Submission No 3

INQUIRY INTO REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS AUTHORITY AND THE MOTOR ACCIDENTS COUNCIL - SIXTH REVIEW

Organisation: NSW Bar Association

Name: Mr Ian Harrison SC

Position: President

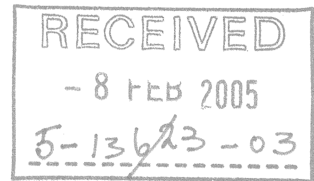
Telephone: 02 9232 4055

Date Received: 8/02/2005

Theme: critical analysis

Summary: issues considered include

1. Insurer profits
2. Premiums
3. Premiums and young drivers
4. Recommendations from the Standing Committee on Law and Justice
5. The Motor Accident Council
6. Claims payments - non-economic loss
7. Fairness
8. The Medical Assessment Service
9. Scheme evaluation by Justice Policy Research Centre
10. Claims assessment and resolution service (CARS)
11. Cost regulations
12. Insurance gap between CTP and public liability
13. Covert Surveillance
14. Withdrawing admissions of liability
15. Allegations of fraud
16. The Hannaford review process



The New South Wales Bar Association

Ian G. Harrison S.C., President

00/334

4 February 2005

The Honourable Christine Robertson MLC
Chair, Standing Committee on Law & Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Robertson

Sixth Review of the exercise of the functions of the MAA and MAC

I refer to your letter dated 13 December 2004.

Thank you for inviting the Association to nominate issues or specific questions for consideration by the Standing Committee of Law and Justice in its review of the *Motor Accidents Compensation Act 1999* and Motor Accidents Authority. Our comments are annexed.

Should you believe we may be able to be of further assistance, might I suggest the Committee's Clerk contact the Association's Executive Director, Mr Philip Selth on ph 9229 1735.

Yours faithfully

Ian G. Harrison SC
President

Selborne Chambers, 174 Phillip Street, Sydney 2000
DX 1204 ◆ Tel (02) 9229 1736 ◆ Fax (02) 9222 9678 ◆ Email president@nswbar.asn.au
www.nswbar.asn.au

ACN 000 033 652 · ABN 18 526 414 014

The New South Wales Bar Association

STANDING COMMITTEE ON LAW AND JUSTICE

SIXTH REVIEW OF MOTOR ACCIDENTS SCHEME

4 February 2005

Selborne Chambers, 174 Phillip Street, Sydney 2000
DX 1204 ◆ Tel (02) 9229 1735 ◆ Fax (02) 9222 9678 ◆ E-mail executivedirector@nswbar.asn.au
www.nswbar.asn.au

ACN 000 033 652 · ABN 18 526 414 014

1. Insurer Profits

One of the two methods used by the Motor Accidents Authority (MAA) to assess insurer profits is to look at the percentage of premium written in any given year which the CTP insurers ultimately retain.

The General Manager of the MAA, Mr. David Bowen addressed the Standing Committee on Law & Justice hearing on 16 February 2004 regarding what represented a reasonable percentage return on premium written. Mr. Bowen stated:

> 'Under the previous scheme the level of insurer profit as the percentage of gross premium was between 9% and 11% - an average of about 10%. One of the objectives of the new scheme was to reduce the amount of premium going to insurer profit...the minimum level of profit required for this business, when you translate into a percentage of the premium, is about 5.5% of the gross premium'.

In short, the intention of the new scheme was to return to insurers approximately 6-8% of premium written as being a reasonable level of profit.

It is well understood that CTP is a 'long tail' form of insurance. It may be upwards of 15 years before the last claim arising out of any given year is finally resolved. Accordingly, any final determination as to actual profit realised from any given year cannot be determined for upwards of 15 years after the premium is collected.

Nonetheless, the MAA does make ongoing assessments as to likely profit for each premium collection year based on actuarial calculations in relation to outstanding claim liabilities. Both the MAA and their actuaries are experienced and expert in making accurate projections as to outstanding claims liabilities.

On 8 November 2002 the MAA's consulting actuaries, Taylor Fry reported to the MAA on year one of the new scheme (5 October 1999 to 4 October 2000). At that time, based on current projected future claim payments, Taylor Fry estimated that CTP insurers would ultimately retain 23% of the year one premium.

The MAA Annual Report for 2003-2004 sets out in tabulated form on page 104 current MAA projections as to scheme performance. Although the MAA give profit estimates based on outstanding claims liabilities, the MAA has not expressed the profit figure in terms of a percentage of premium written.

The MAA figures have been re-tabulated below, adding columns to reflect (on current projections) the percentage of premium likely to be retained as profit.

PROJECTED INSURER PROFIT AS A % OF PREMIUM WRITTEN

Premium Year (ending 30 Sept.)	Premium Written ($ million)	Target Profit- 8% of Premium	Estimated Profit ($ million)	Excess Profits ($ million)	% of Premium retained as Profit
2000	$1325	$106	$315	$209	23.77%
2001	$1321	$105	$282	$177	21.34%
2002	$1342	$107	$277	$170	20.64%
2003	$1388	$111	$217	$106	15.63%

Given that the MAA uses 'percentage of premium retained' as one of its own measures of insurer profits it is unfortunate that the MAA Annual Report does not contain any assessment in percentage terms. Nor does the MAA address what (if any) steps have and will be taken to bring insurer profit back down into the stated target goal of 6-8% of premium written.

1.1 Does the MAA remain of the view that 6% to 8% (of total premium written) represents a reasonable rate of return to CTP insurers as a percentage?

1.2 Does the MAA agree that consistent with projections from the past two years and subject to the accuracy of MAA estimates as to outstanding claims liabilities, the scheme is likely to deliver excess profits to CTP insurers in relation to 1999-2000 in the order of $200 million?

1.3 What are the MAA's views as to the probable 23% insurer profit (on current projections) on premium collected in the first year of operation of the new scheme? How does this figure sit as against the MAA's target of 6-8% of premium retained as profit?

1.4 What view does the MAA take of the probability that the new scheme will deliver profits to insurers (on current projections) in excess of $600 million over its first four years of operation?

1.5 Whilst insurers are currently cutting CTP premiums in response to these high profits, has any of this excess profit been redirected to accident victims in NSW? Does the MAA have any plans to return any of the excess profits currently being garnered by insurers to accident victims?

1.6 Does the MAA monitor profit announcements by insurers in the NSW CTP market? If so, is the MAA aware of insurers such as IAG (NRMA), QBE and Promina (AAMI) announcing record profits in 2004 from their global operations? Is the MAA able to assist the Standing Committee by indicating whether return on CTP business comprises a significant feature in these record profits?

1.7 Have any insurers yet released reserves in relation to the new scheme? If so, what reserves have so far been released and in relation to which years?

2. Premiums

In response to questions raised by the Bar Association through the Standing Committee in December 2003 the MAA stated:

> 'The MAA expects stability in premiums over the next twelve months with the upward pressure of reinsurance being offset by better investment returns and continued scheme stability'.

This prognostication has proved inaccurate. There have been a number of re-filings during 2004 with CTP insurers seeking to reduce premiums.

2.1 What has changed within the CTP market since November 2003 when the MAA predicted that premiums would remain stable? How have premiums been able to drop over the past twelve months?

2.2 Is the drop in premiums reflective of the significant surplus profits which insurers find the new scheme delivers? Has this in turn allowed for a cut in premiums to improve market share?

2.3 Does the MAA accept that the cut in premiums has largely been achieved by a reduction in benefits paid to the injured? Is this fair?

3. Premiums and Young Drivers

In responding to questions raised by the Bar Association to last year's Standing Committee hearing the MAA stated:

> 'Young drivers, as group, do not have a very good road safety record. The Green Slip premiums that they pay are significantly subsidised by older and safer drivers, as a community rating subsidy'.

In short, young people would pay a significantly higher premium if it were not for the cross subsidy by older and safer drivers.

Whilst the new scheme has seen significant reduction in premium for older drivers there has been no significant reduction in premium for younger drivers. In effect there has been a partial unwinding of the degree of cross subsidy between older and younger drivers. Younger drivers continue to face premiums in excess of $500 per year.

3.1 Who made the policy decision to reduce the degree of subsidy between older and younger drivers?

3.2 What was the policy basis for the reduction of the cross subsidy between older and younger drivers?

3.3 Is it recognised that this policy is socially regressive in as much as younger drivers are amongst those least able to afford the relatively higher premiums?

4. Recommendations from the Standing Committee on Law and Justice

The Standing Committee on Law and Justice handed down its fifth report on the operation of the motor accident scheme in April 2004. The report contained seventeen recommendations to the MAA.

4.1 Which of the recommendations from the Standing Committee have to date been implemented or acted upon to the extent of leading to any substantive change or improvement in the operation of the scheme?

4.2 With regards to recommendation 1 concerning the Nominal Defendant and unregistrable vehicles, has the MAA determined that the operation of legislation does have the undesirable effect referred to? If so, what steps has the MAA taken to amend the *Motor Accidents Compensation Act 1999* as recommended by the Standing Committee?

4.3 Recommendation 7 - Has the MAA reported on insurer profits in accordance with the Standing Committee's recommendations? If so, where can this data be found?

4.4 Recommendation 8 - Has the MAA examined trends under the scheme since the 1999 amendments in relation to insurer profits? If so, where is that information included in the Annual Insurer Profit Report to the Standing Committee? Where in the MAA's reporting can any indication as to the reasonableness or otherwise of insurer profits be found?

4.5 Recommendation 9 - What steps has the MAA taken to investigate and deal with the gap between CTP Green Slip insurance and public liability insurance since receiving the Standing Committee's recommendation?

4.6 Recommendation 16 - Has the MAA taken any action to facilitate amendment of the *Supreme Court Act 1970* and the *District Court Act 1973* to allow awards of interim damages in Motor Accident cases? It is noted that one recent high profile case was the subject of approval in the Supreme Court of an award of interim damages. Why aren't interim damages available to other claimants in less high profile cases?

5. The Motor Accident Council

Section 209 of the *Motor Accidents Compensation Act 1999* prescribes some of the functions of the Motor Accident Council (MAC). These include:

(a) To advise and make recommendations to the Authority on, and to keep under review, the MAA medical guidelines and MAA claims assessment guidelines.

(b) To monitor the operation of the services provided under this Act for the assessment of injuries and the assessment of claims.

(c) To monitor the operation of Part 3.2 (early payment for treatment of injured people).

(d) To advise the Board of Directors of the Authority or the Minister (through the Board) on any matter relating to the Motor Accidents scheme under this Act that the Council considers appropriate or that the Board or Minister refers to the Council for advice.

Having regard to the above functions:

5.1 What (if any) recommendations has the MAC made regarding the MAA medical guidelines during 2004?

5.2 What (if any) recommendations has the MAC made regarding the operation of the claims assessment guidelines during 2004?

5.3 What steps has the MAC taken to monitor the operation of services provided for the assessment of injuries (MAS) and the assessment of (CARS) claims during 2004?

5.4 What steps (if any) has the MAC taken to monitor the operation of Part 3.2 in relation to early payment for treatment of injured persons during 2004?

5.5 Can the MAA identify any single item of advice or recommendation generated by the MAC during 2004 upon which the MAA has acted? (i.e. Where has the MAC served to generate or provide advice which has in any way changed or influenced the thinking and actions of the MAA?)

5.6 What (if any) resolutions or motions has the MAC passed in 2004?

6. Claims Payments – NEL

The MAA have previously responded to questions from the Bar Association submitted through the Standing Committee on this issue. Last year the MAA stated that the intention of the new scheme was to limit access to non economic loss (NEL) to claimants with Whole Person Impairment (WPI) greater than 10%. In particular, it was intended to deny NEL to those with soft tissue 'whiplash' injuries to the neck and back.

The Special Minister of State has previously stated that the legislative intention was to allow recovery of NEL to the 10% of claimants who were most seriously injured. (Refer to the response to the question without notice by the Special Minister of State to the Legislative Council on 31 May 2001).

The figure of 10% WPI is an arbitrary and at times capricious line drawn to separate those deemed worthy of compensation for the pain and suffering caused by their injuries from those deemed unworthy. The purported intention is to reflect what the scheme can afford.

It is noted in passing that the stated intention at the time of introducing the 1999 Act was to reduce total payments for NEL from approximately $250 million per claims year to $150 million per claims year. This $100 million saving was achieved by introduction of the 10% WPI threshold. It is disturbing that given projected excess profits of over $200 million for CTP insurers in the first year of operation of the new scheme that changes to the awarding of NEL which now leave a number of seriously injured people uncompensated may have proved wholly unnecessary.

The Bar Association is aware of an increasing number of cases of claimants who ought to be considered as 'seriously injured' who are receiving no compensation for NEL due to the operation of the AMA IV Guidelines.

Amy from the Central Coast is just one illustration of the injustice of the AMA IV Guides as adopted by the MAA. Amy was only 16 years old when a car collided with her school bus, throwing her out of her seat. There was no dispute as to the other driver's fault – the insurer admitted liability. There were no allegations of contributory negligence.

Unfortunately Amy suffered a prolapsed invertebral disc in her low back (L5/S1) which in turn caused nerve root compression at S1. Impingement on the nerve root in turn causes radiculopathy in the form of sciatica (shooting pain) in the legs. In accordance with the AMA IV Guides, Amy is assessed at DRE Category III which in turn mandates 10% WPI.

Amy's injuries were assessed at 10%. She does not exceed 10% and does not receive any NEL.

Amy will shortly turn 20. For the rest of her life she will be unable to jog or run. She will not be able to bend comfortably at the waist. Amy is unable to engage in any employment which requires any significant amount of bending or lifting. Amy is likely to experience complications during pregnancy and will be unable to bend and pick up her children as they grow older.

There is no dispute about the nature and extent of Amy's injuries. Unlike a soft tissue whiplash injury there are clear and objective radiological findings that support Amy's evidence as to the pain she experiences. Nonetheless, the MAA has drawn the rules for compensation (through their employment of the AMA IV Guides) such as to deny Amy any compensation for NEL. It is both puzzling and bizarre that were Amy to suffer the same injury in her upper spine or the neck (disc prolapse with impingement and radiculopathy) then her injuries would be assessed as exceeding 10% WPI.

Amy's is by no means an isolated case of those suffering significant injury not receiving compensation for non economic loss. With CTP insurers projected to make excess profits of over $150 million for the year in which Amy suffered her accident it is difficult to understand why Amy was not entitled to a lump sum to compensate her for her pain and suffering.

6.1 Does the MAA agree that the current scheme is costed on 10% of claimants (approximately 1,500) per year receiving non economic loss?

6.2 Does the MAA agree that the scheme is costed on those 1,500 accident victims per year receiving approximately $150 million in non economic loss between them?

6.3 To date, what is the total dollar value of payments for NEL to accident victims from the first year of operation of the new scheme?

6.4 What percentage of claims from year one remain outstanding and what percentage of those claims has an NEL estimate held by the insurer?

6.5 What number of claimants from year one of operation of the scheme have to date received payments for non economic loss?

6.6 What percentage of completed claims from year one have to date received NEL?

6.7 Does the MAA remain confident that approximately 1,500 accident victims will share approximately $150 million in non economic loss payments for accidents occurring during the first year of operation of the new scheme?

6.8 Has the MAA made any review of claimants who are receiving an assessment of 9% or 10% for WPI from MAS to determine the appropriateness of those persons not recovering compensation for NEL? Does the MAA propose to make any such study?

7. Fairness

At page 113 of the 2003-2004 Annual Report the MAA analyses fairness in the operation of the new scheme in a context of serious brain injury claims. It is stated

that the scheme is intended to provide a fair and equitable system for claimants, ensuring that the most seriously injured receive maximum compensation. An analysis thereafter follows to demonstrate that the seriously brain injured are receiving approximately the same level of compensation under the new scheme as they did under the old scheme.

This analysis overlooks the most fundamental of questions. Is the compensation received by the seriously brain injured under both schemes actually adequate?

Page 5 of the 2003-2004 Annual Report contains a message from the Chairman and General Manager. The message states, 'seriously injured people [are] getting increased compensation'. The basis for this assertion is not supported by the contents of the Annual Report. The only analysis of payments to the seriously injured is in relation to brain injury claims where the average payment (excluding legal and investigation costs) as between the last year of the old scheme and the first year of the new scheme increased by 3%. Taking into account inflation over the period it is clear that damages for the seriously injured have not increased at all. Moreover, with the Motor Accidents Compensation Act resulting in higher solicitor/client costs due to the inability to recover adequate party/party costs it is likely that net damages to the seriously brain injured have slipped backwards.

7.1 What research has the MAA done as to the adequacy of awards of damages for the seriously brain injured?

7.2 What research has the MAA done as to the adequacy of awards of damages for quadriplegics and paraplegics?

7.3 Are the level of damages being awarded for these types of injuries adequate to deal with the lifetime needs of these claimants? If not, why not?

7.4 The MAA is pursuing a scheme to provide long term care for the catastrophically injured. Care is often a major component of the damages awarded to a motor accident victim with serious brain injury, paraplegia or quadriplegia. Part of the MAA's argument for long term care is that awards of damages in such cases have proved inadequate to meet long term needs.

Where has the MAA set out the adequacy or inadequacy of awards of damages for the seriously injured?

7.5 How does the MAA reconcile its statements with regards to fairness at page 113 of the Annual Report with its advocacy of long term care for the seriously injured on the basis of the inadequacy of current provisions for future care?

7.6 Does the MAA agree that current awards of compensation are proving inadequate to meet the long term care and equipment needs of the seriously injured?

7.7 What is the basis for the statement on page 5 of the Annual Report that the seriously injured are now getting increased compensation? What is the degree of increase in compensation to the seriously injured?

7.8 One of the major factors affecting the level of compensation received by the seriously injured is the discount rate applied to awards for future care. The High Court has determined that the common law discount rate for damages awards in Australia will

be 3%. Both the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999* mandate a discount rate of 5%.

The UK Government has recently reduced the discount rate applicable to awards of future care for personal injury cases to 2%. This was on the basis that a higher discount rate resulted in a significant under-funding of future needs for the seriously injured.

Is the MAA aware of the change in the UK discount rate? If so, what consideration has the MAA given to making recommendations for changes to the NSW discount rate?

8. The Medical Assessment Service

At page 114 of the 2003-2004 Annual Report the MAA states that the Medical Assessment Service (MAS) is intended to provide an independent medical assessment procedure designed to end the 'costly and wasteful use of duelling doctors in the claims process'. Implicit within this assertion is that MAS assessments are independent and objective.

The American Medical Association Guidelines for the Assessment of Permanent Impairment 4th Edition are used by MAS to determine Whole Person Impairment (WPI) disputes.

The Bar Association has an ongoing concern as to the actual objectivity and consistency of MAS assessments.

The litigated matter of *Mihalopoulos v. Van Huen Vu* (as reported in multiple issues of the MAS Bulletin) raises significant concerns about consistency in the MAS assessment process.

Mr. Mihalopoulos was assessed by MAS on three separate occasions over a two and a half year period. There is no suggestion that his medical condition significantly altered during this time. Those assessments produced the following results:

i. Dr. Beer initially certified that injuries had stabilised. Dr. Beer assessed the injuries at 12% WPI. The insurer was subsequently granted a review by MAS.

ii. A Review Panel reassessed injuries and determined that WPI was only 2%.

iii. After a Judge set aside the Review Panel's determination as procedurally unfair, Dr. Scougall carried out a third assessment and determined that injuries should be assessed at 9% WPI.

Why do three separate assessments produce three wildly varying determinations? How does this happen with a system employing impartial doctors using an objective system of determination?

Of equally significant concern are the internal operations of MAS in the assessment process. Clause 10 of the MAA Medical Guidelines provide that an assessor's report

must be submitted to MAS in draft form. MAS may request that a doctor amend a report in order to correct errors in the report. The types of errors which MAS are permitted to correct include:

i. An obvious clerical or typographical error.

ii. An error arising from an accidental slip.

iii. An error arising from any omission.

iv. Any defect of form.

The MAA has previously provided assurances to scheme stakeholders that the report checking process internal to the MAA (which had been causing delays of upwards of six months) was fair and neutral and impartial. Moreover, stakeholders were assured that the MAA in checking reports were not seeking to influence the substance of a doctor's opinion.

The MAA do not routinely provide such correspondence as passes between MAS and the assessors in the report checking process to parties who may be affected by such correspondence.

Two examples of MAA correspondence to a medical practitioner in the course of 'report checking' came to light in a litigated matter of *Catsicas v. Mullaney*, a case heard before Judge Sidis in the District Court Newcastle. On the basis of the correspondence between MAS and the doctor who carried out two psychiatric assessments on behalf of MAS, the claimant successfully applied to Judge Sidis to have the MAS certificates set aside pursuant to s.61(4) of the Act on the basis of denial of procedural fairness.

Judge Sidis found in relation to the two letters between MAS and the doctor that the correspondence was:

- 'Beyond power and unauthorised'.
- 'Suggestive of bias on the part of the MAA'.
- 'Constituted an absence of procedural fairness in the process of medical assessment of the plaintiff'.

These findings made by Judge Sidis in a published Interlocutory Judgment are obviously of concern. It is difficult to dismiss the correspondence in the particular case as a one off aberration as there were two separate letters from different MAS officers over twelve months apart, both of which were the subject of Judge Sidis' criticisms.

8.1 Has the MAA conducted any review of the three separate assessments in the *Mihalopoulos* matter to analyse why three widely differing certificates were issued? What explanation does the MAA have for these varying results in a supposedly objective system?

8.2 Is the MAA aware of any other instances where there have been inconsistent results between MAS assessments? What analysis has the MAA made of such inconsistencies to determine their origin and cause?

8.3 What steps does the MAA take to promote consistency of decision making (short of the level of interference in decision making which Judge Sidis found to be indicative of bias)?

8.4 Does the MAA believe that there are aspects of the AMA IV Guides and the MAA's own Guidelines that can lead to inconsistent outcomes? If so, what steps is the MAA taking to address this issue?

8.5 In relation to the *Catsicas* matter, what steps has the MAA taken to review its internal 'report checking' processes?

8.6 Why did the MAA response extend in a subsequent case before Judge Sidis to the MAA claiming privilege over correspondence between the MAS report checkers and MAS assessors?

8.7 Judge Sidis refused to uphold this claim for privilege. The MAA is currently engaged in taking this issue to the Court of Appeal. Does the MAA believe that it will maintain faith in the integrity of the scheme to now claim privilege and to try and not provide correspondence between MAS report checkers and MAS assessors?

8.8 Why won't the MAA hand over to the parties concerned all correspondence between the MAA and its medical assessors?

8.9 In light of the *Catsicas* case, what steps is the MAA taking to ensure that report checking does not involve 'an absence of procedural fairness' or actions 'beyond power and unauthorised' or actions 'suggestive of bias'?

One of the principal complaints about the MAS system over the past two years has been extensive delays. The MAA has acknowledged that at times it has taken upwards of nine to twelve months for MAS to produce a decision as to Whole Person Impairment.

The majority of these delays have now been addressed. However, even operating at maximum efficiency the MAS system still takes a minimum of six months to produce a completed assessment.

8.10 What steps is the MAA taking to further streamline the MAS assessment process to improve the six month assessment turnaround time?

8.11 When can it be expected that optimum assessment time will be cut down to three or four months?

9. Scheme Evaluation by Justice Policy Research Centre

During 2004 the Justice Policy Research Centre has been conducting extensive surveys with CTP scheme users on behalf of the MAA. In October 2004 reports were provided based on the first three surveys of the scheme stakeholders. Those studies were:

i. MAS assessors' perceptions of MAS.

ii. CARS assessors' perceptions of CARS.

iii. CTP insurers' perceptions of MAS and CARS.

The Bar Association suggests that the Standing Committee consider asking the MAA to supply copies of the three survey reports. It is noted that studies with other scheme users (lawyers and claimants) are to be completed in 2005.

The summary of findings of CTP insurers' perceptions of the scheme included:

> 'The main identified benefits of MAS were that medical assessment were independent, objective and, in relation to important issues, definitive and binding. Yet, there was a significant body of complaint about inconsistency in assessments by MAA accredited doctors'.
>
> 'Although they rated the system as fair, many interviewees commented on the unfairness of the 10% WPI threshold or the method of assessing it.' [This from insurers!].
>
> 'Fewer than half thought that the introduction of prescribed claims handling guidelines had helped with the early resolution of claims'.

The comments of the MAS assessors retained by the MAA in the scheme are also worth noting:

> 'They also complained about a pedantic and inconsistent approach to the review of reports by MAAS staff'.
>
> 'A more significant problem they identified was considerable delays in the MAS assessment process'.
>
> 'There was an almost unanimous view that claimants generally do not clearly understand the assessment process, making them at times evasive or defensive or both'.
>
> 'There are concerns about the MAA permanent impairment guidelines and the AMA IV guidelines, including claims that there are inconsistencies within or between them. Those assessors who also worked for WorkCover preferred the AMA V'.
>
> 'A significant minority voiced disquiet about the 10% WPI threshold describing it as unjust, arbitrary and difficult to apply with precision'.

CARS assessors made similar criticisms of the MAS system:

> 'Notwithstanding the very positive overall evaluation, the CARS assessors identified a number of problems or areas of concern. The most significant ones appear to be the following; MAS delays; inconsistencies between MAS assessments; fairness of the Whole Person Impairment threshold; unfairness of the costs regulations to claimants, and the volume of paper work generated as part of the assessment process'.

9.1 Having regard to the above comments, what steps are the MAA taking to address those comments by scheme stakeholders?

9.2 In particular, what steps are the MAA taking to address the consistent level of complaint about inconsistent MAS decision making? Does the MAA agree with a segment of its own assessors who described the 10% WPI threshold as 'unjust, arbitrary and difficult to apply'?

9.3 In response to questions from the Bar Association through the Standing Committee in December 2003 the MAA identified that there was a backlog in Review Determinations but that it was anticipated such backlog would be cleared up in the first few months of the year [2004]. In fact this backlog persisted until the very end of 2004. Why did this occur?

10. Claims Assessment and Resolution Service (CARS)

10.1 Can CARS advise in relation to those assessed 'full and satisfactory' late claim disputes, the percentage of cases in which the explanation for late lodgement of the claim has been rejected by an insurer yet accepted by an assessor?

10.2 Assuming that insurers are successful in maintaining their objection to the reasons given for late lodgement of a claim in little more than 20% of assessed cases, does the MAA agree that insurers persevere with objecting to the explanation for late lodgement in claims in far too many cases?

10.3 It is appreciated that in some cases a full explanation is only provided once the insurer has challenged the original explanation given. Nonetheless, thereafter the insurer has the opportunity to withdraw their objection to the explanation. Common experience is that the insurer will all too frequently 'take their chances' and force the matter to determination by a CARS assessor. Is this the experience of CARS assessors?

10.4 What action has the MAA taken to reduce and discourage the number of unsuccessful objections taken by insurers to the explanations given for the late lodgement of claim forms?

The Bar Association has previously raised questions before the Standing Committee as to allegations of contributory negligence before CARS assessors. In response to questions submitted in December 2003 the MAA indicated that it proposed to survey matters currently progressing through CARS as to allegations of contributory negligence.

10.5 Can the MAA advise as to the number of general assessments concluded by CARS assessors in which contributory negligence has been alleged? In what percentage of cases where contributory negligence has been alleged by the CTP insurer has a CARS assessor concluded that there was contributory negligence?

10.6 Does the MAA have any concern that some insurers are making unwarranted allegations of contributory negligence in the belief that such allegation will preserve their right to seek a re-hearing of the CARS assessor's decision?

10.7 The MAA twice advised the Standing Committee that it would be conducting a sample survey of claims involving contributory negligence as recommended by the Standing Committee in 2003. Has such a survey yet been conducted? If not, when is the survey scheduled for? If it has been conducted, what were the results?

11. Costs Regulations

The Act confers on the MAA the authority to regulate the recoverable party/party legal costs in cases that are not otherwise exempt from CARS. This has been done through the Costs Regulations. Recoverable costs are based partly on a fee for service and linked to the total sum recovered. The regulated fees have not been indexed or increased since introduction of the Act over five years ago. For example, the fee payable (on a party/party basis) to a solicitor or barrister for attending an assessment conference under s.104 of the Act (including preparation time) has remained fixed at $400 (plus GST) for the first two hours. The hourly rate of $125 per hour thereafter has also not changed in the past five years.

For the past two years the Bar Association has raised this issue with the MAA through the Standing Committee. Two years ago the MAA stated in response to a Bar Association question:

> 'The MAA considers it appropriate that the costs scale be reviewed and will consult with the industry, legal and medical profession in undertaking that review'.

It is noted that in the fees payable to CARS assessors have been significantly increased. Why are only the claimants (who must pay the gap between solicitor/client and recoverable party/party costs) being penalised by inactivity on the part of the MAA in reviewing the costs regulations?

11.1 Has the review (which has been promised for the past two years) yet taken place? If not, can the MAA indicate as to when the review will take place?

11.2 The MAA reported two years ago to the Standing Committee that it anticipated a legal costs survey then being conducted by the Justice Policy Research Centre would be finalised in July 2002. This was subsequently revised to April 2003. Has this survey been concluded? What were the findings?

11.3 Why is it that five years after the introduction of the scheme the $400 fixed fee for appearing at a two hour assessment conference has not been increased to reflect inflation? Nor have any of the other fixed legal costs under the Act been increased.

12. Insurance Gap between CTP and Public Liability

The Bar Association has previously made submissions to the Motor Accidents Authority and for the last two years to the Standing Committee on Law and Justice regarding an unfortunate gap between CTP and Public Liability insurance policies.

In short, until 1 January 1996, all accidents that arose out of the 'use or operation' of a motor vehicle were covered by the CTP policy of the vehicle. However, with amendments to the definition of *injury* contained in the *Motor Accidents Act 1988*, the coverage provided by the CTP policy effectively shrank so that the policy only answered claims where an injury arose out of the 'use or operation' of the vehicle and where the accident involved any of the driving of the vehicle; a collision with the vehicle; the vehicle running out of control or a defect in the vehicle.

Public liability policies have not been amended to reflect this change. Many still contain a broad exclusion clause which rules out any indemnity under the policy for any accident arising from the 'use or operation' of a vehicle.

It follows that any accident that arises out of the use or operation of a vehicle that doesn't fall within the scope of driving, a collision, running out of control or a defect, may be the subject of the insurance gap.

This gap penalises both the injured (who may not have any insurer to recover against) and the insured (who may unwittingly find himself personally liable).

The MAA has consistently maintained the approach that 'The regulation of public liability insurance is not a responsibility of the MAA'. This is accepted. However, the gap was specifically created by the action on the part of the MAA in initiating an amendment to the Motor Accident legislation. The Bar Association submits that the MAA has a responsibility to seek legislative change to overcome this gap for those who find themselves caught out as a consequence of legislative change initiated by the MAA.

The MAA reported to the Standing Committee last year that the Insurance Council of Australia (ICA) had issued a general circular to the insurers on 28 November 2002 inviting companies to review their personal liability cover the gap. However, it appears nothing further has been done.

Last year the Standing Committee on Law and Justice specifically recommended to the MAA that it address the issue of this gap. What has the MAA done to address this gap?

12.1 In as much as legislative change instigated by the MAA has created an 'insurance gap' does the MAA accept any responsibility for the gap and its potential consequences?

12.2 What steps has the MAA taken during the past 12 months to close the gap?

12.3 Has the MAA conducted any review of public liability insurance policies over the last 12 months as to whether the gap still exists and how frequently it arises in public liability policies?

12.4 Has the MAA held any discussion with those CTP insurers who also offer public liability insurance to encourage them to eliminate the gap?

12.5 Has the MAA given consideration to any of the following suggestions which could be employed to address the gap issue:

(a) Providing material to the Special Minister of State so that warnings regarding the existence of the gap could be made in Parliament.

(b) Taking out newspaper advertisements to alert consumers to the existence of the gap.

(c) Enclosing a notice with Green Slip renewals advising as to the existence of the gap and urging consumers to check and seek amendment to their public liability policies to eliminate the gap.

(d) Having further discussions with the Insurance Council of Australia to work towards elimination of the gap.

12.6 Does the MAA have any other recommendations as to steps that might be taken to encourage public liability insurers to amend their policies to eliminate this gap?

12.7 Does the MAA agree that it is undesirable that such a gap exists, given the potential for accident victims to find that there is no insurance available in relation to serious injuries and also to vehicle owners who find themselves unintentionally uninsured when a serious injury occurs?

13. Covert Surveillance

The Bar Association recognises that at times covert surveillance by CTP insurers is a necessary measure for the detection and prevention of fraud. However, there is concern about the absence of any regulations or rules governing the conduct of NSW CTP insurers in surveillance activities. Last year the MAA expressed the view to the Standing Committee that surveillance was overused by NSW CTP insurers.

13.1. Does the MAA have any guidelines in place as to the conduct of covert surveillance by insurers?

13.2 Are there any restrictions upon investigators engaged in covert surveillance filming a claimant at their place of work or in their own home?

13.3 Is there any restriction upon investigators engaged in covert surveillance entering onto the premises of a claimant using a false pretext (lying to get admittance)?

13.4 Does the MAA believe there should be any rules or boundaries for the conduct of covert surveillance? If so, what should they be and what steps is the MAA taking to implement them.

13.5 Is the MAA able to give any estimate as to CTP insurers' annual expenditure on surveillance activities?

14. Withdrawing Admissions of Liability

Section 81 of the Act imposes an obligation upon the insurer to make a determination of liability within three months of a claim being notified. The Bar Association is aware of a number of recent cases in which CTP insurers have withdrawn admissions of liability years after the initial admission was made.

14.1 Have there been any complaints to the MAA about insurers withdrawing admissions of liability? If so, what investigations have been made by the MAA and what were the outcomes of those investigations?

14.2 Is the MAA aware of instances where an admission of liability has been withdrawn for the specific purpose of bypassing the CARS assessment procedure?

15. Allegations of Fraud

An allegation of fraud on the part of a CTP insurer provides a mandatory ground for exemption of a claim. The Bar Association is aware of a number of recent cases in which a claim has proceeded for several years to the point of a CARS assessment only for the CTP insurer to then allege fraud. This inevitably causes significant further delays in the matter which must then be exempted and sent off to court.

15.1 Is the MAA aware of any such cases involving late allegations of fraud? Has there been any investigation made of such cases? If so, what was the outcome of the investigation?

15.2 Is the MAA intending to follow up any such cases to ensure that the allegations of fraud which enabled the insurer to bypass CARS are maintained in subsequent court proceedings?

16. The Hannaford Review Process

During 2004 scheme users participated in an extensive review process designed to streamline MAS and CARS. A series of recommendations were drawn up. These recommendations were the subject of debate at the Motor Accident Council. The MAA initially suggested that legislative reform necessary to implement these recommendations would be introduced in the second half of 2004.

16.1 Is the MAA still committed to the introduction of the reforms recommended by the Hannaford Review Process?

16.2 If so, when can it be expected that the necessary legislation will be put in place? Why has there been a delay?

4 February 2005