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**RESPONSE TO QUESTIONS FROM
STANDING COMMITTEE ON LAW AND JUSTICE
ELEVENTH REVIEW OF THE MAA AND MAC**

QUESTIONS TO NSW BAR ASSOCIATION

INTRODUCTION

Whilst the social utility of driving motor vehicles is unarguable, so too is the fact of their social cost. Part of that social cost is paid by the innocent victims of motor accidents. The social cost is paid with broken limbs, psychological scars and loss of life.

The price we as a society extract from others for the right to drive to work, drive the kids to school or drive on holidays, is paid for by others with life and limb.

The reason we have a Motor Accidents Scheme is to ensure fair and proper compensation for those who pay that social price through no choice of their own.

It is easy sitting here in a room, engaged in academic debate, to forget what this scheme is all about. It is about trying to help fix as best we can the lives of those who can no longer walk in comfort, pick up a child, carry out a day's work or enjoy retirement with a much loved spouse.

As the Committee engages in its deliberations, the Bar Association urges the Committee to bear in mind that this is all about trying to compensate those whose lives have been torn apart as they pay the social cost of motor vehicle accidents.

MAA COMPETITION REVIEW

1. The Bar Association has not had any consultation with any independent entity undertaking a competition review. As the Bar Association has not been a part of the process, it is very difficult for the Bar Association to comment upon the process.

Had it had the opportunity to comment, the Bar Association would have made two points.

First, there is a fundamental flaw in the free market operation of the Scheme. Where there are super profits being made, it would be anticipated that insurers would be cutting premium (forsaking part of the super profit) in order to gain market share. However, insurers are very reluctant to cut premiums – they don't want to have the cheapest premium.

Unfortunately, those who base their CTP purchasing decisions purely on price of the green slip alone can be the worst risk – younger drivers in older cars. The CTP insurers don't want the worst risk. They want older drivers in newer

cars, which is why they emphasise risk rating through bundling with comprehensive insurance and other insurance products. Although technically, the CTP insurers are not allowed to discriminate heavily against younger drivers in older cars, the reality is that they try as hard as they can to do so.

A free market cannot operate properly and efficiently where no one wants to have the cheapest price.

Second, there is clearly a breakdown in regulatory supervision if CTP insurers are able to file premiums projecting an 8% profit year after year whilst ultimately yielding profits from those years of between 25% and 30%. Something is going wrong with the process and part of the role of the competition review should be to find out why.

INSURER PROFITS

2. The MAA keeps saying that premium filings predict an 8% profit. The Bar Association views this as a reasonable return for insurers having regard to the risks involved with the scheme.

What the MAA consistently refuse to acknowledge, discuss or analyse is why the initial forecast of 8% profit on premium written ultimately turns into 25-30% profit.

The Bar Association submissions contain a table summarising MAA annual reports over the past decade. What the table shows is that initial forecasts as to meagre profit over time transform into the reality of substantial excess or super profits. The MAA does not argue with the accuracy of this table.

If the Standing Committee asks the MAA no other questions, it urges them to ask these:

- (a) Where in the last Annual Report is there any analysis as to why insurers have made such high returns above and beyond projected profits between 2000 and 2006?
- (b) Why is there no analysis in the Annual Report or any other document as to why insurers are making returns well in excess of projections?
- (c) When will the MAA make any analysis of why insurers have been making profits well in excess of projections?
- (d) Is any part of the explanation as to why insurers are making profits well in excess of projections due to the MAA exercising inadequate regulatory control at the time premium filings are made?
- (e) Is the MAA allowing excessive prudential margins in the premium filings?
- (f) What are the reasons for the insurers making profits well in excess of 8%?

The Bar Association accepts that part of the reason for the insurer super profits is falling accident numbers over the period. However, this is only part of the explanation. The MAA appear unwilling to make further analysis.

What the Bar Association is clear about is that the 1999 "reforms" that denied compensation for pain and suffering to 90% of accident victims were entirely unnecessary. The scheme could have continued to pay 40% of accident victims compensation for pain and suffering had the "super profits" that insurers have made over the past decade been kept available for compensation to the injured.

A SINGLE SYSTEM OF INJURY COMPENSATION

3. The Bar Association urges that there be an independent inquiry as to how a unified system of compensation can be re-introduced. In the context of the Motor Accidents Scheme, this would involve the abolition of MAS and the return to the awarding of compensation for pain and suffering as a percentage of a most extreme case. This is what occurred in motor accident claims between 1988 and 1999 and is what occurs with *Civil Liability Act* claims now.

CARS could be retained as a specialist tribunal. Little more is required to harmonise the Motor Accidents Scheme with the regime currently in place under the *Civil Liability Act*.

It is not anticipated that there would be substantial financial implications for green slip prices. Insurers are currently making super profits. The Bar Association seeks to have some of this super profit re-directed to accident victims.

An inquiry into tort unification would require independent actuarial advice. Unfortunately, the MAA is compromised when it comes to providing independent advice to government regarding reform of the Motor Accidents Scheme. Bureaucratic empires have been built and will be defended. Independent advice is required.

WHOLE PERSON IMPAIRMENT AND SCARRING

4. The Bar Association is surprised at the MAA response. Specific examples have been given where assessments of bodily scarring do **not** take account of multiple scars. The TEMSKI scale specifically directs assessors away from doing so. This remains an area that needs reform and the Bar Association representative on the Motor Accidents Council will continue to urge such reform.

THE MOTOR ACCIDENTS COUNCIL

5. The operation of the Motor Accidents Council under the chairing of Ms. Aplin over the past twelve months has been a substantial improvement on years gone by. It is the opinion of the Bar Association representative on the Motor Accidents Council that the Council has had its most productive year since its

reduction. Debate has been more robust, resolutions have been passed and subcommittees have been formed to address specific issues.

The Bar Association is delighted to advise that there has been a substantial improvement in the operation of the Council and hopes that it continues into the future.

CLAIMS ASSESSMENT AND RESOLUTION SERVICE REVIEW

6. The Bar Association has provided a copy of its submissions to the CARS review. The primary concerns raised were:
 - (a) The bureaucratic nature of CARS pre-filing requirements.
 - (b) The late claims regime.
 - (c) Inadequate legal costs.

There was extensive stakeholder consultation during the review process. It is understood that the review has now been provided to the MAA and that the government is formulating its response.

The Bar Association has had no further involvement since the review was provided to the MAA. The Bar Association has not seen the completed review document.

The Bar Association hopes that the substantial amount of time put into the review process will not have been a waste, but has no guarantees in that regard. There are serious issues to be addressed within the CARS system and it remains to be seen whether and how they will be addressed.

COMPULSORY SETTLEMENT CONFERENCES

7. The Bar Association notes the response from the MAA. A frank and blunt response would be to describe it as bureaucratic blather.

First, although there may have been consultation with key stakeholders as to the introduction of reforms, the Bar Association and other stakeholders were strongly opposed to the introduction of Section 89A. The Bar Association saw this as being an impediment to the smooth progress of claims. Parties who genuinely want to resolve their claims will. It is not necessary to force settlement conferences.

There has been no indication whatsoever so far that Section 89A has enhanced transparency, improved opportunities for the early resolution of claims or improved scheme efficiency. To the contrary, the Bar Association understands that Section 89A is delaying the resolution of claims and providing further bureaucratic obstacles to the progress of matters towards resolution.

The Bar Association would be delighted if the MAA would actually engage with the issues stakeholders are raising, rather than giving meaningless responses.

10 October 2011