

**SUPPLEMENTARY SUBMISSION BY NEW SOUTH WALES  
BAR ASSOCIATION**

**RESPONSE TO SUBMISSIONS BY INSURANCE COUNCIL  
OF AUSTRALIA**

**INTRODUCTION**

In preparation for the hearing of the Standing Committee on Law and Justice the Association has been provided with proposed questions. These included a question as to the Association's views on various assertions and proposals set out in a submission from the Insurance Council of Australia dated May 2008. Given the length of the Insurance Council's submissions and proposals the Association has prepared a written response.

**ARE CARS ASSESSOR'S AWARDS INCREASING**

The primary assertion made by the Insurance Council in relation to the operation of the CARS system is that CARS assessors' awards are increasing ahead of inflation (superimposed inflation). Some analysis is provided in the Insurance Council's submissions although there is no independent actuarial evidence in support.

Last year the MAA did commission an actuarial study in response to a similar assertion by the Insurance Council. The assertion then was that it was awards for future economic loss as "cushions" or "buffers" that were increasing ahead of inflation. The Motor Accident Authority commissioned actuaries to examine and investigate this issue. The actuaries did not find any significant inflation in awards of future economic loss.

This year the Insurance Council assert that domestic assistance awards are increasing at a rate ahead of inflation. The assertion is made based on a very small sample size. The sample includes almost no decisions from the past two and a half years. The Association submits that the Parliament would rely upon actuarial studies from an independent source (the Motor Accident Authority) in preference to the assertions of the Insurance Council.

Moreover, there may be a common sense explanation for some increase in awards for domestic assistance that does not necessarily indicate superimposed inflation. In the early days of the CARS scheme claims for domestic assistance were not particularly well prepared. Insurers took issue with the lack of evidence supporting claims for domestic assistance. Insurers insisted that CARS assessors not award domestic assistance where there was not clear medical evidence in support and where there were no statements from care providers evidencing the assistance that had been rendered.

The response of most solicitors was to start preparing their CARS cases better. Most cases that now proceed to CARS with a care claim have much better evidence

in support of any domestic assistance claim. There is greater use of occupational therapists to provide assessment of care needs. There are more statements from care providers. The Standing Committee is invited to enquire of the CARS assessors who give evidence before it whether they have noticed this change.

The insurers pushed to have claims better proven. They are now reaping their reward – higher awards based on better evidence.

However, there is only so much improvement that can be made in the state of the evidence in a case. If there has been an inflationary burst as a consequence of better prepared cases the Association anticipates that it has largely run its course. There is no ongoing threat to the stability of the scheme.

### **WHY ARE CARS ASSESSORS' AWARDS GREATER THAN SETTLEMENTS?**

The Association is not in the least surprised at the Insurance Council's suggestion that CARS assessors award greater damages for soft tissue injury cases than the insurers usually pay in settlements. There are a number of reasons why this will be so:

1. As the Insurance Council itself acknowledges on page 13 of its submission, claimants who settle early do not receive the full value of their claim. Claimants who settle with an insurance company *"trade off earlier receipt of settlement monies for the chance of a higher assessment at a later date"*. The insurer does not pay the full value of a claim for an early settlement – if a claimant wants full value they will have to proceed to an assessment hearing. Most claimants settle early at a discount to bring the claims process to an end as rapidly as possible. It must follow that those few cases that do proceed to an assessment will generally result in a higher award of damages. That is not to say that the CARS assessor's award is in any way unfair or unreasonable. Rather, it is those who persevere who actually receive the proper compensation.
2. An insurer makes an offer of settlement based on their own review of the case and the information provided by the claimant. Unsurprisingly the claims officer brings their own pro-insurer perspective to the evaluation task.

At CARS the case is reviewed by a solicitor or barrister who may have 20 or 30 years experience in the CTP industry. The assessor not only reviews the insurer's case but also the claimant's case. The assessor gets to hear from the claimant and their family.

It is hardly surprising that a neutral evaluation taking into account all the evidence results in a larger award of damages than the insurer is prepared to offer when they review the matter from their own perspective.

3. Cases that proceed to CARS are fully prepared. Usually a lawyer has considered each and every head of damage and made careful preparation in support of the claim for those heads of damage. This is more likely to produce a higher (and fairer) award of damages than a compromised settlement at an earlier point in time when the case is not yet fully prepared.

4. Most cases that proceed to CARS involve legal representation for the claimant. This ensures that the claimant fully asserts their legal rights. With many of the cases that are settled the claimant is legally unrepresented. The insurer isn't likely to tell the claimant about their full legal rights – the insurer obtains occasional windfalls through the ignorance of claimants about their full legal entitlements. Again, it is hardly surprising that the average CARS award is thus higher than the average settlement.

It is significant to note that the Insurance Council has not identified a single example of a CARS assessor making an error of law, making an error of fact or otherwise making an unjustified award of damages. The insurers collectively simply complain that CARS assessors give more money in damages than insurers can settle cases for.

The MAA has not raised any concerns with the Standing Committee about any blow out in costs within the scheme.

The Association did not address insurer profits in its submissions this year as the Standing Committee has specifically focussed on the CARS process. However, there should be no mistake that insurers continue to book handsome profits from the motor accident scheme. On page 5 of their submission the insurers refer to average profit margins over the last 8 years between 7.7% and 8.7% and note that profit levels have reduced to 6%. This summary is potentially misleading. Insurer profit levels for the first 5 years of the motor accident scheme will be over 20% of premium filed. The "*super profit*" for this period will exceed \$1billion. The figures of 7.7% and 6% are the estimated profits contained in insurer filings. Due to falling accident numbers and the scheme's efficiency in minimising payments to claimants, insurers have in fact made far larger profits than they had budgeted for.

The Standing Committee is invited to put this question to the Insurance Council representatives – once all anticipated claim costs are met isn't it the case that the insurers will collectively keep more than 20% of the premium written in the first four years of the operation of the new scheme?

It will take a very large number of CARS assessments giving a couple of thousand extra dollars to claimants with soft tissue whiplash injuries to claw back over a billion dollars in super profits that insurers have reaped under the Motor Accidents Compensation Act 1999.

### **THE LACK OF TRANSPARENCY**

The Insurance Council asserts that there is lack of transparency in the CARS process as it allows individual assessors to make determinations without providing evidence-based reasons for assessments. To be blunt, this is simply not the case. Every CARS assessor provides written reasons in support of their award of damages. Those reasons will (as with a judgment from a judge) refer to the evidence in support of the claim. The reasons also usually refer to the evidence led by the insurer in support of arguments to minimise the claim. There is exactly the same transparency in a CARS assessor's award as there is in a judgment from a judge.

If the CARS assessor were to make an award without making reference to the evidence then that would be an error of law. The insurer would have the right to appeal the administrative error to the Supreme Court.

The Insurance Council does not identify a single CARS assessor's decision that has been made without providing evidence based reasons for assessment. The assertion of a lack of transparency is entirely without substance.

### **MEASURES SUGGESTED BY THE INSURANCE COUNCIL**

Responding to the various proposals from the Insurance Council in turn:

#### **i) Greater use of treatment reports**

The personal injury claim form provides an authority for an insurer to request reports from treating doctors. It also provides the insurer with authority to obtain clinical records from treatment providers including doctors and hospitals. The Association's experience is that insurers frequently request reports from treatment providers and clinical records from treatment providers. Most CARS assessments are conducted with reports from treating practitioners and records submitted either by the claimant, the insurer or both.

Recent amendments to the Motor Accidents Compensation Act provide for CARS assessors to give directions to treatment providers to produce records and reports.

There is no evidence whatsoever that CARS assessments currently want for relevant factual information. Insurers already have every opportunity to put relevant records before the CARS assessor. The Insurance Council is vague about exactly what it is they want other than some sort of general direction to CARS assessors to minimise awards of damages.

#### **ii) Clear reasons and future economic loss**

CARS assessors are already required to state the evidence on which they rely in awarding future economic loss – see section 126 of the Motor Accidents Compensation Act. It seems insurers are unhappy that a claimant can be awarded future economic loss when they are working at the time of assessment and thus apparently not suffering from any economic loss.

This highly simplistic view of economic loss is typical of the nature of submissions put to CARS assessors by insurers. It is hardly surprising it is often not accepted. The claimant who has a medical condition that is likely to deteriorate over time will face further pressures in maintaining their employment. An award of a cushion in those circumstances is appropriate.

Similarly, the claimant who is clinging to their employment with a benign employer despite extensive injuries may find it difficult to find further employment if they lose their current job. Again, whilst they are not suffering any economic loss on the day

of the assessment they are certainly at risk of future economic loss and a cushion is appropriate.

**iii) Monitoring and Feedback**

The Association supports steps to improve qualitative monitoring and feedback for stakeholders. However, the Association is concerned that the independence of CARS assessors be maintained. The role of any feedback system must be more than to give insurers the opportunity to complain about awards that are higher than they expected.

**iv) Practice Notes**

The Association agrees with the ICA that CARS assessors' practice notes should be made available to all stakeholders.

**v) Data and Monitoring**

The Association has no difficulty with the MAA reporting on the status of the CTP scheme to stakeholders and to keeping a close eye on any emerging trends towards superimposed inflation. However, the Association is concerned that what the insurers really seek is a quarterly lecture to the CARS assessors from the MAA reminding them to keep their awards of damages down least there be inflationary pressures within the scheme. Any such discussions with the CARS assessors would breach 105 of the *Motor Accidents Compensation Act 1999* which provides that a Claims Assessor is not subject to control and direction by the Authority with regards the decisions they make.

**CONCLUSION**

In conclusion the Association submits that there is an element of "cry wolf" in the ICA submissions. Independent actuarial studies on behalf of the MAA have not disclosed any superimposed inflation in relation to economic loss cushions. For the reasons set out in this document the Association suspects that there is not any significant superimposed inflation in relation to care claims either – they are simply being better prepared.