STANDING COMMITTEE ON LAW AND JUSTICE

NEW SOUTH WALES BAR ASSOCIATION

QUESTIONS ON NOTICE

1. The NSW Bar Association's submission argues that the Claims Assessment and Resolution Service (CARS) process is bureaucratic, requiring extensive claims preparation and readily rejecting any applications deemed deficient. You go on to contend that this complexity means that parties find it easier to settle than to proceed through CARS, and that as a result there has been a significant reduction in claims lodged with CARS. Why do you see these outcomes as problematic, and what might be done to address them?

The short answer is that parties should settle for a fair valuation of the claim rather than accepting too little (in the case of the claimant) or paying too much (in the case of the insurer) simply because the claims assessment process makes it easier to settle at a discount or premium than proceed. The Bar Association has no difficulties with settlements provided they are fair settlements.

There are three principal areas that the Association believes can be addressed:

a) The work required to prepare an application;

b) The approach taken by the Motor Accidents Authority ("MAA") towards applications; and

c) The application of exemptions in relation to complex cases

a) <u>The work required to prepare an application</u>

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

CARS was intended to be a system for assessing simple cases, with the more complex cases being dealt with by the court system. A simple system of assessment should not require such complex and detailed preparation. Rather than incorporating more forms, more rules and more requirements in respect of the process, the MAA should be set the task of reviewing the CARS

to see how it could be streamlined, simplified and made less rather than more complex.

b) Lodging the application

The Association is aware of a number of cases involving overly bureaucratic responses to the lodgement of documents. Applications have been rejected because a single document (such as a list of payments) was missing. The Bar Association is aware of a case where an application was rejected because there was no statement from care providers even though there was no claim for past care and only a claim for future care.

The MAA should encourage acceptance of the lodgements of such forms (even with minor deficiencies) rather than taking a highly technical approach resulting in their rejection.

In response to question on Notice 25, the MAA has advised that 14% of incoming applications (40 matters per month) are rejected. They indicate that frequent reasons for rejection of claims is the failure to annex compulsory documents or some questions not being answered or the application not being signed.

Although the MAA states that it is "*not of the view that applications are readily rejected*", with 14% of applications rejected the Association takes a different view. This represents approximately one in seven of all applications.

c) Exemptions

An example of excessive bureaucracy is the obligation to lodge an application for exemption where liability is denied. As the Principal Claims Assessor must grant an exemption in these circumstances pursuant to Chapter 7.1 of the Claims Assessment Guidelines, the MAA is simply requiring parties to waste time, effort and costs in lodging a form when the outcome of the application is predetermined.

The Association is also concerned that very few discretionary exemptions are being granted. This would appear to be a matter of policy. The Principal Claims Assessor ("PCA") said in her evidence to the Committee (page 47 of the transcript) that:

> "*I personally think that the CARS assessors can deal with everything because they are an extraordinarily experienced bunch of practitioners. They have been appointed for their expertise in dealing with motor accident cases. I do not think anybody has disputed that.*"

Later, on page 48, the PCA acknowledged that she had the "*ultimate say*" in terms of whether matters should be exempted for complexity. The PCA then proceeded to say:

> *"...On the issue of complexity, the Supreme Court has given us some very good guidance on what is not complex and what is complex, and it was Justice Sully in a decision of* Larusso *who said:*
>
> > *Complex is anything that a CARS assessor does not think they can deal with."*

On that basis, it would appear that the view of the PCA is that complexity is not a reason for matters to be exempted from the CARS process.

What this approach fails to appreciate is that CARS is now regularly handling multimillion-dollar cases. Complex issues can not always be resolved in the course of a preliminary telephone conference. The difficulty with CARS assessing such large cases is that there cannot be a proper assessment in a two hour CARS assessment hearing. It is just not possible to properly assess the claim of a paraplegic or quadriplegic (involving many contested heads of damage) in that time. The outcome of such an assessment in these circumstances is not fair to either side. It is noted that the insurance industry supports this contention from the Association about inappropriately large matters remaining within the CARS system.

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

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

2. (from MAA answer to question 12, pp 9-10) In its answer to question 12, pp 9-10, the MAA has provided an explanation of the way in which the more detailed forms required for applications to CARS have led to a reduction in applications. The MAA suggests that there are more settlements occurring before the CARS process is entered into, as a consequence of earlier information exchange and better preparation of disputes. Do you have any comment?

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

readily rather than incur the costs of the CARS process. By deterring parties from pursuing disputes the system is not really providing justice at all.

3. (from MAA answer to question 25, pp 24-25) In its answer to question 25, pp 24-25, the MAA have responded to your suggestion that the CARS registry 'readily rejects any application that has any procedural deficiency'. The MAA states that rejections (14 per cent of applications) occur only if they are clearly non-compliant. Do you have any comment?

The Association has commented above in response to the first Question on Notice on the suggestion that the CARS registry "*readily rejects any application that has any procedural deficiency*". The rejection rate of 14% as indicated by the MAA does indicate that too many claims are being rejected. The absence of a signature on a document, for example, should be a procedural and technical non-compliance which can be easily rectified, rather than grounds for rejection.

4. You raise a further concern that the CARS system was not designed to handle the complexity of matters it now regularly deals with. What impact are you seeing this have on cases and what could be done to address the issue?

The Bar Association's concerns regarding complex cases in the CARS system have already been addressed above.

5. Your submission raises further concerns about a perceived incentive for insurers to allege contributory negligence arising from the Court of Appeal decision in Lee v Yang. The Committee is aware that you have raised these concerns with the MAA, and has itself asked the MAA to respond to them. If such an incentive now exists, what might be done to address it?

The Bar Association recommends two mechanisms to resolve the *Lee v Yang* issue.

i. In the short term, the costs regulations should be amended so that where an insurer forces a claimant to rehear a CARS case the claimant at least recovers the reasonable costs of doing so. It is clearly unfair to restrict a claimant to recovery of the prescribed costs (a punitive rate on rehearing) when it is the insurer who forces the rehearing.

ii. Amend the Act so that an allegation of contributory negligence does not trigger a right for an insurer to seek a rehearing on damages. The CARS assessor's determination on damages should bind the insurer.

6. (from MAA answer to question 29, pp 27-29) In its answer to question 29, pp 27-29, the MAA have shown a slight increase in contributory negligence claims from 5.25 per cent in the 12 months prior to the decision in Lee v Yang [2006] to 5.9 per cent in the 12 months after the decision, but an average of 6.1 per cent for all claims under the Motor Accidents Compensation Act 1999. Does the Bar Association still contend that the decision in Lee v Yang [2006] has led to an increase in contributory negligence claims?

- ***greater use of treatment reports and records from treatment providers in assessments;***
- ***establishment of an ongoing annual mechanism for qualitative feedback and monitoring of the CARS process, as was piloted by the Motor Accidents Assessment Service (MAAS) Reference Group;***
- ***quarterly publication of MAA performance reports, more frequent publication of assessment data, and publication of CARS assessors' practice notes.***

What are your views on the Insurance Council's assertions and proposals?

The Bar Association tabled separate submissions to the Standing Committee at the time of the hearing in response to the ICA submissions.

7. (from MAA answer to question 11, pp 6-9) The MAA has responded to your suggestion that the number of claims decreasing is a result of the MAA Scheme in its answer to question 11, pp 6-9. The MAA states that the Taylor Fry report attributed 'much of the decrease in claim frequency' apparently to a decreasing casualty frequency. Do you have any comment?

The Association accepts that some of the decrease in claim frequency can be attributed to decreasing accident rates. However, the experience of the Association's members is that part of the decrease in claims can be attributed to accident victims being deterred from pursuing a claim. In particular, those with statutory workers' compensation rights are now more frequently choosing to rely on those rights rather than pursue a motor accident claim.

8. (from MAA answer to question 26, p 25) In its answer to question 26, p 25, the MAA have responded to your suggestion that it is 'increasingly difficult' to get a discretionary exemption from the CARS system by explaining that suggestions of Supreme Court judges hearing challenges to exemption decisions have led to the existing process. Is the Bar Association aware of the Supreme Court arguments referred to by the MAA?

The Association has already provided its comments above concerning the "*increasing difficulty*" in obtaining a discretionary exemption from the CARS system. The Association believes the principal reason for the increasing difficulty is the attitude of CARS assessors and in particular, the Principal Claims Assessor that "*nothing is too complex for CARS*".

The Association is aware of the Supreme Court arguments referred to by the MAA. Those decisions say little more other than that the discretion of a CARS assessor should not be readily interfered with.

The Association's concern is that CARS assessors will not exercise that discretion to exempt matters from the CARS process. This does not mean that the CARS assessor was "*right*" not to exempt the matter – it simply shows that on administrative appeal it cannot be proven that the discretion miscarried. Administrative appeals are notoriously difficult to bring and cannot be cited as "*vindication*" of a CARS assessor's decision.

9. (from Government response, response to recommendation 2) Have you any comment to make in light of the Government response to the Committee's recommendation in the Eighth Review to undertake a review of Whole Person Impairment assessments to establish the extent of inconsistencies and to identify, if necessary, additional quality control mechanisms to improve consistency?

The MAA response is that it is "*examining these matters*" and will report back to the Committee by the end of 2008. The Association submits that the MAA could and should be more proactive in reviewing the whole person impairment assessment process to establish the extent of inconsistencies and to identify additional quality control mechanisms to improve consistency.

10. (previously circulated to members) The NSW Bar Association's submission draws attention to LTCS participants' rights to review in respect of LTCS decisions, noting that it has previously advocated some form of legal representation or advisory service to facilitate such rights. Please tell us more about the specific advantages these options would offer.

Follow up (from LTCSA answers to question 31 pp 25-26) Have you any further comment in light of the LTCSA's response to your concerns, as set out in its answer to question 31 to the LTCSA?

The Association strongly supports the provision of some form of advisory service or representation to those seeking to exercise their rights under the LTCS scheme.

The Association appreciates that the LTCS Authority is providing some funding for claimants to explore their legal rights in difficult cases on liability. However, this does not specifically address our concerns. The primary

concern of the Association is in relation to the assessment of care needs. There is no advice or representation available to a claimant or the parents or family of a claimant to advise in relation to challenging a decision of the Authority in relation to the care needs of a scheme participant. The Association remains of the view that such advice should be available to Scheme participants in order that they can properly exercise their rights under the scheme.

Highlighted questions from hearing transcript

(a) recommendations concerning exercise of CARS assessors discretion to exempt a matter (Chair, p28 of transcript)

As mentioned above in response to Question on Notice One, the Association considers that the key factor involves greater flexibility in the exercise of the discretion.

(b) Response to Law Society of New South Wales suggestion that liability issues be removed to be determined by a Court, and the matter can then be returned to the CARS process (Hon John Ajaka MLC, p29 of transcript)

The Association does not support such an approach, which would add further complexity, cost and delay to the process.

15 July 2008