Submission
No 4

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

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The New South Wales Bar Association

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23 April 2010

The Hon Christine Robertson MLC
Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
Sydney
NSW 2000

Dear Ms Robertson

Tenth Review of the MAA and MAC

Thank you for your letter of 11 March 2010 to the President of the Association, Tom Bathurst QC, concerning the Law and Justice Committee's Tenth Review of the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council.

The New South Wales Bar Association's submission to the Review is attached.

Thank you for providing the Association with the opportunity to comment on these issues. Please do not hesitate to contact me on 9229 1756 or at amcconnachie@nswbar.asn.au if any further assistance is required.

Yours sincerely

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NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION TO THE STANDING COMMITTEE ON LAW & JUSTICE TENTH REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS AUTHORITY AND MOTOR ACCIDENTS COUNCIL

INTRODUCTION

The New South Wales Bar Association ("the Association") again welcomes the opportunity to provide submissions and questions for the Standing Committee on Law and Justice to consider with its annual review of the Motor Accidents Scheme.

The Association is always willing to participate in the process of parliamentary review of a statutory authority, however we do hold concerns associated with the Government's approach to responding to the Committee's Reports.

It is of course appreciated that the role of the Standing Committee is to make recommendations, and that the responsibility of the Motor Accidents Authority ("MAA") and the Government to formulate responses to the Committee's recommendations. Nonetheless, it is disappointing to see the valuable recommendations of the Standing Committee simply fade away with the effluxion of time.

The Association encourages the Standing Committee to consider adopting a process of reviewing with the MAA each year the progress made in the implementation of previous recommendations of the Committee. Such an annual review of progress in the implementation of recommendations from previous years would be a welcome development in terms of the accountability of the Government to the Parliament.

For the purposes of this year's review, the Association makes the following submissions.

1. Consultation

In the earlier years of operation of the *Motor Accidents Compensation Act 1999* ("the Act") the Motor Accidents Authority could have served as a model for consultation with stakeholders. Unfortunately, that is no longer the case.

A large part of the breakdown in communication can be attributed to the failure to appoint a Motor Accidents Council ("MAC"). The three year term of the previous MAC expired over twelve months ago. There has not been a meeting of the MAC for more than sixteen months. Section 207 of the Act constitutes the MAC as a corporation and provides that it is subject to the control and direction of the minister.

Section 209 stipulates various functions for the MAC including providing advice to the MAA and the Minister in relation to the operation of the Act and its associated Guidelines.

Whilst the Association has previously been critical of the manner in which the MAC was restricted from making substantive recommendations for reform, we do support its existence and functions. When it existed, the Motor Accident Council provided for regular reporting as to scheme operation back to stakeholders and periodic feedback to the MAA as to stakeholder views. This communication has now ceased. The capacity of the Association to make relevant submissions to the Standing Committee for the purposes of this review is significantly hampered, as information that would previously have come to the Association through its representative on the Motor Accident Council is no longer being shared by the MAA. Possible weaknesses and deficiencies in scheme operation go unexamined.

The other consultative body within the MAA is the MAAS Reference Group (MRG). This was previously called the MAAS Users Group. The Association has one representative on this group. There is a meeting every two months with other stakeholders (insurers, the Law Society, the Australian Lawyers Alliance, a MAS assessor and a CARS assessor) and senior staff of the Motor Accidents Assessment Service (MAAS). [MAAS has two significant components - the Medical Assessment Service ("MAS") and the Claims Assessment and Resolution Service ("CARS")].

The MRG considers lower level and practical issues in relation to the day-to-day operation of the scheme. It is an extremely useful forum for addressing practical problems.

However, one of the difficulties confronted by the MRG is that frequently problems arise which require reform or modification of the Act, the Guidelines or the Regulations. Review and reform of the legislative regime is not within the control of the operations side of the MAA (the MAAS) which operates out of 1 Oxford Street. Issues relating to the structure of the scheme are dealt with by the policy unit which is in the MAA's head office at George Street. There is a clear disconnect between the MAA's operational side and its policy role.

There have previously been requests for a representative of the policy division to attend MRG meetings. This is an easy and obvious mechanism to improve lines of communication. However, for reasons which have never been explained, this fairly simple step has not been taken.

The MAA regularly retains outside consultants. Earlier this year, members of the MRG had as productive meeting with a consultant brought in to advise the MAA about the quality of its consultation

meetings. All stakeholders addressed the issue of the disconnect between the operational side of the MAA and the policy work of the MAA. All stakeholders raised concerns that, whilst there are plenty of discussions, little progress has been made in this regard. The MRG would reach conclusions as to sensible steps that needed to be taken to improve the efficiency of scheme operations. Although a report of these discussions would be provided to head office, however, unanimous recommendations would be rejected without any rationale being provided back to the MRG.

The MRG is a very useful consultative body. It would be a far more effective consultative body if a MAA policy representative attended and participated in its discussions.

The final issue with regard to consultation is in relation to costs. In 2009 the MAA formed a working party comprising staff from the MAA, representatives of insurers and two solicitors to conduct a review of the costs regulations. The Association asked to be included in the working party. The application was refused.

This year the working party has been re-convened, apparently with a mission statement and an outside facilitator. Again, the Association has written to the MAA asking to be included. Again the request has not been granted.

The Association represents important stakeholders in the Motor Accidents Scheme. Not only are the Association's members integral to advising and presenting personal injury claims, they have also consistently spoken out in the interests of the injured – a group that does not have any formal voice in most MAA forums.

Questions on consultation

1.1 Why has no Motor Accident Council been appointed for over one year after the term of the last Motor Accident Council lapsed?

1.2 Have all the requisite stakeholders provided nominations (as requested by the Authority on behalf of the Minister) to allow appointments to be made to the Motor Accident Council?

1.3 Does the Authority acknowledge that the Motor Accident Council plays a valuable role in the operation of the Scheme? If so, why has no council been appointed?

1.4 Does the MAA acknowledge that there have been requests from stakeholders for a representative of the policy unit to join the MRG?

1.5 Does the MAA agree that it would be useful to have a representative of the policy unit on the MRG? If yes, why has this not yet occurred? When will it occur?

1.6 Has the MAA received the report from its consultant in relation to the effectiveness of its consultations with stakeholders? Is the MAA prepared to share that report with the Standing Committee on Law and Justice?

1.7 Why has the MAA rejected the Association's request to be included in the costs working party in 2009 and not granted a further request in 2010?

2. Insurer Profits

The purpose of the motor accident scheme is to compensate the victims of motor accidents. With a privately operated scheme, the insurers involved need to make a reasonable return on their capital investment. Administrative costs should be held to a minimum so that premiums are stable and the majority of the premium dollar is returned to the injured.

It is now time to acknowledge that to date, the motor accident scheme has failed to deliver. The scheme has been designed to provide a return to insurers of approximately 8% of premiums written. Over the first six years of operation of the scheme, insurers have and will retain over 25% of the premium written. The excess profits (above and beyond a reasonable rate of return) for that period are in excess of $1.5 billion.

The *Motor Accidents Compensation Act 1999* has presented an enormous windfall to insurers.

The Scheme has now been in operation for close to ten years. To get the insurers back to averaging the reasonable rate of return (8%) it would be necessary to withhold all profits for the next ten years. Put another way, to produce an average rate of return of 8% over the past ten years and for the next ten years, would require the insurers to make no profit for the next decade.

Each and every year the officials of the MAA come before the Standing Committee on Law and Justice and fail to acknowledge the windfall profits that insurers have received. The officials of the MAA are assisted in doing so by calculations which are produced each year in the annual report showing that for the most recent premium collection years, insurer profits are projected to be minimal. For example, on page 75 of the 2008/09 MAA Annual Report there is a table. The table shows that for the 2008 underwriting year, insurers are projected to retain only 1% of the premium as profits (when they should be receiving 8%).

On the basis of this figure, it is anticipated that the officials from the MAA will submit that insurers are now doing it tough, that competition is cut-throat in the market and that nothing need be reviewed or changed.

The problem is that the 1% projection is entirely unreliable. Each and every year the MAA's annual report projects minimal profits for the current years. What invariably follows is that over ensuing years, the insurers' share of the premium dollar retained in profit for that year grows and grows.

The Association has undertaken the task of tabulating the profit projections from the MAA annual reports from 2003/04 onwards (Annexure "A"). What that table clearly shows is that whilst the initial projections as to profitability may be within reasonable bounds, within two or three years of the initial projection, profits have substantially grown.

For example:

(i) The first profit assessment for the 2004 year was in the 2005/06 annual report. The projected insurer profit for that year was 9.3%. The most recent projection is 25%.

(ii) The first profit assessment for the 2005 year was in the 2006/07 annual report. The projected insurer profit for that year was 10%. The most recent projection is 17%.

(iii) The first profit assessment for the 2006 year was in the 2007/08 annual report. The projected insurer profit for that year was 5%. The most recent projection is 13%.

(iv) For the 2007 premium collection year, the initial profit projection was 3% (2007/08 annual report). One year later, and the profit estimate has been revised to 5%.

Having regard to the foregoing, the Standing Committee is entitled to take the estimate presented in the 2008/09 annual report for the 2008 premium collection year of 1% profit with a grain of salt. The experience of eight years of previous projections leads inexorably to the conclusion that within three to four years the insurer profit for 2008 will be above the 8% return which the MAA regards as "reasonable".

The Act excluded 90% of motor accident victims from recovering compensation for their pain and suffering. The Act slashed the recovery of legal costs which also led directly to reduced payments for accident victims as they were forced to pay a much larger solicitor/client costs gap out of their reduced award of damages. At the same time that this has occurred, insurers have pocketed over $1.5 billion in surplus profits.

This situation ought to be the subject of real concern to the Motor Accidents Authority. It is not. There is not a single mention of this state of affairs in the MAA's annual report. There is not a single acknowledgment that the Scheme has delivered seven years of windfall profits to insurers. There is not a single apology to the accident victims who have needlessly had their benefits reduced.

The starting point for any reasonable discussion on profits is to stop accepting that the first year of projections as to likely insurer profits is likely to be accurate. History shows that it is not.

It can be predicted that the MAA will front this year's hearings and point to the 1% projection for 2008/09 as evidence that the scheme is being brought back into balance, as evidence that the windfall profits have evaporated. This is what the MAA have been doing for the better part of a decade. As long as the MAA is able to keep saying the current year projections look reasonable, then there is never any imperative to make a thorough and proper review of scheme profits.

It is noted that there is no way to claw back the windfall profits of the past. However, those who have been responsible for allowing such windfall profits to occur should be accountable. Future projections should be scrutinised far more closely given the history of inaccurate projections in the past.

Questions on insurer profits:

2.1 Does the MAA acknowledge the accuracy of the summary of past profit projections contained in the Bar Association table?

2.2 Does the MAA agree that the windfall profits that have or will be made by insurers over the first six years of operation of the 1999 Act will exceed $1.5 billion?

2.3 Does the MAA agree that the consistent trend over the past ten years has been for initial estimates as to insurer profitability to inexorably grow as each premium collection year matures?

2.4 Bearing in mind the foregoing, does the MAA seriously maintain that the likely percentage of premium written that will ultimately be retained by CTP insurers for the 2008 financial year is 1%? If so, why would CTP insurers remain in the market if they are unlikely to make any profit? Is it because they know that their profits will be far higher than the MAA projection indicates?

2.5 Having regard to the history of profits made by insurers under the 1999 scheme, how can there be any faith in the MAA profit projection for 2008 at 1%?

2.6 What proposals does the MAA have for ensuring that a greater percentage of the premium dollar is returned to the injured and to ensure that insurer profits are brought back to reasonable levels?

3. The *Zotti* problem

A significant problem has developed under the Act as a consequence of the NSW Court of Appeal decision in *Zotti v. Australian Associated Motor Insurers Limited* (2009) NSWCA 323. The decision effectively means that drivers are not insured if they are at fault in an accident and an injury is sustained some time after the actual accident. Examples of how this can occur include:

(a) The driver has an accident, oil leaks onto the road. Subsequently, a cyclist comes along and loses control on the oil (these are the facts from the *Zotti* case).

(b) A driver runs off the road into a tree or telegraph pole. Some hours later, the weakened tree or telegraph pole falls over onto a pedestrian.

It is important to note that the driver at fault is still liable. The *Zotti* decision does not remove their negligence. All the *Zotti* decision does is remove the insurance coverage from these circumstances of accident.

In November 2009, the Association presented detailed submissions to the Motor Accidents Authority to address the *Zotti* problem. A copy of those submissions is annexed (Annexure "B"). The Motor Accidents Authority has since responded indicating that there is to be a legislative solution to the *Zotti* issue. The timing of that legislative solution is unknown.

In the meantime, insurers are now frequently taking the *Zotti* point, arguing that there is insufficient temporal connection between the act of negligence that leads to the accident and the subsequent injury. In any case where injury is not immediately caused by the accident, the insurer has a *Zotti* defence.

It is very important to note that drivers are still liable. Their personal assets, including their family home, could be sold to meet the liability which the CTP scheme is no longer covering.

Questions on *Zotti*:

3.1 Does the MAA acknowledge that drivers should be covered by the CTP policy for injury arising from acts of negligence while driving the vehicle even if there is not an immediate temporal connection between the act of negligence and the injury.?

3.2 Does the Motor Accidents Authority acknowledge that a legislative response to *Zotti* is required?

3.3 What is the timetable for a legislative solution to the *Zotti* problem?

4. The *Doumit* problem

The Act defines a vehicle as being a motorised vehicle that runs on wheels. In *Doumit v. Jabbs Excavations Pty Ltd* [2009] NSWCA 360, the Court of Appeal held that a bulldozer, operating on treads, was not a motor vehicle.

This decision has significant consequences for the NSW motor accidents scheme. Currently, the RTA registers and collects green slips on behalf of a variety of treaded vehicles including bulldozers, caterpillar tractors and tanks. Applying *Doumit*, not only does the CTP policy not cover these vehicles, but the green slip monies have been improperly collected.

The Association wrote to the Motor Accidents Authority about this issue in late 2009. A copy of the submission is annexed (Annexure "C"). The Association urged the Government to make an urgent amendment to regulations to ensure that treaded vehicles with registration were included in the motor accidents scheme and covered by the green slip that had been paid for.

The Authority has advised that the situation is being jointly considered with the RTA. However, no further announcements or advice has been provided. The situation should not be left to languish.

Questions on the *Doumit* problem:

4.1 Does the Authority acknowledge that the *Doumit* decision creates a difficulty within the motor accidents scheme?

4.2 What is the progress with resolving that difficulty?

4.3 Does the Authority acknowledge that the easiest solution is making a regulation prescribing treaded vehicles to be motor vehicles for the purposes of the Act?

4.4 Does the Authority have in hand measures to ensure that treaded vehicles currently operating with a CTP green slip will have the benefit of the policy for which the owners of the vehicle have paid?

4.5 What is the time frame for resolution of the *Doumit* problem?

5. Privacy

Bringing a claim for injury as a consequence of a motor vehicle accident involves a degree of forsaking personal privacy. It is necessary for a claimant to share with the insurer personal information such as financial records and medical records. This invariably includes medical records relating to non-accident related conditions. CTP insurers argue that they need to see the full medical file in order to determine whether there are any non-accident related medical conditions relevant to an assessment of pain and suffering, economic loss or domestic assistance.

The claimant is also possibly going to be the target of surveillance – being followed around and spied upon to check that they are not engaged in activities inconsistent with their claim.

A few years ago, in response to lobbying from the Association, the MAA introduced some guidelines in relation to insurer surveillance. The Claims Handling Guidelines provide that surveillance:

(a) is only permitted in places regarded as public – the investigator cannot trick their way into the claimant's home;

(b) surveillance investigators must not actively interfere with the claimant's activities whilst under observation or interact with them so as to have an impact on their activities (no dropping coins on the pavement in the hope of filming the claimant bending over to pick them up);

(c) surveillance must not involve any inducement, entrapment or trespass;

(d) surveillance is only permitted where there is evidence to indicate that the claimant is exaggerating or providing misleading information in relation to the claim.

The last of these conditions is fairly flexible. There is almost always some degree of disagreement as between the plaintiff's medico-legal experts and the insurer's medico-legal experts as to the exact magnitude of incapacity.

Nonetheless, the Bar Association commends the Authority for introducing guidelines in relation to surveillance which have succeeded in cutting back unnecessary intrusion into claimant's private lives.

However, the time has now come for further consideration of this issue. Cases in the United States and Canada have seen insurers seeking access to claimant's private Facebook accounts in the search for information to challenge the claimant's credit. There have been cases in Australia where insurers have monitored a claimant's public Facebook

site. The Association has no issue with insurers observing a public site – the claimant chooses to put into the public domain the publicly posted information. The question is, should the insurer be able to go further and invade the private domain?

Recently a judge sitting in the District Court Newcastle ordered a claimant to hand over to the insurer (pursuant to a subpoena) photographs from the claimant's overseas holiday. This was on the basis that the photographs may show something inconsistent with the claimant's claim. The insurer had no grounds for suspecting anything was amiss in the holiday photographs – they were simply fishing. Nonetheless, the judge held that there was a legitimate forensic purpose in issuing the subpoena.

The photographs are mostly not of the claimant – they are photographs taken by her. They include photographs of family and friends who had no idea that when they smiled for the camera the photograph would one day end up on file with an insurer.

The Association is concerned that those pursuing a motor vehicle accident claim now need to be told that they have lost a very large element of their personal privacy. They should be warned that their personal family photographs, their Facebook account, their diary and their email account could all be trawled through by an insurer searching for evidence that the claim may be exaggerated. This represents a serious loss of balance between the need for the insurer to properly investigate the claim and the claimant's entitlement to privacy, dignity and respect.

Having previously taken up the challenge of addressing privacy concerns surrounding surveillance, the MAA has shown no willingness to address broader privacy concerns in relation to photographs, Facebook sites and the like. This is an area that can and should be addressed.

Questions on privacy:

5.1 Does the MAA acknowledge that a claimant does have some rights to privacy in a personal injury claim or are all personal materials and correspondence relevant to an investigation of the claim?

5.2 What steps is the MAA taking to review the privacy implications of a personal injury claim in order to ensure that fundamentally personal correspondence and materials can be protected from overly intrusive insurers?

6. The *Wicks* problem

Claims for psychiatric injury in motor accidents are governed by the provisions of the *mental harm* section of the *Civil Liability Act 2002*. Claims for psychiatric injury (without physical injury) are limited by section 30 to those who are close family members of the victim or *"witnessed at the scene, the victim being killed, injured or put in peril".*

The interpretation of this latter phrase was recently considered by the NSW Court of Appeal in *Sheehan v. SRA*; *Wicks v. SRA* [2009] NSWCA 261.

Two cases were brought by police officers who attended at the Waterfall rail disaster. The police officers sustained psychiatric injuries as a consequence of their observations of the injured, the dead and the dying. A Court of Appeal held that because the two police officers did not witness the actual collision, they were not entitled to recover damages. This is despite the fact that they helped rescue and treat the injured and dying.

The non-recovery of damages by rescuers who suffer psychiatric injury is nothing new. In *Hornville-Wiggins v. Connelly* [1999] NSWCA 263, the plaintiff (a teacher) was taking a class at the Spencer Primary School. A motorist ran down an elderly pedestrian on a level crossing at the front of the school. The plaintiff attended and provided mouth-to-mouth resuscitation to the victim for approximately fifty minutes, during which time the victim died. The teacher understandably sustained a psychiatric condition as a consequence of her exposure to the traumatic event. However, the Court of Appeal interpreted the then section 77 of the *Motor Accidents Act 1988* in a strict fashion, determining that the plaintiff had not been present at the scene of the accident when the accident occurred.

The Association does not argue that the *Hornville-Wiggins* case was incorrectly decided. The *Sheehan v SRA* case has been granted special leave by the High Court. What the High Court does with the interpretation of section 30 of the *Civil Liability Act 2002* remains to be seen. The Association submits the MAA should start considering what can be done to assist rescuers who suffer psychiatric injury as a consequence of their exposure to highly traumatic events. Some, such as the police officers in *Sheehan v SRA* will have statutory benefits to fall back on, although no one would choose to try and raise a family and pay off a mortgage from the modest statutory benefits available to most workers. Some rescuers will have no protection at all.

In recent years, the MAA has looked at means to expand the benefits available under the motor accidents scheme. This has included making a $5,000 benefit available under the Accident Notification Form on a no fault basis, providing no fault coverage of treatment expenses for

children and extending the coverage of the scheme to blameless accidents.

Given the social utility of rescuers stepping forward to assist, the time has come to look at extending the operation of the scheme to provide adequate coverage for rescuers. The MAA should be invited to look at what it would cost to provide coverage for psychiatric injury of those who attend at the scene of an accident and provide assistance.

Questions on extending coverage to psychiatric injury for rescuers:

6.1 Does the MAA accept that the distinction between those who observe an accident occur and those who attend its immediate aftermath to provide assistance is arbitrary?

6.2 What would it cost (in terms of dollars per greenslip) to extend the coverage of the CTP scheme to encompass claims for psychiatric injury by rescuers who attend at the scene of an accident?

7. The whole person impairment threshold

The second recommendation of the ninth report of the Standing Committee (September 2008) was that the MAA act on the recommendation contained in the eighth review to undertake a review of whole person impairment ("WPI") assessments to establish the extent of inconsistencies and to identify, if necessary, additional quality control mechanisms to improve consistency.

The Association has long advocated that the WPI threshold is capricious. Some serious injuries fall below the 10% threshold whilst other injuries that might be considered less severe exceed the threshold.

Given the excessive profits that insurers have retained under the scheme to date, it is appropriate that there be a review of the 10% WPI threshold to determine whether too many claimants are being denied appropriate compensation.

Unfortunately, whilst the MAA appears to agree in principle to conduct some sort of review, no such review appears to have occurred. Whilst the demands of insurers to engage yet another set of consultants in the search for inflationary pressures within the scheme are readily granted, studies to determine whether claimants are being appropriately compensated receive no such priority.

Questions on whole person impairment:

7.1 What steps has the MAA taken following the recommendations in the eighth and ninth review of the Standing Committee to

undertake a review of WPI assessments to establish the extent of inconsistencies?

7.2 What steps has the MAA taken to review those cases being assessed at 10% WPI to measure the justice of those with such injuries receiving no compensation for pain and suffering?

7.3 Does the MAA accept that the dividing line between 10% and 11% WPI is arbitrary and in some instances capricious? If so, what is being done to rectify that situation?

8. Full and satisfactory explanations

The Act requires that a claim form be lodged within six months of the accident. After that date it is necessary for the claimant to give a *"full and satisfactory explanation"* for the delay in lodging the claim form.

To understand this provision, it is helpful to reflect upon the historical development of the scheme. Prior to the 1980s, there was no requirement for accidents to be notified to the insurer concerned (then the GIO). The GIO would only learn of the existence of a third party claim when legal proceedings were commenced. This could be six years (later reduced to three years) post accident. In the event of a claim by a child the GIO might not learn of the claim until more than ten years after the accident had occurred.

Since the introduction of the *Motor Accidents Act 1988*, claimants have been required to lodge a claim form within six months and provide a full and satisfactory explanation if they don't meet this requirement. The Association accepts that the early notification of claims has many advantages. They include:

(a) providing an early determination on liability;

(b) providing for early payment of treatment and rehabilitation expenses which leads to better health outcomes;

(c) allowing insurers to make more accurate reserve estimates as to their future potential liabilities.

The obligation to provide a full and satisfactory explanation for late claims was intended to bring about a change in the behaviour of claimants and their legal representatives – making early notification of claims so that the above benefits would flow.

However, the six month limit was never intended to be a bar to the ultimate pursuit of a claim. Insurers collect premiums in order that they can pay out on claims. To deny a claim that is lodged six months and one day after the accident, simply on the basis that there is not a

satisfactory explanation for the delay, largely defeats the purpose of a compulsory insurance scheme.

The whole area of late claims has now become a mess.

(i) Late claim disputes are protracted and lengthy. It is no longer enough to provide a brief explanation from a claimant. The average late claim dispute now involves multiple statements (sworn as statutory declarations) written submissions and a good deal of expense on the part of both parties.

(ii) The arrangements under the legislation is unsatisfactory. The Court of Appeal have held that a CARS assessor's determination as to whether there is a full and satisfactory explanation for a late claim is not binding. The legislation has since been amended to make such assessments binding. However, where the claimant is entitled to proceed to court (with an exemption certificate) the late claim issue can be re-litigated in proceedings before the court.

(iii) A claimant who is dissatisfied with a CARS assessor's decision as to the quantum of their claim is entitled to have that issue re-argued in court. A claimant who is denied the right to bring a claim at all (with a late claim) has no such access to the court system. This is manifestly inconsistent.

(iv) A claimant who is unsuccessful with a late claim dispute before the court is entitled to bring a second application provided there is substantial new evidence. CARS now appear to be adopting the position that no such second application can be brought before a CARS assessor on a section 96 dispute. It is again manifestly inconsistent for a claimant to have greater rights before a court than those that exist before a CARS assessor.

This entire area cries out for reform. The original purpose of encouraging prompt notification of claims has been fulfilled. There is a real incentive for claimants to put the claim form in – it generates access to treatment expenses being paid. Those who are late are usually those who are either unaware of their legal rights in unusual circumstances, (i.e. a claim against the Nominal Defendant) or are receiving workers compensation payments and have not turned their mind to a motor accident claim.

A portion of the public is still unaware of their right to bring a motor accident claim. These groups should not be punished by being denied access to a claim simply because they are late. They should not be put through a complex set of obstacles in order to have their late claim assessed. The emphasis should be on dealing with claims, not finding procedural points to deny claims.

Questions on late claims:

8.1 Does the MAA acknowledge that there is a problem with the current late claim regime?

8.2 How can the current late claim regime be simplified?

8.3 Should the late claim regime afford the same opportunities within the CARS system as it does within the court system?

8.4 Should the emphasis be on insurers paying out on claims for which they have collected the premium and taken the risk, rather than avoiding claims through technicalities?

9. MAS assessors and bias

In its eighth report reviewing the exercise of the functions of the MAA (report 34 November 2007) the third recommendation of the Standing Committee was that the MAA review its procedures and rules in relation to medical assessors and conflicts of interest to ensure that the most appropriate monitoring systems and rules to prevent conflicts of interest are in place.

Two and a half years later and the MAA is slowly approaching the position of revising its conflict rules. The Association is concerned that the proposed revision will not go far enough in eliminating from the MAS panel those doctors who perform all of their medico-legal work for either plaintiffs or defendants.

The most recent draft of the MAA proposals include the recommendation:

> *"No MAS assessor should derive more than 80% of their workload from either claimant or insurer work."*

The concern the Bar Association has is that this prescription is ambiguous. Is the reference to "*workload*" a reference to private medico-legal work or a reference to all work? Clarification has been sought – does an assessor who obtains 15% of his or her work from the Motor Accidents Authority, 10% conducting assessment for the Workers Compensation Commission and performs the other 75% exclusively for either insurers or for claimants' lawyers (on a medico-legal basis) meet this guideline or breach it?

The draft MAA proposals were provided to the MAS Reference Group. The Association's representative on the MRG (Andrew Stone) provided written submissions as to the proposed guidelines, dated 5 February 2010. A copy of those submissions is annexed (Annexure D) for the information of the Standing Committee on Law and Justice.

Questions on MAS and conflict of interest:

9.1 Is the MAA able to provide the Standing Committee with a copy of the finalised new rules for conflicts of interest in relation to MAS and CARS assessors?

9.2 Does the MAA accept that where a MAS assessor performs all of their private medico-legal work for either claimants or insurers then there is a ready perception of bias? Is it agreed that an even-handed assessor should be capable of drawing private work from both sides? It is only the one-sided assessors who find themselves retained exclusively by one side or the other?

9.3 When the MAA guidelines provide that no MAS assessor should derive more than 80% of their workload from either claimant or insurer work, is this a reference to 80% of the assessor's private medico-legal workload or 80% of the workload at large?

10. Legal Costs

The ninth recommendation in the Standing Committee's ninth report (September 2008) was:

> *"That the Motor Accidents Authority, in liaison with the Law Society of NSW, continue to make the study of the impact of the cost regulation a high priority, with a view to having the revised regulation by 1 October 2008."*

This followed on from a similar recommendation in the eighth report of the Standing Committee.

In its ninth report, the Standing Committee noted the Association's submission that claimants were unduly subsidising the operation of the motor accidents scheme [para 6.105 p70]. Mr. Player gave evidence before the Standing Committee on behalf of the MAA indicating the desirability of having new costs regulations in place by October 2008.

The long promised review and reform of the costs regulations has not occurred. As mentioned previously in these submissions, the work of the 2009 working party appears to have been abandoned. All that has happened in the past two years is a one off indexation. There has been no action on the inadequacies of the costs regulations.

At the time of the last indexation, the Association presented submissions to the MAA addressing the general inadequacy of the costs regulations. Those submissions are annexed (Annexure "E"). The various issues raised by the Association in those submissions have not been addressed. The Association has been excluded from the current working party process.

It is all too easy to dismiss complaints made by lawyers about legal costs. However, when the motor accidents scheme caps the costs recoverable by lawyers, it is claimants who suffer.

In most litigation, the successful party should recover approximately 75% of their legal fees incurred. The general view is that a 25% gap as solicitor/client costs is appropriate.

The MAA has commissioned expert consultants to review files made available by solicitors so that there could be an objective assessment of the solicitor/client costs gap in motor accident cases. In December 2008 the MAA received a report from the consultants, FMRC, who found that it would not be economically feasible for law firms to conduct CTP matters solely within the regulated fee available under the regulation.

The study found that there was no evidence of overcharging and that to the contrary, lawyers often charged clients less than the amount shown as work in progress in relation to matters (ie fees were discounted).

The report went on to find that the costs regulations were covering no more than one third of the legal costs involved in running a matter through the CARS process.

The report found that on average, legal costs charged were 13.2% of the settlement amount, whereas the fees allowed pursuant to the regulation, were on average 5.2% of the settlement amount. Claimants were losing 7% of their settlement figure to cover the gap between actual costs and regulated costs.

The failure to pay proper legal fees to claimants simply results in the claimant subsiding the operation of the scheme. This has occurred at a time when insurer profits have been grossly excessive.

The Association repeats the submission made to the Motor Accidents Authority in January 2010 –

> *"the Government's delay in bringing about much needed reform of the costs regulations is unsupportable on policy or social justice grounds".*

Questions on legal costs:

10.1 Will the MAA make a copy of the FMRC report available to the Standing Committee?

10.2 Will the MAA produce the recommendations of the 2009 working party on costs? Why weren't those recommendations acted on?

10.3 Will the MAA make available to the Standing Committee a copy of the terms of reference for the 2010 working party on costs?

10.4 Does the MAA recognise that the current costs regime compels claimants to subsidise the operation of the scheme? Is this appropriate given the degree of insurer profit over the first ten years of operation of the scheme?

10.5 Does the MAA propose increasing legal fees to reduce the claimant's subsidy of the scheme?

10.6 The scheme allows less than $2,000 in legal fees for all MAS disputes over the life of the claim. Does the MAA recognise that in some instances, this is grossly inadequate? Does the MAA recognise that where it is the insurer who generates applications for review and applications for further assessment (which are a cost imposed on the claimant) that the costs regulations are patently unfair?

11. Re-hearings and contributory negligence

In most cases, the insurer has no right of re-hearing in relation to a CARS assessment. The result is binding on the insurer.

There are highly restrictive costs regulations in place for a claimant who seeks a re-hearing. If the claimant does not improve on the CARS assessor's award by 20%, then the claimant recovers no costs. Even where the claimant does recover costs, they are unlikely to be more than 20-30% of the actual costs of running a court case. Very few claimants seek re-hearings of a CARS assessor's award.

However, where an insurer has alleged contributory negligence the insurer is entitled to force the claimant to court. The claimant is caught by the restrictive costs provisions.

The Association raised this unjust situation with the Standing Committee previously. Recommendation 10 in the ninth report was:

> *"That the Motor Accidents Authority in liaison with the Law Society of NSW, ensure that the study of the impact of the costs regulations considers provisions for costs in insurer-initiated court proceedings, so that claimants are not unfairly financially penalised for having to participate in such proceedings."*

Since the Standing Committee made this recommendation, the costs regulations have remained unchanged.

Questions on insurer-generated re-hearings:

11.1 What steps have been taken to implement recommendation 10 from the Standing Committee's ninth report?

11.2 What steps have been taken to implement recommendation 11 from the Standing Committee's ninth report (addressing whether there are inappropriate incentives for insurers to allege contributory negligence)?

23 April 2010