

STANDING COMMITTEE ON LAW AND JUSTICE
Ninth review of the exercise of the functions of the MAA and MAC

Insurance Council of Australia – Supplementary Submission

1. The Insurance Council of Australia’s submission presents data from your member organisations to document trends which suggest that the Claims Assessment and Resolution Service (CARS) process is resulting in substantially higher compensation payouts than those claims settled outside CARS, and that CARS payouts have increased over time, while non-CARS payouts have remained fairly constant. You go on to note that this ‘superimposed inflation’ could place unplanned upward pressure on insurance premiums and discourage early resolution of claims, thereby leading to poorer injury outcomes. You attribute this escalation largely to a ‘lack of transparency’ in the CARS process which allows individual assessors to make determinations without providing evidence-based reasons for assessments.
 - (i) On what basis do you attribute it to this?
 - (ii) Could you explain how, in practical terms, you believe the current CARS decision-making process is contributing to escalating payouts?
 - (iii) Have you raised these concerns with the Motor Accidents Authority (MAA)?

The Insurance Council believes that as the CARS Assessor’s decisions are not published, there is no real mechanism for review of the nature and size of the decisions. However we note with approval the announcement by the MAA that it is investigating the feasibility of publishing CARS decisions.¹

We also consider that there is little opportunity for Insurers to understand the guidelines which CARS Assessors apply in making their determinations and their reliance on the actual evidence presented.

In addition, we submit that such determinations should be based on the clear evidence of treating doctors and other experts who are practicing clinicians rather than merely relying on assertions by the parties. However we consider that many of the latest reforms which provide for medical evidence to be provided prior to the lodgement of CARS Applications will lead to greater transparency.

On 20 June 2008 the Principle Claims Assessor (PCA) advised the hearing of the Standing Committee on Law and Justice (the Committee) that although practice notes are available to stakeholders, that other material which is provided to CARS Assessors is not. This material apparently includes what is described by the PCA as a “bench book” and electronic newsletters provided to CARS Assessors. If this material contains writing tips for CARS Assessors on the assessment of particular heads of damage and what evidence they should take into account, then, in the Insurance Council’s submission, this material should be made available to all stakeholders.

Once all stakeholders have a greater understanding of how CARS Assessors arrive at their decisions, this transparency will achieve, in our submission, greater consistency in results, as well as the earlier resolution of claims and the avoidance of unnecessary

¹ Answers to pre-hearing Questions on Notice: MAA and MAC, page 27 on Parliamentary website at <http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/A7443125872EC3DACA25746E00223686>

disputes. Greater access to CARS newsletters/bench books should also assist those Injured Persons who do not have legal representation to better navigate through the process and clearly understand what needs to be presented in a CARS assessment.

The Insurance Council welcomes the MAA's announcement that a comprehensive review into the level of CARS decisions will be undertaken by Pricewaterhouse Coopers to improve the MAA's monitoring systems to enable early warning through lead indicators of superimposed inflation.²

2. The Insurance Council's submission calls for greater use of evidence-based medical assessments by the Medical Assessments Service (MAS). Could you explain how such assessments would differ from current ones and suggest how this approach might be encouraged?

The Insurance Council welcomes the MAA's commitment to funding medical research and notes that they have sponsored several studies into particular injuries and the effectiveness of various forms of treatment. One of these, the updated guidelines for the management of Acute Whiplash Associated Disorders (WAD), has been highlighted by the MAA in its annual report. These guidelines provide recommendations to health practitioners, insurers and patients for the optimal management of adults with acute WAD in the first 12 weeks following a motor vehicle accident.³

The introduction of section 83(2A) of the *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) ACT 2007* (NSW) has taken this further and the legislation now provides that where the MAA Medical Guidelines approve a particular treatment as an appropriate type of treatment then that approved treatment is taken to be a reasonable expense which the insurer should pay provided it is also necessary.

This section reflects a mutual recognition between Insurers, Medical and Allied Health professionals and the MAA towards greater use of evidence based medicine, relying on, where possible, academic research. We believe that the use of this type of evidence will lead to better health outcomes for injured people.

We also recommend that the MAA issue practice notes to all stakeholders (including CARS Assessors, Insurers, Medical and Allied Health practitioners, legal representatives etc) on any new treatment practices which they recommend. We consider that this will also improve the consistency of decision making across the scheme.

3. The Insurance Council's submission also calls for greater use of treatment reports and records from treatment providers by both MAS and CARS assessors. How would this benefit the process, and what systemic changes are required to facilitate it?

The Insurance Council considers that contemporaneous treatment notes from hospitals and medical practitioners can provide some of the most accurate information concerning the nature and extent of the claimant's injuries. This material provides a much clearer

² Answers to pre-hearing Questions on Notice: MAA and MAC, page 30 on Parliamentary website at <http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/A7443125872EC3DACA25746E00223686>

³ Motor Accidents Authority Annual Report 2006-2007, page 11

picture of the claimant's needs than medico-legal reports (which are obtained after one consultation) can.

However Insurers report ongoing difficulties in obtaining access to contemporaneous medical documentation and pre-accident documentation due to a failure or delays by the Injured Person's legal representatives in providing valid authorities to the insurer.

This problem is further compounded by section 85A of the *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Act 2007* (NSW) which only obliges the injured person to supply information about their current injuries rather than any relevant pre-existing injuries or illnesses they suffered from before their motor vehicle accident.

However we note the new section 100(1A) which introduces the ability for a CARS Assessor to direct a third party to provide material (eg. medical notes and reports). We also note the new section 100(1)(c) which allows CARS Assessors to direct the signing of authorities to third parties. Hopefully this will alleviate many of the issues we have referred to above. However the provisions remain untested and we are unsure how these new powers will be exercised by the CARS Assessors.

Unfortunately these provisions do not apply to MAS Assessments. We submit that MAS Assessors would also benefit from access to these contemporaneous materials in making their determinations. We recommend that the MAA review the powers of MAS Assessors accordingly.

In our submission, the earlier this information is available to all stakeholders the more beneficial it becomes. Earlier access to the information would also, in our view, aid insurers in determining appropriate treatment is provided to Injured Persons.

4. You have also called for an ongoing qualitative monitoring and feedback system for all stakeholders in the CARS system along the lines of the process piloted by the Motor Accidents Assessment Service (MAAS) Reference Group. Could you explain how this would work and what benefits it would offer?

The MRG contains representatives of active stakeholders in the CARS system. At present the only avenue for feedback by insurers to the MAA is by means of a formal complaint against a CARS Assessor on an individual matter. Insurers, as part of the MRG, would like to have input into a qualitative system for the review of CARS and MAS Assessors.

We believe that the MRG can be utilised to provide more qualitative feedback to the CARS Assessors. This monitoring and feedback system would allow a quick identification and response to issues as they arise. From a continuous improvement perspective, it would also provide useful information when the MAA is reviewing the appointment of MAS and CARS Assessors. Such feedback may include:

- Timeliness – in conducting the Assessment, ensuring adherence to CARS timetable etc
- Communication – to ensure that the reasons given for the assessment are clear and there is medical evidence in support of the assessment etc
- Feedback - positive, complaints etc

- Other relevant issues (to be determined in consultation with the MRG)
5. The NSW Bar Association (Submission 8 to the MAA/MAC Review) contends that:
- the CARS process is overly complex and bureaucratic with the effect of encouraging settlement and deterring CARS claims
 - the CARS system was not designed to deal with the complexity of matters it now regularly deals with
 - the overall time it takes to resolve claims (from the time of accident to settlement or award) has changed little under CARS, in that purported reductions in claims resolution times mask the time it takes for cases to be prepared prior to lodgement with CARS.

What is the Insurance Council of Australia's view of these assertions?

On the whole the Insurance Council believes that the CARS process is working well and provides a quick and efficient method of assessing non complex motor vehicle injuries without the added expense of court procedures. The fact that a significant number of claims are settled before the CARS process is an indication, in our view, that the scheme is meeting its objectives.

However, the Insurance Council agrees that some matters, particularly complex contributory negligence claims, should not be dealt with by CARS. These cases require technical evidence which can be lengthy. The parties also need the opportunity to cross-examine this technical evidence which they are unable to do at a CARS Assessment Conference. We recommend that the mandatory exemption remain at the level of 25% until the legislation can be amended to allow for split hearings on liability at court and quantum at CARS.

The Insurance Council does not agree that the overall time it takes to resolve claims has changed little under CARS. We support MAA initiatives which encourage early settlement of claims. We consider that this provides a greater benefit to the claimant and ensures that a greater proportion of the claim costs go to the claimant whilst providing a high degree of affordability for the scheme as a whole. We consider that the reforms introduced in May 2006 to ensure earlier exchange of relevant information by the parties will go a long way in streamlining the process and prevent either party being surprised by new information during the CARS process.

6. Do you have any comments to make on the revised Claims Handling Guidelines for insurers that will shortly commence, as well as the broader reforms to improve efficiencies in claims handling and dispute resolution processes legislated in late 2007?

Once again the CTP Insurers have largely supported the revised Claims Handling Guidelines and are happy to conform to their requirements. The Insurance Council has also recently responded to a request from the MAA for our feedback on the guidelines and suggested some areas of clarification.

We note that the number of procedural steps that an Insurer has to undertake to comply with the Claims Handling Guidelines alone (not including any other Guidelines) is approximately 178 processes. The revised Claims Handling Guidelines have added an additional 22 required processes. By their very nature that number of requirements must

have an impact on claims duration and impact all stakeholders' desire for early resolution.

However we are concerned that the increased level of regulation in the scheme leads to increased costs in complying with those requirements, which in turn of course leads to increased scheme costs overall. In these circumstances a balance between efficiency and increasing scheme costs need to be struck.

7. The committee notes that you did not make a submission to our concurrent first review of the Lifetime Care and Support Authority (LTCSA). Nevertheless, we are interested to hear your views on the objectives and initial period of operation of the Lifetime Care and Support (LTCS) Scheme, as well as the impact the advent of the scheme has had on you. Please tell us about your views on these matters.

As you are aware, the LTCS Scheme is in its very early stages. The CTP Insurers involvement in the LTCS Scheme is limited in that they are responsible for the other heads of damages for Injured Persons who are in the lifetime care scheme. From the Insurance Council's understanding and experience of our members, to date the LTCS Scheme is working well, although the operation of the scheme is a work in progress.

We suggest however that some of the LTCS Scheme's care arrangements are likely to set precedents for claims in the CTP scheme generally. Therefore, we consider that we are a stakeholder in that process and we would like to be involved in determining what sort of care will be provided. We believe that this has a flow-on effect to the CTP scheme in which our insurers operate.

We remain keen to work with the LTCSA as the scheme progresses. We are also participating in ongoing dialogue with MAA and the LTCSA to ensure that there is no duplication of services for those participants in the Scheme and that insurers are also included in any significant changes to the operation of the scheme.

8. (From MAA answer to question 18, p 15) In its answer to question 18, p 15, the MAA outlines the mechanism for MAS and CARS assessors to access treatment reports and records of claimant's treatment providers and describes a change to section 100(c) of the Motor Accidents Compensation Act 1999. Do you have any comment?

We refer to our comments in relation to question 3 above. Although we believe that the amendments to section 100 may to a large extent resolve this problem, we also consider that earlier access to this information will materially assist the parties and promote settlement

At present the Assessor can only direct this information at time of the CARS Assessment and not earlier. We believe that disputes can be minimised and claims resolved earlier if the CARS Assessor (upon application by the Insurer or any relevant party) had the ability to make a direction at any time prior to a CARS assessment. Accordingly we recommend that the question of whether access to these documents could be the subject of a special assessment.