Submission No 10

12TH REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS

Organisation: Australian Lawyers Alliance

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Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Review of the MAA and the MAC

Submission to the NSW Legislative Council Standing Committee on Law and Justice

Review of the Motor Accidents Authority and the Motor Accidents Council

18 November 2013

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Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the NSW Legislative Council Standing Committee on Law and Justice Review of the Motor Accidents Authority and the Motor Accidents Council.

WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. We therefore have excellent knowledge regarding legislative change and what impact this will have upon our clients.

More information about us is available on our website.[1]

OUR STANDING TO COMMENT

The ALA is well placed to provide commentary to the Committee.

Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another.

Our members advise clients of their rights under current state based and federal schemes, including motor accident legislation, workers compensation schemes and Comcare. Our members also advise in cases of medical negligence, product liability and other areas of tort.

We therefore have expert knowledge of compensation schemes across the country, and of the specific ways in which individuals' rights are violated or supported by different Scheme models.

We are well aware of existing methods of compensation reimbursement across the country, in order for individuals to gain access to care, as they deal with intersecting

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

Schemes.

Our members also often contribute to law reform in a range of host jurisdictions in relation to compensation, existing schemes and their practical impact on our clients. Many of our members are also legal specialists in their field. We are happy to provide further comment on a range of topics for the Committee.

EXECUTIVE SUMMARY

1. The Australian Lawyers Alliance supported and continues to support the unanimous recommendations of the Legislative Council General Purpose Standing Committee No. 1 on personal injury compensation dated December 2005. Relevant to the Motor Accidents Compensation Act 1999, this involves:

   (a) Replacing the 10% WPI threshold for non-economic loss with the same threshold as for claims under the Civil Liability Act 2002, namely 15% of a most extreme case,

   (b) Discontinuing the use of the MAA medical assessment guidelines under the AMA guides (recommendation 4),

   (c) Abolishing the Medical Assessment Service (MAS).

   (d) Reducing the 5% discount rate on damages for future losses to a 3% discount rate (recommendations 10 and 11),

   (e) Relieving plaintiffs of the disproportionate burden of costs by comparison with insurers (recommendations 21 and 22).

2. The ALA also makes the following further submissions regarding issues that have arisen since the report of that committee, including:

   (a) Removing the pre-CARS procedures at s89A – 89E of the Act.

   (b) Amending Section 81 of the Act to overcome the problems that have arisen since the Court of Appeal decision of *Smalley v Motor Accident Authority of New South Wales* [2013] NSWCA 318.

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

(c) Cost of New South Wales CTP premiums.

THE DESIRABILITY OF A SINGLE SYSTEM OF COMPENSATION

The current situation

The changes to tort law in recent years have left us with a disjointed system with four major different compensation schemes in NSW:

a) Public liability (eg. Occupiers liability, accidents in public places) and Medical Negligence. These claims are governed by the Civil Liability Act 2002.
b) Motor vehicle accidents. These claims are governed by the Motor Accidents Compensation Act 1999 (with some aspects of the Civil Liability Act 2002 also applying).
c) Work accidents. These claims are governed by the Workers Compensation Act 1987, the Workplace Injury Management and Workers Compensation Act 1998, and in part also by the Civil Liability Act 2002 and Motor Accidents Compensation Act 1999.
d) Intentional acts/assaults. These claims are specifically excluded from the operation of the Civil Liability Act and therefore the common law still applies.

For each of these types of claims there are different thresholds, different methods of assessment of damages for pain and suffering, different heads of damages available and different caps on the amount which can be awarded. This is quite apart from schemes representing special deals, such as that for coalminers and that for police. This is contrary to the recommendations of the Ipp Committee in their Review of the Law of Negligence Report[1], which recommended as follows:

> ***"Overarching recommendation***
>
> ***Recommendation 2***
>
> *The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought*

1 Review of the Law of Negligence Report, 2 October 2002, available at http://revofneg.treasury.gov.au/content/review2.asp

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

in tort, contract, under a statute or any other cause of action.

Paragraphs 2.2 – 2.3"

It is also contrary to the unanimous recommendations of the Legislative Council General Purpose Standing Committee of December 2005[2] as follows:

> *"…the Committee believes that where individuals suffer permanent injury with no realistic prospect of recovery, they should have access to the same level of compensation, regardless of whether their injury occurred in the workplace, a motor vehicle accident or in a public place.*[3]

These differences cannot be logically justified. The same injury should get the same compensation regardless of whether the injury occurred in the workplace, a motor vehicle accident or in a public place. Money should not be wasted litigating over whether a factory injury involving an unregistered forklift is a motor accident or an employment injury or a case of occupiers liability, with very difference consequences (in terms of the damages available) for the injured party. These differences create unjust results, as noted by the Ipp Committee in the Review of the Law of Negligence Report as follows:

> *"The differences between the law applicable in the various jurisdictions also give rise to perceptions of injustice. There is no principled reason, for example, why a person should receive less damages for an injury sustained in a motor accident than for one suffered while on holiday at the beach. There is also no principled reason why there should be large differences in damages awards from one jurisdiction to another."*[4]

The threshold for recovery of general damages under the Motor Accidents Compensation Act is "greater than 10% whole person impairment." The 10% WPI threshold is manifestly unjust. It means that if you have fractures of both arms and both legs, are off work for six months, require total care for most of that period and have been in severe pain, because you make a generally good recovery, you get nothing for pain and suffering. The impairment is not permanent. If the prognosis

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2 Available at: http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/6DEB694C553E0DB8CA2570D100000C9A

3 NSW Legislative Council General Purpose Standing Committee No. 1, Personal injury compensation legislation, page xviii.

4 Review of the Law of Negligence, above n1, at 13.13.

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

is five years of severe depression, because this is not permanent, you get nothing. If you have a 10% permanent physical impairment and a 10% permanent psychological impairment, because the two cannot be aggregated together and neither exceeds 10%, you get nothing for pain and suffering. If pain in an arm or a leg (or both) is so severe that you do not use it but you have not lost the physical and theoretical capacity to use it, your permanent impairment is assessed at nothing. The use of the American Medical Association (AMA) Guides Edition 4 (a different edition from that used for work accidents) ignores the fact that the Guides themselves state that they are not suitable for the use to which they are put in NSW.

Proposal for reform

The ALA proposes that there should be a single system of compensation in NSW and that system should be the one contained in the Civil Liability Act NSW 2002. This would effectively involve amending the Motor Accidents and Workers Compensation legislation to mirror the damage provisions contained in the Civil Liability Act 2002.[5]

Importantly, this would bring the threshold for entitlement to compensation for pain and suffering to 15% of a most extreme case, regardless of how the person was injured. This threshold was recommended by the Ipp Committee which stated that *"a threshold based on 15 per cent of a most extreme case is more likely to be adopted and effectively implemented in all jurisdictions than one based either on a monetary amount or on a system of objective assessment of impairment."*[6] It was also specifically recommended by the NSW Legislative Council Standing Committee in 2005. In this regard, the Committee, stated as follows:

> *"The Committee believes that the current 10% WPI thresholds for accessing non-economic loss damages under the Motor Accidents Compensation Act 1999 and the Workers Compensation Act 1987 should be discontinued, in favour of the test used in the Civil Liability Act 2002, namely a threshold of 15% of 'a most extreme case', coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33% of 'a most extreme case', as judicially assessed. Importantly, this measure encompasses an*

5 This would not affect Workers Compensation claims where there was no fault on behalf of the employer. The Workers Compensation benefits that are available on a no-fault basis would be excluded from the proposed changes.

6 Ibid at 13.47

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

assessment of disability, not just impairment."[7]

It is the ALA's submission that bringing all compensation entitlements to the standards currently imposed by the Civil Liability Act 2002 would be fair and affordable. In relation to the affordability of the proposed changes, the ALA makes the following points:

a) The proposed scheme would maintain the current situation whereby those with minor injuries would be excluded from receiving compensation from pain and suffering. It would still be necessary for an injured person to have injuries that constitute at least 15% of a most extreme case.

b) There would be significant savings in administrative costs in having a scheme that does not require medical assessors to determine the issue of entitlement to compensation for pain and suffering. Currently in the motor accidents scheme the Medical Assessment Service employs hundreds of medical assessors, and a significant number of administrative staff, to assess and process disputes about entitlement of compensation to pain and suffering. The money that is spent on these assessments could be better spent providing compensation to those that have suffered significant injuries in accidents.

c) The current scheme is more profitable than predicted and there are sufficient funds available to provide for the proposed changes. Submissions in relation to insurer profits are set out below

THE WHOLE PERSON IMPAIRMENT THRESHOLD

The current situation

The ALA's primary submission is that there should be a single system of compensation, as outlined above.

However, in the event that a single system of compensation is not introduced, the ALA submits that the "greater than 10% whole person impairment" threshold ought to be urgently reviewed. The threshold is unjust, for the reasons outlined above.

7 NSW Legislative Council General Purpose Standing Committee, above n3 at xxi.

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

The Legislative Council Standing Committee on Law & Justice's Review of the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council, Tenth Report (October 2010) stated:

> *"During the current review, a number of stakeholders expressed ongoing concerns about the WPI assessment, arguing that the ten percent threshold is a capricious measure of impairment resulting from injuries sustained as a result of a motor accident. Several stakeholders expressed concern that the need to exceed the ten per cent threshold before compensation for non-economic loss can be awarded may unfairly exclude claimants who have been severely but not permanently injured, from receiving compensation for pain and suffering.*
>
> *The Committee acknowledges the ongoing importance of these concerns and notes the Australian Lawyers Alliance's suggestion that the threshold should be lowered to encompass a broader range of injuries and that physical and psychological WPI assessments should be able to be aggregated to meet the ten per cent threshold.*
>
> *The Committee considers that the issues surrounding the ten per cent threshold for WPI assessment deserve careful and thorough consideration, to identify whether changes need to be made to ensure that the threshold for non-economic loss compensation is fair and equitable for all Scheme participants. Any change in the threshold requirement should only occur on the basis of a thorough examination of the necessity for the change and the implications for the Motor Accidents Scheme as a whole."*

The Standing Committee on Law and Justice report regarding the Eleventh Review of the functions of the Motor Accidents Authority and Motor Accidents Council – Report 48, December 2011 (hereafter "SCLJ 2011 report") recommended:

> *"Recommendation 10*
>
> *That the New South Wales Government review the threshold for access to damages for non-economic loss under the Motor Accidents Scheme in order to achieve a better balance between Scheme efficiency and compensation.*
>
> *That the Motor Accidents Authority publish a discussion paper outlining the issues relating to access to non-economic loss damages. This discussion paper should include an actuarial analysis of the ramifications to the Scheme, claimants, CTP pricing and insurers of:*

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

- *changing the threshold to access non-economic damages to that of s.16 of the Civil Liability Act*
- *lowering the ten per cent whole person impairment threshold; and*
- *allowing both physical and psychological injuries to be aggregated to determine the whole person impairment threshold.*

The Authority should make this review a priority, and publish the discussion paper, invite comment and pursue any subsequent legislative amendment during 2012."

The review that was recommended in that report has not been carried out, and the ALA submits that it should be carried out as a matter of priority.

Proposal for Reform

The Legislative Council Standing Committee on Law & Justice's 2010 Review recommended (at Recommendation 12):

"That the next review of the Motor Accidents Authority and Motor Accidents Council, to be conducted in 2012 by a Committee of the Legislative Council… include a focus on the issue of the ten percent whole person impairment threshold for non-economic loss."

The ALA endorses this recommendation and specifically submits the following in relation to the WPI threshold:

1. The threshold should be abolished in favour of a "15 per cent of a most extreme case" threshold (regardless of whether there are other changes made to bring in a single system of compensation).
2. If whole person impairment is to be retained as the threshold of assessing entitlement to Non-Economic Loss, the following changes should be made to the Act:
   (a) Repeal s133(3) of the Act so that impairment from psychological injuries can be combined with impairment from physical injuries.
   (b) Amend s131 of the Act to lower the threshold for entitlement to Non-Economic Loss. The ALA submits that a study should be conducted into the issue of whole person impairment before the threshold is revised, so that an appropriate and more just threshold can be set.

THE MEDICAL ASSESSMENT SERVICE

The ALA's primary submission, as outlined above, is that the whole person

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

impairment threshold should be abolished and that therefore the Medical Assessment Service (MAS) should be abolished too.

In the event that MAS is not abolished, there are a number of issues that should be addressed.

Causation

Recent amendments to the Motor Accidents Compensation Act have given MAS Assessors the power to make conclusive findings in relation to causation of injuries, and in relation to future treatment and care needs.

MAS Assessors consistently fail to apply legal tests of causation when making their determinations. The issue of causation involves both medical and legal questions. The law required that an act of negligence be a cause of the injury, not the cause. MAS Assessors repeatedly apply the incorrect test of causation and this has resulted in a dramatic increase in the need for judicial review of MAS Assessments. See, for example, *Ackling v QBE Insurance (Aust) Ltd & Anor* [2009] 53 MVR 377 (Johnson J) and *Rahme v Bevin* [2009] NSWSC 528 (Patten AJ). However, even where a plaintiff can obtain a remedy under s69 of the Supreme Court Act 1970, all that can be done is to send the matter back for reassessment by MAS.

It is submitted that MAS assessors (doctors) have shown themselves so incapable of applying legal ideas of causation that the 2008 amendment making their views binding should be rescinded and the old position in which they could express an opinion but not bind a subsequent assessor be restored. The ALA submits that the issue of causation should be determined by CARS Assessors and Judges, rather than MAS Assessors. The issue of the degree of whole person impairment should be the only issue that is assessable by MAS.

The ALA refers to Recommendation 11 in the Legislative Council Standing Committee 2011 report, as follows:

> *"That the Motor Accidents Council form a sub-committee to review, analyse and recommend a course of action to the Motor Accidents Authority on the issue of legal causation."*

Assessments about Care

Similarly, it is submitted that it is inappropriate for MAS Assessors to make binding decisions in relation to disputes about future treatment (which is defined in s42 of

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

the Act to include care). Care is often a very significant issue in a case and should be determined by a legally trained person (a CARS Assessor or Judge) after consideration of all relevant medical and lay evidence, not by a single doctor expressing his or her own opinion.

Proposal for Reform

The Legislative Council Standing Committee on Law & Justice's 2010 Review recommended (at Recommendation 12):

> *"That the Motor Accidents Authority conduct a review of the decisions made by Medical Assessment Service Medical Assessors regarding causation, to establish whether there are particular issues associated with challenges to these decisions. The review should determine whether improvements can be made to decision making on causation issues. When undertaking this review, the MAA should consult extensively with key stakeholders to ensure that the full range of perspectives on this issue is considered. The results of this Review should be made publicly available."*

The ALA endorses this recommendation.

More specifically, the ALA submits that Section 61(2) of the Act should be amended to revert to the former wording in s61(2)(a), s61(2)(b) and s62(3) as follows:

> *(2) Any such certificate as to:*
>
> *(a) whether the degree of permanent impairment of the injured person is greater than 10%, or*
>
> *(b) whether any treatment already provided to the injured person was reasonable and necessary in the circumstances,*
>
> *is conclusive evidence as to the matters certified in any court proceedings or in any assessment by a claims assessor in respect of the claim concerned.*
>
> *(3) Any such certificate as to any other matters is evidence (but not conclusive evidence) as to the matters certified in any court proceedings or any assessment by a claims assessor in respect of the claim concerned."*

This amendment would provide MAS Assessors with the power to make findings about causation and treatment and care needs, but would leave the ultimate

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

decision about these issues in the hands of the legally qualified decision maker (the CARS Assessor or Judge) who can apply the appropriate legal tests and can weigh all the evidence, including the evidence of the MAS Assessors.

LATE CLAIMS

The current situation

The ALA submits that the issue of late claims requires extensive review, particularly in the following areas:

1. External v Internal Assessors

The ALA submits that assessments of late claims disputes should only be made by external CARS Assessors who have met the criteria for appointment. These Assessors are specialists who are actively working as practitioners in the CTP scheme, and as such are well equipped to make these important decisions that have the ability to terminate a claimant's rights. The internal Assessors are not specialists in the area and may never have been in active practice and do not have the necessary level of experience to be able to make decisions about what actions of a claimant are "full and satisfactory".

2. The penalty for late claims

The right for an insurer to deny a claim on the basis that it is lodged late is manifestly unjust and completely disproportionate as a penalty to the claimant.

The ALA notes that the requirement to lodge a claim within 6 months of the date of the accident was introduced as a means of trying to alter claimant behaviour and encourage early claims notification. There are a number of benefits of early claims notification including the ability to investigate the circumstances of the accident while events are still relatively recent, the ability to provide treatment and rehabilitation to claimants which will hopefully result in better long term outcomes, and the ability for insurers to set reserve estimates on claims at an early stage. The MAA has advised that there is a very good rate of early claim notification in NSW, with more than 95% of claims being lodged within 6 months of the date of the accident. Of the claims that are lodged late, approximately 90% are ultimately allowed to proceed.

The requirement for claimants to provide a "full and satisfactory" explanation for the

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

delay in lodging a claim has become an overwhelmingly difficult and time-consuming exercise. For an explanation to be "full" it must cover, in detail, the entire time from the date of the accident until the date that the explanation is provided. The ALA membership has experienced situations where an explanation has been rejected as not being "full" due to a failure to explain a one day delay between signing an explanation and posting it to the insurer. Such examples are unfortunately becoming the norm. The requirement for an explanation to be "satisfactory" is becoming just as difficult to establish. It is hard to imagine this is what was envisaged when the requirement was introduced.

The ALA submits that it is unconscionable that insurers should be able to deny claims altogether merely due to delay in lodgement. These are claims that insurers have collected premiums in anticipation of, and there is no good reason why an insurer should escape liability for them just because the claim has been lodged a few days or weeks late and because the claimant can't provide a "full and satisfactory" explanation for the delay. In most late claims cases there is no prejudice to the insurer, and in fact prejudice is not even one of the issues that can be considered when determining whether a late claim can be made. In these circumstances the punishment to the claimant for the delay in making a claim (not being able to bring the claim at all) is grossly disproportionate.

3. Court proceedings on late claims.

As a result of the decision in *Smalley v Motor Accident Authority of New South Wales* [2013] NSWCA 318, it is now no longer possible for late claims to be determined by CARS (see further discussion on *Smalley* below).

It was clearly the intention of parliament that CARS should have the power to hear and determine late claims. Section 96 makes this clear.

Until the decision of *Smalley,* most late claims were determined by CARS. The system was not perfect. There was a problem is that in situations where a late claim dispute had been assessed by CARS and the Assessor has determined that the claim could not be made, the claimant was unable to apply for a re-hearing before a Judge except in situations where he or she is entitled to a discretionary exemption from CARS. This meant that in many cases, a claimant's rights were being conclusively determined by CARS Assessors with no recourse to a Court.

However, the decision of *Smalley* has taken things to the other extreme. Now, CARS has no jurisdiction to hear ANY late claim dispute, because once an insurer rejects a claim on the grounds of delay it effectively denies liability for the claim, and

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

Smalley makes it clear that a denial of liability requires that a claim be exempted from CARS pursuant to section 92(1)(a). Accordingly, even if the claim is, in all other respects than the late claims issue, extremely straightforward, the claimant will be forced to commence Court proceedings to have the late claim dispute determined. This is unacceptable for a number of reasons:

(a) It is contrary to the purposes of the Act to have claims being forced to Court instead of CARS. In particular, the ALA refers to s5(1)(b) which indicates that an object of the Act is:

"to provide compensation for compensable injuries sustained in motor accidents, and to encourage the early resolution of compensation claims"

(b) It escalates what should be a relatively quick and simple process of adjudicating a dispute regarding whether a claimant has provided a "full and satisfactory explanation" for the delay in making a claim, into full blown litigation.

(c) It increases the costs incurred by both the claimants and the insurers, who will be forced to engage lawyers to run the late claims disputes in Court.

(d) Once the late claim dispute has been determined by the Court, then even if the Court finds that a late claim can be made, the claimant cannot then go back to CARS for the purposes of having the claim assessed. The claim, once exempt from CARS, is exempt for all time and the claimant is then forced to incur the significant costs of running the substantive matter at Court, if it cannot be settled.

Proposal for Reform

The Legislative Council Standing Committee on Law & Justice's 2010 Review recommended (at Recommendation 14):

"That, as part of its review of the Claims Assessment and Resolution Service, the Motor Accidents Authority examine the late claims process, in consultation with the Motor Accidents Council and key stakeholders. This examination should give consideration to allowing only external assessors, or Principal Claims Assessor, to assess late claims disputes."

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

The ALA endorses this recommendation.

The Legislative Council Standing Committee on Law & Justice's 2011 Review commented (at 4.83):

> *"The Committee understands that a claim lodged as early as possible is beneficial for all parties to the Scheme. The Committee notes that the vast majority of late claims are accepted by insurers, and agrees with the Bar Association that the current late claims process needs to be simplified. The Committee acknowledges that the issue of late claims was part of the CARS review, and that the MAA has advised that it is looking at the issue and developing an appropriate response. The Committee looks forward to assessing this response at its next review."*

The results of the CARS Review have never been released. The MAA has never issued a response to the late claims issues that were raised at the last Committee Review.

The ALA submits that the following reform would be appropriate.

1. Assessment of late claims should only be conducted by external CARS Assessors who have met the criteria for appointment.
2. Consideration should be given to an alternative penalty for making a late claim, that does not rob the claimant of his or her rights altogether. One suggestion may be that a claimant who has lodged a claim late, and who cannot provide a full and satisfactory explanation for the delay, will be penalised by a reduction in damages (say 5% - up to a monetary cap). This would continue to provide an incentive for claimants to provide early notification of claims but would eliminate the harsh and disproportionate penalty that currently exists.
3. The Act should be amended to allow CARS to once again determine late claims disputes, on the basis that if either party then chooses not to accept the decision of the CARS Assessor the matter can then be exempted for determination by the Courts (to fix the problem that existed before Smalley – referred to above).

REDUCING THE DISCOUNT RATE

The current situation

The State Government has imposed a 5% discount rate for future losses. That assumes that a lump sum can be securely invested to return 5% after tax and

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

inflation. We know from historical material and from good actuarial evidence that that is impossible.

The Lifetime Care and Support Authority itself assumes a 2% return on its own investments after tax and inflation. The prescribed rate in England is 2½% and there is pressure to reduce it, not increase it.

The consequence of having a discount rate that is too high is that those with long-term care needs, such as quadriplegics and severe brain-damaged infants, will get between 25 and 30% less than they need to survive. Their money will run out decades early. Those with the greatest needs suffer the greatest discrimination. This is a disgrace. Because many of the inadequately compensated victims become a burden on the taxpayer, what is really occurring is an exercise in cost shifting between State and Commonwealth. The public still has to pay.

The proposal for reform

The Ipp Report and the Legislative Council Report unanimously recommended a 3% discount rate. In this regard the Ipp Committee states:

> *"…in the Panel's opinion, using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing the total damages bill. Furthermore, we have seen that the group that would be most disadvantaged by doing so would be those who are most in need — namely the most seriously injured. It would be inconsistent with the principles that have guided our thinking in this area to reduce the compensation recoverable by the most seriously injured by increasing the discount rate, simply because damages awards in serious cases could thereby be significantly reduced. In this context, it should be noted that although an increase in the discount rate can yield large reductions in awards in serious cases, such cases represent only a relatively small proportion of the total compensation bill."*[8]

The Legislative Council Report relevantly stated:

> *"On a separate issue, the Committee also notes that all areas of personal injury law in New South Wales apply a discount rate of 5% to future economic loss damages paid as a lump sum. This discount rate is intended to acknowledge that a plaintiff awarded a lump sum gains control of that money straight away, allowing the plaintiff to invest the money and gain interest. However, the Committee is concerned that the 5% discount rate is*

8 Review of the Law of Negligence, above n1 at 13.105.

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | F - +61 2 9258 7777 | E - enquiries@lawyersalliance.com.au | W - www.lawyersalliance.com.au

simply too high, meaning that many permanently injured people who receive a lump-sum will not have sufficient income on which to live in the future, and believes that a 3% discount rate would be more appropriate, in line with the recommendation of the Review of the Law of Negligence Report. Importantly, while other Government reforms to personal injury compensation law, notably the use of the thresholds, have sought to limit the amount of damages payable to the less seriously injured, the 5% discount rate affects the most seriously and catastrophically injured, who are most in need of assistance.[9]

The ALA submits that the discount rate in NSW should be reduced from 5% to 3%.

COSTS

The current situation

Ordinarily with competent and fair-charging solicitors, an injured person will recover about 75% of their reasonable costs to run the case. The balance has to come out of their own damages. This in itself is unjust.

However, it has been made even more unjust by reason of the Motor Accidents Compensation Regulations 2005. These regulations limit the amount of costs that are recoverable by claimants in motor accident cases (with the exception of those cases that are exempted from the Claims Assessment and Resolution Service).

The amount of costs that is recoverable under the Regulations is pitifully inadequate. The Motor Accidents Authority commissioned FMRC to conduct a study into the impact of the Motor Accidents Compensation Regulation 2005. The report of FMRC, dated December 2008, is attached to this submission. The key findings of the report included the following:

- *There is a significant gap between the fees charged to the clients and the amount payable under the Regulation.*
- *On average the actual legal fees charged are 250% greater than the amount allowed pursuant to the Regulation.*
- *A review of the time recording logs in conjunction with the files indicates it would be not economically feasible for law firms to conduct CTP matters solely within the amount allowed under the Regulation.*

9 NSW Legislative Council General Purpose Standing Committee, above n3 at xxii.

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- *Variance in complexity and therefore costing of CTP matters is in most instances due to factors outside the control of the lawyers conducting the matter.*

The FMRC report makes it abundantly clear that the costs that are allowed under the Regulations are far too low. This means that injured people are subsidising the scheme by having to pay a far greater proportion of their legal costs than they should have to pay – more than 50% of their total legal costs in most cases.

The other very significant problem with the Regulations is that, despite very significant changes to the Motor Accidents Compensation Act that occurred in 2008, the Regulations have not been updated to reflect the changes to the Scheme. The 2008 changes made the Scheme far more "front loaded", meaning that the majority of the work in a case has to be completed before the matter is even lodged with the Claims Assessment and Resolution Service. However, the Regulations do not reflect this, and a significant amount of the costs are still only recoverable after an assessment at CARS.

Proposal for reform

The Legislative Council Standing Committee on Law & Justice's 2010 Review recommended (at Recommendation 5):

> *"That the working party established by the Motor Accidents Authority to review the Motor Accidents Compensation Regulation 2005 ahead of the 1 September 2011 deadline and the appropriateness of the existing legal costs regime should, among other matters:*
>
> - *carefully consider the findings of the FMRC Legal report on the impact of the Cost Regulation referred to in the Committee's report.*
> - *undertake extensive consultation with all relevant stakeholders to determine how the Regulation can be improved to better meet the needs of claimants under the Motor Accidents Scheme."*

The ALA endorses this recommendation and submits that the Regulations should be urgently revised to properly reflect the costs that are being reasonably incurred in these cases.

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
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PRE-CARS PROCEDURES

Sections 89A – 89E were introduced into the Act in 2008. The sections require that the parties take place in a compulsory settlement conference, and take other steps including exchanging documents and offers, before proceeding to the Claims Assessment and Resolution Service.

There is no doubt that the intention of these provisions was to try and ensure that parties were well prepared before going to CARS and that parties had properly explored settlement opportunities before an application to CARS was made.

However, the pre-CARS procedures have introduced considerable complexity and expense to the scheme. Insurers tend to take technical points regarding compliance with the provisions, which prevents claims being able to move forward. Parties have resorted to having “pre-s89A conferences” due to a inability to comply with the requirements of having a section 89A conference and/or the cost and time involved with preparing for a formal s89A conference.

Furthermore, there are many cases where it is not possible to comply with the provisions prior to the expiration of the 3 year limitation period, because, for instance, there has been a delay in injuries stabilising due to ongoing surgery, all necessary evidence has not been obtained and/or a matter has been delayed in the Medical Assessment Service.

If the pre-CARS procedures cannot be complied with prior to the expiration of the 3 year limitation period, a claimant will be prevented from lodging an application with the Claims Assessment and Resolution Service, which means that the limitation period will not be suspended. This means that, in the event that the matter subsequently proceeds to Court, the claimant will be statute barred (by virtue of section 109) from being able to commence Court proceedings. This is obviously a disastrous outcome and the penalty is out of proportion with the desirability of encouraging early resolution of claims.

The ALA has no difficulty with parties being required to participate in a compulsory conference and exchange documents and offers. However, difficulties with complying with these requirements should not prevent an application from being lodged with CARS.

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Proposal for reform

The Legislative Council Standing Committee on Law & Justice's 2011 Review comments (at 4.90):

> *"The Committee supports the rationale for encouraging the settlement of claims before the more formal processes such as a CARS determination or court case. However, we are somewhat concerned to hear that parties are resorting to "pre-s89A settlement conferences" to avoid the onerous burden of the formal "informal settlement" conference."*

The Committee recommended (at Recommendation 12):

> *"That the Motor Accidents Authority meet with the New South Wales Bar Association and other stakeholders as soon as practicable with a view to finding a solution to the issue of pre-settlement conferences under s89A of the Motor Accidents Compensation Act 1999.*

The ALA endorses the recommendation of the Committee.

The ALA submits that section 89A – 89E should be repealed, and section 91 amended accordingly so that there is no impediment in applying to CARS.

SECTION 81

In the recent case of *Smalley v Motor Accident Authority of New South Wales* [2013] NSWCA 318, the Court of Appeal considered the effect of sections 81 and 92 of the Act, and the relevant sections of the *Claims Assessment Guidelines* that deal with exemptions from CARS.

Section 81 of the Act provides:

> *81 Duty of insurer with respect to admission or denial of liability*
>
> *(1) It is the duty of an insurer to give written notice to the claimant as expeditiously as possible whether the insurer admits or denies liability for the claim, but in any event within 3 months after the claimant gave notice of the claim under section 72.*
>
> *(2) If the insurer admits liability for only part of the claim, the notice is to include details sufficient to ascertain the extent to which liability is*

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
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admitted.

(3) If the insurer fails to comply with this section, the insurer is taken to have given notice to the claimant wholly denying liability for the claim.

(4) Nothing in this section prevents an insurer from admitting liability after having given notice denying liability or after having failed to comply with this section.

(5) It is a condition of an insurer's licence under Part 7.1 that the insurer must comply with this section.

Section 92 provides:

92 Claims exempt from assessment

(1) A claim is exempt from assessment under this Part if:

(a) the claim is of a kind that is exempt under MAA Claims Assessment Guidelines or the regulations, or

(b) a claims assessor has made a preliminary assessment of the claim and has determined (with the approval of the Principal Claims Assessor) that it is not suitable for assessment under this Part.

(2) If a claim is exempt from assessment under this Part, the Principal Claims Assessor must, as soon as practicable, issue the insurer and claimant with a certificate to that effect (enabling court proceedings to be commenced in respect of the claim concerned).

Clause 8.11 of the *Claims Assessment* Guidelines set out the circumstances in which a claim would be exempt from assessment pursuant to s92(1)(a). It relevantly provides:

8.11 For the purpose of section 92(1)(a), the PCA shall issue a certificate of exemption when satisfied that, as at the time of the consideration of the application, the claim involves one or more of the following circumstances:

8.11.1 the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle is denied by the insurer of that vehicle in its written notice issued in

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
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accordance with section 81

In *Smalley*, the insurer had admitted "fault" for a claim but had denied liability for the claim on the grounds that the claim had been lodged late. The claimant had applied for an exemption from CARS both under s92(1)(a) and s92(1)(b) but both applications had been rejected by CARS. The Principal Claims Assessor had found, in respect of the section 92(1)(a) application, that the matter was not exempt because even though the insurer had denied liability, it had admitted "fault", and therefore clause 8.11.1 of the Guidelines was not satisfied.

The Court of Appeal determined that admitting only "fault" or "breach of duty of care" was not an admission of liability, or even a partial admission of liability pursuant to s81(2). An admission of only breach of duty of care or fault does not admit one of the essential elements of the tort of negligence – consequential damage. Furthermore, an admission of only breach/fault does not admit that the insurer is required to pay anything to the claimant. There can be no admission of liability if there is no admission of any obligation to pay. Accordingly, an admission of only breach of duty, or fault, was a deemed denial of liability pursuant to s81(3).

The Court determined that a deemed denial of liability constitutes a written notice denying liability, and that in all matters where there is a deemed denial of liability, CARS is required to issue a Certificate of Exemption pursuant to section 92(1)(a) (mandatory exemption). This is because a deemed denial is a complete denial including a denial of "fault" (the wording used in Clause 8.11.1 of the MAA's Claims Assessment Guidelines 1 October 2008 ("Guidelines"). Leeming JA said (at [70]):

> *"Where as here there is no actual s 81 notice, but a deemed s 81(3) notice, cl 8.11.1 will always be satisfied. That is not altered by the fact that the insurer chooses, outside the time constraints imposed by s81, subsequently to admit the fault of its insured. Nor is it altered by the fact that the insurer chooses to describe the letter evidencing that admission as a "SECTION 81 NOTICE".*

Until *Smalley,* it had been the common practice of many insurers to always issue section 81 notices admitting only "breach of duty of care" or "fault" rather than admitting "liability". It had been the understanding of the industry that an admission of breach of duty of care or fault was effectively the same as an admission of liability. Accordingly, all of those matters had been proceeding through the Claims Assessment and Resolution Service. After *Smalley* this is no longer possible, as section 92(1)(a) requires that those matters be exempted. The language of s92(1)(a) is mandatory – CARS has no power to assess those matters even if the parties wish for the matter to remain in CARS.

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There is a further complication, arising as a result of the recent case of *Allianz Australia Insurance Ltd v Anderson* [2013] NSWSC 1186. In Anderson, an insurer had issued a section 81 notice admitting only breach of duty of care. For the same reasons as the Court of Appeal in *Smalley,* Rothman J held that this was a deemed denial of liability. However, his Honour held that even though a subsequent section 81 notice had never been issued, the insurer had subsequently admitted liability "by conduct".

The fact that liability can now be admitted "by conduct" creates a potential minefield for confusion and disagreement between the parties as to the liability status of a matter, and whether the matter is exempt from CARS or not.

Proposal for reform

Cases where "breach of duty of care" or "fault" are admitted, should be capable of being assessed by CARS. The ALA submits that these cases were always intended to be included in the cases assessed by CARS (as, in fact, they had been for the first 14 years of the scheme).

Section 81 should be amended to require the insurer to advise whether it admits "breach of duty of care" or "fault", and to separately advise whether it admits "liability." This makes it possible to identify the real issues in a case. For instance, an insurer might admit its insured driver is at fault, but then deny liability on the basis that, the claimant did not sustain any consequential damage. Or more likely to occur are situations where an insurer admits fault but then denies the claim on the basis that there is a statutory defence available (eg, the claim has been made out of time).

Amending section 81 in this way would ensure that in cases where there is some reason to deny liability (such as a statutory defence) but fault is not in issue, CARS will still have jurisdiction to assess those matters.

Amending section 81 would also fix the late claims issue referred to above.

COST OF NEW SOUTH WALES CTP PREMIUMS

There has been recent pressure to reduce NSW CTP premiums. Comparisons have been made between the price of the NSW CTP scheme, and the price of CTP schemes in other states, for example, Queensland. However, the comparisons to States like Queensland are inappropriate, for the following reasons:

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
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1. New South Wales incorporates a number of no-fault elements that QLD doesn't have:

   (a) Lifetime Care and Support

   (b) Blameless Accidents

   (c) No-fault benefits under Accident Notification Forms (up to $5,000)

   (d) No fault benefits for children (s7J of the Act)

   The cost of Lifetime Care and Support Scheme alone is approximately $130 per premium. The other no-fault benefits have not been costed but would obviously add to the cost of the scheme compared to a pure fault-based scheme.

2. The latest reports show that the Queensland scheme is underfunded and premiums will inevitably have to be significant increased.

3. The NSW Scheme is already compliant with the requirements of the incoming National Disability Insurance Scheme and National Injury Insurance Scheme, whereas the Queensland scheme will have to introduce no fault benefits, adding cost to the scheme, in order to become compliant.

4. The real cost, after inflation, of CTP premiums in New South Wales is lower than it was in the 1980s.

5. The cost of premiums in NSW is low compared to other countries, such as the United Kingdom. The cost of premiums in the UK is approximately 850 pounds (but the system provides fairer compensation than NSW).

CONCLUSION

The ALA thanks the Standing Committee for the opportunity to provide submissions in relation to this review, and would be happy to provide further information or explanation regarding any of the above submissions.

REFERENCES

[1] Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
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