

Standing Committee on Law and Justice

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

Tenth Report

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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*.¹

¹ *LC Minutes (30/05/2007)* 81-82, Item 4.

Committee membership

The Hon Christine Robertson MLC	Australian Labor Party	<i>(Chair)</i>
The Hon David Clarke MLC	Liberal Party	<i>(Deputy Chair)</i>
The Hon John Ajaka MLC	Liberal Party	
The Hon Greg Donnelly MLC	Australian Labor Party	
The Hon Lynda Voltz MLC	Australian Labor Party	
Mr David Shoebridge MLC*	The Greens	

* Note on Committee membership

Mr David Shoebridge MLC replaced Ms Sylvia Hale MLC as a member of the Committee on 9 September 2010. Ms Hale had been a valued member of the Committee since 29 May 2007.

Secretariat

Ms Rachel Callinan, Director
 Ms Cathryn Cummins, Principal Council Officer
 Ms Kate Harris, Council Officer
 Ms Shu-Fang Wei, Council Officer Assistant

Table of contents

	Chair’s foreword	x
	Executive summary	xi
	Summary of recommendations	xviii
	Glossary	xxi
Chapter 1	Introduction	1
	The Committee’s role	1
	Conduct of the Tenth Review	1
	Submissions	1
	Hearings	2
	Questions on notice	2
	Overview of the NSW Motor Accidents Scheme	2
	Recent reforms to the Scheme	3
	Structure of report	4
Chapter 2	Scheme performance and other issues	5
	Key performance measures	5
	Affordability	5
	Effectiveness	8
	Fairness	9
	Efficiency	10
	Committee comment	11
	Claims frequency and propensity to claim	11
	Committee comment	13
	Health outcome measures	14
	Committee comment	15
	Medical Care and Injury Service Levy	15
	The MCIS levy	16
	Examination of this issue in past reviews	17
	Motorcycle Council of NSW concerns	18
	Committee comment	22
	Classification of private buses	23
	Committee comment	25

	The Motor Accidents Council	25
	Committee comment	28
Chapter 3	Insurer profits and other issues	31
	Insurer profits	31
	Past Committee Reviews	31
	Overview of insurer profits	34
	Criticisms of the level of insurer profit	36
	Insurer's perspective	40
	MAA's perspective	43
	Committee comment	46
	Legal costs for injured persons	48
	Review of the Motor Accidents Compensation Regulation 2005	52
	Committee comment	54
	Discount rate	55
	Committee comment	56
Chapter 4	Eligibility, access and injury prevention strategies	59
	Eligibility for the Scheme	59
	Unregistered work vehicles	59
	Committee comment	60
	Impact of <i>Zotti v Australian Associated Motor Insurers Ltd</i>	61
	Committee comment	64
	Impact of <i>Doumit v Jabbs Excavations</i>	64
	Committee comment	66
	Access issues	67
	Access for people with vision impairment	67
	Access for carers	68
	Committee comment	70
	Injury prevention strategies	70
	Young people	72
	Motorcycle riders	73
	Committee comment	75
Chapter 5	Motor Accident Assessment Service	77
	Motor Accident Assessment Service Reference Group	77
	Committee comment	79
	Medical Assessment Service	79
	Whole person impairment threshold	80
	Committee comment	83
	Consistency of whole person impairment assessments	83
	Committee comment	85

	Application of legal concept of causation	85
	Committee comment	88
	Potential conflicts of interest	89
	Committee comment	90
	Time taken to finalise assessments and disputes	90
	Committee comment	92
	Claims Assessment and Resolution Service	92
	Notifications to CARS	93
	Committee comment	96
	CARS Review	97
	Committee comment	97
	Late claims	98
	Committee comment	100
	Superimposed inflation	101
	Committee comment	102
	Availability of treatment reports	103
	Committee comment	104
	Update of CARS issues from the Ninth Review	104
	Committee comment	108
Appendix 1	Submissions	109
Appendix 2	Witnesses	110
Appendix 3	Tabled documents	111
Appendix 4	Minutes	112

Tables

Table 2.1	MCIS Levy by vehicle class and geographic zone (1 July 2010)	17
Table 3.1	Profit margins in insurer filings	35
Table 3.2	Scheme development by underwriting year	36
Table 3.3	NSW Bar Association: Summary of insurer profitability projections: MAA Scheme performance reports 2003/04 to 2008/09*	37

Chair's foreword

The NSW Motor Accidents Scheme is now in its twelfth year, and the Committee has undertaken ten reviews of the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC), as required by the *Motor Accidents Compensation Act 1999*. This Review is the first since the Committee has moved to a biennial review process.

This report is the culmination of the work of the Committee during each of these ten reviews, drawing together the outcomes of our continued examination of a range of issues relating to the way in which the MAA and the MAC exercise their functions.

The Committee continues to work collaboratively with the MAA and the MAC in the performance of our oversight function. This collaborative relationship has been an important element in the maturation and continuing improvement of both the Authority and Scheme.

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

During this Tenth Review the Committee has found that the Scheme and the MAA and the MAC continue to perform in an effective manner, as we have found in previous reviews. The Committee notes that while there continues to be healthy competition amongst insurance providers, the impact of the global financial crisis has been felt. As a result, the price of Green Slips rose slightly between June 2008 and June 2009. The Committee presumes that as the health of the global economy improves, insurance providers will adjust the price of Green Slips accordingly.

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

I note on a personal level that this will be my sixth, and final, review of the MAA and MAC as the Chair of the Standing Committee of Law and Justice, prior to my retirement from Parliament. During my time as Chair, the Committee has constructively contributed to the ongoing improvement of the way in which the MAA and the MAC exercise their functions and I hope that this now biennial review process will continue to achieve positive outcomes.

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



Hon Christine Robertson MLC
Committee Chair

Executive summary

Introduction (Chapter 1)

This is the Committee's Tenth Review of the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC), as required under the *Motor Accidents Compensation Act 1999*. This is the first report since the Committee has moved to a biennial review process. The Committee has therefore reviewed the way in which the MAA and the MAC have exercised their functions with reference to the MAA's *Annual Report 2007/2008* and *Annual Report 2008/2009*.

The current Review was conducted concurrently with the Committee's Third Review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council. That Review will be the subject of its own report, to be published in November 2010.

The Tenth Review of the MAA and the MAC examines a number of issues, including insurer profits, eligibility and access to the Scheme, and various aspects of the Motor Accidents Assessment Service, including the Medical Assessment Service and the Claims Assessment and Resolution Service.

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

Scheme performance and other issues (Chapter 2)

As in previous reviews, the Committee examined the performance of the MAA with reference to four key indicators: affordability, effectiveness, fairness and efficiency. The Committee was satisfied that the Scheme continues to function in an appropriate manner when assessed against these indicators.

In regards to the price of Green Slips, the Committee notes that the impact of the global financial crisis resulted in increased premiums for consumers. The Committee presumes that as the global economy recovers, insurers will adjust the prices of premiums accordingly.

The Committee examined the issue of claims frequency and propensity to claim, as we have regularly done since our *Seventh Review Report*. The Committee was pleased to note that over a 12 month period to September 2009 there has been a reversal of the declining trends for both claims frequency and propensity. The MAA speculated on a number of reasons for this reversal including the expanded accident notification process, increased awareness of the Scheme and an increase in the number of people making claims for minor injuries that they may not have pursued before the global financial crisis. In light of the fact that this recent increase in claims frequency and propensity has only been reported over a short period, the Committee will continue to closely monitor claims frequency and propensity to claim in its future reviews.

The Committee notes that the development of health outcome measures have been a recurring issue in each of the Committee's reports since the *Sixth Review Report*. We reiterate our support for the ongoing

efforts of the MAA to develop and implement health outcome measures for the Scheme. We will continue to monitor the efforts of the MAA in this regard.

The Motorcycle Council of NSW expressed concern about the Medical Care and Injury Services (MCIS) levy and its impact on CTP insurance premiums for motorcyclists. In our *Ninth Review Report*, the Committee recommended that the MAA investigate the feasibility of itemizing each component of the levy on MCIS Green Slips. The Committee notes that a report has been completed in response to this recommendation. However, the Committee remains unclear about the results of this report and whether it is advantageous and feasible to further itemise the MCIS levy to clearly identify the proportion of the levy allocated to each component of the levy.

The Committee has recommended that the MAA publish the outcome of its investigations into this issue and, if this report demonstrates that it is feasible to further itemise the MCIS levy, the Committee has recommended that the MAA should pursue the introduction of this itemisation.

In its submission to the Review, the Bus and Coach Association NSW proposed changes to premium classifications for buses and coaches to acknowledge the different operating environments and accreditation systems for bus and coach drivers. The Committee considers that classifying buses based on their operating environment and the number of passengers that they transport appears to be a logical step in ensuring that Green Slip prices appropriately reflect the risk of insuring buses operating in different environments.

The Committee welcomes the news that the MAA will consider this matter as part of its next review of the risk relativities for different vehicle classes. The Committee has recommended that as part of this risk relativities review, the MAA should investigate the feasibility of requiring insurers to differentiate between buses based on their operating environment, and on the number of passengers they carry.

The MAC is an advisory group appointed for a term of three years by the Minister for Finance. The role of the MAC is to facilitate input on the Scheme from relevant stakeholders and to consider issues referred by the MAA with a view to providing advice and recommendations. The Committee was concerned that, as of June 2010, there had not been a meeting of the MAC for 16 months because of a lapse in the appointment of new members to the Council.

The Committee believes that action should be taken to eliminate periods where the MAC is not be operational due to a lapse in membership. Accordingly, the Committee recommended that the Minister for Finance pursue an amendment to the *Motor Accidents Compensation Act 1999* to require that the membership of the MAC only lapses upon the appointment of a new membership group, or alternatively, that provision is allowed for interim membership to be granted between the time that one period of membership ceases and another membership is appointed. The Committee also expressed support for the decision of the Minister for Finance to appoint a representative of the Motorcycle Council of NSW to the MAC.

Insurer profits and other issues (Chapter 3)

Insurers are required by the *Motor Accidents Compensation Act 1999* to report to the MAA the profit margin on which their premiums are based and the actuarial basis for calculating their profit margin. Insurers report to the MAA on two types of profits: prospective profit and realised profit. The level of insurer profits was a key issue of concern for Inquiry participants during this year's Review.

Some Inquiry participants, such as the NSW Bar Association and the Australian Lawyers Alliance, were critical that realised insurer profits have repeatedly and significantly exceeded prospective profit forecasts. However, the Insurance Council of Australia argued that prospective profit levels were appropriate, and reflected the difficulties of forecasting profits in a long tail scheme where a number of factors influence the level of realised profits.

The Committee reiterates that our role in relation to insurer profits is to inquire into whether the MAA has properly performed its functions under the *Motor Accidents Compensation Act 1999*. The Committee understands the difficulties faced by the MAA and insurers in forecasting prospective profits in a long tail scheme, and that external factors, which are beyond the control of both the MAA and insurers, will influence the level of realised profit over the life of the premium. The Committee notes the advice from the MAA that its actuaries have found that the current level of projected profit margins are appropriate in the current market conditions.

The Committee welcomes the advice from the MAA that an independent competition review of the Scheme has been initiated, and that one issue to be explored is ways to improve the method of financial modeling used by the MAA. The Committee believes that extensive stakeholder consultation should occur as part of the competition review, to ensure that the full range of perspectives on this challenging issue is considered.

The Committee further considers that the results of this independent review, and any consequent proposals to change the profit assessment tools used by the MAA, should be made publicly available prior to the Committee's Eleventh Review in 2012. This will enable the Committee, with the assistance of stakeholders, to undertake an informed examination of both the findings of the review and any reforms that have subsequently been proposed or implemented.

The Committee is sufficiently concerned about the issue of perceived excessive insurer profits to have considered whether it is appropriate to recommend that this matter be referred to the Independent Pricing and Regulatory Tribunal to examine. The Committee prefers to await the outcome of the review processes initiated by the MAA before considering in the next review in 2012 whether this course of action is warranted.

A second area of concern for Inquiry participants was the issue of legal costs under the Scheme, which are regulated by the Motor Accidents Compensation Regulation 2005 (the 'Cost Regulation'). The Cost Regulation governs, amongst other things, the maximum costs recoverable by legal practitioners for services provided to a claimant or an insurer in any motor accidents matter.

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

The Committee notes that Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2010 only provides for increases to legal fees in line with movements in the Consumer Price Index. However, the Committee understands that a new Cost Regulation must be in place by 1 September 2011, and that a working party has been established to undertake a thorough review of the Cost Regulation prior to this date. The Committee considers that this provides the MAA with a significant opportunity to substantially remake the Cost Regulation to address widely held concerns about the Regulations' adequacy.

The third issue discussed in this Chapter is the discount rate. When a lump sum payment is awarded to seriously injured people to compensate for future economic loss resulting from that injury, the present value of the future economic loss is qualified by adopting a prescribed discount rate. The *Motor Accidents Compensation Act 1999* sets the discount rate for the Scheme at five per cent.

The Australian Lawyers Alliance was concerned that the discount rate of five per cent may result in seriously injured people receiving inadequate compensation to meet their ongoing care needs. The MAA advised that a five per cent discount rate is used in other compensation schemes, and by other Australian States and Territories. Due to the limited evidence that the Committee received on this issue the Committee has not drawn any firm conclusions regarding the discount rate.

Eligibility, access and injury prevention strategies (Chapter 4)

This Chapter examines several issues raised by stakeholders related to eligibility for the Scheme, and access to information about the Scheme. The Chapter also discusses the injury prevention strategies undertaken by the MAA, with particular reference to young people and motorcycle riders.

The Committee notes the concerns of the NSW Farmers' Federation that there may be confusion about the interaction between the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* in situations involving injuries resulting from the use of unregistered vehicles in workplaces. We have recommended that the MAA, in consultation with the NSW Farmers' Federation, review the interaction of these two Acts to identify areas where clarification is needed regarding the application of each Act.

Several Inquiry stakeholders raised concerns about the potential ramifications of two legal cases – *Zotti v Australian Associated Motor Insurers Ltd* and *Doumit v Jabbs Excavations* – on the eligibility for, or coverage of, the Scheme.

In regards to the Zotti case, the Committee is concerned that the Zotti decision means that drivers are not insured for third party purposes if they are at fault in a motor accident and a related injury is sustained at a time subsequent to the accident. The Committee considers that legislative action is needed to ensure that drivers are adequately insured for injuries that are sustained as a consequence of a motor accident, even though the injuries have occurred sometime after the accident itself.

The Committee notes the introduction of the Motor Accidents Compensation Amendment Bill 2010 to the Legislative Assembly. This Bill will amend the *Motor Accidents Compensation Act 1999* to extend coverage of the Scheme to injuries that that are sustained during, or as a consequence of, a motor accident. The Committee believes that these proposed legislative changes adequately address the concerns raised by stakeholders by extending insurance coverage to injuries sustained either during, or as a result of, a motor accident.

In regards to the Doumit case, the Committee is concerned that the Doumit decision means that although vehicles such as bulldozers and over-snow vehicles are required to hold CTP insurance, the policy is in effect invalid if the vehicle runs on tracks or treads, rather than wheels, as these vehicles do. A second repercussion of the Doumit decision is that monies may have been improperly collected for CTP insurance that provides no actual coverage in the event of an accident.

The Committee acknowledges that the Roads and Traffic Authority is the primary government authority responsible for remedying this situation, and that the MAA has advised that the Roads and Traffic Authority is currently giving consideration to amending the definition of 'vehicle' in the *Road*

Transport (General) Act 2005. Currently, the *Road Transport (General) Act 2005* defines a motor vehicle to mean any description of vehicle on wheels (including a light rail vehicle), but not including other vehicles used on railways or tramways.

The Committee recommends that the Minister for Roads should, in consultation with the Minister for Finance, urgently pursue an amendment to the *Road Transport (General) Act 2005* to respond to the ramifications of the Doumit decision by redefining the term 'vehicle' to include vehicles which operate on treads, such as bulldozers and over-snow vehicles.

During the Committee's Review, two issues relating to the ability of people to adequately access information about the Scheme were brought to the Committee's attention. These issues were the difficulties that people with vision impairment can have when accessing information about the Scheme and the importance of ensuring that carers have access to information on the Scheme.

The Committee has recommended that the MAA consult with Vision Australia during the forthcoming process of making technological improvements to its case management system, to ensure maximum accessibility for people with vision impairment. The Committee has also recommended that the MAA consult with carers' advocacy groups to examine the feasibility of modifying the language used on the MAA website and in official publications when referring to the family of injured people and providing clear information on the support services available for carers.

The Committee notes the continued commitment of the MAA to develop and implement a range of injury prevention strategies targeted at specific road users, such as young people and motorcyclists. The Committee encourages the MAA to continue to pursue collaborative relationships to identify appropriate evidence-based injury prevention strategies. In particular, the Committee recognises the importance of developing strong collaborative relations with the peak bodies for targeted road users, such as Youthsafe. These peak bodies can assist the MAA to ensure that timely, effective injury prevention strategies are implemented to improve the safety of vulnerable road users.

Motor Accidents Assessment Service (Chapter 5)

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

The MAAS Reference Group (MRG) provides a consultative forum for the MAAS and its key stakeholders to discuss issues relating to the operation of both MAS and CARS. The MRG is made up of representatives from the MAA, insurance industry, legal profession, MAS Assessors and CARS Assessors.

The Committee has recommended that the MAA facilitate the attendance of relevant officers from the MAA at MRG meetings, dependent on the matters that will be discussed at each meeting, particularly if requested by the MRG. This will allow key stakeholders to discuss issues of concern, and develop appropriate solutions, in consultation with officers from the MAA with the relevant expertise. The Committee also recommended that the MAA implement a feedback mechanism, whereby the MRG is informed as to why certain proposals are not adopted. This type of feedback would assist members of the MRG to understand the outcomes of their work, and help to inform future discussions of issues and strategies.

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

The Committee notes the concerns of several stakeholders in relation to whole person impairment (WPI) assessments, most notably in regards to the appropriateness of the ten per cent threshold which is used to determine if compensation can be awarded for pain and suffering. The Committee considers that, given the importance and complexity of this issue, the next review of the MAA and the MAC by a Committee of the Legislative Council should include a focus on the issue of WPI assessments.

Another area of concern was the ability of MAS Assessors to make assessment about causation, i.e. whether the treatment provided to an injured person relates to the injury caused by the motor vehicle accident. Whilst the assessments made by MAS Assessors primarily involve the consideration of medical issues, they can also involve the consideration of legal issues such as causation. This issue was particularly concerning for several stakeholders because of the binding nature of a MAS Assessors' assessment.

We have recommended that the MAA conduct a review of the decisions made by MAS Assessors regarding causation, in order to establish whether there are particular issues associated with challenges to these decisions. The review should determine whether improvements can be made to decision making on causation issues. The MAA should consult with key stakeholders in undertaking this review to ensure that the full range of perspectives on this issue is considered, and ensure that the results of the review are made publicly available.

The Committee also considered issues impacting on CARS, which provides a cost effective system for the assessment of claims and the resolution of disputes. The overall percentage of notifications to CARS has remained consistent as the Scheme has matured.

The Committee notes that the MAA anticipates commencing a review of CARS in the second half of 2010. This review will examine issues such as the late claims process, superimposed inflation and the development of a CARS user survey. The Committee welcomes this review process, and looks forward to examining its outcomes during our next review of the MAA and the MAC in 2012.

In regards to the late claims process, the Committee supports the intention that the late claims process should serve to encourage claimants to make as early a notification as possible, to the benefit of both the claimant and the insurer. However, the Committee shares the view of the NSW Bar Association that the late claims process should not prevent people from making a claim, nor make it overly arduous to pursue a claim.

The MAA's CARS Review provides an excellent opportunity to undertake a thorough examination of the late claims process. This examination should assist to determine the adequacy and fairness of the late claims process and identify ways in which the process can be improved. The review process should give careful consideration to the suggestion from the NSW Bar Association that only external assessors, or Principal Claims Assessors, should be allowed to assess late claims disputes.

During the Committee's *Ninth Review Report*, the Insurance Council of Australia noted that its members had observed that the levels of compensation awarded by CARS assessors had increased over time, and

labelled this phenomenon 'superimposed inflation'. The Committee notes that the issue of superimposed inflation has been included as part of the terms of reference for the CARS Review.

The Committee is also aware that Pricewaterhouse Coopers was commissioned by the MAA to undertake a study of superimposed inflation in relation to the Scheme as a whole. We believe that the MAA should make publicly available the report on this study, to allow all stakeholders to effectively contribute to the consideration of the causes and impact of superimposed inflation.

The Chapter concludes by providing an update on a number of issues related to CARS that were considered in the Committee's Ninth Review Report, including the transparency of CARS processes, matters referred to the District Court for assessment of liability and insurer communication with self-represented claimants.

The Committee notes the efforts of the MAA to implement our previous recommendations relating to these, and other, matters. We are pleased that our recommendations, developed as part of our ongoing consultation with the MAA and other stakeholders, have contributed positively to the development of the Scheme. We hope that this constructive process will continue.

Summary of recommendations

Recommendation 1

Page 22

That the Motor Accidents Authority publish the report on its investigations into the advantages and feasibility of the further itemisation of each component of the Medical Care and Injury Service Levy on CTP Green Slips.

That, if this report demonstrates that it is feasible to clearly identify the proportion of the levy that is allocated to the Lifetime Care and Support Scheme and the proportion allocated to hospital and ambulance services and the administration costs of the Motor Accidents Scheme, the Motor Accidents Authority should pursue the introduction of this further itemisation.

Recommendation 2

Page 25

That the Motor Accidents Authority, during its forthcoming review of risk relativities, investigate the feasibility of requiring insurers within the Motor Accidents Scheme to differentiate between Green Slip prices for buses and coaches based on their operating environment and on the number of passengers that the vehicle is licensed to transport.

Recommendation 3

Page 29

That the Minister for Finance pursue an amendment to the *Motor Accidents Compensation Act 1999* to require that the membership of the Motor Accidents Council only lapses upon the appointment of a new membership group or, alternatively, to allow provision for interim membership to be granted between the time that one period of membership ceases and another membership is appointed. In determining the form of the amendment consideration should be given to the approach used to appoint the membership of similar advisory bodies and to the view of the Motor Accidents Council on this matter.

Recommendation 4

Page 48

That the independent competition review commissioned by the Motor Accidents Authority and the work being undertaken by the Authority to improve the profit assessment methodology involve extensive stakeholder consultation, including with the Motor Accidents Council and the stakeholders who have contributed to the Committee's Review in relation to insurer profits.

That the Motor Accidents Authority make publicly available the results of this Review, and any subsequent proposals to change the profit assessment methodology used by the Motor Accidents Authority, as soon as possible.

Recommendation 5

Page 55

That the working party established by the Motor Accidents Authority to review the Motor Accidents Compensation Regulation 2005 ahead of the 1 September 2011 deadline and the appropriateness of the existing legal costs regime should, among other matters:

- carefully consider the findings of the FMRC Legal report on the impact of the Cost Regulation referred to in the Committee's report
- undertake extensive consultation with all relevant stakeholders to determine how the Regulation can be improved to better meet the needs of claimants under the Motor Accidents Scheme.

Recommendation 6*Page 61*

That the Motor Accidents Authority, in consultation with stakeholders including the NSW Farmers' Association, review the interaction between the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* to identify areas where clarification is needed regarding the application of each Act.

Recommendation 7*Page 67*

That the Minister for Roads, in consultation with the Minister for Finance, pursue an amendment to the *Road Transport (General) Act 2005* to remedy the situation caused by the decision in *Doumit v. Jabbs Excavations Pty Ltd [2009] NSWCA 360*, whereby insurance coverage does not extend to registered vehicles that operate on treads. The amendment should redefine the term 'vehicle' to include vehicles that operate on treads.

Recommendation 8*Page 70*

That the Motor Accidents Authority consult with Vision Australia during the process of making technological improvements to its case management system, to ensure maximum accessibility to services and information for people with vision impairment.

Recommendation 9*Page 70*

That the Motor Accidents Authority consult with carers' advocacy groups to examine the feasibility of modifying the language used on the Motor Accidents Authority website and in official publications when referring to the family of injured people and providing clear information on the support services available for carers.

Recommendation 10*Page 76*

That the Motor Accidents Authority collaborate with Youthsafe to identify where improvements can be made to current and future youth injury prevention strategies, and to ensure that those strategies maximise their effectiveness in reaching their target audience.

Recommendation 11*Page 79*

That the Motor Accidents Authority facilitate the attendance of relevant officers at Motor Accident Assessment Service Reference Group meetings as appropriate, and develop a feedback mechanism to inform the Group as to the background for not adopting proposals.

Recommendation 12*Page 83*

That the next review of the Motor Accidents Authority and Motor Accidents Council, to be conducted in 2012 by a Committee of the Legislative Council as required under section 210 of the *Motor Accidents Compensation Act 1999*, include a focus on the issue of the ten percent whole person impairment threshold for non-economic loss.

Recommendation 13*Page 89*

That the Motor Accidents Authority conduct a review of the decisions made by Medical Assessment Service Medical Assessors regarding causation, to establish whether there are particular issues associated with challenges to these decisions. The review should determine whether improvements can be made to decision making on causation issues. When undertaking this review, the MAA should consult extensively with key stakeholders to ensure that the full range of perspectives on this issue is considered. The results of this Review should be made publicly available.

Recommendation 14

Page 100

That, as part of its review of the Claims Assessment and Resolution Service, the Motor Accidents Authority examine the late claims process, in consultation with the Motor Accidents Council and key stakeholders. This examination should give consideration to allowing only external assessors, or Principal Claims Assessors, to assess late claims disputes.

Recommendation 15

Page 103

That the Motor Accidents Authority publicly release the Pricewaterhouse Coopers report on the MAA's monitoring systems that included an examination of superimposed inflation, as soon as possible.

Glossary

CARS	Claims Assessment and Resolution Service
CTP	Compulsory Third Party
ICA	Insurance Council of Australia
LTCSA	Lifetime Care and Support Authority
MAA	Motor Accidents Authority
MAAS	Motor Accidents Assessment Service
MAC	Motor Accidents Council
MAS	Medical Assessment Service
MRG	Motor Accidents Assessment Service Reference Groups
The Scheme	NSW Motor Accidents Scheme
The Act	<i>Motor Accidents Compensation Act 1999</i>
WPI	Whole Person Impairment

Chapter 1 Introduction

This Chapter provides an overview of the Review process, outlining the Committee's approach to the Tenth Review of the Motor Accidents Authority and the Motor Accidents Council. The Chapter also briefly describes the Motor Accidents Compensation Scheme and identifies the major reforms to the Scheme since the Committee's last report was tabled in September 2008. The Chapter concludes with an overview of the structure of the report.

The Committee's role

- 1.1 A Committee of the Legislative Council is required under section 210 of the *Motor Accidents Compensation Act 1999* to supervise the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC).
- 1.2 Since 1999, a resolution of the Legislative Council has designated the Standing Committee on Law and Justice to undertake this role, and has set out the terms of reference for the Committee's annual reviews. During its *Ninth Review Report*, the Committee recommended that this resolution be amended to require biennial reviews of the MAA and MAC. The Legislative Council supported this recommendation and amended the resolution accordingly on 22 October 2008.²
- 1.3 Information on the Committee's previous reviews, including reports, can be found on the Committee's website at www.parliament.nsw.gov.au/lawandjustice.

Conduct of the Tenth Review

- 1.4 The Committee resolved to commence this Tenth Review on 25 February 2010. This review is the Committee's first since moving to the biennial review format (see paragraph 1.2). The Committee will therefore review the way in which the MAA and the MAC have exercised their functions since the Committee tabled its last report in October 2008 and examine the MAA's *Annual Report 2007/2008* and *Annual Report 2008/2009*.
- 1.5 This Tenth Review was conducted concurrently with the Committee's Third Review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council. That Review will be the subject of its own report, to be published in November 2010.
- 1.6 The Committee would like to thank all participants in this year's Review. As during previous reviews, the considered contributions of stakeholders have greatly assisted the Committee to successfully undertake its reviewing role.

Submissions

- 1.7 The Committee invited submissions through advertisements in *The Sydney Morning Herald* and *The Daily Telegraph*. As with previous reviews, the Committee also wrote directly to a number of stakeholders to invite them to make a submission.

² *LC Minutes* (22/10/2008) 826.

- 1.8 The Committee received ten submissions from a range of stakeholders including a number of special interest advocacy groups, the legal and insurance sectors and NSW Health. The organisations that made a submission are listed in Appendix 1.

Hearings

- 1.9 The Committee held public hearings on 11 and 21 June 2010, at which Ms Carmel Donnelly, the General Manager of the MAA and Ms Geniere Aplin, the Chairperson of the MAA Board and the MAC, gave evidence.
- 1.10 The Committee also heard from representatives from several other organisations, including the Law Society of NSW, the NSW Bar Association, the Insurance Council of Australia, the Australian Lawyers Alliance and the Motorcycle Council of NSW. A full list of witnesses is provided in Appendix 2.

Questions on notice

- 1.11 Following the practice developed during previous reviews, the Committee forwarded written questions on notice to the MAA prior to the public hearing. These questions were based on the MAA's *Annual Report 2007/2008* and *2008/2009*, the Government Response to the Committee's *Ninth Report* and issues raised in submissions.
- 1.12 The MAA provided answers to these pre-hearing questions, which other stakeholders were asked to respond to during the hearing and in further questions on notice. Stakeholders were also asked to respond to the issues raised in each others' evidence. This allowed for the in-depth consideration of the issues.

Overview of the NSW Motor Accidents Scheme

- 1.13 The NSW Motor Accidents Scheme ('the Scheme') provides compensation for people injured in motor vehicle accidents in NSW that are the fault of another vehicle owner or driver. Compensation payments through the Scheme are financed from compulsory third party (CTP) insurance premiums that must be taken out when registering a motor vehicle in NSW.³
- 1.14 Compensation can be for economic or non-economic loss. Economic loss includes hospital, medical and rehabilitation costs and loss of earnings, whilst non-economic loss is for pain and suffering and loss of quality of life.⁴ The Scheme does not cover damage to property or vehicles.⁵
- 1.15 The MAA regulates the Scheme and its participants and provides information and education to stakeholders and service providers. The MAA also operates an independent assessment and dispute resolution service.⁶ Funds from the Scheme are also used by the MAA for research

³ MAA, *What is a Green Slip*, accessed 22 July 2010, <www.maa.nsw.gov.au/default.aspx?MenuID=264>

⁴ Green Slip NSW, *About Green Slips – third party insurance scheme*, accessed 22 July 2010, <www.greenslips.com.au/third-party-insurance.html>

⁵ MAA, *What is a Green Slip*, accessed 22 July 2010, <www.maa.nsw.gov.au/default.aspx?MenuID=264>

⁶ MAA, *What we do*, accessed 22 July 2010, <www.maa.nsw.gov.au/default.aspx?MenuID=125>

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

- 1.16** The MAC is an advisory group appointed by the Minister for Finance. The role of the MAC is to allow input from relevant stakeholders and to consider issues referred by the MAA with a view to providing advice and recommendations.⁷
- 1.17** A comprehensive description of the Scheme can be found in the Committee's *Ninth Review Report*.⁸

Recent reforms to the Scheme

- 1.18** Since the completion of the Committee's *Ninth Review Report*, several reforms have been implemented to improve the effectiveness of, and to expand the coverage provided by, the Scheme.
- 1.19** On 1 October 2008 the following modifications to the Scheme came into effect:
- Expanding the accident notification process from \$500 to \$5,000 and including loss of earnings as well as medical and treatment expenses.
 - Requiring claimants and insurers to exchange documents, participate in a settlement conference and exchange settlement offers prior to a claim being referred for dispute resolution.
 - Requiring insurers to make advance payments of economic loss entitlements in cases of economic hardship.⁹
- 1.20** On 1 April 2010, the Scheme was expanded to provide assistance to anyone injured in a motor vehicle accident in New South Wales, regardless of who was at fault. Until this time, the Scheme only provided assistance to people who were injured in motor vehicle accidents caused by a negligent, or at-fault, driver.¹⁰ The expanded Scheme provides insurance cover for up to \$5,000 in medical costs and lost wages to all people who are injured in a motor accident.¹¹
- 1.21** The Motor Accidents Compensation Regulation 2005 was updated on 31 August 2010, to increase the maximum costs recoverable for legal services provided by legal practitioners to claimants or insurers in motor accident matters. The amended regulation also increased the maximum fees for the provision of medical reports, and for appearances as witnesses by medical practitioners.¹²

⁷ MAA, *Annual Report 2008/2009*, p 8.

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

⁹ MAA, *Annual Report 2008/2009*, p 12.

¹⁰ Hon M Daley MP, Minister for Finance, 'Green Slip Scheme Expanded to Cover 4000 More Drivers', *Media Release*, 26 March 2010.

¹¹ Hon M Daley MP, Minister for Finance, 'Green Slip Scheme Expanded to Cover 4000 More Drivers', *Media Release*, 26 March 2010.

¹² Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2010.

Structure of report

- 1.22** This report is comprised of five chapters. Chapter 1 outlines the processes undertaken by the Committee during this Review. The chapter also provides a brief overview of the role of the MAA and highlights the significant changes that have been made to the Scheme since the conclusion of the Committee's Ninth Review.
- 1.23** Chapter 2 examines the performance of the Scheme with reference to the four key indicators used by the MAA: affordability, effectiveness, fairness and efficiency. The Chapter also discusses stakeholder issues relating to claims frequency and propensity to claim and the development of health outcome measures, both indicators of Scheme performance. This Chapter also discusses concerns expressed about the Medical Care and Injury Service levy and about the classification system used for private buses and coaches. The Chapter concludes by examining concerns raised by stakeholders about the delay in appointing the new membership of the MAC.
- 1.24** Chapter 3 begins by examining the issue of the level of insurer current profits under the Motor Accidents Scheme. As in previous reviews, participants in the Review hold widely divergent views on the appropriateness of the levels of insurer profits under the Motor Accidents Scheme. The Chapter also discusses issues raised by stakeholders in relation to legal costs and the Motor Accidents Compensation Regulation 2005. The Chapter concludes by considering the discount rate applied to compensation awarded for future economic loss.
- 1.25** Chapter 4 begins by examining several issues raised by stakeholders related to eligibility for the Scheme including injuries caused by unregistered work vehicles and the impact of two court decisions on the coverage provided by the Scheme. Access to information on the Scheme for people with vision impairment and for carers is also examined. The Chapter concludes with a discussion of injury prevention strategies undertaken by the MAA, with particular reference to young people and motorcycle riders.
- 1.26** The final chapter, Chapter 5, focuses on the Motor Accidents Assessment Service (MAAS) which is comprised of the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS). The Chapter begins by discussing the MAAS Reference Group and concerns raised during the Committee's Review about its effectiveness. The Chapter then examines several issues raised by Review participants relating to the MAS and the medical assessments process, including the whole person impairment threshold and consistency in its application, potential conflicts of interest for MAS Assessors and the time taken to finalise assessment reports. The Chapter then focuses on CARS, beginning with an overview of the types of notifications that are made to CARS and a discussion of the MAA's impending review of CARS processes. The issues of late claims, superimposed inflation and the availability of treatment reports are then considered. The Chapter concludes by providing an update on a number of issues related to CARS that were considered in the Committee's *Ninth Review Report*, including transparency of CARS processes, matters referred to the District Court for assessment of liability and insurer communication with self-represented claimants.

Chapter 2 Scheme performance and other issues

This Chapter considers the performance of the NSW Motor Accidents Scheme for 2007/08 and 2008/09. The Scheme's performance is measured using the MAA's four key indicators: affordability, effectiveness, fairness and efficiency. The Chapter then examines claims frequency and propensity to claim and the development of health outcome measures, both indicators of Scheme performance.

This Chapter also discusses concerns expressed about the Medical Care and Injury Service levy and about the classification system used for private buses and coaches. The Chapter concludes by examining concerns raised by stakeholders about the delay in appointing the new membership of the Motor Accidents Council.

Key performance measures

2.1 This section considers the performance of the Scheme in the period since the Committee's last review. The MAA reports on the performance of the Scheme with reference to four key indicators:

- affordability
- effectiveness
- fairness
- efficiency.

Affordability

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

- the driver's accident record
- age of the driver
- age and type of the vehicle
- purpose for which the vehicle is being used.¹³

2.3 The MAA's *Annual Report 2007/08* noted that there was healthy competition amongst insurance providers during the year, with the best price for Green Slips being revised four times. Average prices rose slightly, from \$313 as at 30 June 2007 to \$323 as at 20 June 2008.¹⁴

2.4 The MAA's *Annual Report 2008/09* indicated that there had been an increase in Green Slip prices during the reporting year, with the best prices for premiums revised upwards five times from \$323 as at 30 June 2008, to \$377 in June 2009.¹⁵

¹³ MAA, *How Green Slip Prices Are Set*, accessed 23 August 2010, <www.maa.nsw.gov.au/default.aspx?MenuID=139>

¹⁴ MAA, *Annual Report 2007/08*, p 71.

2.5 Despite this increase over the two reporting periods, as noted by the MAA, '... Green Slips today still cost on average about \$150 less in real terms than they did ten years ago'.¹⁶

2.6 The MAA advised that the global financial crisis was one of the contributing factors that caused an increase in the price of Green Slips over the past 12 months, primarily because of the impact of fluctuating interest rates on investment returns:

Green Slip insurers invest the premiums they collect to ensure they have sufficient funds to meet future claim payments. The global financial crisis saw a large drop in investment returns (based on risk free Commonwealth bond rates) and insurers had to increase premiums to ensure they have adequate funds to meet claim payments.¹⁷

2.7 The Insurance Council of Australia also highlighted the impact of decreasing investment returns on premium prices:

... we submit that the global financial crisis is one of the factors that has led to an increase in premiums. Insurers pay claims partly from the premiums they collect and partly from the interest income they derive on those premiums. In the absence of interest income, insurers needed to increase premiums to ensure that claims could be paid.

Increasing interest rates will generally lead to reductions in premium if all other things are equal. The reduction in premiums prior to the global financial crisis is testament to this. The requirements of the PDGs require insurers to allow for future investment earnings at the expected rate based on the investments. This ensures there is a direct correlation between interest rates and premiums.¹⁸

2.8 In addition to the impact of the global financial crisis, the MAA identified other influences on Green Slip prices, including the number of traffic accident injuries and deaths, the number of compulsory third party claims, inflation, and changes in average costs of claims.¹⁹

2.9 The Insurance Council of Australia suggested that the overall '...affordability of CTP premiums has been sustained' despite the financial crisis and despite the following factors that impacted on the cost of Green Slips:

- ongoing community wage inflation
- ongoing consumer price inflation
- ongoing growth in health expenditure
- inflation allowances, including provisions for superimposed inflation
- large drop in investment returns by insurers as a consequence of the global financial crisis.²⁰

¹⁵ MAA, *Annual Report 2008/09*, p 72.

¹⁶ MAA, *Annual Report 2008/09*, p 12.

¹⁷ Answers to pre-hearing questions on notice, MAA, p 3.

¹⁸ Answers to questions on notice taken during evidence 11 June 2010, Insurance Council of Australia, p 2.

¹⁹ Answers to pre-hearing questions on notice, MAA, p 3.

²⁰ Submission 6, Insurance Council of Australia, p 4.

2.10 Ms Carmel Donnelly, the General Manager of the MAA, indicated that despite the increase in Green Slip prices, there remains competition between Green Slip providers within the Scheme:

Our latest data shows that one in five policy holders change each time they have a renewal. That is great for competition in the Scheme.²¹

2.11 Ms Donnelly also emphasised that the MAA closely monitored premium prices during the global financial crisis to ensure that any changes in premiums were justified:

With the global financial crisis we are all aware that investment returns dropped dramatically. As a result the insurers increased premiums to fully fund future claims costs. While interest rates have begun to increase again, investment returns are still not back to 2007 levels. The MAA has utilised independent actuarial and economic advisers throughout the global financial crisis in its role of monitoring Green Slip prices for adequacy to fully fund liabilities and requiring sound justification by CTP insurers to justify a premium pricing.²²

2.12 Ms Donnelly advised that to further enhance the affordability of Green Slips, the MAA has commenced a competition review of the Scheme, to be conducted by an independent economist.²³ The intent of the review is to '... enhance affordability and fairness of Green Slip pricing by making the Scheme more robust to economic cycles and reforms'.²⁴

2.13 The Motorcycle Council of NSW was concerned about the affordability of Green Slips for motorcycles. Mr Guy Stanford, the former Chairman and current member of the Motorcycle Council of NSW, suggested that there are anomalies in the pricing of premiums for motorcycles across the different insurance companies:

Even though you can have the same motorcycle at the same address with the same rider, you can find widely different prices across the different companies, but each year it comes out that one of them seems to be cheaper than all the others and so everybody rushes over to that one. It has been a rather peculiar situation considering that this is a compulsory purchase for each year. ... There seems to be some anomalies just in the CTP pricing. Again I will emphasise the point that the CTP pricing does not appear to be done on the overall risk of an injury or riding a particular class of vehicle, but on the individual insurance company or participant insurance company's experience with motorcycles over the past year.²⁵

2.14 Ms Donnelly explained that the majority of premiums for motorcycle Green Slips are lower than the premiums for insuring a motor vehicle. She noted that one of the main factors considered in pricing premiums for motorcycles is the higher risk associated with being a passenger in a motorcycle as compared to a passenger in a motor vehicle:

²¹ Ms Carmel Donnelly, General Manager, Motor Accidents Authority of NSW, Evidence, 21 June 2010, p 64.

²² Ms Geniere Aplin, Chairperson, Motor Accidents Authority Board and Motor Accidents Council, Evidence, 11 June 2010, p 3.

²³ Ms Aplin, Evidence, 11 June 2010, p 2.

²⁴ Answers to questions on notice taken during evidence 11 June 2010, Ms Carmel Donnelly, General Manager, Motor Accidents Authority of NSW, p 4.

²⁵ Mr Guy Stanford, Former Chairman and Member, Motorcycle Council of NSW, Evidence, 11 June 2010, p 59.

... about 93 per cent of motorcycles are in a price range that is less than a Sydney sedan, apart from the very big Sydney bikes. Their price range is based on evidence of the frequency of claims and the cost of those claims. One of the drivers of that is that pillion passenger injuries on average are the highest that we see in the Scheme. It does not take much imagination to work out why that is, and they are claiming against the motorcycle rider.²⁶

2.15 During the current review, the Motorcycle Council of NSW held a protest in front of Parliament House to draw attention to their concerns about the affordability of Green Slips for motorcycle and scooter riders.²⁷ Following a meeting with the Motorcycle Council of NSW to discuss their concerns, the Hon Michael Daley MP, Minister for Finance agreed to:

- appoint a representative of the Motorcycle Council of NSW to the Motor Accidents Council (MAC)
- appoint an independent actuary to review Green Slip pricing, following consultation between the MAA and the Motorcycle Council of NSW.²⁸

2.16 The membership of the MAA is examined later in this chapter and further issues relating to the Scheme and motorcycles are discussed in Chapter 4.

Effectiveness

2.17 'Effectiveness' refers to the average time taken for insurers to make the first compensation payment to claimants.

2.18 The MAA advised that the time taken by insurers to make the first payment on all claims has fallen from an average of 58.7 days in 2007 to an average of 44.7 days in 2009.²⁹

2.19 The MAA noted that there are a number of factors which can impact on the time taken by insurers to make the first compensation payment, including:

- whether an Accident Notification Form (ANF) or a Personal Injury Claim (PIC) has been lodged
- delays in submitting accounts for treatment or rehabilitation
- complex liability determinations
- delays in approving payments by insurers
- whether notification of an ANF or claim was made late, or if the claim is actually a worker's compensation or interstate claim.³⁰

²⁶ Ms Donnelly, Evidence, 21 June 2010, p 64.

²⁷ Motorcycle Council of NSW, 'Motorcycle and scooter riders to protest the CTP rip-off on National Motorcycle Day', *Media Release*, 9 August 2010.

²⁸ Hon M Daley MP, Minister for Finance, 'Minister welcomes discussion with Motorcycle Council of NSW', *Media Release*, 31 August 2010.

²⁹ Answers to additional questions on notice, MAA, p 1.

³⁰ Answers to pre-hearing questions on notice, MAA, p 3.

2.20 Despite these factors, the MAA suggested that the October 2008 reforms (outlined in paragraph 1.19), may have contributed to improvements in the effectiveness of the Scheme by encouraging earlier resolution of claims and improving access to health services:

... the 1 October 2008 amendments were intended to "further facilitate the just and expeditious resolution of motor accident claims". These changes promote efficiency in the claims resolution process by encouraging the early settlement of motor accident claims and by facilitating early access to medical treatment and rehabilitation.³¹

2.21 The MAA also noted that shortening the lifecycle of the claim is further encouraged through facilitating early resolution of disputes between the parties to a claim. The amendments achieve this outcome by:

... requiring insurers and claimants to exchange documents concerning the claim, participate in settlement conferences and exchange offers of settlement on the claim before the claim can be referred for dispute resolution. These changes are designed to shorten the life cycle of a claim.³²

Fairness

2.22 'Fairness' refers to whether people injured in motor vehicle accidents are receiving *adequate* compensation.

2.23 In its *Annual Report 2007/08*, the MAA noted that the focus of the Scheme was shifting from vertical fairness, whereby the most seriously injured receive maximum compensation, to greater horizontal fairness, where all seriously injured people receive a consistently high level of support. In that report the MAA indicated that '[d]uring the coming year a number of reforms will commence that further increase fairness ...'.³³

2.24 During this review, the MAA observed that the October 2008 reforms (outlined in paragraph 1.19) improved the fairness of the Scheme by increasing the maximum amount payable under the early accident notification process from \$500 to \$5,000. In addition, the early payment scheme now allows injured people to claim for lost wages using an ANF. The prohibition of recovery for economic loss in the first five days following the accident has also been eliminated.³⁴

2.25 The MAA commented on the effectiveness of these reforms in improving the fairness of the Scheme as follows:

... the preliminary results are very encouraging. Recent figures indicate that the number of ANFs being lodged by injured people under the early accident notification process has risen by over 57% since 1 October 2008. The average payment made on finalised ANFs has more than doubled, from \$400 to \$1,000.³⁵

³¹ Answers to pre-hearing questions on notice, MAA, p 3.

³² Answers to additional questions on notice, MAA, p 1.

³³ MAA, *Annual Report 2007/08*, p 79.

³⁴ Answers to pre-hearing questions on notice, MAA, p 4.

³⁵ Answers to pre-hearing questions on notice, MAA, p 4.

2.26 A second phase of reform to improve fairness took effect from April 2010. Under this reform, the early accident notification benefit was extended to provide coverage of up to \$5,000 in medical costs and lost wages, for *all* persons who are injured in a motor vehicle accident, *regardless of fault*. Previously, the Scheme only provided assistance to people who were injured in motor vehicle accidents caused by a negligent, or at-fault, driver.³⁶

2.27 The MAA explained how the extension of coverage (of up to \$5,000) to accidents involving at-fault drivers increases the fairness of the Scheme:

This means that 'at-fault' drivers are now entitled to be reimbursed to a maximum of \$5,000 for the cost of early medical treatment and rehabilitation and any lost earnings related to the accident injury. The broadening of the base in this manner increases fairness by ensuring that a greater number of people can access the early payment scheme and obtain greater access to early medical treatment.³⁷

Efficiency

2.28 The Scheme is considered to be 'efficient' if '*... as much as possible of each dollar paid in premiums is returned to injured people as compensation payments*'.³⁸

2.29 The MAA's *Annual Report 2007/08* indicated that in the filing period commencing 1 July 2007, the return to claimants was 63 per cent of total premiums collected.³⁹

2.30 The MAA advised that in the next two filing periods, commencing 1 July 2008 and 1 July 2009, returns to claimants have increased from 62 per cent to 64 per cent:

In the filing period commencing 1 July 2008, the projected return to claimants was 62% of total premiums. In the filing period commencing 1 July 2009, the projected return to claimants was 64% of total premiums.⁴⁰

2.31 The MAA noted that it is currently reviewing the Motor Accidents Compensation Regulation 2005, with the aim of identifying ways to reduce the transaction costs associated with claims and thereby increasing the returns to claimants.⁴¹ The MAA *Annual Report 2008/09* identified the types of administration costs associated with the Scheme that could be reduced:

... acquisition expenses incurred by insurers issuing Green Slips and collecting premiums, and the payment of statutory levies. These represent a per policy cost independent of claims costs. Other transaction costs relate to claims management and include the cost of employing investigators, the cost of claims departments and payments to insurers and claimants legal representatives.⁴²

³⁶ Hon M Daley MP, Minister for Finance, 'Green Slip Scheme Expanded to Cover 4000 More Drivers', *Media Release*, 26 March 2010.

³⁷ Answers to pre-hearing questions on notice, MAA, p 4.

³⁸ MAA, *Annual Report 2008/09*, p 73.

³⁹ MAA, *Annual Report 2007/08*, p 73.

⁴⁰ Answers to pre-hearing questions on notice, MAA, p 5.

⁴¹ Answers to pre-hearing questions on notice, MAA, p 5.

⁴² MAA, *Annual Report 2008/09*, p 73.

Committee comment

- 2.32** The Committee is satisfied that the NSW Motor Accidents Scheme continues to function in an appropriate manner when assessed against the broad performance indicators of affordability, effectiveness, fairness and efficiency.
- 2.33** The Committee notes that the global financial crisis impacted adversely on insurance providers, resulting in an increase in premiums for consumers and accepts that the MAA was vigilant in ensuring that any increases in premiums were justified. The Committee presumes that as the health of the global economy improves insurers will adjust the price of premiums accordingly.
- 2.34** The Committee welcomes the commitment from the Minister for Finance to appoint a representative of the Motorcycle Council of NSW to the MAC and, following consultation between the MAA and the Motorcycle Council of NSW, to appoint an independent actuary to review Green Slip pricing. The Committee also notes that the competition review of the Scheme conducted by an independent economist that has been commenced by the MAA will further assist to identify ways to enhance the affordability and fairness of Green Slip pricing.
- 2.35** The Committee will examine the outcome of these reviews with great interest during its next review of the Scheme in 2012.

Claims frequency and propensity to claim

- 2.36** This section updates an issue that has been ongoing since the Committee's Seventh Review. The issue relates to claims frequency and propensity to claim and the barriers that some stakeholders have argued may prevent people who are injured in motor vehicle accidents from making claims under the Motor Accidents Scheme.
- 2.37** 'Claims frequency' refers to the number of notifications to the MAA made per 10,000 registered vehicles. The 'propensity to claim' is measured as a proportion of notifications arising from road casualties in NSW.⁴³ Claims frequency therefore reflects the number of actual claims made, while the propensity to claim reflects the 'tendency' of people to claim:

There is a rate of claims, which is simply how many do we get a year, claims in the CTP scheme. The propensity is another calculation, which is looking at the number of claims over the number of reported injuries, the people who are injured. It is, if you like, the tendency of people who are injured to lodge a claim. That goes more to issues of whether people are informed of the scheme and behavioural choices they might make about whether or not they lodge a claim.⁴⁴

- 2.38** The Committee's *Ninth Review Report* provides a summary of the issue as was examined in the Committee's *Seventh Review Report* and *Eighth Review Report*. The *Ninth Review Report* noted there had been a consistent reduction in both claims frequency and propensity to claim from

⁴³ MAA, *Annual Report 2008/09*, pp 76-77.

⁴⁴ Ms Donnelly, Evidence, 11 June 2010, p 7.

2001 to 2007. The MAA has maintained that the reduction appears to have resulted from, or at least coincided with, a fall in traffic casualties over the same time period.⁴⁵

2.39 Over these reviews, however, the NSW Bar Association and the Law Society of NSW have raised their concerns that the decline in claims frequency and propensity to claim is also partly attributable to accident victims being deterred from making a claim. The MAA refuted the suggestion that there were barriers to people making claims and also advised that the October 2008 reforms to the Scheme would make it easier for accident victims to make claims for compensation.⁴⁶ In its *Ninth Review Report*, the Committee expressed its ongoing concern about the potential barriers and undertook to monitor the issue in future reviews.

2.40 The Committee therefore took this issue up with the MAA in the current Review after noting that the MAA's *Annual Report 2008/2009* states that the steady decline had continued to June 2008.⁴⁷ The Committee asked the MAA to comment on the continued decline in the pre-hearing questions on notice. In response the MAA advised that more recent data showed that there had been a *reversal* in the downward trends for both claims frequency and propensity to claim to September 2009:

... recent MAA data indicates that as at the end of September 2009, the trend in claims frequency and propensity to claim has reversed. The MAA has observed an increase in estimated ultimate claims from 10,205 in 2007/2008 to 11,948 in 2008/2009.⁴⁸

2.41 During the hearing Ms Donnelly, the General Manager of the MAA, hypothesised as to the reasons why there has been an increase in claims frequency and propensity to claim over the last reporting period:

We have a couple of key hypotheses as to why we are seeing that increase in claims. Two of them go to behaviour perhaps changing and one is the extension of the benefits under the accident notification form – the extension of the maximum amount people can claim, and also the introduction of the no-fault accident notification form benefit. There has been quite a lot of publicity, particularly to general practitioners and people who often provide advice to people who are injured, and hospitals, so it may be that there is more information ... The other thing that can occur in changes in economic cycles is that with more economic uncertainty people with more minor injuries may make a claim whereas in rosier times they perhaps would not have bothered.⁴⁹

2.42 While the issue of the past decline in claims frequency and propensity to claim was not raised by stakeholders in their submissions to the current review, the Committee did seek the views of the Law Society and the Bar Association about the decline and the disincentives that may exist to making a claim.

⁴⁵ NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Ninth Report*, Report 36, September 2008, p 91.

⁴⁶ Standing Committee on Law and Justice, Report 36, pp 91-92.

⁴⁷ MAA, *Annual Report 2008/09*, p 77.

⁴⁸ Answers to pre-hearing questions on notice, MAA, p 6.

⁴⁹ Ms Donnelly, Evidence, 11 June 2010, p 7.

2.43 Mr Timothy Concannon, a member of the Personal Injury Compensation Committee of the Law Society of NSW, referred to the following disincentives to making a claim:

- the inability of lawyers to advertise their speciality in personal injury law
- growing public awareness of the restrictions that are in place under the Scheme, such as the 10 per cent whole person impairment requirement for pain and suffering
- perception that legal costs are a problem, particularly as '... the current cost regulation does not provide adequate recovery on a party-party basis for legal costs'.⁵⁰

2.44 The NSW Bar Associations suggested that while the decline in claims frequency may be partly attributable to falling accident numbers, there are also '... substantial disincentives to claim within the Scheme'. The primary disincentives identified by the NSW Bar Association were:

- absence of compensation for pain and suffering for 90 per cent of accident victims
- erosion of any benefits that claimants may receive due to high legal costs.⁵¹

Committee comment

2.45 The Committee has examined the issue of claims frequency and propensity to claim since our Seventh Review and we refer to our past reports for the detailed analysis they contain.

2.46 During the current Review, in response to queries from the Committee, the Law Society of NSW and the NSW Bar Association again identified a number of disincentives to claim inherent in the Scheme, which they associate with the decline in claims frequency and propensity to claim between 2003 and 2008.

2.47 We are pleased to note that data over a 12 month period (approx) to September 2009 shows that the declining trends for both claims frequency and propensity to claim have reversed. The MAA has speculated on a number of reasons for this reversal including the expanded accident notification process, increased awareness about the Scheme and an increase in the number of people making claims for minor injuries that they may not have pursued before the global financial crisis.

2.48 In light of the fact that this recent increase in claims frequency and propensity to claim has only been reported over a short period, the Committee will continue to closely monitor claims frequency and propensity to claim in its future reviews. It is hoped that a clearer picture of the factors that impact on claims frequency and propensity to claim will emerge so as to enable a more informed analysis of whether there are in fact any disincentives to claim that should be addressed as a matter of better practice or policy.

⁵⁰ Mr Timothy Concannon, Member, Personal Injury Compensation Committee, Law Society of NSW, Evidence, 11 June 2010, p 21.

⁵¹ Answers to questions on notice taken during evidence 11 June 2010, Mr Alastair McConnachie, A/Executive Director, NSW Bar Association, p 2.

Health outcome measures

- 2.49** Health outcome measures have been a recurring issue in each of the Committee's reports since the *Sixth Review Report*, which was tabled in May 2005. In the Committee's *Sixth Review Report*, the MAA noted the issue of measuring health outcomes as an indicator of Scheme performance and acknowledged the importance of improving health outcomes for people involved in the Scheme. The MAA advised the Committee that it was undertaking work in areas such as the treatment of whiplash to improve health outcomes for Scheme participants.⁵²
- 2.50** In the *Seventh Review Report*, the Committee noted the ongoing efforts of the MAA to incorporate health outcomes for injured road users into the criteria used to assess the performance of the Scheme.⁵³ The Committee recommended that the MAA collaborate with interested stakeholders to promote improved health outcomes in the NSW Motor Accidents Scheme, in relation to a number of conditions including anxiety, chronic whiplash, spinal injury and brain injury.⁵⁴ The Government response to that recommendation stated that the MAA had contracted a consultant to facilitate the development of options to maximise a health outcomes approach to the Scheme.⁵⁵
- 2.51** In its *Eighth Review Report*, the Committee reiterated its support for the introduction of health outcome measures and in the *Ninth Review Report* noted the continuing work of the MAA to develop health outcome measures to be used as one of the key performance indicators for the Scheme.⁵⁶
- 2.52** During the current Review, the Committee looked to the MAA's Annual Reports to gain a picture of the work that it has undertaken in this area since its last review. The MAA's *Annual Report 2007/08* and *2008/09* both advise that work was continuing to improve health outcomes for Scheme participants. For example, the *Annual Report 2007/08* noted that the MAA had presented a paper on Health Outcome Measures in Compensation Schemes to the National Heads of Compulsory Third Party, to highlight the challenges and issues in health outcome measurements.⁵⁷
- 2.53** The *Annual Report 2008/09* noted that a collaborative research project was being developed to benchmark and monitor health outcomes across different compensation jurisdictions, and that the MAA supported insurers in trialling and evaluating practices that maximise good claimant outcomes.⁵⁸

⁵² NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Sixth Report*, Report 27, May 2005, pp 73-74.

⁵³ NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Seventh Report*, Report 31, September 2006, pp 99-100.

⁵⁴ Standing Committee on Law and Justice, Report 31, p 107.

⁵⁵ NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Seventh Report*, Report 31, September 2006, p 8.

⁵⁶ NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Eighth Report*, Report 34, November 2007, p 9; Standing Committee on Law and Justice, Report 36, pp 17-19.

⁵⁷ MAA, *Annual Report 2007/08*, p 23.

⁵⁸ MAA, *Annual Report 2008/09*, p 18.

- 2.54** During the current review, the MAA advised that it is undertaking a number of research projects in conjunction with other agencies, to facilitate the development of a range of health outcome measures. It is intended that the '... [c]ollection of consistent measures will enable benchmarking of Scheme performance over time and against other jurisdictions'.⁵⁹
- 2.55** Examples of such inter-agency projects include:
- providing funds to the Rehabilitation Studies Unit at the University of Sydney to undertake a two year follow-up study of claimants under the CTP, at 12 and 24 months post injury
 - providing funds to four metropolitan hospitals to provide specialist rehabilitation assessment and multi-disciplinary rehabilitation services post-hospital
 - supporting an application by the Rehabilitation Studies Unit at the University of Sydney for a National Health and Medical Research Council Partnership Grant to explore differences in health outcomes, evaluate methods of identifying those at high risk of poor health outcomes and informing health providers of risk indicators
 - committing funds, together with WorkCover NSW and Lifetime Care and Support Authority, to establish a research centre to enhance research and educational capacity relevant to compensable injury in NSW.⁶⁰
- 2.56** The MAA noted that these joint research activities contribute '... to a growing consensus about the importance of a holistic approach to injury management, the types of measures that best describe outcomes following trauma and the methodologies that can be used to benchmark and improve health outcomes'.⁶¹

Committee comment

- 2.57** The Committee appreciates the difficulties of developing and implementing health outcome measures for the Motor Accidents Scheme. The Committee commends the MAA for its collaborative approach to developing a range of health outcome measures that will allow the performance of the Scheme to be benchmarked over time, and against other jurisdictions. The MAA should continue to pursue these collaborations.
- 2.58** The Committee will be very interested to monitor the outcome of the collaborative research project to benchmark and monitor health outcomes across different compensation jurisdictions. The Committee looks forward to discussing this project during its next review in 2012.

Medical Care and Injury Service Levy

- 2.59** In its submission to the Committee's Third Review of the Lifetime Care and Support Authority (LTCSA), which has been conducted simultaneously with the Tenth Review of the MAA, the Motorcycle Council of NSW expressed concern over the Medical Care and Injury

⁵⁹ Answers to pre-hearing questions on notice, MAA, p 1.

⁶⁰ Answers to pre-hearing questions on notice, MAA, pp 1-2.

⁶¹ Answers to pre-hearing questions on notice, MAA, p 2.

Services (MCIS) levy and its impact on CTP insurance premiums for motorcycle riders in NSW.

- 2.60** As the MCIS levy is a component of CTP insurance premiums and is administered by the MAA, the issues raised by the Motorcycle Council in relation to the MCIS levy will be examined in this report as part of this review of the MAA, rather than in its report on its Third Review of the LTCSA.⁶²

The MCIS levy

- 2.61** The MCIS levy has been shown as a separate item on Green Slips following the introduction of the Lifetime Care and Support (LTCS) Scheme in 2006. There are two components to the MCIS levy:

- The first component is used to finance the LTCS Scheme, which covers the cost of medical treatment and care services for people who have been seriously injured in motor vehicle accidents. This component is set by the Board of the LTCSA.
- The second component covers the costs of hospital and ambulance services for people injured in motor vehicle accidents, as well as the administration costs of the Motor Accidents Scheme. This component is not a new collection but was previously included in the Insurer's premium and was not separately identified.⁶³

- 2.62** In terms of who sets the components, the MAA advised that:

The lifetime care component is set by the Board of the Lifetime Care and Support Authority and the MAA component by the MAA Board. Insurers must apply to MCIS levy rates as determined by each Authority.⁶⁴

- 2.63** The percentage of the levy differs between vehicle classes and geographic zones based on accident and injury rates for the selected vehicle type and zone. Table 2.1 outlines the MCIS levy, at 1 July 2010, for the three common vehicle types in each of the specified geographic zones.

⁶² In previous years this issue has been reported on in the reports on the reviews of the LTCSA: NSW Legislative Council, Standing Committee on Law and Justice, *First Review of the exercise of the functions of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council*, Report 37, October 2008, pp 62-64 and NSW Legislative Council, Standing Committee on Law and Justice, *Second Review of the exercise of the functions of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council*, Report 40, September 2009, p 12.

⁶³ Answers to additional questions on notice, MAA, p 4.

⁶⁴ Answers to additional questions on notice, MAA, p 4.

Table 2.1 MCIS Levy by vehicle class and geographic zone (1 July 2010)⁶⁵

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

2.64 The LTCSA *Annual Report 2007/08* advised that '[b]etween 1 July 2007 and 30 June 2008, there was no increase in the levy and it has remained at the same level since 1 April 2007'.⁶⁶

2.65 The LTCSA *Annual Report 2008/09* indicated that the levy had been reduced twice over the reporting period. The first decrease was by 2.5 per cent in February 2009, whilst the second decrease of 3.5 per cent was approved in June 2009 for implementation from 15 August 2009.⁶⁷

Examination of this issue in past reviews

2.66 During the First Review of the LTSCA, specific concerns about the MCIS levy and CTP premiums were raised in the media and by the Motorcycle Council of NSW. A number of concerns were identified, including that:

- CTP premium prices had risen by substantially more than anticipated with the introduction of the LTCS Scheme
- the 'rating' of individual vehicles in determining the levy was inequitable and contrary to the 'no-fault' principles of the Scheme
- fully funding the Scheme through the MCIS could potentially lead to price fixing of base CTP premium prices or the approval of higher CTP premium prices for profit.⁶⁸

2.67 In relation to these concerns, the Motorcycle Council of NSW called for greater transparency of Green Slips, to ensure that the charges comprising the CTP premium, including the MCIS levy, were clear to all motorists upon purchasing the insurance policy.⁶⁹

2.68 Most of these concerns were addressed during the First Review of the LTSCA and the Committee concluded in its *First Review Report* on the LTCSA that the LTCSA had provided

⁶⁵ MAA, *What is the MCIS levy?*, accessed 22 July 2010, <www.maa.nsw.gov.au/default.aspx?MenuID=344>

⁶⁶ LTCSA, *Annual Report 2007/08*, p 11.

⁶⁷ LTCSA, *Annual Report 2008/09*, p 11.

⁶⁸ Standing Committee on Law and Justice, Report 37, pp 62-64.

⁶⁹ Standing Committee on Law and Justice, Report 37, p 64.

sufficient information to clarify the administration of the levy.⁷⁰ With regard to the issue of greater transparency and the itemisation of Green Slips, the Committee advised that it had investigated and addressed this issue in its Ninth Review of the MAA and MAC. In the Committee's *Ninth Review Report* on the MAA the Committee recommended that the MAA consider the advantages and feasibility of further itemisation of the MCIS levy on CTP Green Slips.⁷¹

2.69 In response to the *Ninth Review Report* on the MAA, the NSW Government indicated its support for the Committee's recommendation and advised that a working party had been established to consider implementing the further itemisation of the MCIS levy.⁷²

2.70 When asked during the current MAA and LTCSA Reviews about the outcome of the working party's considerations, the MAA indicated that it was exploring ways to further itemise the MCIS levy:

The MAA has received advice from all CTP insurers on the technical and administrative changes that would be required to further itemise the MCIS levy on Green Slips. The Authority is currently considering the feasibility of the proposal in the light of this advice.⁷³

2.71 The MAA also stated that a report had been prepared for consideration by the Motor Accidents Council, but did not indicate what the report had concluded.⁷⁴

2.72 While the MCIS levy was not raised as an issue during the Second LTCSA Review, it has emerged as an ongoing concern in the Third LTCSA Review for the Motorcycle Council of NSW, as discussed below.

Motorcycle Council of NSW concerns

2.73 During the current MAA and LTCSA Reviews, the Motorcycle Council of NSW raised three specific issues in regards to the MCIS levy:

- the LTCS portion of the MCIS levy is not transparent
- the MCIS levy is not fairly applied across the community
- the LTCS levy is not fairly applied across vehicle classes and that motorcyclists bear an unfair proportion of the levy.⁷⁵

⁷⁰ Standing Committee on Law and Justice, Report 37, p 64.

⁷¹ Standing Committee on Law and Justice, Report 37, p 64; Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Ninth Report*, Report 36, September 2008, p 85.

⁷² NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Ninth Report*, Report 36, September 2008, p 6.

⁷³ Answers to pre-hearing questions on notice, MAA, p 24.

⁷⁴ Answers to post-hearing questions on notice, MAA, p 4.

⁷⁵ Submission 12 to the Third Review of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council, Motorcycle Council (LTCSA & LTCSAC) of NSW, Motorcycle Council of New South Wales Incorporated, pp 3-5.

Transparency

- 2.74** The Motorcycle Council of NSW suggested that the MCIS levy is not transparent to CTP insurance holder because:
- it is not displayed on the CTP Green Slip as a separate line item
 - its calculation is not accessible to CTP policy holders
 - it is based on an insurance premium that is determined by the individual insurance company and not on any data-based calculation.⁷⁶
- 2.75** The Committee notes that although the MCIS levy is expressed on Green Slips as a separate item, it is not clear what proportion of the levy is used for the LTCS Scheme and what proportion is used for hospital and ambulance services and the administration costs of the Motor Accidents Scheme.
- 2.76** Mr Guy Stanford, the former Chairman and a member of the Motorcycle Council of NSW who gave evidence before the Committee, expressed frustration about the lack of itemisation:
- How much money is going into the LTCS Scheme? Does anybody know that? I cannot tell what component I have paid or any of my other members have paid individually as a component for the LTCS. It is all bundled into the MCIS levy. We are told that in the MCIS levy we have got a component in there for ambulance and a bit for emergency rooms and then the rest for the Lifetime Care and Support. How much is that?⁷⁷
- 2.77** The Motorcycle Council described the MCIS levy as a 'state tax of unknown percentage':
- ... to the average CTP policy holder (ie. the average motorist) the MCIS levy is a state tax of unknown percentage on an insurance premium that is ultimately determined at the discretion of private sector insurers working within an MAA framework that the general public does not understand.⁷⁸
- 2.78** As expressed by Mr Stanford: '... we cannot tell what we are paying for... the LTCS component is calculated as a percentage of whatever this CTP figure works out to be'.⁷⁹
- 2.79** The LTCSA confirmed that the levy is set as a percentage of the CTP insurance premium and acknowledged that the levy varies depending on the zone and type of vehicle. Table 2.1 above, outlines the percentage of the MCIS levy by vehicle class and geographic zone.
- 2.80** The LTCSA explained, however, that the calculation of these percentages is as close to the 'real cost' for those zones and vehicles as practicable and subject to the restrictions that limit increases in any one zone or class to five per cent above natural growth in any one year.⁸⁰

⁷⁶ Submission 12 to the Third Review of the LTCSA & LTCSAC of NSW, p 4.

⁷⁷ Mr Stanford, Evidence, 11 June 2010, p 60.

⁷⁸ Submission 12 to the Third Review of LTCSA & LTCSAC of NSW, p 4.

⁷⁹ Mr Stanford, Evidence, 11 June 2010, p 59.

⁸⁰ Answers to post-hearing questions on notice, LTCSA, Question 8, p 4.

- 2.81** Furthermore, the LTCSA advised that, as the LTCS Scheme is 'still new and the incidence is low', the calculation of these percentages is mainly based on actuarial projections using prior scheme data.⁸¹
- 2.82** As noted in paragraph 2.70 the MAA has advised the Committee that it is exploring ways to further itemise the MCIS levy in light of advice from CTP insurers on the technical and administrative changes that would be required.
- Inequity across the community***
- 2.83** The Motorcycle Council also argued that, while the LTCS Scheme fulfils an important role in the care of the catastrophically injured, the levy which funds it should be 'calculated and applied in a more equitable manner across a broader cross-section of the community'.⁸²
- 2.84** The Council argued that the MCIS levy was not being fairly applied across the community, given that a wide range of people are covered by the Scheme and not simply the motorists who own registered motor vehicles and fund the Scheme through the purchase of a CTP Green Slip.⁸³
- 2.85** The Motorcycle Council cited a number of accidents which it argued demonstrate the wide latitude for coverage under the Scheme. For example, the Council reported that a child playing with a motorcycle in the front yard of a house accidentally accelerated, travelled across the road and crashed into the front of a house on the opposite side of the road, sustaining catastrophic injuries. The Council noted that the child was eligible for care under the Scheme.⁸⁴
- 2.86** According to the Motorcycle Council, 'the LTCS Scheme relies on the few to cover the costs of the many', and suggested that a greater portion of the community should contribute to the funding the Scheme.⁸⁵
- 2.87** The Council expressed concern that this inequity has unfairly impacted on motorcycle riders, particularly those with registered and insured motorcycles and that subsequently they are forced to 'shoulder a disproportionate burden'.⁸⁶
- 2.88** The LTCSA advised that eligibility for the LTCS Scheme is carefully considered by the LTCSA and verified by the MAA if a dispute about 'motor accident injury' is lodged. Under the *Motor Accidents Compensation Act 1999*, an injured person may only be eligible for the Scheme if they have sustained a 'motor accident injury' and if their accident meets specific motor vehicle and motor accident definitions under the *Motor Accidents Compensation Act 1999*.⁸⁷

⁸¹ Answers to post-hearing questions on notice, LTCSA, Question 8, p 4.

⁸² Submission 12 to the Third Review of the LTCSA & LTCSAC of NSW, p 2 and p 11.

⁸³ Submission 12 to the Third Review of the LTCSA & LTCSAC of NSW, pp 4-5.

⁸⁴ Submission 12 to the Third Review of the LTCSA & LTCSAC of NSW, p 5.

⁸⁵ Submission 12 to the Third Review of the LTCSA & LTCSAC of NSW, pp 4-5.

⁸⁶ Submission 12 to the Third Review of the LTCSA & LTCSAC of NSW, p 2 and p 11.

⁸⁷ Answers to questions on notice taken during evidence 11 June 2010, Mr Neil Mackinnon, A/Director, Service Delivery, Lifetime Care and Support Authority, Question 1, p 1.

2.89 When asked about the Motorcycle Council's concerns that claims are being made for accidents involving children and uninsured motorbikes, the MAA advised that there are always test cases around unregistered vehicles on a road and off road, but confirmed that the CTP Scheme does not cover injuries arising from either the use or operation of a motor vehicle or motorcycle that is not capable of registration or the use or operation of an unregistered/uninsured vehicle or motorcycle on private property.⁸⁸ Similarly, the LTCS Scheme does not cover injuries arising from accidents under these circumstances.⁸⁹

Inequity across vehicle classes

2.90 Another argument presented by the NSW Motorcycle Council was that the MCIS levy is not being fairly applied across motor vehicle classes and that 'motorcycle riders, for reasons that are not logical or fair, shoulder a disproportionate burden of the levy'.⁹⁰ The reasons cited by the Council relate to the way in which the levy is determined, the effect of off-road motorcycle issues and unregistered motor vehicles among other matters.⁹¹

2.91 In response to these concerns Ms Donnelly, the General Manager of the MAA, suggested that some incorrect information had been presented as part of the discussion on this issue. She advised that the levy paid by motorcyclists was generally less than a Sydney sedan:

I think there was some incorrect data introduced to that discussion. I saw in the transcript the suggestion that motorcycles in Wollongong pay a higher premium than Sydney cars. That is not true. Their relativity is below. In fact, about 93 per cent of motorcycles are in a price range that is less than a Sydney sedan, apart from the very big Sydney bikes. Their price range is based on evidence of the frequency of claims and the cost of those claims.⁹²

2.92 Ms Donnelly also suggested that the constant change in CTP premiums and increase in prices which have led motorcyclists to 'shop around' every year for the cheaper premium was probably a 'marker of competition'.⁹³ She advised that MAA research had indicated that one in five policy holders change insurance providers each time they have a renewal of registration, which she believed 'is great for competition in the Scheme'.⁹⁴

2.93 With regard to concerns that motorcyclists bear an unfair proportion of the MCIS levy and are subsidising people with uninsured motorcycles, Mr Stanford indicated that many riders feel they are being taking advantage of by irresponsible unregistered riders:

Riders are under the very distinct impression that they are paying for a lot of other people other than just the responsible registered riders and that there are a lot of irresponsible unregistered riders who are taking advantage of the Scheme because their bike might be capable of registration but unregistered.⁹⁵

⁸⁸ Answers to questions on notice taken during evidence 21 June 2010, Ms Donnelly, Question 7, p 5.

⁸⁹ Standing Committee on Law and Justice, Report 37, p 7.

⁹⁰ Submission 12 to the Third Review of the LTSCA & LTCSAC of NSW, p 1.

⁹¹ Submission 12 to the Third Review of the LTSCA & LTCSAC of NSW, pp 5-6.

⁹² Ms Donnelly, Evidence, 21 June 2010, p 56.

⁹³ Ms Donnelly, Evidence, 21 June 2010, p 56.

⁹⁴ Ms Donnelly, Evidence, 21 June 2010, p 56.

⁹⁵ Mr Stanford, Evidence, 11 June 2010, p 67.

- 2.94** In response, Ms Donnelly stated that she was not aware that there was a significant number of these cases but indicated that it could be an issue for further consideration by the MAA.⁹⁶
- 2.95** Ms Donnelly also informed the Committee that the MAA has an established partnership with the Motorcycle Council of NSW, through which a special actuarial review of motorcycle pricing has already been undertaken and resulted in changes to their guidelines as a direct response to concerns raised by the Council.

Committee comment

- 2.96** The Committee notes the concerns of the Motorcycle Council of NSW regarding the MCIS levy and CTP premiums. The Committee acknowledges that the funding of the LTCS Scheme involves a complex calculation of this levy based on a number of factors that are not clear to motorists purchasing Green Slips. The Committee also recognises that these issues require consideration by both the LTCSA and MAA.
- 2.97** With regard to the further itemisation of the MCIS levy on CTP Green Slips, the Committee notes that a report has been completed in response to our recommendation in the *Ninth Review Report* (see paragraph 2.71). However, the Committee remains unclear about the results of this report and whether it is indeed advantageous and feasible to further itemise the MCIS levy to clearly identify the proportion of the levy allocated to the LTCSA Scheme and to hospital and ambulance services and the administration costs of the Motor Accidents Scheme.
- 2.98** The Committee therefore recommends that the MAA publish the outcome of its investigations into the advantages and feasibility of further itemisation of the MCIS levy on Green Slips in order to better inform interested stakeholders as well as the Committee.
- 2.99** If this report demonstrates that it is feasible to further itemise the levy, the Committee believes that the MAA should pursue the introduction of this itemisation. This will clearly inform holders of CTP insurance as to the exact proportion of the MCIS levy allocated to each component, and will eliminate any confusion that may exist within the community as to the purpose of the MCIS levy.

Recommendation 1

That the Motor Accidents Authority publish the report on its investigations into the advantages and feasibility of the further itemisation of each component of the Medical Care and Injury Service Levy on CTP Green Slips.

That, if this report demonstrates that it is feasible to clearly identify the proportion of the levy that is allocated to the Lifetime Care and Support Scheme and the proportion allocated to hospital and ambulance services and the administration costs of the Motor Accidents Scheme, the Motor Accidents Authority should pursue the introduction of this further itemisation.

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- 2.100** As noted in paragraph 2.15 the Minister for Finance announced in early August 2010 that changes were introduced to the NSW Greenslip Scheme on July 1 'in an attempt to make a

⁹⁶ Ms Donnelly, Evidence, 21 June 2010, p 62.

fairer and more equitable' Scheme for all motor cycle riders. The Minister also announced that he will appoint an independent actuary to review Green Slip pricing, following consultation between the MAA and the Motorcycle Council of NSW and appoint a representative of the Motorcycle Council of NSW to the Motor Accidents Council. It is hoped that these measures will address the Motorcycle Council's concerns and enable the Council to directly pursue its concerns within the framework of the Motor Accidents Scheme.

Classification of private buses

2.101 During the Committee's *Seventh Review Report*, the Bus and Coach Association NSW submitted that Green Slip pricing does not reflect the claims experience of different operators and also failed to distinguish between different operating environments for buses.⁹⁷ The Association proposed changes that distinguishes between the different bus and coach operating environments and give more precise recognition to those operators who manage their business in such a manner that minimises the number of claims.

2.102 The Committee did not make a recommendation on this issue at that time, due to difficulties identified by the MAA in implementing the Association's proposal.⁹⁸ These difficulties related to the allocation of different rates of risk to a relatively small vehicle pool.⁹⁹

2.103 In its submission to the current Review, the Bus and Coach Association NSW (BusNSW) raised similar concerns. BusNSW proposed changes to premium classifications to acknowledge the different operating environments and accreditation systems for bus and coach drivers. BusNSW outlined its concerns that the current pricing of CTP premiums may discriminate against operators who have excellent claims histories:

BusNSW seeks changes to premium classifications that distinguishes between the different bus and coach operating environments, not simply setting premiums on the claims history of a collective of "post codes", and vehicle passenger capacities. This method can discriminate against sections of operators who have excellent claims records.¹⁰⁰

2.104 BusNSW identified the different types of operating environments for buses as follows:

- routes services
- school services under government contracts
- Tourist Service, Long Distance and Charter services
- community transport
- private use
- U Drive.¹⁰¹

⁹⁷ Standing Committee on Law and Justice, Report 31, p 118.

⁹⁸ Standing Committee on Law and Justice, Report 31, p 120.

⁹⁹ Standing Committee on Law and Justice, Report 31, p 119.

¹⁰⁰ Submission 3, Bus and Coach Association NSW, p 1.

¹⁰¹ Submission 3, p 1.

2.105 BusNSW noted that because the first three operators – route services, school services and Tourist Service, Long Distance and Charter services – are public passenger services and are therefore required to meet stringent safety and maintenance guidelines, these operators often have better safety record than operators in the other three classes:

The first three groups of operators require NSWTTI accreditation to operate as a public passenger service, and the accreditation system requires operators and drivers to comply with OH&S, Safety Management Systems, and Vehicle Preventative Maintenance Programs which provides for a better safety record than the other groups.¹⁰²

2.106 BusNSW also noted that the Roads and Traffic Authority (RTA) recently amended its classification of vehicles to acknowledge these differences. As a consequence of this 'clear delineation' of different operating environments, the Bus and Coach Association submitted that '... it is now the time to also change the premium setting arrangements by introducing CTP classes for each of the groups based on their respective exposures to potential claims'.¹⁰³

2.107 As of July 2008, the recognised RTA classifications for operating environments have been:

- State Transit buses in Sydney and Newcastle
- metropolitan Newcastle and Wollongong privately operated Regular Passenger and School Services
- regional and rural Regular Passenger and School Services
- tourist, long distance and charter services.¹⁰⁴

2.108 BusNSW further suggested that, in addition to differentiating between buses and coaches based on their operating environment, further differentiation should be made with respect to the number of passengers that a coach or bus is authorised to transport. Under this proposal this additional level of classification would differentiate between vehicles carrying:

- under 14 passengers
- between 14 and 24 passengers
- over 25 passengers.¹⁰⁵

2.109 When questioned on BusNSW's proposal, the MAA indicated that it would be considered as part of its next review of the risk relativities for different vehicle classes:

The MAA *Premiums Determination Guidelines* enable insurers to utilise any objective risk-rating factor except race, input tax credit entitlement or policy duration. The MAA regularly reviews risk relativities for the various vehicle classes in the Green Slip scheme. The Bus and Coach Association's proposal will be considered as part of the next review.¹⁰⁶

¹⁰² Submission 3, p 1.

¹⁰³ Submission 3, pp 1-2.

¹⁰⁴ Submission 3, p 1.

¹⁰⁵ Submission 3, p 2.

¹⁰⁶ Answers to pre-hearing questions on notice, MAA, p 23.

- 2.110** The Committee was advised that the next annual review of risk relativities is expected to commence before the end of 2010.¹⁰⁷

Committee comment

- 2.111** When the Committee examined this issue in its *Seventh Review Report* we deferred to the MAA on technical questions regarding the calculation of risk in respect of any given class of vehicles, noting the MAA's advice that the small size of the bus and coach vehicle pool makes it difficult to allocate risk in an alternative manner.
- 2.112** We are concerned, however, that four years later the issue is still a significant concern for the group that advocates on behalf of private bus and coach operators in NSW. It would appear that classifying buses on their operating environment and the number of passengers that they transport, is a logical step in ensuring that Green Slip prices appropriately reflect the risk of insuring buses operating in different environments.
- 2.113** The Committee therefore welcomes the news that the MAA will consider this matter as part of its next review of the risk relativities for different vehicle classes. The Committee is of the view that, during its forthcoming risk relativities review, the MAA should investigate the feasibility of requiring insurers to differentiate between buses based on their operating environment. Consideration should also be given to further classifying buses and coaches based on the number of passengers they carry. These two proposals would allow insurers to charge premiums that better reflect the risk associated with insuring different vehicle classes.

Recommendation 2

That the Motor Accidents Authority, during its forthcoming review of risk relativities, investigate the feasibility of requiring insurers within the Motor Accidents Scheme to differentiate between Green Slip prices for buses and coaches based on their operating environment and on the number of passengers that the vehicle is licensed to transport.

The Motor Accidents Council

- 2.114** The Motor Accidents Council (MAC) is an advisory group appointed for a term of three years by the Minister for Finance. The role of the MAC is to facilitate input on the Motor Accidents Scheme from relevant stakeholders and to consider issues referred by the MAA with a view to providing advice and recommendations.¹⁰⁸
- 2.115** Some participants in the Committee's Review expressed deep concern that, as of June 2010, '[t]here has not been a meeting of the MAC for more than sixteen months', as no new members were appointed to the MAC upon the expiry of the three year term of the previous membership.¹⁰⁹

¹⁰⁷ Email from Mr John Dietrich, Manager, Ministerial and Community Assistance, Motor Accidents Authority to Principal Council Officer, 10 September 2010.

¹⁰⁸ MAA, *Annual Report 2008/09*, p 8.

¹⁰⁹ Submission 4, NSW Bar Association, p 1.

- 2.116** The Committee notes that this issue also arose the previous time that the three year term of the MAC expired. In its *Seventh Review Report* the Committee reported that there was a delay in appointing new members to the MAC at the end of 2005.¹¹⁰ Whilst the MAA advised at that time that informal consultations continued during this delay, the Committee expressed the view that '[d]elays in the appointment of MAC are to be avoided where possible'.¹¹¹
- 2.117** During the current review the Committee was informed that the extended period of inactivity of the MAC led to, what the NSW Bar Association termed, a 'breakdown in communication' between stakeholders.¹¹² The Bar Association highlighted the negative impact of the suspension of the activities of the MAC as follows:
- When it existed, the Motor Accident Council provided for regular reporting as to Scheme operation back to stakeholders and periodic feedback to the MAA as to stakeholder views. This communication has now ceased ... Possible weaknesses and deficiencies in Scheme operation go unexamined.¹¹³
- 2.118** Mr Andrew Stone, a member of the MAC (as nominated by the NSW Bar Association) highlighted that, without a functioning MAC, it is difficult for stakeholders to ensure that the issues raised in informal discussions are examined:
- That is what the Motor Accident Council does. If something is on the council agenda and we raise a concern, it appears in the minutes, we meet again two months later and I at least get a chance to ask, "What has happened since?" ... That is why the council is important. At the very least it makes it think about the issues regularly.¹¹⁴
- 2.119** In regard to the current delay, the MAA advised that it had provided advice to the Government regarding the nominations to the MAC in June 2009, November 2009 and January 2010, and had also '... had ongoing discussions at officer level with ministerial staff regarding progress with the appointments'.¹¹⁵
- 2.120** The MAA also emphasised that although there were no meetings of the MAC '... the Authority has continued to regularly consult with stakeholders through various informal discussions and meetings'.¹¹⁶
- 2.121** With regard to stakeholder consultation, the MAA also advised the Committee that an external review of stakeholder engagement and relationship management, conducted by the Internal Audit Bureau concluded that:
- Motor Accident Assessment Service (MAAS) stakeholders are provided with a wide range of information and support, as well as opportunities to comment on strategies and policies
 - the MAAS Reference Group is effectively representing a diverse range of stakeholders

¹¹⁰ Standing Committee on Law and Justice, Report 31, pp 128-130.

¹¹¹ Standing Committee on Law and Justice, Report 31, p 130.

¹¹² Submission 4, p 1.

¹¹³ Submission 4, p 2.

¹¹⁴ Mr Andrew Stone, Member, Motor Accidents Council, as nominated by the NSW Bar Association; Member, Common Law Committee, NSW Bar Association, Evidence, 11 June 2010, p 30.

¹¹⁵ Answers to questions on notice taken during evidence 11 June 2010, Ms Donnelly, p 2.

¹¹⁶ Answers to pre-hearing questions on notice, MAA, Question 16, p 10.

- the MAS and Claims and Assessment Resolution Service (CARS) Assessor Practice Groups are effective forums for assessors to communicate with MAAS
- there is a wide range of publications and information available to assist stakeholders.¹¹⁷

2.122 Ms Donnelly emphasised the quality of informal relationships between the MAA and stakeholders, noting that '[t]he approach that I have taken as general manager and also as deputy general manager has to be very clear to stakeholders that there is an open door'.¹¹⁸

2.123 Mr Stone acknowledged that some stakeholder input was still achieved through informal consultation and through the Motor Accidents Assessment Service Reference Group:

There are two positives. First, there continues to be a consultative forum, which is the Motor Accidents Assessment Service Reference Group, or MRG. That group, which meets over at Oxford Street, deals largely with functional day-to-day issues. It is a very useful forum, although you have seen our criticism that it has a breakdown between it and policy ... The second positive is that, when you ask it to, the MAA will meet with you. When there have been serious issues we have rung, it has been prepared to have meetings, and it has listened to us.¹¹⁹

2.124 Nonetheless Mr Stone proposed a legislative solution that would circumvent situations where there was a delay in the appointment of new membership:

... the simple legislative solution would be to have the current Council serve until replaced rather than to have it automatically lapse and then be dependent upon reappointment. I understand that that is not an uncommon legislative provision. It seems to be a practical solution.¹²⁰

2.125 The MAA advised the Committee that new appointments to the MAC were approved by the Government on 10 May 2010, to take effect from 1 June 2010.¹²¹

2.126 Dr Andrew Morrison SC, a member of the State Committee of the Australian Lawyers Alliance, suggested that the timing of these reappointments may be connected to the timeframe for the Committee's review process:

It is no coincidence that the council's reappointment occurred something like 16 days before this Committee started sitting, so this Committee is obviously serving a function in terms of putting pressure on the MAA and the Minister to do what should have been done a long time ago.¹²²

¹¹⁷ Answers to pre-hearing questions on notice, MAA, Question 35, p 20.

¹¹⁸ Ms Donnelly, Evidence, 11 June 2010, p 4.

¹¹⁹ Mr Stone, Evidence, 11 June 2010, p 30.

¹²⁰ Mr Stone, Evidence, 11 June 2010, p 30.

¹²¹ Answers to pre-hearing questions on notice, MAA, p 10.

¹²² Dr Andrew Morrison, Senior Counsel; Member, State Committee, Australian Lawyers Alliance, Evidence, 11 June 2010, p 42.

- 2.127** Ms Geniere Aplin, the Chairperson of the MAA Board and the MAC, indicated that the first meeting of the newly appointed MAC, scheduled for 15 June 2010, would afford an opportunity for Council members to raise issues that may have lapsed during the period of inactivity:

The first meeting we intend to talk to the members in a consultative way about what needs to be on the agenda, but the purpose of the council is very much for matters to be referred to it by the board, or from the Minister, to then establish the strategy. At the first meeting we will be talking about matters that have not been discussed obviously in that 16 months and understand whether there are any issues that the members have that they would like us to discuss moving forward ...¹²³

- 2.128** In September the MAA advised that, since the Committee's public hearings, the MAC has met on 15 June 2010, 27 July 2010 and 14 September 2010. The next meeting is scheduled for 9 November 2010.¹²⁴

Committee comment

- 2.129** Strong stakeholder relationships are essential to ensuring that the MAA and the Motor Accidents Scheme continue to meet the needs of participants by being aware of, and responsive to, changes in the operating environment.
- 2.130** It is due to the importance of quality stakeholder relationships that the Committee was deeply concerned about the significant period of inactivity of the MAC, particularly as this is the second time that such a lapse has occurred. The Committee believes that a functioning MAC is a central pillar in identifying and facilitating improvements to the Scheme.
- 2.131** The Committee is also concerned that, as one stakeholder speculated, it may have taken the commencement of our Tenth Review to provide the necessary impetus for the reappointment of the MAC's membership in May this year. This has led the Committee to question whether the move to a biennial review process, as we recommended in the Ninth Review and which was subsequently implemented, was as prudent as we thought. Whilst the Committee does not at this stage consider it necessary to revert to an annual review process, we will continue to closely monitor the effectiveness of the biennial review process to ensure that we are able to properly exercise our supervisory function.
- 2.132** The Committee believes that action should be taken to eliminate periods where the MAC is not be operational due to a lapse in membership. Accordingly, the Committee recommends that the Minister for Finance pursue an amendment the *Motor Accidents Compensation Act 1999* to require that the membership of the MAC only lapses upon the appointment of a new membership group, or alternatively, that provision is allowed for interim membership to be granted between the time that one period of membership ceases and another membership is appointed. In determining the form of the proposed amendment, consideration should be given to the approaches used to appoint the membership of similar advisory bodies as well as to the views of the MAC.

¹²³ Ms Aplin, Evidence, 11 June 2010, p 4.

¹²⁴ Email from Mr John Dietrich, Manager, Ministerial and Community Assistance, Motor Accidents Authority to Principal Council Officer, 21 September 2010.

Recommendation 3

That the Minister for Finance pursue an amendment to the *Motor Accidents Compensation Act 1999* to require that the membership of the Motor Accidents Council only lapses upon the appointment of a new membership group or, alternatively, to allow provision for interim membership to be granted between the time that one period of membership ceases and another membership is appointed. In determining the form of the amendment consideration should be given to the approach used to appoint the membership of similar advisory bodies and to the view of the Motor Accidents Council on this matter.

- 2.133** The Committee also notes the recent commitment from the Minister for Finance to appoint a representative of the Motorcycle Council of NSW to the MAC (see paragraph 2.15). The Committee further notes that the Motor Accidents Compensation Amendment Bill 2010, introduced to the Legislative Assembly on 24 September 2010, will amend the *Motor Accidents Compensation Act 1999* to allow the Minister for Finance to appoint up to four additional members to the MAC. The Committee supports the decision to broaden the representation of the MAC and, in particular, to include a representative of the Motorcycle Council of NSW.

Chapter 3 Insurer profits and other issues

This Chapter begins by examining the issue of the level of insurer profits under the Motor Accidents Scheme. As in previous reviews, participants in the Committee's Review hold widely divergent views on the appropriateness of the levels of insurer profits under the Motor Accidents Scheme. The Chapter also discusses issues raised by stakeholders in relation to legal costs and the Motor Accidents Compensation Regulation 2005. The Chapter concludes by considering the discount rate applied to compensation awarded for future economic loss.

Insurer profits

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

Past Committee Reviews

3.2 Insurer profits was one of the key issues discussed in the Committee's *First, Second, Third and Fourth Review Reports*, although no specific recommendations were made.¹²⁵

3.3 The Committee's *Fifth Review Report*, however, made a number of recommendations relating to the way in which the MAA reported on insurer profits. These recommendations included that:

- the MAA present a separate and specific report on insurer profits to the Committee on an annual basis,
- a copy of the report on insurer profits be included in the MAA Annual Report to facilitate public access to the information, and
- the report on insurer profits contain details including the MAA's assessment of the profit margin and the actuarial basis for its calculations.¹²⁶

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

- determining a suitable quantum of total capital (net assets) for an insurer,
- determining a suitable allocation of insurer capital,

¹²⁵ NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – First Report*, Report 13, June 2000, p 9; NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Second Report*, Report 16, February 2001, pp 12-17; NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Third Report*, Report 19, February 2002, pp 10-12; NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Fourth Report*, Report 24, December 2002, p 1.

¹²⁶ 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, pp 39-40.

- calculating a profit loading that would service the allocated capital at a fair rate of return.¹²⁷
- 3.5** The Committee recommended that the MAA explore the trends in insurer profits since the 1999 amendments to the Scheme and include that information in the report on insurer profits.¹²⁸
- 3.6** The Government response to the *Fifth Review Report* advised that the MAA would include a statutory report on insurer profits in its future annual reports, commencing with the *Annual Report 2002/03*. The response also included a detailed explanation of the objective criteria and methodology prepared by Taylor Fry and adopted by the MAA for assessing the profit component of a premium.¹²⁹
- 3.7** In the Committee's Sixth Review, some stakeholders again expressed concern about the level of insurer profits under the Scheme.¹³⁰ The Committee's recommendations were similar to those from the *Fifth Review Report*, requesting that the MAA annually provide a separate and specific report on the level of insurer profits to the Committee.¹³¹
- 3.8** The Government response to the *Sixth Review Report* reiterated that the MAA would include its statutory report on insurer profit in annual reports, commencing with the *Annual Report 2002/03*. The response also noted that the MAA was satisfying its statutory obligations set out under section 28(1) and 28(2) of the *Motor Accidents Compensation Act 1999* by including an assessment of insurer profits in its annual reports.¹³²
- 3.9** During the Seventh Review it was again argued by several stakeholders that insurers have earned excessive profits in each accident year since the introduction of the 1999 reforms.¹³³ The Committee's *Seventh Review Report* contained an extensive discussion of the issue of insurer profits, including both prospective and retrospective profit.¹³⁴ The Committee noted the complexity of the issue of insurer profits. It concluded that its role as a parliamentary body, with a responsibility to oversee the performance of the MAA, was to determine if the MAA had exercised its functions under the *Motor Accidents Compensation Act 1999* in relation to insurer profits in a proper manner.¹³⁵ The Committee observed that its role did *not* require the Committee to act as an actuary in examining the issue of insurer profits.¹³⁶

¹²⁷ Standing Committee on Law and Justice, Report 25, pp 40-44.

¹²⁸ Standing Committee on Law and Justice, Report 25, p 44.

¹²⁹ NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Fifth Report*, Report 25, April 2004, pp 2-5.

¹³⁰ NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Sixth Report*, Report 27, May 2005, p 27.

¹³¹ Standing Committee on Law and Justice, Report 27, p 30.

¹³² NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Sixth Report*, Report 27, May 2005, pp 2-3.

¹³³ NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Seventh Report*, Report 31, September 2006, pp 26-27.

¹³⁴ Standing Committee on Law and Justice, Report 31, pp 10-39.

¹³⁵ Standing Committee on Law and Justice, Report 31, p 12.

¹³⁶ Standing Committee on Law and Justice, Report 31, p 30.

- 3.10** The Committee noted the difficulties of forecasting profits given the long tail nature of the Scheme, and acknowledged 'that it is highly likely that there will be significant discrepancy between profit margins in CTP premiums filed with the MAA and the profit that will be realised on those premiums.'¹³⁷
- 3.11** The Committee further noted that the *Motor Accidents Compensation Act 1999* provides the MAA with the authority to reject CTP premiums if that premium will not fully fund the present or future liabilities of the insurer, or if the premium is considered to be excessive.¹³⁸ The *Motor Accidents Compensation Act 1999* states that a premium will not 'fully fund' liabilities unless it includes 'a profit margin in excess of all claims, costs and expenses that represents an adequate return on capital invested and compensation for risk taken'.¹³⁹ However, the Act does not define what it meant by 'adequate return on capital', nor does it define the term 'excessive'.¹⁴⁰
- 3.12** The Committee found, on the advice of the MAA, that the gap between estimated and realised insurer profits was attributable to a number of factors, including reductions in claims frequency, propensity to claim and the average cost per claim. With these issues in mind, the Committee concluded that it was '... satisfied that the profit estimates are sufficiently reliable for the Committee's purposes...' and that the MAA had 'acted reasonably' in the execution of its statutory role.¹⁴¹
- 3.13** The issue of insurer profits was not examined at length in either the *Eighth* or *Ninth Review Reports*, although stakeholders maintained their strong criticism about the level of insurer profits. During the Eighth Review, the MAA advised that the level of insurer profit fell within the range considered appropriate by the MAA.¹⁴²
- 3.14** In the *Ninth Review Report*, the Committee noted the downward pressure on insurer profits since 2006/07, which was attributed to the introduction of the Lifetime Care and Support Scheme.¹⁴³ The MAA again advised the Committee that it considered the range of profit margins for the reporting year to be reasonable.¹⁴⁴
- 3.15** During the current Review, a number of stakeholders again raised the level of insurer profits as an issue of concern. Accordingly, the Committee considered it appropriate to revisit the issue of insurer profits in some detail in this report, particularly as the Committee is now conducting its reviews on a biennial basis. At the outset, however, the Committee wishes to reiterate that its role has not changed since the *Seventh Review Report*, and that its role is to inquire into whether the MAA has properly performed its functions under the Act in relation to the issue of insurer profit.

¹³⁷ Standing Committee on Law and Justice, Report 31, p 30.

¹³⁸ *Motor Accidents Compensation Act 1999*, s 27(1); Standing Committee on Law and Justice, Report 31, p 14.

¹³⁹ *Motor Accidents Compensation Act 1999*, s 27(8)(c).

¹⁴⁰ Standing Committee on Law and Justice, Report 31, p 14.

¹⁴¹ Standing Committee on Law and Justice, Report 31, p 30 and p 38.

¹⁴² NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Ninth Report*, November 2007, Report 34, p 51.

¹⁴³ NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Ninth Report*, Report 36, September 2008, p 16.

¹⁴⁴ Standing Committee on Law and Justice, Report 36, p 17.

Overview of insurer profits

- 3.16** This section provides a brief overview of insurer profits under the Motor Accidents Scheme. A more comprehensive overview can be found in the Committee's *Seventh Review Report*.¹⁴⁵
- 3.17** There are seven insurers in the Motor Accidents Scheme which have remained unchanged since 2007.¹⁴⁶ These insurers are: AAMI, Allianz, CIC Allianz, GIO, NRMA, QBE and Zurich.
- 3.18** Insurers are required by the *Motor Accidents Compensation Act 1999* to report to the MAA the profit margin on which their premiums are based and the actuarial basis for calculating their profit margin.¹⁴⁷ Insurers report to the MAA on two types of profits: prospective profit and realised profit.

Prospective profit

- 3.19** The MAA receives a premium filing from each insurer at least annually, and gives consideration to all of the factors that have gone into calculating the premium.¹⁴⁸ The MAA may reject a premium if that premium will not fully fund the insurers' liabilities, or if the prospective profit is considered to be 'excessive'.¹⁴⁹
- 3.20** Section 27(8)(c) of the *Motor Accidents Compensation Act 1999* states that 'a premium will fully fund a liability referred to in this section if the premium is sufficient to provide a profit margin in excess of all claims costs and expenses that represents an adequate return on capital invested and compensation for the risk taken'.¹⁵⁰
- 3.21** The MAA outlined the factors that it considers when evaluating prospective profit margins, such as long term interests rates and claims frequency and size:

The main factors influencing the calculation of prospective insurer profit margins are a matter for the individual insurers. Factors reported to the MAA by insurers include the need to maintain minimum capital requirements set by APRA as well as additional capital reserves in order to maintain a prudential margin and the confidence of stakeholders; targeted returns on capital; long term interest rates; and claim frequency and size.¹⁵¹

- 3.22** The MAA's *Annual Report 2007/08* indicated that the profit margin for the reporting year averaged at 7.7 per cent.¹⁵² According to the *Annual Report 2008/09*, the profit margin rose to 8.1 per cent the following year.¹⁵³

¹⁴⁵ Standing Committee on Law and Justice, Report 31, pp 10-39.

¹⁴⁶ MAA, *Annual Report 2007/08*, p 13; MAA, *Annual Report 2008/09*, p 12.

¹⁴⁷ *Motor Accidents Compensation Act 1999*, s 28(1).

¹⁴⁸ MAA, *Annual Report 2007/08*, p 73.

¹⁴⁹ MAA, *Annual Report 2007/08*, p 73.

¹⁵⁰ *Motor Accidents Compensation Act 1999*, s 27(8)(c).

¹⁵¹ Answers to pre-hearing questions on notice, MAA, p 6.

¹⁵² MAA, *Annual Report 2007/2007*, p 73.

¹⁵³ MAA, *Annual Report 2008/2009*, p 75.

- 3.23** The MAA advised that prospective profit margins in the past six years ranged between four per cent and 11 per cent, and that margins have fallen since the introduction of the Lifetime Care and Support Scheme:

Over the past six years, estimated profit margins have ranged from 4% to 11% for individual insurers, with an industry average between 6% and 8.7%. Since the introduction of the Lifetime Care and Support Scheme, lower profit margins have been experienced by the insurers. These have averaged at 8.1% for the current reporting year.¹⁵⁴

- 3.24** The table below sets out the prospective profit margins in insurer filings approved by the MAA from 2003/04 to 2008/09.

Table 3.1 Profit margins in insurer filings¹⁵⁵

Filing period	Range (%)	Weighted average (%)
2003/04	7.5 – 9.7	8.5
2004/05	7.5 – 10.0	8.7
2005/06	7.5 – 10.0	8.7
2006/07	4.0 – 11.0	6.0
2007/08	5.0 – 9.3	7.7
2008/09	4.7 – 9.3	8.1

- 3.25** As with previous years the MAA reported in 2008/09 that it '... considers the reported range of profit margins to be reasonable'.¹⁵⁶

Realised profit

- 3.26** Section 5(2)(d) of the *Motor Accidents Compensation Act 1999* stipulates that '... insurers, as receivers of public money that is compulsorily levied, should account for their profit margins, and their records should be available to the Authority to ensure that accountability'.¹⁵⁷
- 3.27** The assessment of the realised profit involves a review of the development of the underwriting year from the time of the premium filing, which includes estimates of the prospective profit. The actual profit or loss made by the insurer will be dependent on the extent that the assumptions made in the premium filing are fulfilled.¹⁵⁸
- 3.28** Each year, the MAA's *Annual Report* details the development of the Scheme by underwriting year, with reference to a number of factors such as the monetary value of premiums written during the year, the monetary amount of profits or loss made by insurers, and the percentage

¹⁵⁴ MAA, *Annual Report 2008/2009*, p 75.

¹⁵⁵ MAA, *Annual Report 2008/2009*, p 75.

¹⁵⁶ MAA, *Annual Report 2008/2009*, p 75.

¹⁵⁷ *Motor Accidents Compensation Act 1999*, s 5(2)(d).

¹⁵⁸ MAA, *Annual Report 2008/2009*, p 75.

of premiums that this profit or loss represents.¹⁵⁹ The table below outlines the development of the Scheme by underwriting year, as shown in the *MAA's Annual Report 2008/09*.

Table 3.2 Scheme development by underwriting year¹⁶⁰

Underwriting year ended 30 September	Premiums written during the year (\$millions)	Estimate of discounted value of profit or loss for the insurer	
		Amount (\$million)	% of premiums
2000	1,325	396	30%
2001	1,321	371	28%
2002	1,342	419	31%
2003	1,395	330	24%
2004	1,476	369	25%
2005	1,451	248	17%
2006	1,426	180	13%
2007	1,221	64	5%
2008	1,178	17	1%

3.29 When questioned on the one per cent profit for 2008, the MAA advised that this figure would change as time progressed, due to the finalisation of claims from that underwriting year:

Because most claims from 2008 are not yet finalised, the reported 1% profit for 2008 is based on incomplete recent claims experience. As more claims are finalised estimated profit margins become more robust and this is monitored by the Authority over a longer period of time.¹⁶¹

3.30 The MAA's *Annual Report 2008/09* indicates that caution should be exercised when examining the estimated profit margin for recent years because '[e]stimates for recent underwriting years are much more sensitive to uncertain assumptions regarding future claims payments due to the large number of claims still to be finalised'.¹⁶²

Criticisms of the level of insurer profit

3.31 As in previous reviews, a number of Review participants were concerned about the size of the profits realised by insurers. For example, the NSW Bar Association noted that over several years of the Scheme's operation, insurers had retained profits well in excess of the prospective forecasts:

¹⁵⁹ See for example MAA, *Annual Report 2007/2007*, p 74 and MAA, *Annual Report 2008/2009*, p 75.

¹⁶⁰ MAA, *Annual Report 2008/2009*, p 75.

¹⁶¹ Answers to pre-hearing questions on notice, MAA, pp 7-8.

¹⁶² MAA, *Annual Report 2008/2009*, p 75.

It is now time to acknowledge that to date, the Motor Accidents Scheme has failed to deliver. The Scheme has been designed to provide a return to insurers of approximately 8% of premiums written. Over the first six years of operation of the Scheme, insurers have and will retain over 25% of the premium written. The excess profits (above and beyond a reasonable rate of return) for that period are in excess of \$1.5 billion. The *Motor Accidents Compensation Act 1999* has presented an enormous windfall to insurers.¹⁶³

3.32 The Bar Association framed its concern about the level of profits with reference to the limitations that the Scheme has placed on the compensation that injured people can receive:

The Act excluded 90% of motor accidents victims from recovering compensation for their pain and suffering. The Act slashed the recovery of legal costs which also led directly to reduced payments for accident victims as they were forced to pay a much larger solicitor/client costs gap out of their reduced award of damages. At the same time that this has occurred, insurers have pocketed over \$1.5 billion in surplus profits.¹⁶⁴

3.33 The Bar Association provided a table of data it compiled from the MAA's Annual Reports which compares the profit projections from the Annual Reports from 2003/04 onwards. The Bar Association notes that '[w]hat the table clearly shows is that whilst the initial projections as to profitability may be within reasonable bounds, within two or three years of the initial projection, profits have substantially grown.'¹⁶⁵

Table 3.3 NSW Bar Association: Summary of insurer profitability projections: MAA Scheme performance reports 2003/04 to 2008/09*

	Premium collected (\$m)	03/04 MAA profit projection %**	04/05 MAA profit projection %	05/06 MAA profit projection %	06/07 MAA profit projection %	07/08 MAA profit projection %	08/09 MAA profit projection %	"Surplus" profits*** (\$m)	Increase since 07/08 Annual report
2000	\$1.325	23.7	24.8	26.5	30	30	30	\$265	-
2001	\$1.321	21.3	19.8	20.5	27	28	28	\$238	-
2002	\$1.342	20.6	21.5	18.5	27	30	31	\$281	\$14m
2003	\$1.395	15.6	18.9	9.7	20	22	24	\$195	\$28m
2004	\$1.476	-	-	9.3	19	21	25	\$221	\$59m
2005	\$1.451	-	-	-	10	13	17	\$101	\$58m
2006	\$1.426	-	-	-	5	9	13	\$43	\$57m
2007	\$1.221	-	-	-	-	3	5	-\$61	\$24m
2008	\$1.178	-	-	-	-	-	1	-\$106	-

* Figures taken from MAA annual reports from 2003/04 through 2008/09.

** % of premium collected projected by MAA to be retained by CTP insurers as profit.

*** Projected profit less allowance of 10% for "reasonable" profit in dollar terms.

3.34 In interpreting the table the Bar Association noted by way of example that: '[t]he first profit assessment for the 2004 year was in the 2005/06 annual report. The projected insurer profit for that year was 9.3%. The most recent projection is 25%.¹⁶⁶

¹⁶³ Submission 4, NSW Bar Association, p 4.

¹⁶⁴ Submission 4, p 5.

¹⁶⁵ Submission 4, p 4.

¹⁶⁶ Submission 4, p 4.

3.35 Mr Andrew Stone, a member of the Common Law Committee of the NSW Bar Association, and the Association's nominee on the MAC, highlighted the accumulative impact of the underestimation of insurer profits:

... it has now been about 10 years since this Scheme was introduced. They should have been making about \$130 million a year out of it – 10 per cent of the premium written each year. In fact, some years they have been making 30 per cent, some years 25 per cent. If they did not make a single cent in profits for the next 10 years, they would still be on par to make their average 10 per cent over the 20-year span. You would have to take away every cent of profit for the next 10 years to bring them back to the reasonable profit they ought to have made.¹⁶⁷

3.36 The Australian Lawyers Alliance similarly noted that '... at all times since its inception, insurers' profitability has greatly exceeded the 8% return for which the Scheme was framed. Moreover, returns have on occasions been anything up to four times the return budgeted.¹⁶⁸

3.37 The Australian Lawyers Alliance argued that these excess profits are attributable to insurers making very pessimistic estimates as to the amount of the future payouts, meaning that profits increase as assumptions that have been made never eventuate:

... profitability for particular years when followed through on a year by year basis increases over time as risks for which allowance was made, never come to fruition. It is simply too easy for insurers to hide excessive profitability in excessively pessimistic calculations of future payouts. The history of what is now a mature scheme, clearly establishes that there is a capacity to pay much better benefits to the injured than has been the case since its inception.¹⁶⁹

3.38 Dr Andrew Morrison SC, a member of the State Committee of the Australian Lawyers Alliance, said that while the conservative assessment of risk was an understandable practice for insurers to pursue, this practice had the effect of disguising the true extent of insurer profit from the Scheme:

... what the insurers are doing – not necessarily deliberately but in practice – is disguising the full extent of their profits by giving excessive estimates as to their future liability. Now, one can understand them being conservative about their risks, but they are so conservative that the effect is that in a scheme that was designed to provide an eight per cent for insurers, they have over a very long period of time grossly exceeded that at a very modest risk to themselves.¹⁷⁰

3.39 The Australian Lawyers Alliance included in its submission to the Committee a February 2010 report that it commissioned from Cumpston Sarjeant Pty Ltd which undertakes a high level analysis of the history of the profitability of the CTP Scheme in NSW, and the corresponding

¹⁶⁷ Mr Andrew Stone, Member, Motor Accidents Council, as nominated by the NSW Bar Association; Member, Common Law Committee, NSW Bar Association, Evidence, 11 June 2010, p 32.

¹⁶⁸ Submission 2, Australian Lawyers Alliance, p 3.

¹⁶⁹ Submission 2, pp 3-4.

¹⁷⁰ Dr Andrew Morrison, Senior Counsel; Member, State Committee, Australian Lawyers Alliance, Evidence, 11 June 2010, p 41.

efficiency of the Scheme.¹⁷¹ This report found that realised profit margins for insurers were 'significantly higher' than the prospective profit margin identified when the premiums were filed:

The general pattern, with a few exceptions is for the profit percentage to increase over time. It is reasonable to expect that the more recent underwriting years shall follow a similar pattern and the resultant profit margins shall be significantly higher than the prospective profit margin upon filing.¹⁷²

3.40 The report noted that the data for earlier years is more reliable than the information for more recent years, as more claims have been paid:

The magnitude of the expected increases would be lower for the earlier years, as more payments have been made, so the outstandings and the corresponding margins are lower.¹⁷³

3.41 The 2010 Cumpston Sarjeant report also noted that because the Motor Accidents Scheme is a long-tailed scheme, meaning that there is a gap between the receipt of premiums and the payment of claims, insurers were able to invest premiums received and potentially earn returns on that investment:

As CTP is a long-tailed insurance class, there is a time gap between the receipt of premiums and the payment of associated claims and expenses. Costs such as acquisition expenses, reinsurance premiums, and bulk-billed hospital & ambulance fees are paid relatively quickly (i.e. in the first two years) following the writing of premium. The delay in many other payments allows insurers to invest a proportion of premium receipts in expectation of investment returns prior to the payment of claims.¹⁷⁴

3.42 The 2010 Cumpston Sarjeant report suggested that these investment returns would *not* have been included in the estimates of prospective profits, meaning that investment returns could contribute to the actual profit realised by insurers:

... for underwriting years to 2008, estimated profit at the time of the 2008/09 annual report exceeds the level of prospective profit estimated in the relevant premium filings. It is significant to note that these estimates of profit do not appear to include any further profits which may have been derived from investment returns. It would be expected that investment returns would add to the actual profit earned by the insurers.¹⁷⁵

3.43 The Australian Lawyers Alliance also asserted that insurers do not take into account income that may be earned on investments when they forecast their prospective profit: '[m]oreover,

¹⁷¹ Submission 2 - Appendix 2, *Supplementary report of Cumpston Sarjeant Consulting Actuaries, prepared in February 2010*, Australian Lawyers Alliance, p 1. Note: this report is an update of a June 2005 report by Cumpston Sarjeant.

¹⁷² Submission 2 - Appendix 2, p 3.

¹⁷³ Submission 2 - Appendix 2, p 3.

¹⁷⁴ Submission 2 - Appendix 2, p 5.

¹⁷⁵ Submission 2 - Appendix 2, p 5.

these calculations ignore the fact that the insurers have the benefit of investing (presumably profitably) the premiums whilst they wait to see if there are claims'.¹⁷⁶

- 3.44** The 2010 Cumspton Sarjeant report acknowledged that variable rates of return on any investments would impact on the level of insurer profits:

While not all premiums would be invested in growth assets, it is reasonable to assume that the high equity returns until late 2007 would have contributed to CTP profits, but since that time lower returns (and indeed negative for some periods) would lessen the CTP profits.¹⁷⁷

- 3.45** Mr Stone expressed concern that the MAA was repeatedly setting unrealistic budgets for insurers:

It is very difficult because the MAA comes back and says “But this year we are setting them a 10 per cent budget and we are doing the right thing.” The response of the MAA every time is “But we are setting the budgets right. There is nothing more we can do”. It requires you to ask: are they really setting the budgets right if it is being this consistently wrong?¹⁷⁸

- 3.46** The NSW Bar Association emphasised these concerns in its answers to questions on notice, noting that the MAA did not appear to be taking action to revise its approach to premium setting to minimize the chance of windfall profits occurring:

It is extremely unfortunate that the MAA does not provide the Standing Committee with realistic appraisals of just how significantly insurer profits have blown out in previous years. There is no analysis presented to the Standing Committee as to why this has occurred. There is no suggestion that the MAA is revising its approach to premium setting to avoid repetition of the windfall profits that have occurred in previous years. Nor is there any evidence that the MAA is taking steps to ensure that such blow outs in profits don't continue in future years.¹⁷⁹

Insurer's perspective

- 3.47** The Insurance Council of Australia (ICA) argued that prospective profit levels were appropriate. The ICA also provided information in response to the assertions made by some stakeholders that excessive profits are being made.

- 3.48** The ICA explained that the financial provisioning undertaken by the insurance industry is intended to ensure that insurers are able to meet any claims that are made over the long-term, rather than aimed at earning profits:

This type of financial provisioning by the insurance industry is vital and is also mandated for legal and regulatory purposes. It ensures that the insurance industry can make financial payments to an injured person when they are required by the person. It

¹⁷⁶ Submission 2, p 4.

¹⁷⁷ Submission 2 - Appendix 2, p 5

¹⁷⁸ Mr Stone, Evidence, 11 June 2010, p 35.

¹⁷⁹ Answers to questions on notice taken during evidence 11 June 2010, Mr Alastair McConnachie, A/Executive Director, NSW Bar Association, p 2.

is incorrect and ill informed to claim that funds set aside for provisioning are simply profit for insurance companies ...¹⁸⁰

- 3.49** The ICA referred to the role of the MAA in ensuring that the Scheme is fully funded and notes that the MAA considers the prospective profit margins to be reasonable:

The MAA ensures that the CTP Scheme is fully funded from year to year and that CTP insurers are in a financial position to meet all claim costs as they arise and for the full duration of the claim. Over the last six years (2003-2004 to 2008-2009) insurer profit margins have averaged between 6 and 8.7%. The MAA considers this range of profit margin to be reasonable.¹⁸¹

- 3.50** Mr Anthony Mobbs, a member of the Motor Accidents Insurance Policy Committee of the ICA, described the multistage process that insurers follow in setting their premiums:

The premium determination guidelines are extensive and set out a detailed process which we have to follow, and it involves an examination of our own claims data, the industry's claim data. We look at that and work out what the trends are. We have several qualified actuaries internally who prepare that analysis for us. The schedules that we put together in accordance with our premium determination guidelines are then assessed by our external actuaries – an independent external actuary – and they help us prepare the final document. The final submission is in excess of 100 pages long so there are a multitude of disclosures and examination of all of the assumptions, including average weekly earnings rates and inflation rates, yields on bonds, et cetera. Once we put that submission together we then submit that with our set of premiums to the MAA for examination. They have their own external actuary look at it and I understand that they have an extensive process of examination as well. So it is a very complex and I would like to say robust process as well that we go through involving many different parties.¹⁸²

- 3.51** The ICA said that insurer profits were complex to determine because, as claims are rarely paid out immediately, it takes time for the nature of a claimants medical and financial needs to become apparent:

The issue of insurer profits cannot be understood merely on the basis of a simple equation being the amount of premiums minus claims paid totals insurer profits for that year. Almost all claims cannot be paid out in full immediately. This is because it takes time for injuries to stabilise and therefore time for the insurer to determine the extent of a person's injury and a person's need for subsequent rehabilitation ... To ensure that injured people receive the appropriate level of ongoing support (both medical and financial), insurers make financial provision for future payment of that support over a period of time. This ensures that money is available to provide the appropriate level of compensation when the injured person needs it, and when a person's injuries and rehabilitation needs are more completely understood.¹⁸³

¹⁸⁰ Submission 6, Insurance Council of Australia, pp 4-5.

¹⁸¹ Submission 6, pp 4-5.

¹⁸² Mr Anthony Mobbs, Member, Motor Accidents Insurance Policy Committee, Insurance Council of Australia, Evidence, 11 June 2010, p 56.

¹⁸³ Submission 6, p 4.

3.52 Mr Mobbs advised that payments of claims can occur anywhere up to 20 years after the policy has been taken out:

... we make payments up to 20 years after we write the policy itself. You can see that the first 5 per cent of payments we make are within the first two years. We do not pay the last 5 per cent for anywhere from 10 to 20 years after we write the policy.¹⁸⁴

3.53 The ICA provided the following analysis to demonstrate when claim payments are made after the setting of the original premium:

- five per cent of claims payments are made up to two years after setting the premiums
- the next 20 per cent of claim payment are made up to three and a half years after setting the premiums
- the next 25 per cent of claim payment are made up to four and a half years after setting the premiums
- the next 25 per cent of claim payment are made up to five and a half years after setting the premiums
- the final 25 per cent of claim payment are made up to 20 years after setting the premiums.¹⁸⁵

3.54 The ICA noted that because of the extended period of time over which claims can be made, the assumptions that were used to originally estimate profit levels are likely to be widely divergent from the actual outcome:

Our members report that the payments made in the few years after setting the premiums are likely to closely match the assumptions. However, we submit that for the payments made up to 20 years later than the original premium was set, it is likely that the actual experience will differ substantially from the original assumptions.¹⁸⁶

3.55 Mr Mobbs stressed that '[t]here can be all manner of things that might affect – even media storms – our future payments. It is several years before you can accurately assess our profitability'.¹⁸⁷ The ICA also identified a number of external factors beyond the control of insurers that influence profit levels, such as:

- legislation and regulations
- case law
- interest rates and other economic factors
- claims management practices.¹⁸⁸

¹⁸⁴ Mr Mobbs, Evidence, 11 June 2010, p 51.

¹⁸⁵ Answers to questions on notice taken during evidence 11 June 2010, Mr Robert Whelan, Executive Director and Chief Executive Officer, Insurance Council of Australia, Question 5, p 5.

¹⁸⁶ Answers to questions on notice taken during evidence 11 June 2010, Mr Whelan, Question 5, p 5.

¹⁸⁷ Mr Mobbs, Evidence, 11 June 2010, p 51.

¹⁸⁸ Answers to questions on notice taken during evidence 11 June 2010, Mr Whelan, Question 5, p 5.

- 3.56** The ICA also highlighted that the recent increase in claims frequency, following a lengthy period of decreasing claims frequency, would have a negative impact on insurer profits:

However, frequency does not always reduce and, in fact, for the 2007/08 underwriting year through to 2009/10, our members report that the claim frequency has increased and is higher than what was expected in the filings for those periods. Accordingly we submit that insurers' filings did not reflect this higher claim frequency until 1 July 2010, resulting in more than two years of premium priced to a lower frequency than what has actually occurred. The Insurance Council submits that this is a clear example that shows insurers' assumptions, while uncertain are not conservative, and that actual profit margins for these two years could be lower than originally estimated.¹⁸⁹

- 3.57** The ICA also noted that the longer period of decreasing claims frequency, which occurred between 2000 and 2008, had resulted in higher than expected profits for insurers:

Although there are certain historical underwriting years (2000 to 2008), where the ultimate profit margins are estimated to be higher than the filed profit margins, we do not believe that this implies any conservatism in the insurer filings. Rather, we submit that this arises when the actual experience is quite different to that which had been expected. For each year from 2000 through to 2008, the actual claim frequency has reduced unexpectedly, and we believe that this is the primary cause of the profit being higher than expected. For every year during this period, neither insurers nor the MAA expected the claim frequency to continue to reduce at the rate it did.¹⁹⁰

- 3.58** Claims frequency is examined in Chapter 2.

- 3.59** The ICA was critical of the 2010 Cumpston Sarjeant report, noting that the report itself acknowledged the difficulties of estimating future profit:

In fact Cumpston Sarjeant has acknowledged the uncertainty of the estimates when they stated "The actual profit to emerge is uncertain, and shall depend on the ultimate payments for each underwriting year".¹⁹¹

MAA's perspective

- 3.60** The Committee raised the concerns of the Bar Association and the Australian Lawyers Alliance about the amount of realized profits made by insurers under the Scheme with the MAA in its pre-hearing questions on notice. The MAA's brief response focused on prospective profits noting that its actuarial advice suggests that the current level of projected margins is considered appropriate in the current market:

The Authority does monitor insurer profit margins and will query any profits that are considered excessive. However, independent actuarial advice is that the projected margins from insurers are currently regarded as reasonable given current market conditions.¹⁹²

¹⁸⁹ Answers to questions on notice taken during evidence 11 June 2010, Mr Whelan, Question 4, pp 3-4.

¹⁹⁰ Answers to questions on notice taken during evidence 11 June 2010, Mr Whelan, Question 4, p 3.

¹⁹¹ Answers to questions on notice taken during evidence 11 June 2010, Mr Whelan, Question 4, p 3.

¹⁹² Answers to pre-hearing questions on notice, MAA, p 8.

3.61 When the issue was raised during the hearings Ms Carmel Donnelly, the General Manager of the MAA, acknowledged the range of views on insurer profits and explained that the role of the MAA was to monitor the matter and take a balanced view based on expert advice:

... the Committee is likely to hear diverse views on insurer profit and they are probably going to range from that the profit is too high to that, if profit is not high enough, insurers will leave the market. Our role is to monitor and take a balanced view. We do it with expert advice and also based on evidence and data analysis. It is certainly a valid point that insurer profits should not be too high...¹⁹³

3.62 Ms Donnelly pointed to a number of factors relevant to the level of profits made by insurers including legal costs and the extension of benefits under the Scheme, such as 'the children's benefit and the blameless accidents defence'.¹⁹⁴

3.63 Ms Donnelly also advised that the MAA had requested the Scheme's actuaries, Taylor Fry, to look at the concerns raised by the Bar Association and the Australian Lawyers Alliance in their submissions and provide a response. Ms Donnelly provided the Committee with a copy of the response and noted that the advice received explains the difficulty in accurately forecasting profit in a long-tail compensation scheme:

That advice does explain the difficulty in accurately forecasting profit in a long-tail compensation Scheme. It also outlines one area of misinterpretation in one of those submissions and it explains that, due to some refinement in the reporting of profit estimates by the MAA, the estimates published in annual reports from 2007 are less likely to change as dramatically as we have seen in previous years.¹⁹⁵

3.64 The Taylor Fry response acknowledges the Bar Association's points regarding the uncertainty of estimating insurer profit as follows:

For a long tailed class of insurance business such as NSW CTP, for which ultimate claims costs are inherently uncertain, any estimate of ultimate insurer profit calculated soon after the end of an underwriting year is uncertain and may turn out to differ considerably from the ultimate outcome.¹⁹⁶

3.65 The advice went on to note that the only way to avoid publishing uncertain estimates would be to publish estimates within a wide range or not publish the estimates for a number of years:

Because of the inherent and unavoidable uncertainty, the only way to ensure that one does not publish estimates which subsequently turn out to differ materially from the ultimate outcome would be: either to publish estimates which show a wide range of possible ultimate outcomes for recent underwriting years (instead of single point estimates), or not to publish any estimates until several years after the end of the underwriting year concerned, which could reasonably be regarded as unhelpful or obstructive.¹⁹⁷

¹⁹³ Ms Carmel Donnelly, General Manager, Motor Accidents Authority of NSW, Evidence, 11 June 2010, p 6.

¹⁹⁴ Ms Donnelly, Evidence, 11 June 2010, p 6.

¹⁹⁵ Ms Donnelly, Evidence, 11 June 2010, p 6; Tabled document, Ms Carmel Donnelly, General Manager, Motor Accidents Authority of NSW, *Letter from Taylor Fry, the Scheme's actuaries, to Ms Donnelly*, 10 June 2010.

¹⁹⁶ Tabled document, *Letter from Taylor Fry, the Scheme's actuaries, to Ms Donnelly*, 10 June 2010, p 6.

¹⁹⁷ Tabled document, *Letter from Taylor Fry, the Scheme's actuaries, to Ms Donnelly*, 10 June 2010, p 6.

3.66 Ms Donnelly also advised the Committee that an independent competition review of the Scheme has been initiated and that one issue it will examine is to look at improvements in financial modeling 'that would assist us in our regulatory matters in [regard to insurer profits]'.¹⁹⁸ She described the review as follows:

What I have done since being appointed is initiate a competition review, which looks both at how do we sustain the players in the market and the environment of competition but also I have, as part of that, commissioned some work by the economist Dr Peter Abelson to undertake that review to look at improvements in financial modelling. It is quite a broad-ranging baseline review to help me to understand where there may be room for improvement ...¹⁹⁹

3.67 No time-frame was provided for the completion of the competition review.

3.68 In addition to the competition review, Ms Donnelly advised that the MAA was undertaking work to improve the profit assessment methodology that is presently used to assess the adequacy of insurer profit estimates, such as examining the possibility of using a multi-year assessment rather than a single-year assessment:

One of the things I am looking at is whether in assessing whether profit is adequate – our current framework looks at the underwriting year that insurers are suggesting new premiums for going forward – could we have a more multi-year approach? Within our current legislation I am certainly exploring options for enhancing our methodology to take that into account.²⁰⁰

3.69 In response to a direct question that was taken on notice about the 'bigger than expected profits' the MAA referred to a passage from the Committee's own conclusions in its Seventh Report, which was tabled in September 2006, and then noted:

The MAA continues to monitor competition within the Greenslip Scheme. In particular, the MAA has commenced a competition review of the compulsory third party scheme to identify improvements to Green Slip regulation which would enhance affordability and fairness of Green Slip pricing by making the Scheme more robust to economic cycles and reforms'.²⁰¹

3.70 The MAA was also asked to by the Committee to comment on the suggestion that the MAA should 'claw back' some of the excessive profits made by the insurers. In response, Ms Donnelly advised that although the *Motor Accidents Compensation Act 1999* grants the MAA a certain level of control over premiums and profits, the MAA is unable to 'claw back' any excess profits that insurers may earn over time:

... the Scheme that we are responsible for implementing has got regulatory oversight, to some degree, over profit. The way that that is designed in the legislation is that the MAA has the power to undertake a compliance assessment when insurers lodge a submission because they want to change their premiums, and we have a six-week period in which we can look at the compliance of the filing of that submission for a change of premiums against four criteria in the Act. We do not have the power within

¹⁹⁸ Ms Donnelly, Evidence, 11 June 2010, p 6.

¹⁹⁹ Ms Donnelly, Evidence, 21 June 2010, p 59.

²⁰⁰ Ms Donnelly, Evidence, 21 June 2010, p 60.

²⁰¹ Answers to post-hearing questions on notice, MAA, p 4.

the legislation as it stands to claw back any excess profits if they eventuate over time.²⁰²

- 3.71** Ms Donnelly explained that if a 'claw back' option was implemented as part of government policy, there are potentially serious consequences whereby insurers could request that the government underwrite any losses that may occur, which would shift the dynamic of the Scheme towards a publicly underwritten insurance scheme:

Moving to a more extensive clawback as a policy option for government, one of the things we would need to consider responsibly is that there may be years of losses and if the provision was there for a clawback of profits above a certain level, then would government have to underwrite the losses and would that change the behaviour of the insurers so that they know that if they do not fully fund government will effectively underwrite and would we have informally moved to a publicly underwritten scheme in which they are not actually bearing the risk?²⁰³

Committee comment

- 3.72** The Committee is acutely aware that the issue of the level of insurer profits has been raised as a concern in all of the Committee's reviews to date. The Committee notes that for the underwriting years from 2000 to 2005, insurer profits have significantly exceeded their prospective profit forecasts. A comparison of Tables 3.1 and 3.3 shows that the statistics are quite stark, particularly when the actual dollar amount of realized profits is considered. For example, in 2003/04 the prospective profit margin is 8.5% and the realized profit reported in 2008/09 for that same period is 30%, or \$265 million. The Committee notes that these figures may not be replicated in years of economic downturn.
- 3.73** This important issue has implications for the effective operation of the NSW Motor Accidents Scheme, the provision of appropriate compensation to people injured in motor vehicle accidents and the level of premiums paid by NSW motorists. In light of the inability to 'claw-back' larger than expected profits, the question arises as what can and is being done to ensure that profits significantly higher than the prospective profit approved by the MAA do not continue to be made.
- 3.74** The Committee reiterates that our role in relation to insurer profits is to inquire into whether the MAA has properly performed its functions under the Act. All the information sought by the Committee from the MAA via the Minister for Finance, including questions based on the valuable input of stakeholders, is sought to better enable the Committee to discharge its function of overseeing the MAA in the exercise of its functions.
- 3.75** The Committee notes that the limited information that it has received from the MAA on the issue of insurer profits during this Tenth Review has made this a difficult task. By way of example, we note the response the Committee received to one of its questions on notice which quoted a lengthy passage from the Committee's *Seventh Review Report*. The Committee is dissatisfied with responses such as this.

²⁰² Ms Donnelly, Evidence, 21 June 2010, p 59.

²⁰³ Ms Donnelly, Evidence, 21 June 2010, p 60.

- 3.76** The Committee understands the difficulties faced by the MAA and insurers in forecasting prospective profits in a long tail scheme. It is acknowledged that external factors, which are beyond the control of both the MAA and insurers, will influence the level of realised profit over the life of the premium.
- 3.77** The Committee also acknowledges the advice from the MAA that its actuaries have found that the current level projected profit margins are appropriate in the current market conditions. We are also cognizant that the MAA's own actuaries, Taylor Fry, raised issues with the consultant report relied upon by the Australian Lawyers Alliance to support their arguments and some of the assumptions made by the Bar Association in its analysis of the issues.
- 3.78** The Committee welcomes the advice from the MAA that an independent competition review of the Scheme has been initiated, and that one issue to be explored is ways to improve the method of financial modeling used by the MAA. The Committee also notes that the MAA has indicated that it will explore alternative methods of profit assessment methodology, such as using a multi-year profit assessment tool rather than a single-year assessment tool. The Committee considers that the independent competition review should closely explore this alternative profit assessment methodology to ensure that the MAA is utilising the best possible assessment tools.
- 3.79** The Committee believes that extensive stakeholder consultation should occur as part of the competition review and the exploration of alternative methods of profit assessment methodology, including consultation with the Motor Accidents Council and other relevant stakeholders, to ensure that the full range of perspectives on this challenging issue is considered.
- 3.80** The Committee further considers that the results of this independent review, and any consequent proposals to change the profit assessment tools used by the MAA, should be made publicly available prior to the Committee's next review in 2012. This will enable the Committee, with the assistance of stakeholders, to undertake an informed examination of both the findings of the review and any reforms that have subsequently been proposed or implemented.
- 3.81** The Committee is sufficiently concerned about the issue of the perceived excessive insurer profit to have considered whether it is appropriate to recommend that this matter be referred to the Independent Pricing and Regulatory Tribunal (IPART) to examine. The Committee notes that a matter such as this would fall within IPART's functions (on the request of the Premier). We also note that the *Motor Accidents Compensation Act 1999* already provides a role for IPART to play in the Scheme in terms of arbitrating disputes between the MAA and a licensed insurer.²⁰⁴
- 3.82** Unlike the Committee, IPART could avail itself of the necessary technical expertise to examine this issue fully in order to determine whether changes need to be made to the Scheme, or the way in which the Scheme is administered by the MAA. Now that the Scheme is in its eleventh year it may be appropriate that such a review be undertaken.

²⁰⁴. *Motor Accidents Compensation Act 1999* (NSW), s27(6)(c)

- 3.83** The Committee prefers however, to await the outcome of the two review processes initiated by the MAA before considering in its Eleventh Review in 2012 whether this course of action is warranted.

Recommendation 4

That the independent competition review commissioned by the Motor Accidents Authority and the work being undertaken by the Authority to improve the profit assessment methodology involve extensive stakeholder consultation, including with the Motor Accidents Council and the stakeholders who have contributed to the Committee's Review in relation to insurer profits.

That the Motor Accidents Authority make publicly available the results of this Review, and any subsequent proposals to change the profit assessment methodology used by the Motor Accidents Authority, as soon as possible.

Legal costs for injured persons

- 3.84** The issue of legal costs under the Motor Accidents Scheme, which are regulated by the Motor Accidents Compensation Regulation 2005 (the 'Cost Regulation'), arose as a concern for participants during the current Review, as it has during the Committee's four previous reviews.
- 3.85** The Cost Regulation governs, amongst other things, the maximum costs recoverable by legal practitioners for services provided to a claimant or an insurer in any motor accidents matter.²⁰⁵ In practice, legal representatives set their own fees, which are paid by their clients, and if the clients claim is successful, the insurer reimburses the claimant an amount according to the Cost Regulation, leaving the client liable for any difference between the fee charged and the recoverable cost.
- 3.86** Over the years participants in the Committee's reviews, such as the Law Society of NSW and the NSW Bar Association, have repeatedly expressed concerns that as a consequence of increasing legal fees, the Cost Regulation does not adequately provide for recoverable costs, which can leave claimants unfairly disadvantaged.²⁰⁶
- 3.87** In the *Sixth Review Report*, which was tabled in May 2005, the Committee recommended that the MAA investigate methods to analyse the effects of the cost regulation and review the legal costs schedule.²⁰⁷ The Government response to the *Sixth Review Report* advised that the effect of the legal costs regulation is regularly reviewed by the MAA and that a detailed review of the

²⁰⁵ 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.

²⁰⁶ See for example Standing Committee on Law and Justice, Report 27, pp 15-16; Standing Committee on Law and Justice, Report 31, pp 81-84; Standing Committee on Law and Justice, Report 34, pp 66-72; NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Ninth Report*, Report 36, September 2008, pp 68-72.

²⁰⁷ Standing Committee on Law and Justice, Report 27, p 16

options for regulating legal costs in motor accident matters was undertaken during the development of the Motor Accidents Compensation Regulation 2005.²⁰⁸

- 3.88** In the *Seventh Review Report*, the Committee recommended that the MAA analyse the impact of the Cost Regulation on claimants, with a view to determining if the regulation significantly disadvantages claimants.²⁰⁹ In its response to the *Seventh Review Report*, the Government noted the difficulties in obtaining information about lawyers' billing practices and undertook to seek the co-operation of the Law Society of NSW in ascertaining the impact of the Cost Regulation.²¹⁰
- 3.89** In the *Eighth Review Report*, the Committee recommended that the MAA make its Study of the Impact of the Costs Regulation, conducted with the assistance of the Law Society of NSW, a priority project and allocate resources accordingly.²¹¹ In its response to the *Eighth Review Report*, the Government indicated that it supported the recommendation and had engaged a consultant to undertake the study, which it anticipated would be completed in the second half of 2008.²¹²
- 3.90** In the *Ninth Review Report*, the Committee recommended that the MAA continue to accord a high priority to the Study of the Impact of the Cost Regulation, with a view to having a revised regulation in place by 1 October 2008.²¹³ The Government response to the *Ninth Review Report*, received in March 2009, expressed support for this recommendation and advised that the MAA was considering the findings of the final report by FMRC Legal on the impact on legal costs for claimants of the Motor Accidents Compensation Regulation 2005. The Government further advised that the MAA was continuing to work on a revised costs schedule.²¹⁴
- 3.91** During the current Review, the MAA updated the Committee on the outcomes of the FMRC Legal report, which examined the impact of the Cost Regulation on 56 files. The study indicated that '... there is a significant gap between the fees charged to clients and the amount payable under the Regulation'.²¹⁵
- 3.92** The MAA outlined the key findings of the FMRC Legal report as follows:
- in all files reviewed there were costs agreements between the client and solicitor
 - there is a significant gap between the fees charged to clients and the amount payable under the Regulation

²⁰⁸ Government Response to the Standing Committee on Law and Justice, Report 27, p 2.

²⁰⁹ Standing Committee on Law and Justice, Report 31, p 84.

²¹⁰ NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Seventh Report*, Report 31, September 2006, p 6.

²¹¹ Standing Committee on Law and Justice, Report 34, p 72.

²¹² NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Eighth Report*, Report 34, November 2007, p 3.

²¹³ Standing Committee on Law and Justice, Report 36, p 72.

²¹⁴ Government Response to the Standing Committee on Law and Justice, Report 36, pp 4-5.

²¹⁵ Answers to pre-hearing questions on notice, MAA, p 10.

- on average the actual legal fees charged were 250 per cent greater than the amount allowed under the Regulation
- on average the legal costs charged were 13.19 per cent of the settlement amount, compared to the 5.22 per cent of fees allowed under the regulation
- it was not possible to determine the 'gap' between legal fees charged to claimants and legal costs recovered because the settlement amounts were inclusive of legal fees in virtually all matters
- legal fees charged for matters with smaller settlement amounts were proportionally higher than the matters with larger settlement amounts
- it would not be economically feasible for law firms to conduct CTP matters only within the amounts allowed under the Regulation
- the majority of matters settle prior to assessment by CARS
- variance in complexity and costing of CTP matters is in most instances due to factors outside the control of the lawyers conducting the matter.²¹⁶

3.93 The Law Society of NSW suggested that the FMRC Legal report '... reinforced the fact that the existing costs regulations were manifestly inadequate when it came to covering anything like the full costs payable by a plaintiff out of a motor accident damages action'.²¹⁷

3.94 The NSW Bar Association expressed concern that '... the fundamental problems with costs in the Scheme has not been addressed', noting that the FMRC Legal report identifies:

- that legal practitioners are charging reasonable fees
- that there is no overcharging
- that solicitors and barristers are frequently cutting costs to assist claimants to resolve claims, and
- that costs recoverable under the Regulation from the insurer equate to approximately 40 per cent of the total legal costs incurred in running a matter, with claimants paying for 60 per cent of their legal costs out of their damages.²¹⁸

3.95 Ms Jnana Gumbert, the NSW Branch President of the Australian Lawyers Alliance, noted that the FMRC Legal report served to highlight that while lawyers are appropriately charging clients for their services, there are significant discrepancies between the recoverable costs allowed under the Regulation and the actual legal costs faced by claimants:

The costs that are able to be recovered are usually less than half of the total costs – and quite often less than that. I believe earlier today there was reference to the FMRC report, which indicates that on average costs are 250 per cent greater than the recoverable costs and, furthermore, that that is work that is justified and not the fault of the lawyer, if that makes sense. There is a very significant gap and what is happening now is that claimants are subsidising the system through legal costs ... The

²¹⁶ Answers to additional questions on notice, MAA, p 7.

²¹⁷ Submission 5, Law Society of NSW, p 2.

²¹⁸ Answers to questions on notice taken during evidence 11 June 2010, Mr McConnachie, Question 7, p 6.

point is that lawyers are still charging for their proper costs, it is just that the claimants have to pay a higher proportion of those costs than they would have had to pay if they were not in this Scheme.²¹⁹

- 3.96** Mr Timothy Concannon, a member of the Personal Injury Compensation Committee of the Law Society of NSW, commented on the inadequacies of the Cost Regulation for claimants, suggesting that while the Regulation allows for the recovery of 30 to 35 per cent of total legal costs, the actual legal costs can be between 60 and 65 per cent:

... the general view was that somewhere between 30 per cent to 35 per cent of the total legal costs that a law firm was charging were recoverable under the existing cost regulation. As a plaintiff solicitor I have always operated on the rule of thumb that you can expect to recover on a party-party basis against the defendant roughly around 60 per cent to 65 per cent. We have a huge gap there.²²⁰

- 3.97** The Law Society of NSW noted that there were two reasons why the Society '... continues to be disturbed by the inadequacy of the present legal costs regime set out in the Motor Accidents Compensation Regulation 2005'.²²¹ First, the Law Society observed that the Regulation fails to recognise the increased workload for lawyers that has resulted from changes to the Scheme, particularly within the Claims and Assessment Resolution Service, which '... require more thorough preparation, particularisation and negotiation of claims even before an application is lodged ...'.²²²

- 3.98** Second, the Law Society suggested that the Regulation made unrealistic allowances for the level of legal costs incurred by claimants, and that a substantial overhaul of the Regulation was needed:

... the inadequacy of the current costs regime is most apparent in the unrealistic allowances made for overall scaled costs ... there must be fundamental increases in the level of legal fees to reflect the fact that there have not been any substantive changes (other than CPI increases) in the level of legal fees since the scheme first commenced in 1999.²²³

- 3.99** Mr Concannon reiterated that there has '... not been effective, substantive amendment to the costs regulation since the system commenced in 1999. The person who bears the brunt of that discrepancy is the claimant'.²²⁴

- 3.100** The NSW Bar Association also noted the negative impact that an inadequate Cost Regulation has on claimants:

All that has happened in the past two years is a one off indexation. There has been no action on the inadequacies of the costs regulations ... The failure to pay proper legal fees to claimants simply results in the claimant subsidising the operation of the

²¹⁹ Ms Jnana Gumbert, Director, Stacks Goudkamp Solicitors; NSW Branch President, Australian Lawyers Alliance, Evidence, 11 June 2010, p 43.

²²⁰ Mr Timothy Concannon, Member, Personal Injury Compensation Committee, Law Society of NSW, Evidence, 11 June 2010, p 25.

²²¹ Submission 5, Law Society of NSW, p 1.

²²² Submission 5, p 1.

²²³ Submission 5, pp 1-2.

²²⁴ Mr Concannon, Evidence, 11 June 2010, p 25.

scheme. This has occurred at a time when insurer profits have been grossly excessive.²²⁵

- 3.101** The Committee notes that the Motor Accidents Compensation Regulation 2005 was amended on 26 March 2010, through the Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2010. The amendment increased the maximum costs recoverable for legal services provided by legal practitioners to claimants or insurers in motor accident matters.²²⁶ The explanatory note for the amended Regulation advised that '[t]he increases are generally in line with movements in the Consumer Price Index'.²²⁷ The MAA informed the Committee that the Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2010 was not based on the FMRC Legal review.²²⁸

Review of the Motor Accidents Compensation Regulation 2005

- 3.102** The Motor Accidents Compensation Regulation 2005 was due to be automatically repealed on 1 September 2010, under the provisions of the *Subordinate Legislation Act 1989*.²²⁹ The MAA advised that the repeal date is now 1 September 2011 after an extension was sought by the Minister and granted.²³⁰
- 3.103** The MAA indicated that it had established a working party, including the Law Society of NSW and the Insurance Council of Australia, to review the Cost Regulation and the appropriateness of the existing legal costs regime:

The MAA established an industry working party comprising members of the Law Society of NSW, Insurance Council of Australia and the MAA to review the Motor Accidents Compensation Regulation 2005 and make recommendations as appropriate. In particular, the working party sought to review the existing regulated legal costs regime for compulsory third party claimants in the light of the significant procedural reforms to the Motor Accidents Compensation Act 1999 that commenced in October 2008.²³¹

- 3.104** The MAA advised that the working party will also examine '... the issue of insurer-initiated court proceedings in the context of the statutory review of the regulation'.²³²

²²⁵ Submission 4, pp 16-17.

²²⁶ Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2010.

²²⁷ Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2010.

²²⁸ Answers to pre-hearing questions on notice, MAA, p 10.

²²⁹ Motor Accidents Compensation Regulation 2005, accessed 21 September 2010, <www.legislation.nsw.gov.au/fullhtml/inforce/subordleg+492+2005+cd+0+N#pt.1>

²³⁰ Telephone conversation between Mr J Ireland, Senior Policy Officer, Policy, MAA, and Director, 6 October 2010.

²³¹ Answers to additional questions on notice, MAA, pp 7-8.

²³² Answers to pre-hearing questions on notice, MAA, p 10.

- 3.105** The Law Society of NSW said that, as a member of the working party on the Cost Regulation, it was 'anxious' to ensure that improvements were made to the Regulation, and emphasised that any increase in regulated costs would be to the benefit of claimants, and not to their legal representatives:

The Committee is anxious to ensure that some meaningful improvement is achieved in the current costs regime under the proposed Regulation. In this respect, it must be borne in mind that an increase in the regulated costs will not mean any greater profits for lawyers. In all but the very small claims, lawyers will still be charging the same fees as they did previously. The sole beneficiary of increases in the costs regulations will be the injured.²³³

- 3.106** Ms Donnelly was optimistic that the remade regulation would assist to address concerns about the suitability of the existing legal costs regime:

... I am really grateful for the amount of effort, which has been a considerable amount of effort, that both the Insurance Council and the Law Society representatives on a working party have put in ... I think it is a very good package and provided that I can cross the t's and dot the i's, I expect to put that forward to government for the remaking of that regulation and I think we should go some way to certainly addressing those concerns about legal costs.²³⁴

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

I welcome the recent suggestion from the legal costs working party that in the future plaintiff lawyers would, with a remade regulation, disclose to the MAA in confidence information about the final settlement amount that claimants have received so that we would be able to more transparently say, "Here is the percentage that is going to claimants", and look at all of the different costs to the scheme, including insurer profit, but other services as well.²³⁵

- 3.108** Ms Donnelly outlined that increased disclosure of net settlements would allow the MAA to better monitor the efficiency of the Scheme: '[g]reater transparency would enable better monitoring of the efficiency of the Scheme and the proportion of premium return to claimants in benefits'.²³⁶

- 3.109** The NSW Bar Association informed the Committee that it was not invited to be part of the working party reviewing the Cost Regulation, despite repeated requests to be involved in the process.²³⁷

- 3.110** In response to this, the MAA advised that while the Bar Association was not part of the working party, it had nevertheless been 'actively involved' in the review process, including commenting on the terms of reference and the summary report of the working party's

²³³ Submission 5, p 2.

²³⁴ Ms Donnelly, Evidence, 21 June 2010, p 60.

²³⁵ Ms Donnelly, Evidence, 11 June 2010, p 6.

²³⁶ Ms Donnelly, Evidence, 11 June 2010, p 2.

²³⁷ Submission 4, p 3.

deliberations.²³⁸ Ms Donnelly advised that in addition to consulting with the NSW Bar Association, the MAA had also sought '... input from the Australian Lawyers Alliance and the Australian Medical Association and others as this review progresses'.²³⁹

- 3.111** The NSW Bar Association indicated that, having viewed a copy of the working party's report, the Association remained concerned that '...the fundamental problems with costs in the Scheme have not been addressed.²⁴⁰ On this basis the NSW Bar Association expressed the view that a further, independent, review of the Cost Regulation should be undertaken, to determine how the Regulation can be improved:

The Association recommends an independent review of the inadequacy of the Costs Regulations, building on the FMRC report, with independent recommendations (supported by actuarial analysis) to establish fair and reasonable Costs Regulations.²⁴¹

Committee comment

- 3.112** The Committee notes that over a number of its reviews several stakeholders have repeatedly raised concerns over the adequacy of the maximum costs recoverable by legal practitioners for services provided to a claimant or an insurer in any motor accidents matter under the Motor Accidents Compensation Regulation 2005.
- 3.113** The Committee notes that Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2010, which took effect from 26 March 2010, only provides for increases to legal fees in line with movements in the Consumer Price Index.
- 3.114** The Committee considers that the need to have a new Cost Regulation in place by 1 September 2011 provides the MAA with a significant opportunity to substantially remake the Cost Regulation to address widely-held concerns about the Regulations' adequacy.
- 3.115** The Committee believes that the working party should undertake a thorough review of the Motor Accidents Compensation Regulation 2005. In doing so, the working party should consider the findings of the FMRC Legal report on the Cost Regulation referred to in this report, and should continue to undertake consultation with relevant stakeholders, including those who are not members of the working party, to determine how the Regulation can be improved to better meet the needs of people injured in motor vehicle accidents in NSW.
- 3.116** The Committee further notes the commitment from the MAA to pursue a mechanism whereby legal practitioners notify the MAA of the amount of compensation that a claimant receives once their legal fees have been deducted. The Committee believes that the working party on the Cost Regulation should consider the feasibility of this suggestion and, if appropriate, determine strategies for its implementation.

²³⁸ Answers to additional questions on notice, MAA, p 8.

²³⁹ Ms Donnelly, Evidence, 11 June 2010, p 2.

²⁴⁰ Answers to questions on notice taken during evidence 11 June 2010, Mr McConnachie, p 5.

²⁴¹ Answers to questions on notice taken during evidence 11 June 2010, Mr McConnachie, p 6.

Recommendation 5

That the working party established by the Motor Accidents Authority to review the Motor Accidents Compensation Regulation 2005 ahead of the 1 September 2011 deadline and the appropriateness of the existing legal costs regime should, among other matters:

- carefully consider the findings of the FMRC Legal report on the impact of the Cost Regulation referred to in the Committee's report
- undertake extensive consultation with all relevant stakeholders to determine how the Regulation can be improved to better meet the needs of claimants under the Motor Accidents Scheme.

Discount rate

- 3.117** When a lump sum payment is awarded to seriously injured people to compensate for future economic loss resulting from that injury, the present value of the future economic loss is qualified by adopting a prescribed discount rate. Under section 127 of the *Motor Accidents Compensation Act 1999*, that discount rate is set at five per cent.²⁴²
- 3.118** The MAA advised that the purpose of a discount rate '... is to protect injured people from short term fluctuations in interest rates impacting on the damages they are awarded to support them in the longer term'.²⁴³
- 3.119** The Committee's *Sixth Review Report* reported the concerns of the NSW Bar Association that this rate is inadequate, because a discount rate of five per cent can result in under-funding of the future needs of the seriously injured. The Bar Association expressed its preference for a lower discount rate, noting that the Australian High Court had set the common law discount rate for damages awards at three per cent, and that in the United Kingdom the discount rate applicable to awards for future care for personal injury cases is set at two per cent.²⁴⁴ In response to these concerns, the MAA advised that it was unaware of any information or evidence to suggest that consideration should be given to revising the discount rate.²⁴⁵ This issue was not taken up in subsequent reviews.
- 3.120** During the current Review, however, the Australian Lawyers Alliance argued that the five per cent discount rate was unrealistic, particularly given that the MAA only assumes a two per cent return on its own investments under the Lifetime Care and Support Scheme:

In respect of the discount rate, we note that the State Government has imposed a 5% discount rate on future losses. That assumes that a lump sum can be securely invested to return 5% after tax and inflation. We know from historical material and from good actuarial evidence that that is impossible. The MAA itself assumes a

²⁴² *Motor Accidents Compensation Act 1999*, s 127.

²⁴³ Answers to pre-hearing questions on notice, MAA, p 8.

²⁴⁴ Standing Committee on Law and Justice, Report 27, p 63.

²⁴⁵ Standing Committee on Law and Justice, Report 27, p 63.

2% return on its own investments after tax and inflation according to the Lifetime Care Scheme.²⁴⁶

- 3.121** The Australian Lawyers Alliance expressed concern that the five per cent discount rate may mean that seriously injured people receive inadequate compensation to meet their ongoing care needs:

The consequence of having a discount rate that is too high is that those with long-term care needs, such as quadriplegics and severe brain damage infants, will get between 25% and 30% less than they need to survive.²⁴⁷

- 3.122** In light of the Australian lawyers Alliance's comments, the Committee asked the MAA to provide it with an update on its view about the discount rate since the Committee's *Sixth Review Report*. The MAA advised that other compensation schemes in NSW, and in other Australian States and Territories, also use a discount rate of five per cent:

Provision for the discounting of the future economic loss component of a compensation award is not unique to the motor accidents scheme. Section 14 of the Civil Liability Act 2002 and section 151 J of the Workers Compensation Act 1987 make provision for the application of a discount rate of 5%, where another rate has not been prescribed by regulation. The discount rate is consistent with other States and Territories (except the ACT) which all use discount rates in the range of 5-6%.²⁴⁸

- 3.123** The MAA also noted that since the establishment of the Lifetime Care and Support Scheme the effect of the discount rate has been reduced for the most severely injured people:

... since the establishment of the Lifetime Care and Support Scheme, severely injured people have had their treatment, rehabilitation and attendant care needs fully funded by the Scheme for the rest of their lives. Prior to the Lifetime Care and Support Scheme allowances for future care and medical expenses were a major component of the award in larger claims for very severely injured people.

However, since the establishment of the Lifetime Care and Support Scheme any participants in the Scheme who are also entitled to claim from the CTP Scheme may only seek a lump sum for economic loss and non-economic loss and these claims are expected to settle more quickly than before. The effect of the discount rate has therefore been reduced for the most severely injured people since 2007.²⁴⁹

- 3.124** As noted in Chapter 1, the Tenth Review of the MAA was conducted concurrently with the Committee's Third Review of the Lifetime Care and Support Scheme, which will be the subject of a separate report to be published in November 2010.

Committee comment

- 3.125** The Committee notes the concerns of the Australian Lawyers Alliance that the discount rate of five per cent may result in seriously injured people receiving inadequate compensation to

²⁴⁶ Submission 2, p 2.

²⁴⁷ Submission 2, p 3.

²⁴⁸ Answers to pre-hearing questions on notice, MAA, p 8.

²⁴⁹ Answers to pre-hearing questions on notice, MAA, p 8.

meet their ongoing care needs. The Committee also notes the advice from the MAA that a five per cent discount rate is used in other compensation schemes, and by other Australian States and Territories. Due to the limited evidence that the Committee received on this issue the Committee has not drawn any firm conclusions regarding the discount rate.

Chapter 4 Eligibility, access and injury prevention strategies

This Chapter examines several issues raised by stakeholders related to eligibility for the Scheme including injuries caused by unregistered work vehicles and the impact of two court cases on the coverage provided by the Scheme. Access to information on the Scheme for people with vision impairment and for carers is also examined. The Chapter concludes with a discussion of injury prevention strategies undertaken by the MAA, with particular reference to young people and motorcycle riders.

Eligibility for the Scheme

- 4.1 During the Committee's Review, several participants raised issues pertaining to the eligibility for, or coverage, of the Motor Accidents Scheme. The ramifications of two legal cases – *Zotti v Australian Associated Motor Insurers Ltd* and *Doumit v Jabbs Excavations* – and concerns about the status of injuries caused through the use of unregistered work vehicles will be examined in this section.

Unregistered work vehicles

- 4.2 The NSW Farmers' Association drew attention to the interaction between the *Motor Accidents Compensation Act 1999* and the *Workers' Compensation Scheme Act 1987*, highlighting:

... the confusing, costly and inefficient operation of the two Acts which is apt to produce litigation to determine if the work related injury occurred as a result of an unsafe system of work or an injury to which the MAC Act would apply. Significantly, the operation is further complicated when a claim involves an unregistered motor vehicle, including agricultural plant, used exclusively on private property.²⁵⁰

- 4.3 The NSW Farmers' Association argued that the *Motor Accidents Compensation Act 1999* should '... be confined solely to target the rehabilitation and compensation of injuries arising as a result of registered motor vehicles on public roads', and not apply to unregistered vehicles that operate in workplaces.²⁵¹ The Association stated that:

Any failure to exclude liability from the MAC Act for injury arising as a result of the use of unregistered motor vehicles, including agricultural plant, used exclusively on private property, creates costly legal uncertainty which is transferred directly to the consumer and threatens the operational integrity of the NSW Workers' Compensation Scheme.²⁵²

²⁵⁰ Submission 8, NSW Farmers' Association, p 1.

²⁵¹ Submission 8, p 2.

²⁵² Submission 8, p 2.

- 4.4 The NSW Farmers' Association believes that '... the failure to explicitly extend the application of the exemption to other industries has resulted in a lack of certainty as to when either Act applies'.²⁵³
- 4.5 The Association suggested that the *Motor Accidents Compensation Act 1999* should be amended to '... explicitly preclude compensation in circumstances when the injury is work-related involving an unregistered vehicle not being driven on a public road'.²⁵⁴ At present, the Act only excludes work injury claims in respect of the death of or injury to a coal miner.²⁵⁵
- 4.6 When questioned about the NSW Farmers' Association's proposal, the MAA indicated that any response with regard to this issue would require consideration at a whole of government level, as the '... situation described could relate to a number of schemes including Workers Compensation, Motor Accidents and Lifetime Care'.²⁵⁶
- 4.7 Ms Carmel Donnelly, the General Manager of the MAA advised during the Committee's hearings that she would pursue further consultation with the NSW Farmers' Association to better understand the issue:

... we would be quite willing to meet with the parties that have prepared the submissions and make sure that we understand the issues, but my understanding is that it may require looking at a few different compensation schemes and a number of different Acts, not just ours, so I would propose that what we would do next is get in contact with them and try to understand the issue ...²⁵⁷

Committee comment

- 4.8 The Committee notes that confusion may exist about to the interaction between the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* in situations involving injuries arising from the use of unregistered vehicles that operate in workplaces.
- 4.9 The Committee welcomes the undertaking from the General Manager of the MAA to pursue consultation with the NSW Farmers' Association on this issue. This will allow the MAA to develop a more fulsome understanding of the concerns raised by the Association during the Committee's Review.
- 4.10 The Committee therefore recommends that the MAA, in consultation with the NSW Farmers' Association and other relevant stakeholders, should review the interaction between the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* to identify areas where clarification is needed regarding the application of each Act. Once the review is complete, the MAA should advise the Minister for Finance if there is a need to pursue legislative change to clarify the situations in which each Act applies.

²⁵³ Submission 8, p 1.

²⁵⁴ Submission 8, p 1.

²⁵⁵ *Motor Accidents Compensation Act 1999*, s 3B.

²⁵⁶ Answers to pre-hearing questions on notice, MAA, p 5.

²⁵⁷ Ms Carmel Donnelly, General Manager, Motor Accidents Authority of NSW, Evidence, 21 June 2010, p 6.

Recommendation 6

That the Motor Accidents Authority, in consultation with stakeholders including the NSW Farmers' Association, review the interaction between the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* to identify areas where clarification is needed regarding the application of each Act.

Impact of *Zotti v Australian Associated Motor Insurers Ltd*

4.11 Several stakeholders raised concerns about the impact of the case of *Zotti v Australian Associated Motor Insurers Limited* [2009] NSWCA 323, which they argue has potentially serious ramifications for the Scheme.

4.12 The MAA outlined the facts and judgement of the Zotti case as follows:

Zotti v Australian Associated Motor Insurers Limited [2009] NSWCA 323 concerned a person (Mr Zotti) who was injured when he lost control of a bicycle he was riding. Mr Zotti claimed that an oil slick that remained on the road following an earlier motor accident caused his accident. The court held that the insurer of the CTP insurer of the vehicle that caused the earlier accident did not have to indemnify the owner of that vehicle since the accident did not come within the definition of motor accident in the *Motor Accidents Compensation Act 1999*.²⁵⁸

4.13 The NSW Bar Association explained why a 'significant problem' has developed for the Scheme as a consequence of the Zotti decision:

The decision effectively means that drivers are not insured if they are at fault in an accident and an injury is sustained some time after the actual accident ... It is important to note that the driver at fault is still liable. The Zotti decision does not remove their negligence. All the Zotti decision does is remove the insurance coverage from these circumstances of accident.²⁵⁹

4.14 The Law Society of NSW was also concerned about the potential ramifications of the Zotti decision, noting that '[t]he effect of this decision is that some drivers on public roads will not be insured for third party purposes if they were at fault in the accident and an injury was sustained not during the accident itself but at some subsequent time'.²⁶⁰

4.15 Mr Andrew Stone, a member of the Common Law Committee of the NSW Bar Association and the Association's nominee on the Motor Accidents Council, explained how the Zotti decision impacts on the cover provided by CTP insurance:

If any of you are driving home tonight and you lose control of your vehicle and run over a pedestrian, the pedestrian will sue you and you will be protected by your CTP policy ... If you run off the road and into a telegraph pole, and the telegraph pole falls over and hits a pedestrian, the pedestrian will sue you and you will be protected by your CTP policy ... If you run off the road and run into a telegraph pole, you are

²⁵⁸ Answers to pre-hearing questions on notice, MAA, p 21.

²⁵⁹ Submission 4, NSW Bar Association, p 7.

²⁶⁰ Submission 5, Law Society of NSW, p 3.

carted off to hospital, your car is towed away, and two hours later the telegraph pole falls over and hits a pedestrian, you have still been negligent, you have still caused a telegraph pole to fall over, you will be sued, and following Zotti, you will not be protected by your CTP policy ... They apply the temporal link test between the accident and the injury whereas the reality is that accidents happen and injuries may take a little while to come out, in these relatively rare cases.²⁶¹

- 4.16** Mr Stone noted that the Zotti decision meant that people involved in a motor accident should be acutely aware of any actions subsequent to the accident in order to preserve the protections provided by CTP insurance:

... if you are involved in an accident that might leave oil on the road or a telegraph pole to fall over, as you are being carted off to hospital you should be screaming out to police as you go “leave my car here, leave my car here” cause the longer the car is there, the more protection you have got from the CTP policy. Once the car has gone you are personally liable, without the CTP policy for the oil on the road or the telegraph pole that falls over. That is random, that is capricious, that is not any system of justice as I know it.²⁶²

- 4.17** Dr Andrew Morrison SC, a member of the State Committee of the Australian Lawyers Alliance, described the outcome of the Zotti case as 'wholly unacceptable':

The insurer took a premium expecting to have to pay out in exactly that situation. It is unacceptable that because of the constant narrowing of the third party policy there are now large areas of insurance that no longer give us the universal third party insurance scheme that this Parliament brought in in New South Wales in 1942. That is a wholly unacceptable outcome that has been produced by insurers constantly rewriting the definition of “motor accident” in order to narrow their liability.²⁶³

- 4.18** The NSW Bar Association acknowledged that '[t]he Zotti point will only come up infrequently as most injuries occur contemporaneously with the motor vehicle accident. It is a relatively rare case where the injury occurs at some latter point in time'.²⁶⁴ Nonetheless, several participants in the Committee's Review pressed for the issue to be remedied.

- 4.19** As a solution to the Zotti problem the NSW Bar Association proposed a 'straightforward' legislative fix to amend the *Motor Accidents Compensation Act 1999* to extend coverage to injuries caused during, or as a consequence of, a motor accident:

That s.3A(1) of the *Motor Accidents Compensation Act 1999* be amended [by the substitution of the words in bold] so that it reads: -

"This Act (including any third-party policy under this Act) applies only in respect of the death of or injury to a person that is caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle and only **where the death or**

²⁶¹ Mr Andrew Stone, Member, Motor Accidents Council, as nominated by the NSW Bar Association; member, Common Law Committee, NSW Bar Association, Evidence, 11 June 2010, pp 33-34.

²⁶² Mr Stone, Evidence, 11 June 2010, p 37.

²⁶³ Dr Andrew Morrison, Senior Counsel; member, State Committee, Australian Lawyers Alliance, Evidence, 11 June 2010, p 45.

²⁶⁴ Answers to questions on notice taken during evidence 11 June 2010, Mr Alastair McConnachie, A/Executive Director, NSW Bar Association, p 5.

injury is caused (whether or not by a defect in the vehicle) during or as a consequence of:

- a) The driving of the vehicle, or
- b) A collision, or action taken to avoid a collision, with the vehicle, or
- c) The vehicle's running out of control.²⁶⁵

4.20 Ms Mary Macken, the President of the Law Society of NSW, was supportive of the NSW Bar Association's proposal, stating that:

In the event the High Court does uphold the decision of the NSW Court of Appeal then the Law Society of NSW supports legislative amendment to sections 3 and 3(1)A to widen the definition of "motor accident" to include an injury that is sustained at a subsequent time to the incident or accident ... The Law Society of NSW notes and supports the NSW Bar Association submission that the definition of "motor accident" be amended to include "or as a consequence of" after the word "during". I note that this would also require amendment to section 3A (1) so that it mirrors the drafting of section 3.²⁶⁶

4.21 Ms Donnelly advised that the MAA is '... very aware of that case. We have put a proposal to the Minister that he supported to propose some legislation and we are working very hard on that and are quite close to completing legislation'.²⁶⁷

4.22 The NSW Bar Association noted that until a legislative solution is forthcoming insurers are frequently using the 'Zotti defence':

... insurers are now frequently taking the Zotti point, arguing that there is insufficient temporal connection between the act of negligence that leads to the accident and the subsequent injury. In any case where injury is not immediately caused by the accident, the insurer has a Zotti defence.²⁶⁸

4.23 On 24 September 2010, the Hon Michael Daley MP, Minister for Finance, introduced the Motor Accidents Compensation Amendment Bill 2010 into the Legislative Assembly. The Explanatory note of the Bill states that one of the proposed amendments will extend the coverage of CTP insurance to incidents and accidents that occur both during, and as a result of, a motor accident:

The objects of this Bill are:

- (a) to amend the *Motor Accidents Compensation Act 1999*:
 - (i) to extend the compulsory third-party insurance scheme to include coverage of incidents and accidents that occur as a result of a dangerous situation caused by the driving of a motor vehicle, a collision, action taken to avoid a collision

²⁶⁵ Supplementary Submission 4a - Annexure B, NSW Bar Association, p 2.

²⁶⁶ Answers to questions on notice taken during evidence 11 June 2010, Ms Mary Macken, President, Law Society of NSW, p 2.

²⁶⁷ Ms Donnelly, Evidence, 11 June 2010, p 5.

²⁶⁸ Submission 4, p 7.

or any vehicle running out of control, in addition to incidents that occur during such events...²⁶⁹

4.24 At the time that this report was finalised, the Bill was still being considered by the Parliament.

Committee comment

4.25 The Committee is concerned that the *Zotti* decision means that drivers are not insured for third party purposes if they are at fault in a motor accident and a related injury is sustained at a time subsequent to the accident.

4.26 The Committee notes that the NSW Bar Association, Law Society of NSW and Australian Lawyers Alliance are in concurrence that the *Motor Accidents Compensation Act 1999* needs to be amended to extend coverage to injuries caused during, or as a consequence of, a motor accident.

4.27 The Committee considers that legislative action is needed to ensure that drivers are adequately insured for injuries that are sustained as a consequence of a motor accident, even though the injuries have occurred sometime after the accident itself. The Committee believes the amendment proposed by the NSW Bar Association appropriately addresses these concerns.

4.28 The Committee notes the advice from the MAA that a proposal was provided to the Minister for Finance to amend the *Motor Accidents Compensation Act 1999* to remedy the situation. The Committee further notes the introduction of the Motor Accidents Compensation Amendment Bill 2010 to the Legislative Assembly. This Bill will amend the *Motor Accidents Compensation Act 1999* to extend coverage of the Scheme to injuries that that are sustained during, or as a consequence of, a motor vehicle accident.

4.29 The Committee believes that these proposed legislative changes will adequately address the concerns raised by stakeholders by extending insurance coverage to injuries sustained either during, or as a result of, a motor vehicle accident.

Impact of *Doumit v Jabbs Excavations*

4.30 Stakeholders advised the Committee that a second case, *Doumit v. Jabbs Excavations Pty Ltd [2009] NSWCA 360*, also has consequences for the Motor Accidents Scheme. The facts and judgement of the case are as follows:

Mr Doumit was injured on a work site when a vehicle that ran on tracks rather than wheels ran over his foot. The definition of motor vehicle in the *Motor Accidents Compensation Act 1999* is "a motor vehicle or trailer within the meaning of the *Road Transport (General) Act 2005*". The *Road Transport (General) Act 2005* defines a motor vehicle to mean a vehicle (within the meaning of the Act) that is built to be propelled by a motor that forms part of the vehicle. The same Act defines vehicle to mean any description of vehicle on wheels (including a light rail vehicle) but not including other vehicles used on railways or tramways.

The Court of Appeal determined that the vehicle that caused Mr Doumit's injury was not a "motor vehicle" within the definition of the *Motor Accidents Compensation Act 1999*

²⁶⁹ Motor Accidents Compensation Amendment Bill 2010, Explanatory note, p 1.

as the vehicle ran on tracks not wheels. As a result, it was determined that Mr Doumit could not recover damages under the Motor Accidents Scheme.

If a vehicle that runs on tracks is not a motor vehicle, it is not required to be registered and is therefore not required to carry CTP insurance.²⁷⁰

- 4.31** Some Review participants expressed concern about the ramifications of this case. For example, the NSW Bar Association noted the 'significant consequences' of the Doumit decision for the Scheme in respect of the improper collection of monies for CTP insurance that does not actually provide any coverage in the event of an accident:

This decision has significant consequences for the NSW motor accidents scheme. Currently, the RTA registers and collects Green Slips on behalf of a variety of treaded vehicles including bulldozers, caterpillar tractors and tanks. Applying Doumit, not only does the CTP policy not cover these vehicles, but the Green Slip monies have been improperly collected ...²⁷¹

- 4.32** The Law Society of NSW noted that the Doumit decision means that there are a number of uninsured vehicles being driven on public roads and argued that urgent action is required to remedy the situation:

... the Court held that a bulldozer which was operating on treads rather than wheels was not a motor vehicle and was not governed by the third party scheme. This means that in respect of such vehicles which operate on treads, Green Slip monies have been collected by the relevant insurers ... this problem requires urgent legislative amendment given that a significant number of vehicles which are currently operating on public roads are presently uninsured by reason of this decision.²⁷²

- 4.33** Dr Morrison of the Australian Lawyers Alliance highlighted the impact of the case on the insurance coverage of over-snow vehicles, which are not classified as motor vehicle under the Doumit decision:

What you need is to picture this: You decide you will go skiing at Charlotte Pass this year. You catch the over-snow transport from Perisher to Charlotte Pass, which is a bus on tracks. The driver of the vehicle does not have to have a licence. He is driving on a public road but there is no requirement for a licence. That vehicle does not have to have registration or insurance. In fact, of course, the driver does have a licence and the vehicle is registered and insured. But if through that driver's negligence you are injured, you will not be covered by the third party scheme.

Although the Roads and Traffic Authority has taken its money and the insurer has taken its money, there will be no payout because it does not fall under the cover of the scheme. You have no protection. There are going to be tens of thousands of people put at risk this winter on a public road between Perisher and Charlotte Pass in respect of over-snow vehicles where there is currently no provision requiring a third party insurance payout because it is deemed not a motor accident.²⁷³

²⁷⁰ Answers to pre-hearing questions on notice, MAA, p 21.

²⁷¹ Submission 4, p 8.

²⁷² Submission 5, p 3.

²⁷³ Dr Morrison, Evidence, 11 June 2010, p 45.

- 4.34** The Bar Associations' Mr Stone suggested that all that is required to remedy the situation is a legislative amendment to extend coverage to tracked vehicles:

If you are working with an excavator that you can drive from place to place and it runs into something, or a tractor that drives from place to place that is tracked, yes it should have a CTP. Indeed the RTA currently makes it register and makes it get a Green Slip, and the Green Slip is your answer. You can fix that by a relatively straightforward amendment to guidelines. This ought not have taken as long as it has taken.²⁷⁴

- 4.35** The NSW Bar Association also expressed its concern that despite representations to the Government, the situation in regards to the Doumit case had not yet been rectified:

The Association urged the Government to make an urgent amendment to regulations to ensure that treaded vehicles with registration were included in the motor accidents scheme and covered by the Green Slip that had been paid for. The Authority has advised that the situation is being jointly considered with the RTA. However, no further announcements or advice has been provided. The situation should not be left to languish.²⁷⁵

- 4.36** The General Manager of the MAA, Ms Donnelly, explained that the MAA had been working with the RTA to resolved the matter, and that '... the RTA is considering an amendment to the definition of "vehicle" in the Road Transport Act and it is a matter for it to address any gap that might have arisen from that court decision'.²⁷⁶

- 4.37** Ms Donnelly further indicated that, if a situation were to arise where an insurer denied liability, the MAA would consult with that insurer about the appropriateness of that decision, particularly given that a legislative amendment has been foreshadowed to resolve the situation caused by the Doumit decision:

I am certainly not aware of any cases where denial of liability has occurred on that matter and I would go further and say that in that case, where particularly the intention would be to remedy it, I would be having discussions with the insurer about the appropriateness of taking a position that is likely to be overtaken by legislative amendment.²⁷⁷

Committee comment

- 4.38** Currently, the *Road Transport (General) Act 2005* defines a motor vehicle to mean any description of vehicle on wheels (including a light rail vehicle), but not including other vehicles used on railways or tramways.

- 4.39** The Committee is concerned that the Doumit decision means that, although vehicles such as bulldozers and over-snow vehicles are required to hold CTP insurance, the policy is in effect invalid if the vehicle runs on tracks or treads, rather than wheels, as these vehicles do. A second repercussion of the Doumit decision is that monies may have been improperly collected for CTP insurance that provides no actual coverage in the event of an accident.

²⁷⁴ Mr Stone, Evidence, 11 June 2010, p 34.

²⁷⁵ Submission 4, p 8.

²⁷⁶ Ms Donnelly, Evidence, 11 June 2010, p 5.

²⁷⁷ Ms Donnelly, Evidence, 11 June 2010, p 5.

- 4.40** In this context the undertaking from Ms Donnelly to consult with insurers in instances where an insurer has denied liability based on the decision in the Doumit case is an important one. The Committee encourages the MAA to discuss with insurers the appropriateness of pursuing a course of action that is likely to be overtaken by a legislative amendment to the Scheme.
- 4.41** The Committee acknowledges that the RTA is the primary government authority responsible for remedying this situation, and that the MAA has advised that the RTA is currently giving consideration to amending the definition of 'vehicle' in the *Road Transport (General) Act 2005*. However, the consequences of the Doumit decision, which was handed down in November 2009, for the Motor Accidents Scheme are important, and therefore require attention.
- 4.42** The Committee therefore recommends that the Minister for Roads should, in consultation with the Minister for Finance, pursue an amendment to the *Road Transport (General) Act 2005* to respond to the ramifications of the Doumit decision by redefining the term 'vehicle' to include vehicles which operate on treads, such as bulldozers and over-snow vehicles.

Recommendation 7

That the Minister for Roads, in consultation with the Minister for Finance, pursue an amendment to the *Road Transport (General) Act 2005* to remedy the situation caused by the decision in *Doumit v. Jabbs Excavations Pty Ltd [2009] NSWCA 360*, whereby insurance coverage does not extend to registered vehicles that operate on treads. The amendment should redefine the term 'vehicle' to include vehicles that operate on treads.

Access issues

- 4.43** During the Committee's Review, two issues relating to the ability of people to adequately access information about the Motor Accidents Scheme were brought to the Committee's attention. The difficulties that people with vision impairment can have when accessing information about the Scheme and the importance of ensuring that carers have access to information on the Scheme will be examined in this section.

Access for people with vision impairment

- 4.44** Vision Australia advised that there are barriers to vision impaired people accessing services and information provided by the MAA. For example, Vision Australia noted several challenges faced by people with vision impairment in accessing the accident notification system:

... the largest barriers to applications included difficulties completing paper forms, problems accessing online applications through specialist technology, difficulties reading print material provided to them at interviews or in assessment centres, needing a drivers licence to comply with selection criteria, and encountering people who have preconceived ideas about the capabilities (or disabilities) of the applicant.²⁷⁸

²⁷⁸ Submission 7, Vision Australia, p 3.

- 4.45** Vision Australia emphasised the need for the MAA to be aware of accessibility issues for people with vision impairment when undertaking forthcoming technological improvements to the case management system:

Vision Australia notes the Motor Accidents Authority is in the early stages of making technological improvements to streamline its case management system to allow for the electronic lodgement of forms, in the long term extending it to all users. Vision Australia would like to emphasise the need for consideration of appropriate approaches which allows vision impaired people to access and lodge information.²⁷⁹

- 4.46** In response to these concerns, the MAA indicated that it is conscious of ensuring the accessibility of its information and services to all members of the community, and noted that it would welcome any input from Vision Australia to ensure the maximum accessibility of services for people with vision impairment:

The Motor Accidents Authority is conscious of ensuring its services are accessible to all people, including those with disabilities such as vision impairment. General content on the Authority's website is compliant with current accessibility guidelines and as part of an upgrade of the online calculator the issue of accessibility is being considered. To assist people who have trouble filling in forms or using the online calculator, the Authority operates a Claims Advisory Service that can provide information over the phone, including Green Slip price comparisons, and an outreach service that can walk people through any questions about the scheme and assist them fill in claim forms if required.

The MAA would welcome the assistance of Vision Australia in providing advice on ensuring that the needs of vision impaired people are best met in these areas.²⁸⁰

Access for carers

- 4.47** Carers NSW drew the attention of the Committee to an issue that has not previously been raised during the course of the Committee's reviews of the MAA. Carers NSW highlighted the importance of carers being able to access clear and relevant information on the services provided by the MAA, in acknowledgement of the integral role that carers play in supporting people who have been injured as a consequence of a motor vehicle accident.²⁸¹

- 4.48** Carers NSW defines the term 'carer' as

... any individual who provides unpaid care and support to a family member or friend who has a disability, mental illness, drug and alcohol dependencies, chronic condition, terminal illness or who is frail.²⁸²

- 4.49** Carers NSW made three suggestions that would improve the quality of access to information for carers:

- modify the language used by the MAA when referring to the family of injured people

²⁷⁹ Submission 7, pp 3-4.

²⁸⁰ Answers to pre-hearing questions on notice, MAA, p 25.

²⁸¹ Submission 9, Carers NSW, pp 2-3.

²⁸² Submission 9, p 1.

- provide clear information on support services for carers
- establish an ongoing support group for carers of people with traumatic brain or spinal cord injury.

4.50 Carers NSW noted that the MAA annual reports and website '... use the term "family" when referring to those involved in the support of a loved one', and congratulated the MAA '... in recognising the inclusion of the family in providing support to a loved one with catastrophic injuries'.²⁸³ However, Carers NSW encouraged the use of the term 'carer' or 'family carer' instead of 'family member', in order to more clearly recognise the role that carers play in the support and rehabilitation of injured family members.²⁸⁴

4.51 Secondly, Carers NSW suggested that the MAA website should provide clearer information '... to assist family carers to learn about and access appropriate services for their needs, different from those of the person for whom they care'.²⁸⁵ Carers NSW indicated that the MAA could provide details of carer support services such as Commonwealth Respite and Carelink Centres, as well as information on Carers NSW, on the MAA's website.²⁸⁶

4.52 Carers NSW also suggested the creation of an information booklet for carers, to assist families to better understand their caring role for family members who have been injured in a motor vehicle accident, and to provide information on the support services that are available to assist carers in this role:

Another suggestion could be a specific booklet about what to expect in a caring role in caring for someone severely injured as a result of road accident or catastrophic injury. A general information booklet will assist families to understand and cope with a range of unfamiliar systems and what to expect in navigating the systems and support available.²⁸⁷

4.53 The third suggestion from Carers NSW related to the establishment of a support group for carers of people with traumatic brain or spinal cord injury.

4.54 Carers NSW advised that between August 2004 and December 2005, the MAA provided funding to Carers NSW to conduct the 'Carers Linked in Caring Project (CLIC) – A Support Program for Carers of People with Traumatic Brain or Spinal Cord Injury'.²⁸⁸ Carers NSW noted that the evaluation of the pilot CLIC program showed that the program was beneficial in supporting this group of carers. Carers NSW indicated that it would welcome a partnership with the MAA and the Lifetime Care and Support Authority to operate the CLIC program on an ongoing basis.²⁸⁹

²⁸³ Submission 9, p 2.

²⁸⁴ Submission 9, p 2.

²⁸⁵ Submission 9, p 3.

²⁸⁶ Submission 9, p 3.

²⁸⁷ Submission 9, p 3.

²⁸⁸ Submission 9, p 3.

²⁸⁹ Submission 9, p 3.

Committee comment

- 4.55** It is essential that all members of the community have access to the services and information provided by the MAA. The Committee notes the commitment of the MAA to collaborate with Vision Australia in order to improve the accessibility to services and information for people with vision impairment. The Committee recommends that the MAA consult with Vision Australia during the forthcoming process of making technological improvements to its case management system, to ensure maximum accessibility for people with vision impairment.
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Recommendation 8

That the Motor Accidents Authority consult with Vision Australia during the process of making technological improvements to its case management system, to ensure maximum accessibility to services and information for people with vision impairment.

- 4.56** The Committee acknowledges the vital role that carers play in our community, and the importance of carer advocacy organisations in enhancing the rights of carers. The Committee notes that Carers NSW has identified a number of ways to improve access to information on the services provided by the MAA for this stakeholder group. These measures included modifying the language used by the MAA when referring to carers and providing clear information on the support services that are available to carers.
- 4.57** The Committee recommends that the MAA consult with carers' advocacy groups to examine the feasibility of modifying the language used by the MAA on its website and in official publications when referring to the family of injured people and providing clear information on the support services available for carers.
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Recommendation 9

That the Motor Accidents Authority consult with carers' advocacy groups to examine the feasibility of modifying the language used on the Motor Accidents Authority website and in official publications when referring to the family of injured people and providing clear information on the support services available for carers.

Injury prevention strategies

- 4.58** The MAA derives its responsibility for road safety initiatives from the *Motor Accidents Compensation Act 1999*. Under the Act, the MAA is required to provide funding for measures for preventing or minimising injuries from motor accidents, and safety education.²⁹⁰

²⁹⁰ *Motor Accidents Compensation Act 1999*, s 206(2)(f).

4.59 The MAA undertakes a number of injury prevention strategies as part of its contribution to road safety initiatives, in conjunction with bodies such as the RTA. The MAA outlined its role in its *Annual Report 2008/09*:

The Motor Accidents Authority seeks to complement the broader New South Wales road safety agenda with specific initiatives relevant to our key target audiences, including young drivers, motorcycle and scooter riders, pedestrians and children. Initiatives include education, promotion and research to support evidence-based practice in injury prevention.²⁹¹

4.60 Ms Donnelly highlighted that the relevant agencies pursue a collaborative approach to major road safety initiatives to ensure that strategies are co-ordinated:

With the establishment of the Centre for Road Safety, as part of the RTA and as the lead agency for road safety it has been important for the MAA not to go off and run its own race. I think it has created opportunities for us to work in a team approach on road safety across government. We continue to work closely with the Centre for Road Safety. We jointly fund a risk management research centre. We have a number of projects that we jointly fund and support ... we now have a high degree of coordination and we can provide and share information with the Roads and Traffic Authority and have a more coordinated strategy.²⁹²

4.61 This co-ordinated strategy also serves to '... ensure that there is no duplication of effort while maximising road safety education and awareness for motorists and other road users'.²⁹³

4.62 The Committee notes that the MAA's injury prevention strategies have been a recurring theme in a number of its past reviews of the MAA, with the Committee encouraging the MAA to actively involve key stakeholder groups in the formation of any injury prevention strategies to increase their effectiveness.²⁹⁴

4.63 Previous reviews have explored the efforts of the MAA in developing and implementing a range of injury prevention strategies. For example, the *Seventh Review Report* explored a range in injury prevention strategies, such as the relationship between the MAA and other road safety agencies, targeted road safety initiatives for a range of road users, and rural and regional road safety.²⁹⁵ The *Eighth Review Report* discussed issues relating to road safety research funding and targeted road safety initiatives for young people, children, pedestrians and motorcyclists.²⁹⁶ In the *Ninth Review Report*, the Committee acknowledged the efforts made to decrease the number of road fatalities in NSW, and encouraged key stakeholders to continue to collaborating on this work.²⁹⁷

²⁹¹ MAA, *Annual Report 2008/09*, p 10.

²⁹² Ms Donnelly, Evidence, 11 June 2010, p 9.

²⁹³ Answers to pre-hearing questions on notice, MAA, p 22.

²⁹⁴ See for example NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Seventh Report*, Report 31, September 2006, p 97.

²⁹⁵ Standing Committee on Law and Justice, Report 31, pp 87-98.

²⁹⁶ NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Eighth Report*, Report 34, November 2007, pp 74-80.

²⁹⁷ NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Eighth Report*, Report 36, September 2008, pp 88-89.

4.64 This section highlights the current injury prevention strategies that are used for two of the key target audiences: young people, and motorcyclists. The section also discusses issues raised by some stakeholders in relation to these two target audiences.

Young people

4.65 The MAA promotes road safety to young people through the *Arrive alive* brand, using a number of education and marketing activities to disseminate road safety messages. The activities that are undertaken include:

- the *Arrive alive* website, which is the focus for youth initiatives
- partnerships with sporting teams to conduct visits to 97 high schools
- sponsorship of the *Arrive alive* schoolboy cup, a major schoolboy rugby league competition
- the *Arrive alive Wheelchair* Road show, visiting 198 schools
- sponsorship of NSW Youth Week
- sponsorship of YouthRock, a high school band competition.²⁹⁸

4.66 Youthsafe advised that despite these initiatives, young people are disproportionately represented in statistics on motor vehicle injuries and fatalities as compared to other age groups, and suggested that additional efforts are need to reduce the involvement of young people in motor accidents:

... data on injuries and fatalities due to road trauma continue to reflect the over representation of young people compared to other age groups. It is also evident that road trauma remains a major cause of death and disability amongst young people, particularly young males. Youthsafe would therefore advocate that injury prevention for young road users should be an ongoing priority for the MAA and that effective strategies that assist in preventing road trauma in the first instance are an invaluable investment addressing both the financial and social impact of death and injury on the roads.²⁹⁹

4.67 Youthsafe was particularly concerned that the current road safety programs do not adequately communicate the potential dangers associated with motor vehicles:

It would seem that current MAA road safety programs for young people that focus on one off events and sponsorship of sports people to present to young people at schools about road safety do not adequately take into account the complexities nor take full advantage of the potential for MAA to influence road safety for young people. Youthsafe would encourage the MAA to consider a broader range of activities to address road safety for this age group ...³⁰⁰

²⁹⁸ MAA, *Annual Report 2008/09*, pp 10-11.

²⁹⁹ Submission 1, Youthsafe, pp 2-3.

³⁰⁰ Submission 1, p 5.

4.68 Youthsafe emphasised the importance of affording high priority to the area of injury prevention for young people on the roads by implementing a 'whole of community', evidence-based approach to the issue:

... it is important that the funding be used to support a multi-strategic approach which is co-ordinated with other stakeholders and incorporates '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. Intervention strategies should also be evidence based and considered, taking into account up to date research in the field and issues associated with practical application.³⁰¹

4.69 The Committee notes that in its *Ninth Review Report*, Youthsafe raised similar concerns regarding the focus of MAA injury prevention strategies for young people, and the need to ensure that a high priority is given to preventing injuries for young drivers.³⁰² At that time, the MAA advised that it was engaged in developing evidence-based strategy which utilised partnerships with public bodies such as the RTA and NSW Police Force to widely disseminate the road safety message.³⁰³

4.70 When questioned on the concerns raised by Youthsafe during this review, the MAA advised that it would continue to undertake its current strategies, whilst collaborating with the Centre for Road Safety to develop future initiatives:

The MAA continues to host the 'Arrive Alive' website, which is aimed at young people, and supports KidSafe in a range of activities. Future activities in the road safety area will be undertaken in consultation with the CRS, in support of the CRS's evidence-based strategy for promoting road safety to young people. This will ensure that there is no duplication of effort while maximising road safety education and awareness for motorists and other road users.³⁰⁴

Motorcycle riders

4.71 The Committee's *Seventh Review Report* observed that the MAA had developed an ongoing strategy to reduce motorcyclist injuries, involving collaborative relationships with relevant stakeholders such as the Motorcycle Council of NSW and the RTA.³⁰⁵

4.72 In its *Annual Report 2008/09*, the MAA noted that these collaborative relationships are continuing, through a number of initiatives aimed at reducing the number of road crash injuries sustained by motorcyclists.³⁰⁶

³⁰¹ Submission 1, p 8.

³⁰² Standing Committee on Law and Justice, Report 36, pp 88-89.

³⁰³ Standing Committee on Law and Justice, Report 36, p 89.

³⁰⁴ Answers to pre-hearing questions on notice, MAA, p 22.

³⁰⁵ Standing Committee on Law and Justice, Report 31, pp 93-94.

³⁰⁶ MAA, *Annual Report 2008/09*, p 10.

4.73 Mr Guy Stanford of the Motorcycle Council of NSW, noted the success of the relationship between the Motorcycle Council and the MAA in preventing an escalation in the rates of motorcycle crashes at a time when there is increasing usage of motorcycles as a form of transport:

The MAA has been extremely useful and very professional, and they have provided some funding. We produced a road safety strategic plan, with funding from the MAA. We produced the first version in June 2002, and following the publication of that we then saw the MAA put up some money, which the RTA then matched, to run the motorcycle awareness programs here in NSW. Those programs have been very effective. Since that time there has been almost a doubling in the number of motorcycles on the road, and yet the total number of crashes has only risen very marginally.³⁰⁷

4.74 Mr Stanford advised that the collaboration between the MAA and the Motorcycle Council of NSW in improving safety awareness for motorcyclists is continuing, with the two organisations currently '... making some training-type videos, just three-minute videos for distribution, to bring particular safety points to the attention of riders'.³⁰⁸

4.75 The Motorcycle Council highlighted that additional injury prevention strategies would be useful to reduce the dangers that are associated with roadside furniture and road surfaces. Mr Stanford explained his concerns in relation to road surfaces:

Uneven road surfaces, particularly in curves, present a black spot to a motorcycle. Motorcycles are utterly reliant on the grip of the tyre to the road, particularly as they are a single-track vehicle. The slipping of one wheel causes the vehicle to change direction dramatically, as opposed to what happens with a car. Crashes in curves as a result of road surface issues are a significant issue.³⁰⁹

4.76 Mr Stanford argued that the dangers associated with median dividers, which prevent head on crashes, are particularly acute:

That is fine on big, straight, long sections of road but once the road starts to curve you start to have other problems because motorcycles lean over in curves. So our problem there is the placement and the selection of the type of barrier. There is no question that Armco, which is the W-beam that is on big solid posts, it is like a continuous rail – the old term was Armco but the classification is W-beam – or there is the wire rope system with lots of posts with wire running through them, when those are placed very close to the road and a vehicle does not have enough room to recover, to get back on, there are big issues when motorcycles hit those. The effect of hitting those is that the motorcycle is temporarily arrested and the rider is thrown from the motorcycle and tends to roll along the top of the fence. So with Armco-type fencing you tend to get severing of arms, legs, heads, whereas with the multiple posts of the wire rope type they tend to just get shredded by the tops of the little posts. With concrete it presents a smooth surface so the bike tends to slide along, and people have been known to recover and continue on their way after that ... But as you reduce the

³⁰⁷ Mr Guy Stanford, Former Chairman and Member, Motorcycle Council of NSW, Evidence, 11 June 2010, p 63.

³⁰⁸ Mr Stanford, Evidence, 11 June 2010, p 64.

³⁰⁹ Mr Stanford, Evidence, 11 June 2010, p 64.

diameter of anything that a rider hits when they are sliding the rate of injury goes up dramatically ...³¹⁰

4.77 Mr Stanford noted that the Centre for Road Safety is currently conducting research into the use of road safety barriers, and suggested that underrun barriers may provide a safer alternative to the systems that are used at present:

There are systems, which are employed in Europe. The Spanish and the Portuguese both have standards for these systems. There has been a lot of work done in Austria and Germany on this. France has introduced underrun barriers. We can see underrun barriers in use in Victoria and in Queensland; only in one place in New South Wales, very begrudgingly added by the Roads and Traffic Authority on the old Pacific Highway ... The Centre for Road Safety is currently undertaking a study in this area, and we are not quite sure where that is up to or what the approach is.³¹¹

4.78 In regards to this research, the MAA advised that it has contributed \$25,000 to the University of NSW Injury Risk Management Research Centre to examine the crash characteristics and causal factors that motorcycle riders and pillion passengers are subject to when they impact with a roadside barrier.³¹²

4.79 In addition to this project, the MAA is involved in a number of other research projects related to motorcycle safety, including: bullet alignment

- partnering with the Motorcycle Council of NSW to education projects, including a short film on motorcycle safety and the production of safety pamphlets
- taking the lead in establishing an cross-jurisdictional working party on motorcycle protective clothing
- working with the Centre for Road Safety to develop a motorcycle safety strategy
- funding work that explores the acute management of people suffering fractures in motor vehicle accidents and, following this initial study, providing funds to four Sydney hospitals to trial and evaluate a model of early rehabilitation assessment and follow-up, which is likely to improve outcomes for injured motorcyclists.³¹³

Committee comment

4.80 The Committee notes the continued commitment of the MAA to developing and implementing a range of injury prevention strategies targeted at specific road users, such as young people and motorcyclists. The Committee considers that this is a critical element of the MAA's work, and encourages the MAA to continue to pursue collaborative relationships to identify appropriate evidence-based injury prevention strategies.

4.81 In particular, the Committee recognises the importance of developing strong collaborative relations with the peak bodies for targeted road users, such as Youthsafe and the Motorcycle

³¹⁰ Mr Stanford, Evidence, 11 June 2010, p 67.

³¹¹ Mr Stanford, Evidence, 11 June 2010, p 67.

³¹² Answers to additional questions on notice, MAA, pp 5-6.

³¹³ Answers to additional questions on notice, MAA, pp 5-6.

Council of NSW. These peak bodies can assist the MAA to ensure that timely, effective injury prevention strategies are implemented to improve the safety of vulnerable road users.

- 4.82** The Committee notes the ongoing concerns of Youthsafe that current road safety programs do not adequately communicate the potential dangers associated with motor vehicles, and that greater importance should be afforded to the youth road safety issues. The Committee believes that the MAA should collaborate with Youthsafe to identify where improvements can be made to current and future youth injury prevention strategies, and to ensure that those strategies maximise their effectiveness in reaching their target audience.

Recommendation 10

That the Motor Accidents Authority collaborate with Youthsafe to identify where improvements can be made to current and future youth injury prevention strategies, and to ensure that those strategies maximise their effectiveness in reaching their target audience.

- 4.83** The Committee also notes the concerns of the Motorcycle Council of NSW regarding the dangers that uneven road surfaces and roadside furniture present to motorcyclists. The research being conducted by Centre for Road into the use of road safety barriers will be of critical importance in developing future injury prevention strategies for motorcyclists. The Committee will be very interested to examine the findings and outcomes of this research during its next Review.

Chapter 5 Motor Accident Assessment Service

This Chapter examines certain issues raised by participants in the Committee's Tenth Review in relation to the Motor Accident Assessment Service (MAAS). The two components of MAAS, the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS) were extensively examined in the Committee's *Eighth Review Report* and *Ninth Review Report* respectively. Several of the issues examined in this Chapter were also raised during these earlier reviews.

The Chapter begins by discussing the MAAS Reference Group and concerns raised during the Committee's Review about its effectiveness. The Chapter then examines several issues raised by participants relating to the MAS and the medical assessments process, including the whole person impairment threshold and consistency in its application, potential conflicts of interest for MAS Assessors and the time taken to finalise assessment reports.

The Chapter then focuses on CARS, beginning with an overview of the types of notifications that are made to CARS and a discussion of the MAA's impending review of CARS processes. The issues of late claims, superimposed inflation and the availability of treatment reports are then considered. The Chapter concludes by providing an update on a number of issues related to CARS that were considered in the Committee's Ninth Review, including transparency of CARS processes, matters referred to the District Court for assessment of liability and insurer communication with self-represented claimants.

Motor Accident Assessment Service Reference Group

- 5.1 The MAAS Reference Group (MRG) provides a consultative forum for the MAAS and its key stakeholders to discuss issues relating to the operation of the two assessment services, MAS and CARS.³¹⁴
- 5.2 The Committee's *Seventh Review Report* discussed the performance of both MAS and CARS and user perceptions of the two elements of MAAS.³¹⁵ The Committee recommended that the MAA remain in consultation with key stakeholder groups, such as representatives from the legal profession, assessors and insurers, to ensure continual improvement to MAS and CARS.³¹⁶
- 5.3 The Government response to the *Seventh Review Report* advised that the MAA had established the MRG to provide a representative consultative forum between the MAA and key stakeholders on significant issues of policy and procedure and to contribute to continuous improvement in the timely and cost effective resolution of disputes.³¹⁷

³¹⁴ Answers to pre-hearing questions on notice, MAA, p 11.

³¹⁵ 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 67-76.

³¹⁶ Standing Committee on Law and Justice, Report 31, p 86.

³¹⁷ NSW Government, Government response to the 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 6.

5.4 The MRG is made up of representatives from the MAA, insurance industry, legal profession, MAS Assessors and CARS Assessors. It meets bi-monthly to discuss issues around improving medical and claims assessment services.³¹⁸

5.5 In its submission to the current Review the NSW Bar Association noted that, while the MRG '... is an extremely useful forum for addressing practical problems', the MRG is not able to affect change to the legislative requirements of the Scheme despite the identification of areas for improvement:

However, one of the difficulties confronted by the MRG is that frequently problems arise which require reform or modification of the Act, the Guidelines or the Regulations. Review and reform of the legislative regime is not within the control of the operations side of the MAA ... there is a clear disconnect between the MAA's operational side and its policy role.³¹⁹

5.6 The Bar Association also outlined its concerns regarding the disconnect between the MRG, which largely deals with operational aspects of the MAA, and the policy arm of the MAA, as follows:

Earlier this year, members of the MRG had a productive meeting with a consultant brought in to advise the MAA about the quality of its consultation meetings. All stakeholders addressed the issue of the disconnect between the operational side of the MAA and the policy work of the MAA. All stakeholders raised concerns that, whilst there are plenty of discussions, little progress has been made in this regard. The MRG would reach conclusions as to sensible steps that needed to be taken to improve the efficiency of Scheme operations. Although a report of these discussions would be provided to head office, however; unanimous recommendations would be rejected without any rationale being provided back to the MRG.³²⁰

5.7 The Bar Association suggested that the effectiveness of the MRG as a consultative body could be improved if representatives of the MAA policy development area attended and participated in MRG discussions.³²¹

5.8 In response to the Bar Association's suggestion, the MAA noted that '[o]fficers from other areas of the MAA may attend meetings of the MAAS Reference Group as appropriate'.³²²

5.9 In turn, the Bar Association said that although the MAA stated that officers from other areas of the MAA may hypothetically attend meetings of the MRG, in practice it is unlikely that a policy officer would attend meetings:

With regards the MAA's comments that officers from other areas of the MAA "may" attend meetings of the MRG as appropriate, the Bar Association acknowledges the hypothetical possibility, but seeks to change the reality. No officer from the policy unit has attended an MRG meeting in the memory of the Association's representative. The suggestion of an officer from the policy unit attending MRG meetings was first

³¹⁸ Government response to the Standing Committee on Law and Justice, Report 31, p 6; MAA, *Annual Report 2008/09*, p 15.

³¹⁹ Submission 4, NSW Bar Association, p 2.

³²⁰ Submission 4, pp 2-3.

³²¹ Submission 4, p 2.

³²² Answers to pre-hearing questions on notice, MAA, p 11.

made with the MAA over six months ago and there have been no developments in this regard since.³²³

Committee comment

- 5.10** The Committee acknowledges the importance of the MAAS Reference Group in providing a consultative forum for key stakeholders to discuss issues relating to both MAS and CARS with the MAA. The Committee considers that the proposal from the NSW Bar Association that representatives from the policy development area of the MAA attend meetings of the MRG has merit.
- 5.11** The Committee notes the advice from the MAA that officers from other areas of the MAA may attend meetings of the MRG as appropriate.
- 5.12** The Committee therefore encourages that the MAA facilitate the attendance of relevant officers at MRG meetings, dependent on the matters that will be discussed at each meeting, particularly if requested by the MRG. This will allow key stakeholders to discuss issues of concern, and develop appropriate solutions, in consultation with officers from the MAA with the relevant expertise.
- 5.13** The Committee also considers that it would be beneficial to implement a feedback mechanism, whereby the MRG is informed as to why a particular recommendation has not been adopted by the MAA. This type of feedback would assist members of the MRG to understand the outcomes of their work, and help to inform future discussions of issues and strategies.

Recommendation 11

That the Motor Accidents Authority facilitate the attendance of relevant officers at Motor Accident Assessment Service Reference Group meetings as appropriate, and develop a feedback mechanism to inform the Group as to the background for not adopting proposals.

Medical Assessment Service

- 5.14** The MAS assesses medical disputes that arise between an injured person and an insurer regarding the treatment, stabilisation and degree of permanent impairment of injuries, as well as the level of impairment of a claimant's earning capacity.³²⁴
- 5.15** Assessments are undertaken by health experts who are appointed as MAS Assessors and who are independent of both the claimant and the insurer. Decisions made by MAS Assessors

³²³ Answers to questions on notice taken during evidence 11 June 2010, Mr Alastair McConnachie, A/Executive Director, NSW Bar Association, pp 4-5.

³²⁴ MAA, *Annual Report 2007/2008*, p 81.

about past and future treatment, permanent impairment and stabilisation, are binding on the parties to the claim, CARS and the Courts.³²⁵

5.16 The exercise of the MAA's functions through the MAS was the focus of the Committee's Eighth Review and a detailed description of the MAS is contained in the Committee's *Eighth Review Report*.³²⁶ In that report the Committee noted that the performance of the MAS continues to improve, including in relation to the quality and timeliness of assessments carried out by the MAS. A number of issues relating to specific aspects of the MAS were, however, raised by stakeholders and the Committee made several recommendations aimed at further enhancing the efficiency and effectiveness of the MAS. Some of those issues are ongoing and have also been considered during the current review.

5.17 This section discusses the following issues that were raised by participants about the MAS during the current review:

- the whole person impairment threshold
- consistency of whole person impairment assessments
- potential conflicts of interest for MAS Assessors
- the application of legal concepts of causality
- time taken to finalise assessments and disputes.

Whole person impairment threshold

5.18 Whole person impairment (WPI) assessments involve the determination of the degree of permanent impairment resulting from the injuries caused by a motor accident. An assessment of more than ten per cent entitles the claimant to claim compensation for non-economic loss (that is, pain and suffering).³²⁷

5.19 The ten per cent threshold for WPI assessment was extensively examined in the Committee's *Eighth Review Report*. During the Eighth Review, some stakeholders criticised the threshold as being unfair because it excludes a significant proportion of those injured in motor accidents from receiving compensation for non-economic loss. Stakeholders were also concerned that the score for assessment of psychiatric injury could not be combined with the score for the assessment of physical impairment when determining the degree of WPI.³²⁸ The Committee noted these concerns but did not comment on the appropriateness of the threshold, preferring instead to focus on identifying measures to improve the consistency of WPI assessments.³²⁹

³²⁵ MAA, *Annual Report 2007/2008*, p 81.

³²⁶ 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 16-45

³²⁷ MAA, *Annual Report 2008/09*, p 85.

³²⁸ Standing Committee on Law and Justice, Report 34, p 38.

³²⁹ Standing Committee on Law and Justice, Report 34, pp 38-39.

5.20 During the current Review, several stakeholders continued to express concern that the ten per cent threshold for the WPI assessment is an unfair measure of impairment resulting from injuries sustained as a result of a motor accident.

5.21 For example, Dr Andrew Morrison SC, a member of the State Committee of the Australian Lawyers Alliance, expressed the view that the threshold unfairly excludes the majority of injured people from receiving compensation for non-economic loss:

The 10 per cent-plus is capricious, it is unfair, it denies compensation for pain and suffering to something in the order of 90 per cent of those injured in motor accidents...³³⁰

5.22 The NSW Bar Association concurred that the threshold was unjust, noting that the Association '... has long advocated that the WPI threshold is capricious. Some serious injuries fall below the 10% threshold whilst other injuries that might be considered less severe exceed the threshold'.³³¹

5.23 Mr Timothy Concannon, a member of the Personal Injury Compensation Committee of the Law Society of NSW, observed that the community is increasingly aware of the challenges faced in attempting to receive compensation for pain and suffering: 'The general community is now aware – to some extent, if not wholly – that it is very difficult to recover money for pain and suffering in a motor accident'.³³²

5.24 The Australian Lawyers Alliance outlined the challenges faced by claimants in exceeding the ten per cent threshold, particularly in instances where serious, but not permanent, injury has resulted as a consequence of a motor accident:

... if you have fractures of both arms and both legs, are off work for six months, require total care for most of that period and have been in severe pain, because you make a generally good recovery, you get nothing for pain and suffering. The impairment is not permanent. If the prognosis is five years of severe depression, because this is not permanent, you get nothing.³³³

5.25 Dr Morrison noted that it is especially difficult to reach the ten per cent threshold in the case of psychiatric injury, because it is unusual to receive a prognosis of permanent impairment for this type of injury:

Generally on the psychiatric it has to be a gross injury to recover because for most psychiatric injuries the prognosis is not for permanent impairment. You may be unable to work for the next 10 years but because that is not a permanent impairment you will be assessed at nil on the permanent impairment scale. There is a difficult methodology of working it out.³³⁴

³³⁰ Dr Andrew Morrison, Senior Counsel; Member, State Committee, Australian Lawyers Alliance, Evidence, 11 June 2010, p 40.

³³¹ Submission 4, p 12.

³³² Mr Timothy Concannon, Member, Personal Injury Compensation Committee, Law Society of NSW, Evidence, 11 June 2010, p 21.

³³³ Submission 2, Australian Lawyers Alliance, p 2.

³³⁴ Dr Morrison, Evidence, 11 June 2010, pp 40-41.

5.26 The Australian Lawyers Alliance also expressed serious concern that claimants were unable to aggregate physical and psychological impairment assessments to reach the ten per cent threshold:

If you have a 10% permanent physical impairment and a 10% permanent psychological impairment, because the two cannot be aggregated together and neither exceeds 10%, you get nothing for pain and suffering. If pain in an arm or a leg (or both) is so severe that you cannot use it but you have not lost the physical and theoretical capacity to use it, your permanent impairment is assessed at nothing.³³⁵

5.27 The Australian Lawyers Alliance suggested that, in the event that it was not possible to remove the requirement to reach a certain threshold before compensation for pain and suffering could be awarded, there were two possible solutions to address the identified issues. First, the Alliance proposed that the threshold be lowered to encompass a broader range of injuries:

One of the problems with the 10 per cent threshold is that there are many, many injuries that, under the guidelines, equal exactly 10 per cent rather than being over 10 per cent. We find that there are a lot of injured people in the 7, 8, 9 and 10 per cent categories ... it is excluding a huge range of injuries, including very serious injuries. If it is not going to be abolished altogether, which is our primary submission, then reducing it to a lower threshold would make it a lot better.³³⁶

5.28 Alternatively, the Alliance proposed retaining the ten per cent threshold, but allowing the aggregation of the assessment results for physical and psychological impairment:

The default position would be that you should get rid of the difference between psychological and physical impairment so that you can combine the two. At the moment you do have situations where you can have someone with 10 per cent physical impairment, which is a very serious impairment, 10 per cent psychological impairment, which is very serious also, and yet that does not combine to be 20 per cent. It combines to be effectively nothing ...³³⁷

5.29 The NSW Bar Association suggested that the MAA had expressed in principle support for a review of the ten per cent WPI threshold, but noted that no firm commitment has been made by the MAA to undertake such a review:

Unfortunately, whilst the MAA appears to agree in principle to conduct some sort of review, no such review appears to have occurred. Whilst the demands of insurers to engage yet another set of consultants in the search for inflationary pressures within the scheme are readily granted, studies to determine whether claimants are being appropriately compensated receive no such priority.³³⁸

5.30 The MAA did not comment on the WPI threshold or advise if there was to be review of the threshold as flagged by the NSW Bar Association.

³³⁵ Submission 2, p 2.

³³⁶ Ms Jnana Gumbert, Director, Stacks Goudkamp Solicitors; NSW Branch President, Australian Lawyers Alliance, Evidence, 11 June 2010, p 44.

³³⁷ Ms Gumbert, Evidence, 11 June 2010, p 44.

³³⁸ Submission 4, p 12.

Committee comment

- 5.31** The Committee considered issues surrounding the WPI assessment in detail in its *Eighth Review Report*, including the fairness of the ten per cent threshold which is used to determine if compensation can be awarded for pain and suffering. The Committee concluded that as the threshold was a matter of policy for the Government, the Committee would focus on the operation of the MAS in relation to the threshold rather than the threshold itself.
- 5.32** During the current review, a number of stakeholders expressed ongoing concerns about the WPI assessment, arguing that the ten per cent threshold is a capricious measure of impairment resulting from injuries sustained as a result of a motor accident. Several stakeholders also expressed concern that the need to exceed the ten per cent threshold before compensation for non-economic loss can be awarded may unfairly exclude claimants who have been severely, but not permanently injured, from receiving compensation for pain and suffering.
- 5.33** The Committee acknowledges the ongoing importance of these concerns and notes the Australian Lawyers Alliance's suggestion that the threshold should be lowered to encompass a broader range of injuries and that physical and psychological WPI assessments should be able to be aggregated to meet the ten per cent threshold.
- 5.34** The Committee considers that the issues surrounding the ten per cent threshold for WPI assessment deserve careful and thorough consideration, to identify whether changes need to be made to ensure that the threshold for non-economic loss compensation is fair and equitable for all Scheme participants. Any change in the threshold requirement should only occur on the basis of a thorough examination of the necessity for the change and the implications for the Motor Accidents Scheme as a whole.
- 5.35** Accordingly, the Committee believes that the next parliamentary committee review of the MAA and the Motor Accidents Council should include a focus on the issue of whole person impairment. This will allow the Committee to examine the issue from a range of perspectives and, if appropriate, to develop recommendations that contribute positively to the evolution of the Scheme.

Recommendation 12

That the next review of the Motor Accidents Authority and Motor Accidents Council, to be conducted in 2012 by a Committee of the Legislative Council as required under section 210 of the *Motor Accidents Compensation Act 1999*, include a focus on the issue of the ten per cent whole person impairment threshold for non-economic loss.

Consistency of whole person impairment assessments

- 5.36** Another aspect of WPI assessments that has been previously explored by the Committee is the need to ensure consistency between WPI assessments made by different MAS Assessors. The Committee's *Eighth Review Report* contains a detailed discussion of the concerns held by stakeholders about inconsistencies in WPI assessments.³³⁹

³³⁹ Standing Committee on Law and Justice, Report 34, pp 33-36.

- 5.37** The Committee's *Eighth* and *Ninth Review Reports* recommended that the MAA undertake a review of WPI assessments to determine the extent of inconsistencies in assessment and to identify if any additional measures were necessary to improve consistency in assessment.³⁴⁰
- 5.38** The Government Response to the Committee's *Ninth Review Report* noted that several quality control mechanisms have been introduced by the MAA to improve consistency in WPI assessment. These measures include:
- bi-monthly forums to discuss disputed assessment and contentious areas of assessment, and to develop and refine internal policies
 - an annual conference to update assessors
 - a regular electronic newsletter which contains procedural and policy updates, together with any areas of concern that have arisen
 - an email address for permanent impairment questions and queries
 - the publication of de-identified case studies on the MAA website to assist assessors to better understand assessments
 - the formation of the Permanent Impairment Guidelines Interpretation Group, to provide expert advice on the Guidelines
 - review applications are given to the original assessor, together with any reply, the Proper Officer's decision and a copy of the Review Panel Certificate, to provide the assessor with feedback
 - the provision of review panel determinations to all assessors to inform of any issues that have arisen.³⁴¹
- 5.39** During the current review, the MAA advised that that effectiveness of these mechanisms has been demonstrated by:
- a reduction in the number of total impairment disputes received by MAS from 84 per cent in 2008 to a current level of 76 per cent
 - a decrease in the number of cases referred to the medical review panel that resulted in a material change to the original assessment, from 64 per cent in 2008 to a current level of 58 per cent
 - an increase in the number of cases that have had the original assessment confirmed or non-materially changed, from 35 per cent in 2008 to a current level of 42 per cent
 - a decrease in the number of requests to correct obvious errors in medical assessments, from 52 request in 2008 to 18 in the first six months of 2010
 - a decrease in the total number of complaints against MAS assessor assessment procedures, from 33 in 2007/08 to eight in 2009/10.³⁴²

³⁴⁰ Standing Committee on Law and Justice, Report 34, p 39; NSW Legislative Council, Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council – Ninth Report*, Report 36, September 2008, p 31.

³⁴¹ Government Response to the Standing Committee on Law and Justice, Report 36, September 2008, pp1-2; Answers to pre-hearing questions on notice, MAA, pp 11-12.

³⁴² Answers to additional questions on notice, MAA, pp 4-5.

5.40 Only one stakeholder drew the Committee's attention to inconsistencies in WPI assessments during the current review. In this regard the Australian Lawyers Alliance's submission stated that '[t]he requirement for a MAS assessment of permanent impairment has resulted in inconsistent and highly contradictory outcomes.'³⁴³

Committee comment

5.41 The Committee commends the ongoing efforts of the MAA to address the concerns of stakeholders and the Committee about the consistency of WPI assessments. The Committee is confident that as the measures to improve consistency in assessment are embedded in the operation of MAS, the uniformity of assessment will continue to improve.

5.42 The Committee will continue to monitor the consistency of assessments in future reviews to ensure that any action taken by the MAA serves to enhance and improve consistency in WPI assessment in the long term.

Application of legal concept of causation

5.43 Another issue raised during the current review was the ability of MAS Assessors to make assessment about causation, i.e. whether the treatment provided to an injured person relates to the injury *caused* by the motor vehicle accident. This issue was particularly concerning for several stakeholders because of the binding nature of a MAS Assessors' assessment. This was the first time during the course of the Committee's ten reviews that stakeholders have raised concerns about this issue.

5.44 Under sections 58 and 61 of the *Motor Accidents Compensation Act 1999*, certificates issued by a MAS Assessor in regards to certain matters are '... conclusive evidence, and are, therefore, binding on the parties, CARS and the courts'.³⁴⁴ These matters include:

- whether the treatment provided, or to be provided, to the injured person was or is reasonable and necessary in the circumstances
- whether any such treatment relates to the injury caused by the motor accident
- whether, as a result of the motor accident, the degree of permanent impairment of the injured person is greater than ten per cent.³⁴⁵

5.45 In its submission the Law Society of NSW was critical of the ability of the medically trained MAS Assessors to adequately make decisions about 'care' disputes in general and decisions about causation in particular.

5.46 The Law Society of NSW noted that the 2009 Supreme Court decision in *Ackling v. QBE Insurance (Australia) Limited* endorsed the binding nature of a MAS Assessors' decision about the causation of a claimant's injuries:

... the recent Supreme Court decision of *Ackling v. QBE Insurance (Australia) Limited* delivered on 28 August 2009 appears to endorse the proposition that, in relation to

³⁴³ Submission 2, p 7.

³⁴⁴ Answers to pre-hearing questions on notice, MAA, p 15.

³⁴⁵ Answers to pre-hearing questions on notice, MAA, p 15.

those matters set out in s.58, a MAS Assessor appointed by the Medical Assessment Service is entitled to express a binding view on the causation of the Claimant's injuries.³⁴⁶

- 5.47** The Law Society explained that while the Ackling case related to the issue of entitlement to non-economic loss, under the *Motor Accidents Compensation Act 1999* a MAS Assessor may equally express a binding opinion on the reasonableness of the treatment regime of the claimant and also whether the injury was actually *caused* by the motor accident:

Whereas Ackling was an issue in relation to the Claimant's entitlement to non-economic loss (i.e. pain and suffering), a MAS Assessor may equally express a binding view pursuant to s.58 as to whether "any such treatment relates to the injury caused by the motor accident" and as to whether past or future medical treatment "is reasonable and necessary". Disconcertingly, treatment is defined not only to include issues relating to medical treatment or dental treatment, but also to include "attendant care services" pursuant to s.42 of the *Motor Accidents Compensation Act 1999*. Effectively this means that a doctor, or possibly an occupational therapist, will be providing a binding assessment not only as to the reasonableness of any proposed care regime but also as to whether or not the injury itself was one that was caused by the motor accident.³⁴⁷

- 5.48** The Law Society of NSW argued that '... medical practitioners are not trained in the legal test of causation and are, therefore, ill-equipped to assess such matters'.³⁴⁸ The Law Society suggested that if the determination of treatment disputes was left solely to MAS Assessors, the result could be a protracted review process as the accuracy of determinations were questioned:

... leaving the determination of care disputes in the hands of MAS Assessors represents a denial of natural justice for the injured person and it has the real potential to stagnate the whole MAS and CARS process during the inevitable review and further medical assessment process which follows a flawed MAS care determination.³⁴⁹

- 5.49** Mr Andrew Stone, a member of the Common Law Committee of the NSW Bar Association and the Association's nominee on the Motor Accidents Council, shared the view that these binding assessments are problematic. He noted that, while the assessments involve the consideration of medical issues, they also involve consideration of legal issues that MAS Assessors are not trained to apply:

There is dispute in a very significant number of cases as to both whether the injury was caused by the accident, and the extent to which the injury was caused by the accident. Causation is partly a medical question, but it is also partly a legal question that the doctors are regularly getting wrong. Given the doctors' exclusive jurisdiction over that question, while you can argue whether or not they are getting the medical part of it right, they are quite frequently getting the legal part of it wrong.³⁵⁰

³⁴⁶ Submission 5, Law Society of NSW, p 2.

³⁴⁷ Submission 5, p 2.

³⁴⁸ Submission 5, p 2.

³⁴⁹ Submission 5, p 3.

³⁵⁰ Mr Andrew Stone, Member, Motor Accidents Council, as nominated by the NSW Bar Association; Member, Common Law Committee, NSW Bar Association, Evidence, 11 June 2010, pp 34-35.

- 5.50** Dr Morrison of the Australian Lawyers Alliance argued that MAS Assessors consistently fail to correctly consider the legal aspect of their decisions:

Causation, as has already been pointed out by previous witnesses to you, involves both medical and legal questions. The doctors consistently do not apply legal standards. They tend to apply the test of what is “the” cause of the injury, not “a” cause of the injury, which is the legal test.³⁵¹

- 5.51** The Australian Lawyers Alliance also highlighted that because MAS Assessors often incorrectly apply, or fail to take into account, the legal aspects of their decision, there appears to have been an increase in judicial reviews of assessments:

Medical practitioners have very different ideas of causation from the law. The law requires that the act of negligence be a cause of the injury, not the cause. MAS Assessors have repeatedly failed to apply the law and there has been a dramatic increase in the need for judicial review of MAS assessments.³⁵²

- 5.52** The Law Society proposed that treatment disputes should be considered by a legally trained person with access to the entire case history, including medical evidence:

... this power to deal with care disputes is one that should be the subject of detailed analysis by a legally trained person who has all the relevant material before him or her including any relevant care statements and including the totality of the medical evidence. This legally trained person should have the capacity, if appropriate, to question the Claimant and his or her carers and to invite legal submissions from Solicitors or Counsel from both sides.³⁵³

- 5.53** The Australian Lawyers Alliance proposed that the situation be resolved by reverting to the 2008 position, where a MAS Assessors decision was not binding but simply an expression of an opinion:

It is submitted that MAS assessors (doctors) have shown themselves so incapable of applying legal ideas of causation that the 2008 amendment making their views binding should be rescinded and the old position in which they could express an opinion but not bind a subsequent assessor be restored.³⁵⁴

- 5.54** Mr Stone identified an alternative solution, suggesting that MAS Assessors should be allowed to make a recommendation as to the medical aspect of causation, before having a CARS Assessor or a judge determine the question of legal causation:

I think the answer is that you make it not binding on the question of causation. Leave it up to them to decide whether it is over 10 per cent or not. Let them express an opinion on causation, but then subsequently have the Claims Assessment and Resolution Service assessor or the judge consider that they have guidance on the medical question of causation, now let them add their legal expertise on causation and reach a final conclusion.³⁵⁵

³⁵¹ Dr Morrison, Evidence, 11 June 2010, p 41.

³⁵² Submission 2, pp 7-8.

³⁵³ Submission 5, p 2.

³⁵⁴ Submission 2, pp 7-8.

³⁵⁵ Mr Stone, Evidence, 11 June 2010, pp 34-35.

- 5.55** However, Ms Mary Maini, member of the Motor Accidents Insurance Policy Committee and Chair of the CTP Claims Managers Committee of the Insurance Council of Australia, cautioned against steering the Scheme towards a more legally oriented perspective:

I believe that the Insurance Council would say that generally MAS does work. It is a medically based scheme and that is one of the elements of the *Motor Accidents Act*. If you accept that then you have MAS Assessors making medical decisions. If you move away from that and towards a legal scheme, that means a complete rewrite.³⁵⁶

- 5.56** Despite the concerns raised, the MAA suggested that it would be unsuitable for a person other than an appropriately qualified medical or health specialist to make a binding determination on treatment, causation and impairment:

Questions of reasonable and necessary treatment, causation and the degree of permanent impairment of injuries are matters of specialist medical opinion which should be addressed by appropriately qualified medical and allied health specialists. It would be inappropriate for someone other than a MAS Assessor to make a binding determination on these matters.³⁵⁷

- 5.57** The MAA also highlighted that if a party to a matter believes a material error in assessment has been made, it is possible to have the decision reviewed: 'If either party to a matter is of the opinion that a MAS Assessor has made a material error in the course of their assessment, they may seek a review under section 63 of the *Motor Accidents Compensation Act 1999*'.³⁵⁸

- 5.58** Under section 63 of the *Motor Accidents Compensation Act 1999*, the decision is referred to a review panel of at least three MAS Assessors for review.³⁵⁹ The review is not limited to a review only of that aspect of the assessment that is alleged to be materially incorrect, but is a new assessment of all the matters relating to the medical assessment.³⁶⁰

- 5.59** The MAA *Annual Report 2007/08* states that over the reporting period, there were 466 applications for further assessment, 23 per cent of which were referred to a review panel for consideration.³⁶¹ In 2008/09, there were 401 applications for further assessment, 25 per cent of which were referred to a review panel for consideration.³⁶²

Committee comment

- 5.60** The binding nature of MAS Assessors' decisions, and their ability to make determinations about causation in particular, generated a great deal of concern among some stakeholders in this review. Whilst the assessments made by MAS Assessors primarily involve the consideration of medical issues, they can also involve the consideration of legal issues such as causation. The Committee notes the concerns raised by the NSW Bar Association, the Law

³⁵⁶ Ms Mary Maini, Member, Motor Accidents Insurance Policy Committee and Chair, CTP Claims Managers Committee, Insurance Council of Australia, Evidence, 11 June 2010, p 52.

³⁵⁷ Answers to pre-hearing questions on notice, MAA, p 16.

³⁵⁸ Answers to pre-hearing questions on notice, MAA, p 16.

³⁵⁹ *Motor Accidents Compensation Act 1999*, s 63(1) and (3).

³⁶⁰ *Motor Accidents Compensation Act 1999*, s 63(3A).

³⁶¹ *MAA, Annual Report 2007/08*, p 88.

³⁶² *MAA, Annual Report 2008/09*, p 88.

Society of NSW and the Australian Lawyers Alliance and the options they have identified to address the issue.

- 5.61** The Committee is mindful that one of the main premises of the Motor Accidents Scheme is that it provides efficient and cost effective dispute resolution with minimal recourse to the Courts. In this regard careful consideration is required before any necessary changes to the dispute resolution system can be identified.
- 5.62** The Committee therefore recommends that the MAA conduct a review of the decisions made by MAS Assessors regarding causation, in order to establish whether there are particular issues associated with challenges to these decisions. The review should determine whether improvements can be made to decision making on causation issues. When undertaking this review, the MAA should consult with key stakeholders to ensure that the full range of perspectives on this issue is considered. The results of this review should be made publicly available.

Recommendation 13

That the Motor Accidents Authority conduct a review of the decisions made by Medical Assessment Service Medical Assessors regarding causation, to establish whether there are particular issues associated with challenges to these decisions. The review should determine whether improvements can be made to decision making on causation issues. When undertaking this review, the MAA should consult extensively with key stakeholders to ensure that the full range of perspectives on this issue is considered. The results of this Review should be made publicly available.

Potential conflicts of interest

- 5.63** Actual or perceived conflicts of interest can arise where a MAS Assessor also undertakes private medical assessments for claimants and/or insurers.³⁶³
- 5.64** The issue of potential conflicts of interest for MAS Assessors was explored in detail during the Committee's *Eighth Review Report*.³⁶⁴ In order to overcome potential conflicts of interest, the Committee recommended that the MAA review its procedures and rules in relation to MAS Assessors and conflicts of interest, to ensure that appropriate monitoring systems and prevention strategies were in place.³⁶⁵
- 5.65** The Government response to the *Eighth Review Report* indicated that consultation with stakeholders about this recommendation had taken place and that the MAAS was reviewing its procedures and rules in light of feedback received.³⁶⁶

³⁶³ Standing Committee on Law and Justice, Report 34, p 39.

³⁶⁴ Standing Committee on Law and Justice, Report 34, pp 39-42.

³⁶⁵ Standing Committee on Law and Justice, Report 34, p 42.

³⁶⁶ NSW Government, Government Response to the Standing Committee on Law and Justice, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Eighth Report*, Report 34, November 2007, p 1.

5.66 During the current review, the MAA advised that it has completed the review of MAS Assessors' practice workloads and potential perceptions of conflicts of interest.³⁶⁷ As a consequence of the review findings, the MAA indicated that it intends to implement a number of changes for future recruitment practices for MAS Assessors in order to minimise potential conflicts of interest. These changes are:

- all MAS treatment assessors must be in current clinical practice
- an assessor will be precluded from assessing disputes involving a party, if more than ten per cent of the assessors work is derived from that party
- assessors should not derive more than 80 per cent of their private medico-legal workload from either insurer or claimant work
- applicants who work for both insurers and claimants, or for neither insurers or claimants, should be preferred assessors
- applicants who can receive work for a majority of insurers should be preferred assessors.³⁶⁸

5.67 Whilst the majority of stakeholders were silent on this issue during the current review, the NSW Bar Association expressed concern that these new guidelines do not sufficiently define what constitutes a workload of 80 per cent of private medico-legal workload, meaning that conflicts of interest may not be avoided:

... the proposed revision will not go far enough in eliminating from the MAS panel those doctors who perform all of their medico-legal work for either plaintiffs or defendants'. For example, the Association raised concerns about the 'ambiguous' reference to an assessor being unable to derive more than 80 per cent of their private medico-legal workload from either insurer or claimant work. The Association is unclear if 'workload' pertains only to private medico-legal work or all work.³⁶⁹

Committee comment

5.68 The Committee notes the concerns of the NSW Bar Association that the guidelines may not overcome all potential situations where conflicts of interest may arise. However, the Committee considers that the measures implemented by the MAA should be given time to take effect before a review of those measures takes place. Accordingly, the Committee will re-examine the issue in its next review in 2012.

Time taken to finalise assessments and disputes

5.69 In its *Eighth Review Report*, the Committee examined in detail the matter of delays in assessments and disputes under the MAS system.³⁷⁰ Stakeholders such as the Insurance Council of Australia and the NSW Bar Association noted that there was scope for improvement in the time taken to finalise assessments and disputes.³⁷¹

³⁶⁷ Answers to pre-hearing questions on notice, MAA, p 13.

³⁶⁸ Answers to pre-hearing questions on notice, MAA, p 13.

³⁶⁹ Submission 4, p 15.

³⁷⁰ Standing Committee on Law and Justice, Report 34, pp 42-45.

³⁷¹ Standing Committee on Law and Justice, Report 34, pp 42-45.

- 5.70** In response to these concerns, the Committee recommended that the MAA conduct a study of MAS assessments and matters that took more than ten months to finalise, and report back to the Committee about the status of delays and current or future initiatives aimed at reducing delays.³⁷² The Government response to the *Eighth Review Report* expressed support for this recommendation, and advised that the MAAS was examining this matter.³⁷³
- 5.71** The Committee's *Ninth Review Report* referred to the MAA's *Annual Report 2006/07* which stated that the lifecycle of MAS assessments had reduced to 93 days as of May 2008.³⁷⁴ The MAA identified a number of factors that had contributed to this reduction, including:
- the implementation of the first stage of the MAAS Reform Agenda in May 2006, and the introduction of revised Medical Assessment Guidelines
 - reduced timeframes for MAAS administrative procedures
 - the earlier exchange of information between the parties, and in particular the earlier lodgement of MAS replies
 - improvements in the timeliness of MAS Assessors submitting their decisions to MAS.³⁷⁵
- 5.72** The MAA's *Annual Report 2007/08* advised that the average MAS application lifecycle in 2007/08 was 97 days.³⁷⁶ The *Annual Report 2007/08* also noted that it was anticipated that the October 2008 reforms would assist to reduce the amount of time taken to finalise disputes by encouraging the early exchange of information between parties to facilitate quicker settlement.³⁷⁷
- 5.73** During the current review, the MAA updated the Committee on the time taken to finalised assessments and disputes.
- 5.74** The MAA's *Annual Report 2008/09* indicated that the lifecycle for MAS assessments that were finalised in the reporting period was improving, as demonstrated by the high proportion of disputes being finalised within eight months.³⁷⁸ The MAA advised that:
- the proportion of medical disputes finalised within six months of lodgement rose to 90 per cent of all disputes finalised in the 2008/09 financial year. This was a significant improvement from 2002/03, when only 31 per cent of matters were finalised within six months
 - the proportion of medical disputes finalised within eight months of lodgement rose to 97 per cent of all disputes finalised in the 2008/09 financial year. In 2002/03, only 42 per cent of matters were finalised within eight months.³⁷⁹

³⁷² Standing Committee on Law and Justice, Report 34, p 45.

³⁷³ Government Response to the Standing Committee on Law and Justice, Report 34, p 2.

³⁷⁴ Standing Committee on Law and Justice, Report 36, pp 29-30.

³⁷⁵ Standing Committee on Law and Justice, Report 36, p 30.

³⁷⁶ MAA, *Annual Report 2007/08*, p 19.

³⁷⁷ MAA, *Annual Report 2007/08*, p 19.

³⁷⁸ MAA, *Annual Report 2008/09*, p 16.

³⁷⁹ MAA, *Annual Report 2008/09*, p 16.

- 5.75 The MAA suggested that the relatively few matters that take longer than ten months to be finalised may feature one or more of the following characteristics:
- physical assessments requiring multiple assessments
 - care disputes requiring multiple assessments
 - Acquired Brain Injury claims requiring multiple assessments
 - medical disputes that are not yet able to be assessed
 - claimants failing to attend medical assessment examinations.³⁸⁰
- 5.76 The MAA stated that it would continue to monitor the timeliness of the finalisation of medical disputes at MAS on a regular and ongoing basis.³⁸¹

Committee comment

- 5.77 The Committee notes that the lifecycle for the finalisation of MAS assessments has improved following the introduction of the 2008 reforms that encourage the early resolution of claims. The Committee will continue to monitor the time taken to finalise assessments and disputes to ensure that these matters continue to be finalised in a timely manner.

Claims Assessment and Resolution Service

- 5.78 CARS provides a cost effective system for the assessment of claims and the resolution of disputes. Claims are assessed by officers who have been designated as CARS Assessors by the MAA.³⁸² CARS Assessors are expert legal practitioners with significant experience in personal injury law and the assessment of damages.³⁸³
- 5.79 In assessing a claim, CARS Assessors can determine issues about fault or liability for the claim as well as the amount of damages or compensation to be paid. If the insurer has admitted liability, the CARS assessment is binding on the insurer and the insurer must pay the amount of damages or compensation assessed. The claimant can reject the assessment and proceed to court, however, cost penalties can apply if the claimant does not do significantly better at court. There is no access to the Courts to resolve a disputed claim unless that claim has either been assessed at CARS, or has been exempted from the CARS process.³⁸⁴
- 5.80 CARS was examined extensively by the Committee in its *Ninth Review Report*.³⁸⁵ The Committee concluded that CARS was functioning well, although several issues were identified as requiring further attention. Accordingly, the Committee made a number of recommendations to facilitate improvements in CARS, including improving access to

³⁸⁰ Answers to pre-hearing questions on notice, MAA, p 14.

³⁸¹ Answers to pre-hearing questions on notice, MAA, p 13.

³⁸² MAA, *Annual Report 2007/2008*, p 88.

³⁸³ MAA, *Annual Report 2007/2008*, p 19.

³⁸⁴ MAA, *Annual Report 2007/2008*, p 88.

³⁸⁵ Standing Committee on Law and Justice, Report 36, pp 33-80.

information for relevant stakeholders and assessing trends in claim behaviours.³⁸⁶ Several of these issues are ongoing and are examined further in this Chapter.

5.81 This section begins by providing an update on the types of notifications that are made to CARS and the trends in these notifications since the Committee's last review. A number of issues raised by stakeholders in relation to CARS are then discussed, as follows:

- MAA review of CARS processes
- late claims
- the issue of 'superimposed inflation', and
- the availability of treatment reports.

5.82 The section concludes by providing an update on several matters that were considered in the Committee's *Ninth Review Report*. These issues are:

- complex matters that are considered by CARS
- the *Guide to CARS* brochure and survey of users
- the transparency of CARS processes
- claims of contributory negligence
- matters referred to the District Court for assessment of liability, and
- insurer communication with self-represented claimants.

Notifications to CARS

5.83 There are four types of notifications that can be made to CARS: exemptions, general assessment, further assessment, and special assessment.³⁸⁷ Not all claims are referred to CARS for assessment. The Committee's *Ninth Review Report* provides a comprehensive overview of CARS and the lifecycle of a CARS assessment.³⁸⁸

5.84 In regards to the overall percentage of notifications to CARS each reporting period, the MAA's *Annual Report 2007/08* advised that no more than a third of all claims in any one accident year have any claims or disputes lodged at CARS. This disputation rate has remained consistent as the Scheme has matured.³⁸⁹

5.85 The MAA's *Annual Report 2008/09* shows that since 2001/02, the percentage of notifications has ranged from 26 per cent in 2001/02 and 22 per cent 2005/06.³⁹⁰

³⁸⁶ Standing Committee on Law and Justice, Report 36, pp xi-xviii.

³⁸⁷ MAA, *Annual Report 2008/2009*, p 89.

³⁸⁸ Standing Committee on Law and Justice, Report 36, pp 33-39.

³⁸⁹ MAA, *Annual Report 2007/2008*, p 89.

³⁹⁰ MAA, *Annual Report 2008/2009*, p 89.

- 5.86** However, the *Annual Report 2008/09* also indicated that between 2006/07 and 2008/09, the proportion of all notifications to CARS declined dramatically, falling from 12 per cent in 2006/07 to two per cent in 2008/09.³⁹¹
- 5.87** When questioned on this decrease in notifications, the MAA advised that the data for those three reporting periods has yet to be finalised, so it is likely that the proportion of notifications will change over time:
- ... the data for the most recent three years referred to in the question is underdeveloped. Some claims arising during those years are still very recent and it is too early in the development of those claims, and those lodgements at CARS to draw any conclusions regarding the number of referrals that will result.³⁹²
- 5.88** The performance of CARS in relation to applications for assessment was discussed in the Committees' *Ninth Review Report*.³⁹³ The Committee concluded that CARS was performing well, partly as a result of the Claims Handling Guidelines which encourage the early resolution of any disputes.³⁹⁴
- 5.89** During the Committee's Ninth Review the MAA indicated that, as part of the reform agenda for the Motor Accidents Assessment Service, it was considering implementing changes to the Claims Handling Guidelines. These changes were intended to enhance compliance with the amended Scheme requirements following the introduction of the October 2008 reforms, and further facilitate the early resolution of claims.³⁹⁵ The October 2008 reforms are discussed in Chapter 1.
- 5.90** Subsequent to the October 2008 reforms, the Claims Handling Guidelines were amended to:
- increase the amount payable under the early notification scheme from \$500 to \$5,000
 - encourage early settlement of claims
 - set timeframes for the payment of settlement amounts.³⁹⁶
- 5.91** The MAA advised that its 2009 review of the new Guidelines demonstrated that the new Guidelines had resulted in '... high levels of compliance with no increase in the costs of compliance'.³⁹⁷
- 5.92** The Committee will monitor the continuing impact of the amended Guidelines during its next review in 2012.

Exemptions

- 5.93** The MAA's *Annual Report 2007/08* notes that the *Motor Accidents Compensation Act 1999* provides for two types of exemptions from assessment at CARS:

³⁹¹ MAA, *Annual Report 2008/2009*, p 89.

³⁹² Answers to pre-hearing questions on notice, MAA, p 16.

³⁹³ Standing Committee on Law and Justice, Report 36, pp 39-44.

³⁹⁴ Standing Committee on Law and Justice, Report 36, p 44.

³⁹⁵ Standing Committee on Law and Justice, Report 36, pp 88-89.

³⁹⁶ Answers to pre-hearing questions on notice, MAA, p 11.

³⁹⁷ Answers to pre-hearing questions on notice, MAA, p 11.

- mandatory exemptions by the Principal CARS Assessor, where a claim can be exempted based on specific circumstances outlined in the Claims Assessment Guidelines
- discretionary exemptions, where a CARS Assessor can find that a claim is 'unsuitable for assessment', and approval from the Principal CARS Assessor is obtained.³⁹⁸

5.94 The MAA's *Annual Report 2008/09* indicated that the number of applications for exemptions had trended upwards over the reporting periods from 2004/5 and 2008/09, ranging from 39 per cent in 2004/2005 to 49 per cent in 2008/09.³⁹⁹ Of the matters where exemptions were requested, 97 per cent of applications were exempted in 2008/09, compared with 96 per cent in 2007/08.⁴⁰⁰

General and further assessments

5.95 If an insurer admits liability, the CARS general assessment of the quantum of the claim is binding on the insurer. However, a *claimant* can reject the CARS general assessment and proceed to Court for resolution of the claim. Cost penalties apply if the claimant does not achieve a 'significantly better' result via the Court process.⁴⁰¹

5.96 If, after the matter has proceeded to Court, new evidence is adduced that was not available to the original CARS Assessor, the matter may be remitted back to CARS for Further Assessment.⁴⁰²

5.97 The MAA's *Annual Report 2008/09* indicated that the number of applications for general assessments had trended downwards over the reporting periods from 2004/5 and 2008/09, decreasing from 56 per cent in 2004/2005 to 45 per cent in 2008/09.⁴⁰³ Requests for Further Assessments remained constant at approximately 0.2 per cent of applications.⁴⁰⁴

Special Assessment disputes

5.98 Special Assessment disputes encompass instances where a procedural dispute arises, such as:

- late claims
- claims that are not reported to the Police
- claim forms that do not meet with requirements
- whether an insurer can delay making an offer
- whether a payment for treatment or rehabilitation must be made.⁴⁰⁵

³⁹⁸ MAA, *Annual Report 2007/2008*, p 90.

³⁹⁹ MAA, *Annual Report 2008/2009*, p 90.

⁴⁰⁰ MAA, *Annual Report 2007/2008*, p 90; MAA, *Annual Report 2008/2009*, p 91.

⁴⁰¹ MAA, *Annual Report 2008/2009*, p 91.

⁴⁰² MAA, *Annual Report 2008/2009*, p 91.

⁴⁰³ MAA, *Annual Report 2008/2009*, p 90.

⁴⁰⁴ MAA, *Annual Report 2008/2009*, p 90.

⁴⁰⁵ MAA, *Annual Report 2008/2009*, p 92.

5.99 The MAA advised that the number of Special Assessment disputes has remained consistently between five per cent and six per cent over the reporting periods from 2004/05 and 2008/09:

Although when expressed as a percentage there appears to be a certain degree of volatility, the number of actual Special Assessment Disputes has remained consistent and small over that time, ranging between 156 and 235 applications per annum. As a percentage of disputes lodged, special assessment applications have remained consistent, at between 5% and 6%, of all applications lodged over the past 5 years.⁴⁰⁶

5.100 Between 2007 and 2009, the majority of Special Assessment disputes related to late claims. In 2007/08, late claims accounted for 65 per cent of all Special Assessment disputes, increasing to 85 per cent in 2008/09.⁴⁰⁷

5.101 During the current review, some stakeholders raised concerns in relation to the late claims process. These concerns are discussed in detail in Chapter 4.

Number of finalisations

5.102 In 2007/08, there were 3,490 CARS assessments finalised. The finalisations comprised:

- 1,475 exemptions (42 per cent)
- 1,848 general assessments (53 per cent)
- 4 further assessments (0 per cent)
- 163 special assessments (5 per cent).⁴⁰⁸

5.103 In 2008/09, there were 3,564 matters finalised, comprising of:

- 1,698 exemptions (48 per cent)
- 1,689 general assessments (47 per cent)
- 5 further assessments (0 per cent)
- 172 special assessments (5 per cent).⁴⁰⁹

Committee comment

5.104 The Committee notes that the overall percentage of notifications to CARS has remained consistent as the Scheme has matured. The Committee further notes that the amended Claims Handling Guidelines, which were enacted following the October 2008 reforms to the Scheme, will assist to encourage the early resolution of claims.

⁴⁰⁶ Answers to pre-hearing questions on notice, MAA, pp 16-17.

⁴⁰⁷ MAA, *Annual Report 2008/2009*, p 92.

⁴⁰⁸ MAA, *Annual Report 2008/2009*, p 90.

⁴⁰⁹ MAA, *Annual Report 2008/2009*, p 90.

CARS Review

- 5.105** During the Committee's review, the MAA advised that it is undertaking preliminary work, including consultation with licensed insurers and the NSW Bar Association and the Law Society of NSW, to establish the terms of reference and timetable for a review of CARS processes.⁴¹⁰
- 5.106** The MAA advised that the main objectives of the CARS Review will be to identify ways to ensure that CARS functions to meet its objectives, and to enable CARS to respond to community needs.⁴¹¹
- 5.107** Ms Maini from the Insurance Council of Australia indicated that the Insurance Council of Australia was optimistic that the CARS Review would lead to improvements in the operation of the service:

The insurance industry is really looking forward to the CARS review. We are seeing awards increase, but when we read some of the assessments we cannot see why. When we look at it over the cohort, we cannot understand why it is going up. We hope that the CARS review and everybody participating in it will be able to contribute and we will have healthy tweaking.⁴¹²

- 5.108** During the course of the Committee's review the MAA indicated that a number of issues raised by stakeholders would be included as part of the CARS review, as follows:
- Late claims process (see paragraph 5.122)
 - Superimposed inflation (see paragraph 5.129)
 - Complex matters considered by CARS (see paragraph 5.150)
 - CARS user survey (paragraph 5.154)
- 5.109** The MAA advised the Committee that it anticipates commencing the review in the second half of 2010.⁴¹³ No further detail about the commencement of the review is known at the time this report was being finalised.

Committee comment

- 5.110** The forthcoming review of CARS will allow the MAA and key stakeholders to closely scrutinise the operations of CARS and ensure that the service is meeting its objectives. The review will also allow for the identification of areas for improvements as well as any trends in dispute resolution processes to which CARS may need to respond. The Committee looks forward to examining the outcomes of this process during its next review of the MAA in 2012.

⁴¹⁰ Answers to pre-hearing questions on notice, MAA, p 19.

⁴¹¹ Answers to additional questions on notice, MAA, p 3.

⁴¹² Ms Maini, Evidence, 11 June 2010, p 52.

⁴¹³ Answers to additional questions on notice, MAA, p 3.

Late claims

5.111 One Review participant raised concerns about the requirements for lodging a late claim with the MAA. These concerns pertained to the requirement to make a 'full and satisfactory' explanation as to why a late claim is being lodged, and the binding decisions that can be made by a Claims Assessment and Resolution Services (CARS) Assessor in determining whether or not a 'full and satisfactory' explanation has been provided.

5.112 Although the MAA encourages claimants to lodge claims as soon as possible after an accident, there are mechanisms to facilitate the lodgement of late claims. As noted by the MAA, late claims attract an additional requirement to provide a 'full and satisfactory' explanation for the delay:

A claim must be made within six months of the date of the accident. A claim may be made more than six months after the date of the accident in which case it is called a late claim. In accordance with section 73 of the *Motor Accidents Compensation Act 1999*, a late claim can be made if the claimant provides a full and satisfactory explanation for the delay in making the claim.

This means that a claimant must provide a "full account of the conduct, including the actions, knowledge and belief of the claimant, from the date of the accident until the date of providing the explanation. The explanation is not a satisfactory explanation unless a reasonable person in the position of the claimant would have failed to have complied with the duty or would have been justified in experiencing the same delay".⁴¹⁴

5.113 The MAA advised that the additional requirement associated with lodging a late claim is intended to '... encourage the early notification of claims and in turn, the early rehabilitation of claimant's injuries and the early resolution of claims'.⁴¹⁵

5.114 The *Annual Report 2008/2009* states that in the 2007/08 reporting period 101 late claims were lodged compared to 158 lodged in the 2008/09 reporting period.⁴¹⁶

5.115 The NSW Bar Association raised concerns regarding the late claims process, suggesting that '... the whole area of late claims has now become a mess'.⁴¹⁷ The Association argued that the requirement, or 'penalty', to provide a 'full and satisfactory' explanation when lodging a late claim is problematic, because what constitutes a 'full and satisfactory' explanation is open to interpretation:

Unfortunately, the "penalty" of having to provide a "full and satisfactory" explanation has become an end in itself, rather than a means to an end. Insurers fight bitterly to prove that there is not a full and satisfactory explanation with the aim of escaping liability for claims. There is regular litigation in the Supreme Court, the Court of Appeal and there have even been High Court cases over what constitutes a "full and satisfactory" explanation.⁴¹⁸

⁴¹⁴ Answers to pre-hearing questions on notice, MAA, p 20.

⁴¹⁵ Answers to pre-hearing questions on notice, MAA, p 20.

⁴¹⁶ MAA, *Annual Report 2007/08*, p 92; MAA, *Annual Report 2008/09*, p 92.

⁴¹⁷ Submission 4, p 14.

⁴¹⁸ Answers to questions on notice taken during evidence 11 June 2010, Mr McConnachie, p 3.

5.116 The issue of late claims was first raised during the Committee's Sixth Review, with the Committee's *Sixth Review Report* briefly noting the NSW Bar Association's similar concern regarding the requirement to provide a 'full and satisfactory' explanation.⁴¹⁹

5.117 During the current review, the NSW Bar Association noted that the requirement to provide a 'full and satisfactory' explanation for late claims was intended to encourage claimants to make an early notification of claims.⁴²⁰ The Association identified the following benefits of the early lodgement of claims:

- allowing for an early determination on liability
- facilitating better health outcomes through the early payment of treatment and rehabilitation expenses
- allowing insurers to make more accurate estimates of their future potential liabilities.⁴²¹

5.118 However, the NSW Bar Association highlighted that the late claims process was *not* intended to provide insurers with the opportunity to deny claims due to the timing of their lodgement:

... the six month limit was never intended to be a bar to the ultimate pursuit of a claim. Insurers collect premiums in order that they can pay out on claims. To deny a claim that is lodged six months and one day after the accident, simply on the basis that there is not a satisfactory explanation for the delay, largely defeats the purpose of a compulsory insurance scheme.⁴²²

5.119 During the current review, the NSW Bar Association observed that for some members of the community, delays in making a claim may be attributable to their lack of awareness about the Scheme:

A portion of the public is still unaware of their right to bring a motor accident claim. These groups should not be punished by being denied access to a claim simply because they are late. They should not be put through a complex set of obstacles in order to have their late claim assessed. The emphasis should be on dealing with claims, not finding procedural points to deny claims.⁴²³

5.120 The NSW Bar Association identified an additional issue with the late claims process relating to the fact that CARS Assessors can make a binding decision as to whether or not a 'full and satisfactory' explanation has been provided. The Association expressed concern that as this decision is binding, potential claimants have no avenue of appeal if they disagree with the CARS Assessor's decision:

The *Motor Accidents Compensation Act 1999* has been amended with the purported intent of making a CARS Assessor's determination on a late claim binding. This gives a CARS Assessor far greater power than a District Court judge. If a judge determines that a late claim may not be made, a claimant at least has appellant review rights in the Court of Appeal. If a CARS Assessor determines that there is not a full and

⁴¹⁹ 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 49.

⁴²⁰ Submission 4, p 13.

⁴²¹ Submission 4, p 13.

⁴²² Submission 4, pp 13-14.

⁴²³ Submission 4, p 14.

satisfactory explanation for a late claim, then this is a finding of fact, with the claimant having no further recourse to appellat review. In such circumstances, it is critically important that CARS Assessors make well-reasoned and creditable decisions regarding late claim applications.⁴²⁴

- 5.121** The NSW Bar Association suggested two courses of action to allay their concerns about the late claims process: first, that only external assessors, or Principal Claims Assessors, should be allowed to assess late claims disputes; and second, that a review of the late claims system be undertaken.⁴²⁵
- 5.122** In response to the Bar Association's concerns the MAA stated that the late claims process will be considered as part of the CARS Review (see paragraphs 5.105-5.110).⁴²⁶

Committee comment

- 5.123** The Committee supports the intention that the late claims process should serve to encourage claimants to make as early a notification as possible, to the benefit of both the claimant and the insurer. However, the Committee shares the view of the NSW Bar Association that the late claims process should not prevent people from making a claim, nor make it overly arduous to pursue a claim.
- 5.124** The MAA's CARS Review provides an excellent opportunity to undertake a thorough examination of the late claims process. This examination should assist to determine the adequacy and fairness of the late claims process and identify ways in which the process can be improved.
- 5.125** The Committee considers that, in examining the late claims process as part of the CARS Review, the MAA should consult with the Motor Accidents Council and any other key stakeholders to ensure that a full range of stakeholder views informs any changes to the late claims process. Careful consideration should be given to the suggestion from the NSW Bar Association that only external assessors, or Principal Claims Assessors, should be allowed to assess late claims disputes. Such a measure may be necessary to ensure that only highly experienced assessors are able to make a binding determination regarding applications for late claims.

Recommendation 14

That, as part of its review of the Claims Assessment and Resolution Service, the Motor Accidents Authority examine the late claims process, in consultation with the Motor Accidents Council and key stakeholders. This examination should give consideration to allowing only external assessors, or Principal Claims Assessors, to assess late claims disputes.

⁴²⁴ Answers to questions on notice taken during evidence 11 June 2010, Mr McConnachie, p 3.

⁴²⁵ Answers to questions on notice taken during evidence 11 June 2010, Mr McConnachie, p 4.

⁴²⁶ Answers to pre-hearing questions on notice, MAA, p 20.

Superimposed inflation

- 5.126** During the Committee's Ninth Review, the Insurance Council of Australia noted that its members had observed that the levels of compensation awarded by CARS assessors had increased over time, and labelled this phenomenon 'superimposed inflation'.⁴²⁷ The Insurance Council was concerned that if this trend was left unchecked, there could be upward pressure on premiums and erosion of the benefits of the Scheme.⁴²⁸
- 5.127** In response, the MAA advised that, while superimposed inflation had not been identified as a problem during a 2006 review conducted by Pricewaterhouse Coopers, the issue would again be investigated during a review of the MAA's monitoring systems, also to be conducted by Pricewaterhouse Coopers.⁴²⁹ The Committee recommended that the MAA work collaboratively with stakeholders to implement any necessary recommendations identified by the review.⁴³⁰
- 5.128** The Government Response to the *Ninth Review Report* advised that the MAA had engaged Pricewaterhouse Coopers to undertake a further study of superimposed inflation in relation to the Scheme as a whole, and that CARS assessments would be examined as part of this study.⁴³¹
- 5.129** During the Committee's current review, the MAA indicated that a final report on the issue had been received from Pricewaterhouse Coopers, and that the issue had been included as part of the terms of reference for the upcoming review of CARS:

The MAA has received the final report by PricewaterhouseCoopers on superimposed inflation in relation to the compulsory third party scheme. The Authority has consulted extensively with insurers to identify potential causes of superimposed inflation, including aspects of the operation of CARS. The potential causes identified have been reflected in the proposed terms of reference for the review of CARS.⁴³²

- 5.130** No further information was provided on the content of the final report by Pricewaterhouse Coopers and it does not appear that the report has been made publically available.
- 5.131** The Insurance Council of Australia again raised the issue of superimposed inflation as a concern during this Review, with its submission suggesting that superimposed inflation is the consequence of poorly justified decisions made by CARS Assessors:

... the Insurance Council continues to be of the view that there are pockets of superimposed inflation in the areas of future economic loss and care. This escalation is driven by the CARS process as it allows individual assessors to make their determinations without providing sufficient reasons for some assessments.⁴³³

- 5.132** When questioned on the Insurance Council's view, the MAA declined to comment.⁴³⁴

⁴²⁷ Standing Committee on Law and Justice, Report 36, p 57.

⁴²⁸ Standing Committee on Law and Justice, Report 36, p 57.

⁴²⁹ Standing Committee on Law and Justice, Report 36, pp 58-59.

⁴³⁰ Standing Committee on Law and Justice, Report 36, p 62.

⁴³¹ Government Response to the Standing Committee on Law and Justice, Report 36, p 4.

⁴³² Answers to pre-hearing questions on notice, MAA, p 18.

⁴³³ Submission 6, Insurance Council of Australia, pp 8-9.

⁴³⁴ Answers to pre-hearing questions on notice, MAA, p 18.

5.133 Mr Anthony Mobbs, a member of the Insurance Council's Motor Accidents Insurance Policy Committee, noted that this trend in increasing awards for economic loss and future care '... has been particularly evident since 2005'.⁴³⁵

5.134 Ms Maini noted that insurers are sometimes unable to determine the reasons why an award for future care has been made:

Our claims costs are increasing and then when we analyse them we see that if a matter has gone to a CARS assessment there has been an assessment for future care and then when we review the files there is no medical evidence. There is nothing to suggest that the person actually required or sought care and assessments have included that component of care in them.⁴³⁶

5.135 Ms Maini continued to outline the potential problems associated with superimposed inflation:

It is a problem for prediction; it is a problem for premium setting and it is a problem then for saying, "Well, is the majority of the compensation dollar designed to go to the more seriously injured or are we then distributing compensation to everyone?"⁴³⁷

5.136 The Insurance Council of Australia indicated that the industry continued '... to work collaboratively with the MAA on appropriate feedback mechanisms to ensure that CARS Assessments are transparent and as consistent as possible'.⁴³⁸ Mr Mobbs expressed optimism that the pending review of the CARS process would assist to '... examine all the trends and identify solutions' to the issue of superimposed inflation.⁴³⁹

Committee comment

5.137 The Committee acknowledges the ongoing concerns of the Insurance Council of Australia regarding the increased levels of compensation awarded by CARS assessors and superimposed inflation. However, the Committee is mindful that any upward trends in the amount of compensation awarded by CARS assessors may also be attributable to factors other than superimposed inflation, such as the aspects of the operation of CARS.

5.138 The Committee notes the MAA's advice that the issue of superimposed inflation has been included as part of the terms of reference for the CARS Review. The examination of this issue during the review of CARS will allow all key stakeholders to contribute their views and ensure that any findings and recommendations for action take into consideration a range of stakeholder perspectives.

5.139 The Committee believes that the MAA should make publicly available the Pricewaterhouse Coopers report on monitoring systems that included an examination of superimposed inflation. This will allow all stakeholders to the Scheme, including those involved in the review of CARS processes, to effectively contribute to the consideration of the causes and impact issue of superimposed inflation and, if necessary, identify solutions to overcome this issue.

⁴³⁵ Mr Anthony Mobbs, Member, Motor Accidents Insurance Policy Committee, Insurance Council of Australia, Evidence, 11 June 2010, p 49.

⁴³⁶ Ms Maini, Evidence, 11 June 2010, p 57.

⁴³⁷ Ms Maini, Evidence, 11 June 2010, p 58.

⁴³⁸ Submission 6, pp 8-9.

⁴³⁹ Mr Mobbs, Evidence, 11 June 2010, p 49.

Recommendation 15

That the Motor Accidents Authority publicly release the Pricewaterhouse Coopers report on the MAA's monitoring systems that included an examination of superimposed inflation, as soon as possible.

Availability of treatment reports

- 5.140** The Insurance Council of Australia expressed concern about the availability of treatment reports and records from treatment providers for use in the assessment process. The Council said that there is currently no appropriate mechanism to provide CARS Assessors with all relevant medical assessments:

The Insurance Council supports the reduction in the use of competing medico-legal reports when independent reports from MAS are available. The process, we submit, could benefit from a greater use of treatment reports and records from treatment providers as their opinions not only assist MAS Assessors but also CARS Assessors. The current system does not adequately provide a mechanism for these to be provided and as a result these relevant records are often not available for consideration by MAS and CARS.⁴⁴⁰

- 5.141** This is the first time that concern has been expressed to the Committee about the availability of treatment reports. No other stakeholders raised the availability of treatment reports as a concern in this review.
- 5.142** When questioned on this issue, the MAA advised that this issue had been addressed by the October 2008 reforms which amended the *Motor Accidents Compensation Act 1999* to allow a CARS Assessor to request that a person supply documents or specified information:

This issue was addressed as part of the 1 October 2008 reforms to the motor accidents scheme. Section 100(1A) of the *Motor Accidents Compensation Act 1999* enables a CARS Assessor to give a direction in writing to a person who is not a party to an assessment requiring that person to produce documents or furnish specified information.⁴⁴¹

- 5.143** This issue was discussed further during the Committee's hearing, where Ms Maini noted that although CARS Assessors are able to request information, there is no mechanism to automatically provide assessors with the relevant information:

... it is not a requirement to provide treatment reports. Some of this has been cured by the introduction of legislation which allows CARS assessors to request from the treating doctor or a hospital, or whoever it is, the treatment records. But our problem with that is that the request is made during the CARS assessment. So what would be great news is if we could actually accelerate that and have access to treatment records

⁴⁴⁰ Submission 6, p 8.

⁴⁴¹ Answers to pre-hearing questions on notice, MAA, p 14.

earlier, so that we could reduce the cost of having to make an assessment on which to base an application to get records.⁴⁴²

- 5.144** Ms Maini outlined the expected benefits of earlier access to this information in reducing the sometimes adversarial approach to claims assessment:

The reason for that is, as insurers, we believe that the treating clinician is the best person to provide those records or materials. If we get access to early treatment records or early treatment material from the treating doctor, it will stop a lot of the adversarial approach in relation to having the injured person get an independent medico-legal.⁴⁴³

Committee comment

- 5.145** The Committee acknowledges the concerns of the Insurance Council of Australia regarding the timeliness of access to treatments reports. The Committee also notes the advice from the MAA that the reforms introduced in October 2008 largely alleviate this issue by allowing a CARS Assessor to request that a person supply documents or specified information. Given that the effectiveness of the October 2008 reforms have not had sufficient time to develop the Committee will monitor any progress with regards to this issue during its next review, scheduled to commence in 2012.

Update of CARS issues from the Ninth Review

- 5.146** This section provides an update of certain CARS issues that were raised with the Committee during its Ninth Review, but which were not an ongoing concern for stakeholders during the current review. The Committee anticipates that as our biennial review process develops, it will necessary to undertake such an update on an ongoing basis.

Complex matters considered by CARS

- 5.147** The Committee's *Ninth Review Report* examined the issue of complex matters considered by CARS. The Committee noted the increasing complexity of some CARS decisions and the need for CARS Assessors to develop a high level of expertise to be able to determine complex matters. Some stakeholders were concerned that this increased complexity may mean that Assessors could lack the expertise and time needed to make an informed determination.⁴⁴⁴
- 5.148** The Committee recommended that the MAA, together with the MRG, consider ways to achieve greater recognition of instances where the complexity of a matter lodged with CARS is such that the matter could benefit from a different form of assessment.⁴⁴⁵
- 5.149** The Government Response to this recommendation indicated that the recommendation was supported, and that the consultation with the MRG would take place.⁴⁴⁶

⁴⁴² Ms Maini, Evidence, 11 June 2010, p 54.

⁴⁴³ Ms Maini, Evidence, 11 June 2010, p 54.

⁴⁴⁴ Standing Committee on Law and Justice, Report 36, pp 51-57.

⁴⁴⁵ Standing Committee on Law and Justice, Report 36, p 57.

⁴⁴⁶ Government Response to the Standing Committee on Law and Justice, Report 36, p 4.

- 5.150** During the current review, the MAA advised that it had consulted with both the MRG and the CARS Assessors Practice Group on the issue of complex cases, but gave no indication if any conclusions had been reached as a consequence of this consultation.⁴⁴⁷ The MAA said that the issue of complex matters would be considered further as part of the review of CARS.⁴⁴⁸

Guide to CARS information brochure

- 5.151** The Committee's *Ninth Review Report* recommended that the MAA should make its strategies to improve claimants' understanding of CARS processes a priority and that the MAA evaluate the effectiveness of those strategies by conducting a further study of claimants' perceptions of CARS.⁴⁴⁹ This recommendation was made in response to concerns that some claimants may be unaware of the processes used by CARS in evaluating their claims.⁴⁵⁰
- 5.152** The Government response to this recommendation indicated that the MAA was developing a *Guide to CARS* information brochure for claimants, which will be made available to claimants upon application to CARS for assessment.⁴⁵¹
- 5.153** During the current review, the MAA advised that, following feedback from the MRG and CARS Assessors Practice Group on a series of draft *Guide to CARS* brochures, it is currently finalising the brochures for claimants.⁴⁵² The MAA indicated that it is intended that the brochures will contain information on '... claims assessment and exemptions, assessment conference hearings and special assessments of disputes that arise in connection with claims'.⁴⁵³
- 5.154** The MAA further advised that it is intended that a CARS user survey, which will assist to identify user perceptions of the service, will be developed in conjunction with the forthcoming review of CARS.⁴⁵⁴

Transparency

- 5.155** The issue of the transparency of CARS processes was considered in detail in the Committee's *Ninth Review Report*. Some Review participants had expressed concern that claimants may not fully understand the processes used by CARS to determine their claims. The Committee, noting that '... transparency is essential to the optimal functioning of CARS', made a number of recommendations to facilitate greater transparency.⁴⁵⁵
- 5.156** These recommendations included publishing de-identified decisions relating to CARS assessments, publishing performance data on CARS on a quarterly basis, and providing external stakeholders with access to the practice manual for CARS Assessors.⁴⁵⁶

⁴⁴⁷ Answers to pre-hearing questions on notice, MAA, p 17.

⁴⁴⁸ Answers to pre-hearing questions on notice, MAA, p 17.

⁴⁴⁹ Standing Committee on Law and Justice, Report 36, p 48.

⁴⁵⁰ Standing Committee on Law and Justice, Report 36, p 47.

⁴⁵¹ Government Response to the Standing Committee on Law and Justice, Report 36, p 2.

⁴⁵² Answers to pre-hearing questions on notice, MAA, p 17.

⁴⁵³ Answers to pre-hearing questions on notice, MAA, p 17.

⁴⁵⁴ Answers to pre-hearing questions on notice, MAA, p 17.

⁴⁵⁵ Standing Committee on Law and Justice, Report 36, pp 62-68.

⁴⁵⁶ Standing Committee on Law and Justice, Report 36, pp 62-68.

- 5.157** The Government response to the recommendations indicated that it supported the publication of de-identified decisions and performance data and that work was ongoing to implement these two recommendations.⁴⁵⁷ In response to the recommendation that external stakeholders be provided with access to the practice manual for CARS Assessors, the Government advised that this recommendation would be considered by the MRG.⁴⁵⁸
- 5.158** During the current review, the MAA indicated that it has implemented these three recommendations to improve the transparency of the CARS process through the:
- ongoing development of an implementation plan to publish CARS decisions on the MAA website
 - provision of detailed biannual briefings to the MRG on medical and CARS Assessor performance data, and
 - publication of a CARS practice manual, prepared in consultation with assessors and the MRG, to provide guidance to external stakeholders.⁴⁵⁹

Claims of contributory negligence

- 5.159** The Committee's *Ninth Review Report* discussed that some stakeholders held concerns regarding claims of contributory negligence. Contributory negligence refers to situations where the injured person has contributed to the cause of the accident for which they are claiming compensation.⁴⁶⁰
- 5.160** During the Ninth Review the NSW Bar Association suggested that there had been an increase in claims of contributory negligence by insurers. Under section 95 of the *Motor Accidents Compensation Act 1999*, if an insurer alleges contributory negligence, the insurer is entitled to reject the CARS Assessor's determination, which may result in a rehearing of the case.⁴⁶¹
- 5.161** In response to the Bar Association's concerns, the Committee recommended that the MAA monitor trends in insurer claims of contributory negligence to determine if legislative action was required to address any inappropriate incentives.⁴⁶²
- 5.162** The Government Response to this recommendation indicated that the recommendation was supported and that the MAA would continue to monitor trends in insurer initiated matters that proceed to a court hearing on the question of contributory negligence.⁴⁶³
- 5.163** During the course of the current review, the MAA advised that '[n]o significant movement has been observed in insurer allegations of contributory negligence'.⁴⁶⁴

⁴⁵⁷ Government Response to the Standing Committee on Law and Justice, Report 36, pp 3-4.

⁴⁵⁸ Government Response to the Standing Committee on Law and Justice, Report 36, p 4.

⁴⁵⁹ Answers to pre-hearing questions on notice, MAA, p 18.

⁴⁶⁰ Standing Committee on Law and Justice, Report 36, p 72.

⁴⁶¹ Standing Committee on Law and Justice, Report 36, pp 72-73.

⁴⁶² Standing Committee on Law and Justice, Report 36, p 74.

⁴⁶³ Government Response to the Standing Committee on Law and Justice, Report 36, p 5.

⁴⁶⁴ Answers to pre-hearing questions on notice, MAA, p 19.

- 5.164** The MAA further advised that it would continue to monitor the issue, and that it would be considered by the working party to the review of the Motor Accidents Compensation Regulation 2005. This working party comprised representatives of the Law Society of NSW, the Insurance Council of Australia and the MAA.⁴⁶⁵
- 5.165** The Motor Accidents Compensation Regulation 2005 is discussed in detail in Chapter 3, with particular reference to the provisions relating to for legal costs.

Matters referred to the District Court for assessment of liability

- 5.166** The Committee's *Ninth Review Report* recommended that the MAA should give consideration to the proposal that in matters where liability has been declined, only the matter of liability should be determined by the District Court, with the broader matter remitted to CARS for assessment.⁴⁶⁶
- 5.167** This recommendation stemmed from concerns raised by the Law Society of NSW concerning the length of time taken for the District Court to determine both liability and the amount of damages to be awarded. The Law Society considered that it may be more time-effective to have the District Court determine liability, while CARS determined the boarder issue of damages.⁴⁶⁷
- 5.168** The Government Response to this recommendation advised that further consideration would be given to this recommendation to determine if there was evidence of problems arising with the current practice, or if the recommendation could result in duplication and delays in resolving matters.⁴⁶⁸
- 5.169** During the current review, the MAA advised that while the proposal had been considered, it did not received support from the Attorney General or court administrators:

The Attorney General has advised that the recommendation is not supported as there is insufficient evidence of problems arising in practice and the proposal could lead to further duplication and delays in proceedings. The Director General of the Department of Justice and Attorney-General has also advised that court administrators and the Chief Judge of the District Court do not support the recommendation.⁴⁶⁹

Insurer communication with self-represented claimants

- 5.170** The issue of insurer communication with self-represented claimants was raised during the Committee's *Ninth Review Report*, with the Law Society of NSW expressing concern about the quality and fairness of communication between insurers and self-represented claimants.⁴⁷⁰

⁴⁶⁵ Answers to pre-hearing questions on notice, MAA, p 19.

⁴⁶⁶ Standing Committee on Law and Justice, Report 36, p 75.

⁴⁶⁷ Standing Committee on Law and Justice, Report 36, pp 74-75.

⁴⁶⁸ Government Response to the Standing Committee on Law and Justice, Report 36, p 5.

⁴⁶⁹ Answers to pre-hearing questions on notice, MAA, p 19.

⁴⁷⁰ Standing Committee on Law and Justice, Report 36, pp 81-82.

- 5.171** In response to these concerns, the MAA advised that it would be conducting a review of insurer communication with claimants, with a view to ensuring that the information provided is clear, accurate and appropriate.⁴⁷¹
- 5.172** The Government Response to this recommendation advised that insurers had given the MAA copies of current generic claim information that is provided to self-represented claimants, and that the MAA anticipated back to the Motor Accidents Council on its analysis of the material provided by insurers and any proposals for change by 30 June 2009.⁴⁷²
- 5.173** The MAA indicated during the current review that the evaluation of insurer communication with self-represented claimants had been completed, with only minor issues identified as needing correction. The MAA said that the issue would continue to be the subject of scrutiny:

While most of the information provided to self-represented claimants by insurers was found to be accurate and appropriate, the review identified a number of minor issues which CTP insurers were asked to address. The MAA will be conducting another review of the generic claim information provided by insurers to self-represented claimants in the second half of 2010.⁴⁷³

Committee comment

- 5.174** The Committee notes the effort of the MAA to improve transparency and communication of CARS processes with claimants and other stakeholders. The impending publication of the *Guide to CARS* information brochure for claimants, together with other efforts to improve transparency such as the publication of a CARS practice manual and the ongoing development of a plan to publish CARS decisions on the MAA website, will greatly assist claimants and other stakeholder to understand the CARS process.
- 5.175** In the interim between this review and the Committee's next review in 2012, the CARS Review will allow the MAA and its key stakeholders to continue to identify further ways to improve on CARS processes
- 5.176** The Committee notes the action taken by the MAA to implement previous recommendations of the Committee relating to claims of contributory negligence, matters referred to the District Court for assessment of liability and insurer communication with self-represented claimants. The Committee is pleased that its recommendations, developed as part of our ongoing consultation with the MAA and other stakeholders during these reviews, have contributed positively to the development of CARS. We hope that this constructive process will continue.

⁴⁷¹ Standing Committee on Law and Justice, Report 36, p 82.

⁴⁷² Government Response to the Standing Committee on Law and Justice, Report 36, p 6.

⁴⁷³ Answers to pre-hearing questions on notice, MAA, p 25.

Appendix 1 Submissions

No	Author
1	Youthsafe
2	Australian Lawyers Alliance
3	Bus and Coach Association NSW
4	NSW Bar Association
4a	NSW Bar Association
5	Law Society of NSW
6	Insurance Council of Australia
7	Vision Australia
8	NSW Farmers' Association
9	Carers NSW
10	NSW Health

Appendix 2 Witnesses

Date	Name	Position and Organisation
Friday 11 June 2010 Room 814/815 Parliament House	Ms Carmel Donnelly	General Manager, Motor Accidents Authority (MAA)
	Ms Geniere Aplin	Chairperson, MAA Board and Motor Accidents Council (MAC)
	Ms Mary Macken	President, Law Society of NSW
	Mr Timothy Concannon	Member, Personal Injury Compensation Committee, Law Society of NSW
	Mr Alastair McConnachie	A/Executive Director, NSW Bar Association
	Mr Andrew Stone	Common Law Committee of the NSW Bar Association; Member, MAC - as nominated by the NSW Bar Association
	Ms Jnana Gumbert	NSW Branch President, Australian Lawyers Alliance
	Dr Andrew Morrison SC	Member of the State Committee, Australian Lawyers Alliance
	Ms Mary Maini	Chair, CTP Claims Managers Committee, Insurance Council of Australia
	Mr Anthony Mobbs	Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia
	Mr Guy Stanford	Member and former chairman, Motorcycle Council of NSW
Monday 21 June 2010 Room 814/815 Parliament House	Ms Carmel Donnelly	General Manager, MAA
	Ms Geniere Aplin	Chairperson, MAA Board and MAC

Appendix 3 Tabled documents

Friday 11 June 2010

Public Hearing, Room 814/815, Parliament House

1. Report entitled 'Compulsory Third Party Insurance Review of Premium Relativities from 1 July 2010', prepared for the Motor Accidents Authority (MAA) by Finity Consultants, tabled by Ms Carmel Donnelly, General Manager, MAA
2. Correspondence from Taylor Fry, Consulting Actuaries to Ms Carmel Donnelly, regarding Hindsight estimates of insurers' profits referred to in submissions to the Standing Committee on Law and Justice from the Australian Lawyers Alliance and the NSW Bar Association, dated 10 June 2010, tabled by Ms Carmel Donnelly, General Manager, MAA
3. Document entitled 'Summary of Insurer Profitability Projections, MAA Scheme Performance Reports 2003-4 to 2008-9', tabled by Mr Andrew Stone, Member, Personal Injury Compensation Committee, NSW Bar Association
4. Correspondence from NSW Bar Association to Ms Carmel Donnelly, General Manager, MAA, in relation to *Doumit v Jabbs Excavations Pty Limited*, dated 17 November 2009, tabled by Mr Andrew Stone, Member, Personal Injury Compensation Committee, NSW Bar Association
5. Graph entitled 'Time from Underwriting Date (years)', tabled by Mr Tony Mobbs, Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia
6. Report entitled 'Positioned for Safety 2010, A Motorcycle Safety Strategic Plan 2007-2010', Motorcycle Council of NSW, tabled by Mr Guy Stanford, Member and former Chairman, Motorcycle Council of NSW.

Monday 21 June 2010

Public Hearing, Room 814/815, Parliament House

7. Document entitled 'Establishment, structure and operation of the Compensation Authorities Staff Division of the NSW Government Service', tabled by Ms Geniere Aplin, Chairperson, Motor Accidents Authority Board and Chief Executive Officer, Motor Accidents Council.

Appendix 4 Minutes

Minutes No 39

Thursday 25 February 2010

Members' Lounge, Parliament House, Sydney, at 10.30 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Ms Hale
Ms Voltz

2. ***

3. ***

4. ***

5. ***

6. 10th Review of the MAA/3rd Review of the LTCSA

Resolved, on the motion of Mr Ajaka: That:

- The Committee commence its tenth review of the exercise and functions of the MAA and MAC and its third review of the exercise and functions of the LTCSA and LTCSAC and that the reviews be held concurrently
- The commencement of the reviews be publicised on the Committee's web site and through a press release during the second week of March 2010
- The reviews and the call for submissions be advertised in the *Sydney Morning Herald* and *Daly Telegraph* on Wednesday 10 March 2010
- The Secretariat distribute to the Committee for consideration a list of stakeholders to be invited to participate in the reviews, and that, after input from the Committee is received by 5 March 2010, the stakeholders be invited to make submissions to the reviews
- The Committee hold one full day and one half day of hearings on dates to be confirmed by the Secretariat in consultation with the Chair and subject to the availability of members and witnesses
- Representatives of the MAA, MAC, LTCSA and LTCSAC be invited to appear as witnesses along with any other witnesses determined by the Secretariat in consultation with the Chair and the Committee
- Questions on notice process be conducted prior to the hearings as has occurred in previous reviews of the MAA and LTCSA.

7. Adjournment

The Committee adjourned at 10.57 am *sine die*.

Madeleine Foley
Clerk to the Committee

Minutes No 40

Monday 29 March 2010

Room 814-815, Parliament House, Sydney, at 9.30 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*) (from 11.20 am)
Mr Ajaka
Mr Donnelly

Ms Hale
Ms Voltz

2. **Apologies**
Mr Clarke (for the initial portion of the hearing).
3. **Minutes**
Resolved, on the motion of Mr Donnelly: That draft Minutes No 39 be confirmed.
4. ***
5. ***
6. **Adjournment**
The Committee adjourned at 12.35 pm until Thursday 1 April 2010, at 9.30 am.

Madeleine Foley
Clerk to the Committee

Minutes No. 42
Tuesday 11 May 2010
Room 1136, Parliament House, Sydney, at 2.00 pm

1. **Members present**
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Ms Voltz
2. **Minutes**
Resolved, on the motion of Mr Donnelly: That draft Minutes Nos 40 and 41 be confirmed.
3. ***
4. ***
5. **10th Review of the MAA/3rd Review of the LTCSA**

5.1 Correspondence

The Committee noted the following item of correspondence sent:

- 10 March 2010 – From Chair to Hon Michael Daley MP, Minister for Finance, advising of the commencement of the 10th Review of the MAA and the 3rd Review of the LTCSA.

The Committee noted the following items of correspondence received:

- 13 April 2010 – From Mr Stephen O'Neill, Executive Director, Home Care Branch, Department of Ageing, Disability & Home Care, to the Chair, advising that the Department does not intend to lodge a submission to the inquiries
- 30 April 2010 – From Mr Alastair McConnachie, Acting Executive Director, NSW Bar Association, to the Chair, providing a copy of a letter to Ms Carmel Donnelly, General Manager, MAA, regarding legal costs regulations
- 3 May 2010 – From Hon David Campbell MP, Minister for Transport and Roads, to the Chair, regarding the input of the RTA to the inquiries.

5.2 Publication of submissions

Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of:

- ***
- MAA10: Submissions 1-8.

Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the partial publication of:

- ***

6. ***

7. **Adjournment**

The Committee adjourned at 2.10 pm until Monday 31 May 2010, at 9.30 am.

Teresa McMichael

Clerk to the Committee

Minutes No 43

Wednesday 2 June 2010

Members' Lounge, Parliament House, Sydney, at 1.05 pm

1. **Members present**

Ms Robertson (*Chair*)

Mr Donnelly

Ms Hale

Ms Voltz

2. **Minutes**

Resolved, on the motion of Ms Hale: That draft Minutes No 42 be confirmed.

3. ***

4. **10th Review of the MAA/3rd Review of the LTCSA**

4.1 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:

- ***

- MAA10: Submissions 4a and 9.

4.2 Answers to pre-hearing questions on notice

Resolved, on the motion of Ms Voltz: 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 answers to the pre-hearing questions on notice from:

- Lifetime Care and Support Authority
- Motor Accidents Authority.

5. ***

6. **Adournment**

The Committee adjourned at 1.10 pm until Friday 11 June, at 9.30 am.

Madeleine Foley

Clerk to the Committee

Minutes No 44

Friday 11 June 2010

Room 814-815, Parliament House, Sydney, at 9.30 am

1. **Members present**

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)
 Mr Ajaka
 Mr Donnelly
 Ms Voltz

2. Apologies

Ms Hale

3. Public hearing – 10th Review of the MAA/3rd Review of the LTCSA

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding procedural matters.

The following witnesses from the Motor Accidents Authority and Motor Accidents Council were sworn and examined:

- Ms Carmel Donnelly, General Manager, MAA
- Ms Geniere Aplin, Chairperson, MAA Board and MAC.

Ms Donnelly tendered the following documents:

- Compulsory Third Party Insurance Review of Premium Relativities from 1 July 2010, report, Motor Accidents Authority, Finity Consulting Pty Limited 2010; and
- Correspondence from Taylor Fry, Consulting Actuaries to Ms Carmel Donnelly, regarding Hindsight estimates of insurers' profits referred to in submissions to the Standing Committee on Law and Justice from the Australian Lawyers Alliance ("ALA") and the NSW Bar Association ("NSW BA"), dated 10 June 2010.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council were sworn and examined:

- Mr David Bowen, Chief Executive Officer, LTCSA
- Mr Nicholas Whitlam, Chairman, LTCSA Board
- Mr Dougie Herd, LTCSAC Chairman
- Mr Neil Mackinnon, Acting Director, Service Delivery, LTCSA.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Law Society of NSW were sworn and examined:

- Ms Mary Macken, President
- Mr Tim Concannon, Member, Personal Injury Compensation Committee.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Bar Association were sworn and examined:

- Mr Alastair McConnachie, A/Executive Director
- Mr Andrew Stone, Member, Personal Injury Compensation Committee.

Mr Stone tendered the following documents:

- Summary of Insurer Profitability Projections, MAA Scheme Performance Reports 2003/04 to 2008/09
- Correspondence from NSW Bar Association to Ms Carmel Donnelly, General Manager, MAA, re Doumit v Jabbs Excavations Pty Limited, dated 17 November 2009.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Lawyers Alliance were sworn and examined:

- Ms Jnana Gumbert, NSW Branch President
- Dr Andrew Morrison SC, NSW Member.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Insurance Council of Australia were sworn and examined:

- Ms Mary Maini, Chair, CTP Claims Managers Committee
- Mr Tony Mobbs, Member, Motor Accident Insurance Policy Committee.

Mr Mobbs tendered the following document:

- Graph, 'Time from Underwriting Date (years)'.

The evidence concluded and the witnesses withdrew.

The following witness from the Motorcycle Council of NSW was sworn and examined:

- Mr Guy Stanford, Member and former Chairman.

Mr Stanford tendered the following document:

- Positioned for Safety 2010, A Motorcycle Safety Strategic Plan 2007-2010, report, Motorcycle Council of NSW Incorporated.

The evidence concluded and the witness withdrew.

The public hearing concluded at 4.15 pm. The public and the media withdrew.

4. Deliberative meeting

4.1 10th Review of the MAA/3rd Review of the LTCSA

Minutes

Resolved, on the motion of Mr Ajaka: That draft Minutes No 43 be confirmed.

Correspondence

The Committee noted the following item of correspondence received:

- 9 June 2010 – From Mr Tom Bathurst SC, President, NSW Bar Association to the Chair regarding answers to questions provided by the Motor Accidents Authority.

Publication of tendered documents

Resolved, on the motion of Mr Ajaka: That the Committee accept and publish, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the following documents tendered during the public hearing:

- Compulsory Third Party Insurance Review of Premium Relativities from 1 July 2010, report, Motor Accidents Authority, Finity Consulting Pty Limited 2010; and
- Correspondence from Taylor Fry, Consulting Actuaries to Ms Carmel Donnelly, regarding Hindsight estimates of insurers' profits referred to in submissions to the Standing Committee on Law and Justice from the Australian Lawyers Alliance ("ALA") and the NSW Bar Association ("NSW BA"), dated 10 June 2010
- Summary of Insurer Profitability Projections, MAA Scheme Performance Reports 2003-4 to 2008-9, tendered by Mr Andrew Stone, Member, Common Law Committee, NSW Bar Association and Member, MAC
- Correspondence from NSW Bar Association to Ms Carmel Donnelly, General Manager, MAA, re *Doumit v Jabbs Excavations Pty Limited*, dated 17 November 2009
- Graph, 'Time from Underwriting Date (years)', tendered by Mr Mobbs, Member, Motor Accident Insurance Policy Committee, Insurance Council of Australia
- Positioned for Safety 2010, A Motorcycle Safety Strategic Plan 2007-2010, report, Motorcycle Council of NSW Incorporated, tendered by Mr Stanford, former Chairman and member, Motorcycle Council of NSW.

Witnesses

Resolved, on the motion of Ms Voltz: That the Committee invite the witnesses who appeared today to represent the MAA and the MAC and the LTCSA and the LTCSAC to appear again before the Committee on Monday 21 June at a time to be confirmed by the Secretariat.

Deliberative date

Resolved, on the motion of Mr Donnelly: That the Committee set aside Monday 25 October 2010 to deliberate on the Chair's draft report for the 3rd Review of the LTCSA and the LTCSAC and the 10th Review of the MAA and the MAC.

4.2 ***

4.3 ***

5. Adjournment

The Committee adjourned at 4.30 pm *sine die*.

Rachel Callinan

Clerk to the Committee

Minutes No 45

Monday 21 June 2010

Room 814-815, Parliament House, Sydney, at 9.30 am

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*) (at 10.15 am)

Mr Ajaka

Mr Donnelly

Ms Voltz

Ms Hale (until 3.25 pm)

2. Public hearing – 10th Review of the MAA/3rd Review of the LTCSA

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding procedural matters.

The following witnesses from the Brain Injury Rehabilitation Directorate and State Spinal Cord Injury Service were sworn and examined:

- Dr Adeline Hodgkinson, Co-Chair, Brain Injury Rehabilitation Directorate
- Dr Jo Gurka, Director, Brain Injury Program, Brain Injury Rehabilitation Directorate
- Ms Frances Monypenny, Manager, State Spinal Cord Injury Service.

The evidence concluded and the witnesses withdrew.

The following witness from the Royal Rehabilitation Centre Sydney was sworn and examined:

- Mr Stephen Lowndes, Chief Executive Officer.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Mark Harris, LTCS Scheme participant
- Ms Nicky Harris, Wife of Mark Harris
- Mr David Harris, Father of Mark Harris.

Mr David Harris tendered the following documents:

- Opening statement
- Series of letters from pharmacy to Lifetime Care and Support Authority regarding outstanding payment for Mark Harris.

Ms Nicky Harris tendered the following documents:

- Opening statement

- Document outlining difficulties experienced with finding suitable rental accommodation.

Mr Mark Harris tendered the following document:

- How I will use my lump sum payout
- Tennis chair approval
- Document outlining difficulties experienced with the LTCSA and providing recommendations.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Daniel Strbik, LTCS Scheme participant carer
- Mr Ian Franklin, LTCS Scheme participant carer
- Mr Lyndon Wait, LTCS Scheme participant.

The evidence concluded and the witnesses withdrew.

The following witness from the Australian RehabWorks was sworn and examined:

- Ms Anna Castle-Burton, Director.

The evidence concluded and the witness withdrew.

The following witnesses from Spinal Cord Injuries Australia were sworn and examined:

- Mr Sean Lomas, Policy and Advocacy Manager
- Mr Gregory Killeen, Policy and Advocacy Officer.

Mr Lomas advised that he wished to retract point 4 in Spinal Cord Injuries Australia submission (Submission 2).

The evidence concluded and the witnesses withdrew.

The following witnesses from the MAA, the MAA Board and the MAC were sworn and examined:

- Ms Carmel Donnelly, General Manager, MAA
- Ms Geniere Aplin, Chairperson, MAA Board and Chief Executive Officer, MAC.

Ms Aplin tendered the following document:

- Establishment, structure and operation of the Compensation Authorities Staff Division of the NSW Government Service.

The evidence concluded and the witnesses withdrew.

The following witness from the LTCSA & LTCSAC were sworn and examined:

- Mr David Bowen, Chief Executive Officer, LTCSA
- Mr Nicholas Whitlam, Chairman, LTCSA Board
- Mr Neil Mackinnon, A/Director, Service Delivery Chief Executive Officer, LTCSA.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.15 pm. The public and the media withdrew.

3. Deliberative meeting

3.1 10th Review of the MAA/3rd Review of the LTCSA

Correspondence

The Committee noted the following item of correspondence received:

- 21 June 2010 – From NSW Health to the Director, enclosing the Report on the NSW Health Review of the Impact of the Lifetime Care and Support Scheme, March 2010.

Resolved, on the motion of Ms Voltz: That the Committee publish, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1) the document from NSW Health titled: Report on the NSW Health Review of the Impact of the Lifetime Care and Support Scheme, March 2010.

Publication of tendered documents

Resolved, on the motion of Ms Voltz: That the Committee accept and publish, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the following documents tendered during the public hearing:

- Series of letters from pharmacy to Lifetime Care and Support Authority regarding outstanding payments for Mark Harris, tendered by Mr David Harris
- Document outlining difficulties experienced with finding suitable rental accommodation, tendered by Ms Nicky Harris
- Document, How I will use my lump sum payout, tendered by Mr Mark Harris
- Document, Tennis chair approval, tendered by Mr Mark Harris
- Document outlining difficulties experienced with the LTCSA and providing recommendations, tendered by Mr Mark Harris
- Establishment, structure and operation of the Compensation Authorities Staff Division of the NSW Government Service, tendered by Ms Geniere Aplin, Chairperson, MAA Board and Chief Executive Officer, MAC.

3.2 ***

4. Adjournment

The Committee adjourned at 5.19 pm until Tuesday 29 June 2010, at 9.30 am.

Rachel Callinan

Clerk to the Committee

Minutes No 46

Tuesday 29 June 2010

Room 1102, Parliament House, Sydney, at 9.30 am

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Ajaka

Mr Donnelly

Ms Hale

Ms Voltz

2. Minutes

Resolved, on the motion of Mr Ajaka: That Draft Minutes No 45 be confirmed.

3. ***

4. ***

5. ***

6. Adjournment

The Committee adjourned at 11.46 am until Wednesday 11 August 2010.

Madeleine Foley

Clerk to the Committee

Minutes No 47

Monday 19 July 2010

Christine Robertson's Office, Parliament House, Sydney, at 4.05 pm

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly

2. Apologies

Mr Ajaka
Ms Hale
Ms Voltz

3. *****4 10th Review of the MAA/3rd Review of the LTCSA****4.1 Answers to questions on notice**

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 received from:

- NSW Bar Association
- Australian Lawyers Alliance
- Motorcycle Council of NSW
- State Spinal Cord Injury Service.

5 *****6 Adjournment**

The Committee adjourned at 4.10 pm until Wednesday 11 August 2010, at 9.30 am.

Rachel Callinan

Clerk to the Committee

Minutes No 48

Wednesday 11 August 2010

Jubilee Room, Parliament House, Sydney, at 9.30 am

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Ms Voltz
Ms Hale (from 9.45 am)

2. *****3. Deliberative meeting****3.1 Minutes**

Resolved, on the motion of Mr Donnelly: That Draft Minutes No 47 be confirmed.

3.2 10th Review of the MAA/3rd Review of the LTCSA**3.2.1 Correspondence**

The Committee noted the following items of correspondence received:

- 25 June 2010 – From Ms Anna Castle-Burton, Director, Australian RehabWorks, regarding clarification to the transcript

- 12 July 2010 – From Mr Sean Lomas, Spinal Cord Injuries Australia, enclosing an amended submission and material requested by the Committee
- 13 July 2010 – From Mr Mark Harris, LTCSA participant, providing additional information.

3.2.2 Publication of answers to questions on notice

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 publication of answers to questions on notice and additional questions received from:

- Spinal Cord Injuries Australia
- Motor Accidents Authority
- Insurance Council of Australia
- Westmead Brain Injury Rehabilitation Service
- Law Society of NSW.

3.3 ***

3.4 ***

4. ***

5. Adjournment

The Committee adjourned at 4.05 pm until Thursday 12 August 2010, at 10.45 am.

Rachel Callinan

Clerk to the Committee

Draft Minutes No. 52

Monday 25 October 2010

Room 1102, Parliament House, Sydney, at 9.35 am

1. Members present

Ms Robertson (*Chair*)
 Mr Clarke (*Deputy Chair*)
 Mr Donnelly
 Ms Voltz

2. Minutes

Resolved, on the motion of Mr Donnelly: That Draft Minutes No 51 be confirmed.

3. General correspondence

The Committee noted the following items of correspondence sent:

- 23 September 2010 – From Chair to Ms Sylvia Hale, farewelling and thanking Ms Hale for her contribution as a Committee member.

4. ***

5. ***

6. 10th Review of the MAA/3rd Review of the LTCSA

6.1 Correspondence

The Committee noted the following items of correspondence received:

- 10 September 2010 - From Mr John Dietrich, Manager, Ministerial and Community Assistance, MAA, to Secretariat, advising that the next relativities review will commence later this year
- 21 September 2010 - From Mr John Dietrich, Manager, Ministerial and Community Assistance, MAA, to Secretariat, advising of the meeting schedule for the MAA
- 13 October 2010 – From John Driscoll, General Manager Policy, Consumer Directorate, Insurance Council of Australia, providing answers to questions on notice.

6.2 Publication of documents

Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of correspondence received from Mr Dietrich and Mr Driscoll.

6.3 Chair's draft report

The Chair's tabled her draft report entitled *The exercise of the functions of the Motor Accidents Authority and Motor Accidents Council - Tenth Review*, which, having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Ms Voltz: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Donnelly: That Recommendation 1 be adopted.

Resolved, on the motion of Mr Clarke: That Recommendation 2 be adopted.

Resolved, on the motion of Ms Voltz: That Recommendation 3 be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 2 be adopted.

Chapter 3 read.

Resolved, on the motion of Ms Voltz: That paragraph 3.47 be amended by omitting 'did not comment directly on the level of realised profits and' and inserting instead 'also provided information in response to'.

Resolved, on the motion of Ms Voltz: That a new sentence be inserted at the end of paragraph 3.72 to state 'The Committee notes that these figures may not be replicated in years of economic downturn.'.

Resolved, on the motion of Mr Donnelly: That Recommendation 4 be adopted.

Resolved, on the motion of Ms Voltz: That recommendation 5 be amended by omitting the third dot point which reads:

- 'consider the feasibility of requiring legal practitioners to notify the Motor Accidents Authority of the amount of compensation that a claimant receives once their legal fees have been deducted and, if appropriate, determine strategies for the implementation of this mechanism.'

Resolved, on the motion of Mr Donnelly: That Recommendation 5, as amended, be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Clarke: That Recommendation 6 be adopted.

Resolved, on the motion of Mr Donnelly: That Recommendation 7 be adopted.

Resolved, on the motion of Mr Clarke: That Recommendation 8 be adopted.

Resolved, on the motion of Ms Voltz: That Recommendation 9 be amended by omitting the words 'including Carers NSW'.

Resolved, on the motion of Ms Voltz: That Recommendation 9, as amended, be adopted.

Resolved, on the motion of Ms Voltz: That paragraph 4.57 be amended to reflect the amendment to Recommendation 9.

Resolved, on the motion of Mr Donnelly: That Recommendation 10 be adopted.

Resolved, on the motion of Mr Clarke: That Chapter 4, as amended, be adopted.

Chapter 5 read.

Resolved, on the motion of Ms Voltz: That Recommendation 11 be amended by omitting the words 'reason for the rejection of any of its proposals' and inserting instead 'background for not adopting proposals'.

Resolved, on the motion of Ms Voltz: That Recommendation 11, as amended, be adopted.

Resolved, on the motion of Ms Voltz: That paragraph 5.13 be amended to reflect the amendment to Recommendation 11.

Resolved, on the motion of Mr Donnelly: That Recommendation 12 be adopted.

Resolved, on the motion of Mr Clarke: That Recommendation 13 be amended by omitting the words 'an unacceptable number of determinations are being successfully challenged. The review should identify the extent of this issue and determine whether improvements can be made to support Medical Assessors in their decision making about causation issues.' and inserting instead 'there are particular issues associated with challenges to these decisions. The review should determine whether improvements can be made to decision making on causation issues.'.

Resolved, on the motion of Mr Clarke: That Recommendation 13, as amended, be adopted.

Resolved, on the motion of Mr Clarke: That paragraph 5.62 be amended to reflect the amendment to Recommendation 13.

Resolved, on the motion of Ms Voltz: That Recommendation 14 be adopted.

Resolved, on the motion of Mr Donnelly: That Recommendation 15 be adopted.

Resolved, on the motion of Mr Clarke: That Chapter 5, as amended, be adopted.

Resolved, on the motion of Mr Donnelly: That the draft report, as amended, be the report of the Committee and presented to the House according to Standing Order 226(1).

Resolved, on the motion of Mr Donnelly: That the Committee present the report to the House, together with transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and correspondence relating to the Inquiry.

Resolved on the motion of Mr Donnelly: That the Committee Secretariat corrects any typographical and grammatical errors prior to tabling.

The Chair advised that the Chair's Foreword and the media release announcing the tabling of the Tenth Review of the MAA and the MAC would be circulated to the Committee via email.

7. Adjournment

The Committee adjourned at 10.20 am until Friday 29 October 2010 at 9.30 am.

Rachel Callinan
Clerk to the Committee