The New South Wales Bar Association

00/334-4

30 June 2010

Ms Rachel Callinan
Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Callinan

Review of the MAA and MAC – Tenth Review

Thank you for providing the New South Wales Bar Association with the opportunity to make a submission and to give evidence before the Committee on 11 June 2010.

Thank you also for providing a copy of the uncorrected transcript and the further questions on notice from the Committee. I have attached a supplementary submission from the Association containing our answers to the questions on notice. Also attached is a corrected version of the transcript with suggested changes.

Please do not hesitate to contact me on 9229 1756 if I can be of further assistance.

Yours sincerely

Alastair McConnachie
Acting Executive Director

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NEW SOUTH WALES BAR ASSOCIATION

SUPPLEMENTARY SUBMISSION TO THE STANDING COMMITTEE ON LAW & JUSTICE TENTH REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS AUTHORITY AND MOTOR ACCIDENTS COUNCIL

Additional Questions on Notice & Responses

Insurer profits

1. *The MAA has explained that 'the reported 1% profit for 2008 is based on incomplete recent claims experience' and that 'as more claims are finalised estimated profit margins become more robust...'*[1]
    - *What is your response to this explanation?*

The Association agrees that the "*reported 1% profit for 2008*" will become more robust (increase) as that premium collection year matures. The whole point of the table supplied to the Standing Committee by the Association is that profit estimates invariably increase over time.

The Association emphasises the importance in separating two approaches to profits. When engaged in premium setting, the Motor Accidents Authority ("MAA") only allows insurers to project a profit in the order of 8% of premium written. This is the profit figure the MAA continually refer to because it is the only profit figure the MAA can control. However, this 8% figure is only a theoretical projection at the time the premium is set. It is no more than a budget estimate.

The Association refers the Standing Committee to the table provided during the course of the hearing. The table consists of no more than extracts from the MAA annual reports collated into the one document. The accuracy of the table is not challenged by the MAA. What the table shows is that the actual profits and future projected profits have proven to be well in excess of 8% over the first eight years of operation of the motor accidents scheme. Insurers have made windfall profits. In giving evidence to the Standing Committee, the representatives of the MAA have not been willing to acknowledge just how excessive these profits have been.

As against this background, it can be confidently predicted that the 2008 profit will be well in excess of 1% of premium collected.

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[1] MAA answers to pre-hearing QONs, q 11, p 8

2. *In your view, does the consistent trend over the life of the Scheme of annually revising estimated profits upwards for each underwriting year indicate that original profit estimates are incorporating unrealistically high estimates of future compensation payouts into their premiums?*

In a word – yes. However, this is a question best directed to the MAA and its actuaries. 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.

Claims frequency and propensity to claim

3. *The MAA's Annual Report notes a steady decline in claims frequency and propensity to claim from 03/04 to 08/09.*[2]
   - *What is your view of this decline?*
   - *What are the disincentives to claim within the Scheme?*

There is no doubt that there has been a decline in claims frequency. Again, the MAA is better positioned than the Association to provide statistical analysis. It is acknowledged that part of the reason for the decline in claims frequency is falling accident numbers. However, there are also substantial disincentives to claim within the scheme.

The primary disincentives are:

(i) The absence of compensation for pain and suffering for 90% of accident victims in New South Wales; and

(ii) The established fact (as per the FMRC report) that legal costs will substantially erode any benefit a claimant might recover from bringing a claim. A potential claimant is placed in a bind – the system is far too complex for any lay person to pursue without legal assistance. The MAA has designed a scheme that ensures that the recoverable costs are inadequate compared to the legal assistance required. The claimant ends up cross-subsidising the scheme.

In-House CARS assessors deciding late claims

4. *Your supplementary submission, which consists of a letter from the Bar Association to the General Manager of the MAA raises concerns about in-house CARS assessors deciding late claims.*[3] *Can you explain this issue to us as well as indicated what you feel needs to be done about it?*

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[2] MAA Annual Report 08/09, p 77
[3] Submission 4a, NSW Bar Association

Any claimant who lodges a claim form more than six months after the accident can be required by the CTP insurer against whom the claim is made to provide a "*full and satisfactory*" explanation for the delay. This obligation was first introduced into the motor accidents scheme in 1988 as a means to encourage early notification of claims. Early notification leads to early rehabilitation and arguably better health outcomes.

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.

The *Motor Accidents Compensation Act 1999* partially brought the determination of whether there was a full and satisfactory explanation for a late claim under the control of CARS. A claim is not exempt from CARS just because it is a late claim.

There are separate problems associated with the issue of whether the CARS assessor's determination in relation to a late claim is binding or not. 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 satisfactory explanation for a late claim, then this is a finding of fact, with the claimant having no further recourse to appellant review.

In such circumstances, it is critically important that CARS assessors make well-reasoned and creditable decisions regarding late claim applications.

There are some forty CARS assessors who are senior solicitors and barristers. To be appointed, they are required to have at least ten years experience as a personal injury practitioner before being appointed. If a solicitor, it is preferable that they be an "*Accredited Specialist*" in personal injury law.

The MAA also has a couple of in-house assessors. Appointment to these positions does not require ten years of legal experience. It does not require status as an Accredited Specialist. The appointees to these positions do not need to be senior and experienced legal practitioners.

The more modest qualifications required for the in-house assessors is understandable – their role is largely administrative in assisting the Principal Claims Assessor (PCA) with determining exemption applications. The in-house assessors have not been allowed to date to conduct General Assessments (determining a claimant's entitlement to damages). However, they have been allowed to determine late claim disputes.

Unfortunately, the finding of a late claim determination is just as important to a claimant as the subsequent assessment of damages.

The Association has two recommendations:

(i) Only external assessors (or the Principal Claims Assessor) should be permitted to assess late claims disputes. [The Association has made this recommendation to the MAA. The response received has been unsatisfactory. See attached correspondence from the MAA dated 9 June 2010 and the Association's reply dated 23 June 2010.]

(ii) The entire system of late claims needs to be reviewed. The original goal of encouraging claimants to lodge claims within six months has been largely achieved. The penalty of being unable to proceed with the claim at all where there is not a full or satisfactory explanation for the late claim is unduly severe. The MAA has said that it will look at the late claims process as part of its review of the CARS system. However, this should really be the subject of separate and independent review. This is not a CARS specific issue. It is a more general scheme issue.

The MAAS Reference Group

5. *In response to the Bar Associations suggestion that that a representative from the MAA's policy unit be added to the MAAS Reference Group to enhance the connection between the MAA's operational and policy functions*[4]*, the MAA stated that '[o]fficers from other areas of the MAA may attend meetings of the MAAS Reference Group as appropriate.*'[5]

   - *Can you tell us about the disconnect that you perceive between the MAA's operation and policy functions and the problems this causes?*
   - *What is your response to the MAA's comments?*

From experience of its representative attending at meetings, the Association is able to say that there is frequently a consensus between stakeholders (claimants' representatives, insurers, assessors) as to minor modifications that need to be made to ensure the smooth operation of the scheme. MAAS Reference Group ("MRG") meetings end with agreement as to what needs to be done. There is then a report back at the next meeting indicating that the suggested reforms cannot be implemented or that there are delays in implementation. There is rarely a clear explanation why. The Association understands that the usual procedure is that such issues are referred to the MAA's policy unit.

What the Bar Association seeks is to have someone from the policy unit attend the meetings of the MRG so that when policy questions arise, they can be promptly and efficiently dealt with. Where the policy unit has an issue with an MRG suggestion for reform or refinement of the operation of the scheme, then the issue can be directly relayed to stakeholders who may be able to come up with some alternate suggestion.

The Association simply seeks better lines of communication within the MAA.

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

[4] Submission 4, NSW Bar Association, pp 3-4
[5] MAA answers to pre-hearing QONs, q 18, p 11

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 made with the MAA over six months ago and there have been no developments in this regard since.

Zotti v Australian Motor Insurers Limited* and *Doumit v Jabbs Excavations Pty Ltd

6. *Your submission notes that 'in the meantime, insurers are now frequently taking the Zotti point'[6] and thus availing themselves of a defence – how many times since the Zotti case was determined has this point been raised and how many times has it been successfully used?*

Unfortunately, the Association is unable to assist with precise statistics. Perhaps the Bar Association's submission could have been better expressed. The *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. However, the Association is aware (through its members) that there have been a number of cases since *Zotti* was handed down where the *Zotti* point has been raised. The Association is not yet aware of any of those cases having proceeded to conclusion – the High Court's review of the Court of Appeal's decision in *Zotti* is still pending. It remains to be seen whether the *Zotti* defence will prove successful in other cases.

There may also be cases where claimants are now not pursuing a case that they otherwise would have pursued, having been advised by their solicitor that a *Zotti* defence would be successfully raised against them. The Association is unable to say how many such cases there may be.

None of the foregoing changes the reality: the *Zotti* problem needs to be fixed.

Legal costs

7. *Your submission raises the issue of legal costs asserting that 'the Government's delay in bringing about much needed reform of the costs regulation is unsupportable on policy or social justice grounds.*
    - *Can you explain how this issue has progressed, or not progressed, since the Committee's Ninth Review?*
    - *What recommendations do you have about the way forward on this issue?*

The Costs Regulations need to be revised by September as the current regulations will then expire. Since the Association gave evidence to the Standing Committee, it has received from the MAA a confidential copy of a report on the work of the costs working party prepared by the facilitator.

It was emphasised to the Association that the report was not official MAA or government policy and was only the facilitator's views.

[6] Submission 4, NSW Bar Association, p 7

It is noted that subsequent to this, the General Manager of the Motor Accidents Authority has given evidence to the Standing Committee (at the second day of its hearings) indicating that favourable consideration was being given to the facilitator's report and implementing some of the measures contained therein.

The Association is concerned that the fundamental problems with costs in the scheme have not been addressed. The FMRC report identifies:

(i) that legal practitioners are charging reasonable fees;

(ii) that there is no overcharging;

(iii) That solicitors and barristers are frequently cutting costs to assist claimants to resolve claims; and

(iv) That the costs recoverable under the Regulations from the insurer equate to approximately 40% of the total legal costs incurred in running a matter. Claimants are paying for 60% of their legal costs out of their damages – a far heavier subsidy of the costs of justice than other litigants in other forums face.

The Association understands that the MAA is not considering any substantial increases in recoverable costs. The injustice will continue until such time as there is a substantial increase in costs.

There will have to be some form of new regulation by September. The *Motor Accidents Compensation Act 1999* requires the MAA to seek comment from various bodies (including the Insurance Council of Australia, the Bar Association and the Law Society) in relation to any amendment to the Costs Regulations. This consultation has only just commenced, with an initial meeting being held between representatives of the Association and the MAA on 29 June. Given how late in the piece the consultation has been left, the Association is concerned that the consultation will not lead to the fundamental injustices being addressed.

Given that it appears that the revisions of the Costs Regulations for September will not address the fundamental injustices in the costs system, the Association recommends that the much needed further review of the Costs Regulations be taken out of the hands of the MAA. The MAA has now had two years to try and deliver on reform of the Costs Regulations. They have left it to the very last minute and there is still not yet any definite proposal. The MAA has had two working parties running over two years and has excluded the Association from both of them (despite requests for inclusion). The MAA was unable to produce any reform or revision to the Costs Regulations out of the first working party process.

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.

30 June 2010

ATTACHMENT "A"

Motor Accidents Authority of NSW

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MAA Ref: 09/974
Your Ref: 02/24

9 June 2010

Alistair MCConnachie
Acting Executive Director
Bar Association of NSW
Selbourne Chambers
174 Phillip Street
Sydney NSW 2000

Dear Mr McConnachie,

I refer to your letter dated 20 May 2010 concerning certain issues arising from the recent Supreme Court decision in ***Gudelj v Motor Accidents Authority & ors [2010] NSWSC 436.***

In terms of your general concerns, as you are aware the Motor Accidents Authority is currently considering a Review of CARS. As part of that review it is intended that the late claim process be considered. I would be happy for the Bar Association to bring forward its views and in particular any relevant evidence that would assist in looking at this particular aspect of the process. It may also be appropriate for the CARS review to consider the relative merits of appointing CARS Assessors from within the Public Sector or the present process of appointing a combination of internal and external legal practitioners or other alternatives. Again, the Bar Association's views and any relevant evidence on this issue would be welcome.

You may also be aware that the Motor Accidents Assessment Service is currently considering the issue of Performance Management of both internal and external CARS Assessors. I would also appreciate any feedback that would assist on this issue.

Yours sincerely

Andrew Nicholls
Deputy General Manager

ATTACHMENT "B"

The New South Wales Bar Association

02/24; 10/20

23 June 2010

Mr Andrew Nicholls
Deputy General Manager
Motor Accidents Authority of NSW
DX 1517 SYDNEY

Dear Mr Nichols

Late Claims And Internal Assessors

Thank you for your letter of 9 June 2010. The Association is delighted that the MAA intends to review the late claim process. However, in the interim, CARS assessors will continue to make important decisions regarding a claimant's right to bring a late claim.

It remains the view of the Association that where a claimant's right to pursue their entitlements is at stake, the late claim dispute should be assessed by an independent external assessor, rather than by one of the Authority's internal assessors. This was one of the critical points made in our correspondence of 20 May.

Until such time as a review takes place, the Association urges the MAA to resolve this matter by not using internal assessors who do not meet the criteria for external appointment to determine late claims.

Claimants are entitled to have their disputes assessed by fully qualified, independent, external assessors.

We look forward to your response.

Yours sincerely

Alastair McConnachie
Acting Executive Director

Draft let to MAA re late claims and internal assessors 22.06.10

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