommendation 3 be adopted.

Resolved, on the motion of Mr Ajaka: That recommendation 4 be amended by inserting the words 'by 30 June 2009,' immediately after the words 'formally consider,'.

Resolved, on the motion of Mr Clarke: That recommendation 4, as amended, be adopted.

Resolved, on the motion of Mr Ajaka: That recommendation 5 be amended by inserting a comma after 'Claims Assessment and Resolution Service assessments' and moving the words 'including when the study's findings and implications are considered' after the comma. Then, insert a comma after the words 'continue to work collaboratively with all relevant stakeholders' and insert the words 'and implement any necessary recommendations' immediately after the words 'all relevant stakeholders'.

Resolved, on the motion of Mr Ajaka: That recommendation 5, as amended, be adopted.

Resolved, on the motion of Mr Donnelly: That recommendation 6 be adopted.

Resolved, on the motion of Ms Fazio: That recommendation 7 be adopted.

Resolved, on the motion of Mr Ajaka: That recommendation 8 be amended by inserting the words 'and the legal profession' immediately after the words 'including insurers'.

Resolved, on the motion of Mr Ajaka: That recommendation 8, amended, be adopted.

Resolved, on the motion of Mr Donnelly: That recommendation 9 be adopted.

Resolved, on the motion of Mr Clarke: That recommendation 10 be adopted.

Resolved, on the motion of Mr Clarke: That recommendation 11 be adopted.

Resolved, on the motion of Ms Fazio: That recommendation 12 be adopted.

Resolved, on the motion of Mr Ajaka: That recommendation 13 be adopted.

Resolved, on the motion of Mr Donnelly: That recommendation 14 be adopted.

Resolved, on the motion of Ms Fazio: That Chapter 6, as amended, be adopted.

Chapter 7 read.

Resolved, on the motion of Ms Fazio: That recommendation 15 be adopted.

Resolved, on the motion of Mr Ajaka: That recommendation 16 be amended by inserting the words 'by 30 June 2009,' immediately after the words 'the Motor Accidents Council, consider'.

Resolved, on the motion of Mr Ajaka: That recommendation 16, as amended, be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 7 be adopted.

Executive summary read.

Resolved on the motion of Ms Fazio: That the Executive Summary be adopted.

Resolved, on the motion of Ms Fazio: That the Committee Secretariat correct any typographical and grammatical errors in the report prior to tabling.

Resolved, on the motion of Mr Clarke: That the report, as amended, be the report of the Committee and be presented to the House, together with transcripts of evidence, submissions, tabled documents, minutes of proceedings, answers to questions on notice and correspondence relating to the inquiry, in accordance with Standing Order 231.

**6. Adjournment**

The Committee adjourned at 9:01 am *sine die*.

Madeleine Foley

**Clerk to the Committee**