

NSW Bar Association

QUESTIONS ON NOTICE

Due Friday 14 September 2007

LEGISLATIVE COUNCIL
COMMITTEES

4 SEP 2007

RECEIVED

Whole Person Impairment Assessments

Use of the AMA4 Guides

The Bar Association has expressed concern in its submission (p4-5) about the Whole Person Impairment threshold for non-economic loss and the use of the AMA4 Guides. As noted by the Committee in its last report (p79), it is likely that the WPI test and its reliance on the AMA4 Guides will remain a key feature of the Motor Accidents Scheme. Given this situation, are there steps that you feel the MAA could take to minimise the disadvantage that you see the WPI test causing?

The Bar Association remains committed to a uniform method for assessing pain and suffering across the field of personal injury. However, in answering the committee's question there certainly are steps the MAA can take.

Before you can fix a problem you first have to acknowledge it. The MAA does not even concede that the 10% WPI threshold produces unjust and capricious outcomes. For several years now we have been bringing examples of unjust outcomes to this Committee.

Last year we circulated to the Committee the photograph of a Korean lady whose entire ear had been torn off in a motor vehicle accident. She was assessed at 10%. Last month the MAA Gazetted new medical assessment guidelines. They now deem the complete loss of an ear to be over 10%. We appreciate the change but it is a band aid rather than a principled approach.

The starting point for a review of the 10% threshold is to systematically gather case studies of those assessed at 9 or 10% to see whether it is truly fair that they miss out on any damages to compensate their pain and suffering. For two years we have been asking the MAA to collect this information. We have sought a review of the 10% cases to address whether it is just that people in this category miss out.

We respectfully suggest that the Committee invite the MAA to collect data over the next six months as to the 10% cases, prepare de-identified case studies and then come back before the Committee and justify why those individuals, some of them very seriously injured, most of them experiencing pain and suffering, are missing out on fair and proper compensation for the sake of a marginally cheaper green slip.

Motor Accidents Council (*question for Mr Stone*)

Mr Stone, could you comment on your experience as a member of the MAC?

As a mechanism for distributing information the Council is excellent, however the Council could be far more effective than it is in practice.

The Council agenda for our hour and a half meetings every two months usually comprises two or three presentations as to different aspects of the operation of the scheme. This means that stakeholders are kept well informed as to what is happening. However, following any presentation there is usually very little discussion and debate.

From the limited discussions we have, the MAA does get some feedback from the Council. However, in my view the Council could be a more vigorous, robust and useful body if it was less tightly controlled and even occasionally engaged in some debate about policy issues.

In short, the Council is informative rather than consultative. The MAA only ever bring an issue to Council once they have determined their own position. I can't think of too many occasions where the MAA have changed their position or approach on anything as a consequence of discussions at the Motor Accident Council.

In evidence before the Committee the Chair of the Council stated that the Council has no "decision-making capacity". That statement is simply incorrect – see section 209 of the *Motor Accidents Compensation Act 1999*. The MAA may prefer that the Council make no decisions, but that is not the law!

In your view, is the MAC effective in its role to provide advice to the Minister and the MAA on issues relating the Motor Accidents Scheme?

In the eight years that the Council has been operating, this is the first time this question has been asked of a Council member other than the Chairman.

I would like to think that the MAA took on board some of the matters raised at Council meetings.

In my five years in the Council we have made the grand total of one recommendation to the Minister. We recommended, uncontroversially, that the Government consider amending its fleet purchasing requirements to incorporate vehicles with a particular safety feature.

There is a difficulty with getting the Council to make any recommendations to the Minister. If the Council were to recommend a change then it is an implicit acknowledgement that something is broken or wrong. It's very difficult to get the MAA bureaucracy to acknowledge that there are any problems, let alone a problem that the Council (rather than the MAA) recommends be fixed.

At various times I have moved at Council meetings to make a recommendation to the Minister, but only once has my motion even progressed to a vote.