

**INQUIRY INTO THE EXERCISE OF THE FUNCTIONS OF  
THE LIFETIME CARE AND SUPPORT AUTHORITY AND  
LIFETIME CARE AND SUPPORT ADVISORY COUNCIL -  
THIRD REVIEW**

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**Date received:** 30/04/2010

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

28 April 2010

RECEIVED  
30 APR 2010

Dear Ms Robertson

**TENTH REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS  
AUTHORITY AND THE MOTOR ACCIDENTS COUNCIL AND THIRD REVIEW OF THE  
EXERCISE OF THE FUNCTIONS OF THE LIFETIME CARE & SUPPORT AUTHORITY  
AND THE LIFETIME CARE AND SUPPORT ADVISORY COUNCIL**

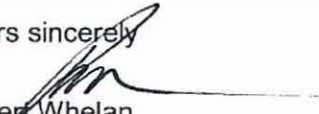
The Insurance Council of Australia<sup>1</sup> is pleased to contribute to the Standing Committee on Law and Justice's (Committee) Tenth Review of the exercise of functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC) in addition to the Committee's Third Review of the exercise of the Lifetime Care & Support Authority (LTCSA) and the Lifetime Care and Support Advisory Council (LTCSAC).

Our submission, detailed in the attached document, addresses issues raised in the *Motor Accidents Authority of NSW and Motor Accidents Compensation Scheme Performance Annual Report 2008-09* (the MAA Report). The Insurance Council submits that the current operation of the CTP scheme in New South Wales is largely achieving the aims of the government's reforms in 1999. We also submit that the CTP scheme is meeting public expectations to ensure that more of the compensation dollar is going to meet the needs of injured people.

In the second part of our submission, we also take this opportunity to raise a number of matters for your consideration as part of your review of the LTCSA.

The Insurance Council and its members look forward to working with all stakeholders to ensure the continual evolution of a successful CTP scheme. If you have any questions or comments in relation to our submission please do not hesitate to contact John Driscoll, Insurance Council's General Manager Policy, Consumer Directorate on (02) 9253 5120 or [jdriscoll@insurancecouncil.com.au](mailto:jdriscoll@insurancecouncil.com.au).

Yours sincerely

  
Robert Whelan  
Executive Director & CEO

<sup>1</sup> The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. December 2009 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross premium revenue of \$32.9 billion per annum and has total assets of \$94.2 billion. The industry employs approx 60,000 people and on average pays out about \$95 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).



**Tenth Review of the Exercise of the Functions of  
the Motor Accidents Authority and the Motor  
Accidents Council**

**Third Review of the Exercise of the Functions of  
the Lifetime Care & Support Authority and the  
Lifetime Care and Support Advisory Council**

**Submission by Insurance Council of Australia**

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28 April 2010

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## Introduction

The Insurance Council of Australia is pleased to contribute to the Standing Committee on Law and Justice's (Committee) Tenth Review of the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC).

We are also pleased to contribute to the Committee's Third Review of the exercise of the Lifetime Care & Support Authority (LTCSA) and the Lifetime Care and Support Advisory Council (LTCSAC).

The Insurance Council's Strategic Blueprint relating to personal injury management and compensation contains the following objectives:

- a competitive industry for personal injury insurance
- to promote reforms to personal injury management and compensation that are focussed on optimal health, lifestyle and work outcomes
- harmonisation of the benefits and scheme design for CTP insurance so that injury management and compensation systems operate on a stable, predictable, affordable and nationally consistent basis, for the benefit of insurance consumers, injured people and their families.

## Motor Accidents Compensation Scheme Performance Annual Report 2008-2009

This section of the submission addresses some of the issues raised in the *Motor Accidents Authority of NSW and Motor Accidents Compensation Scheme Performance Annual Report 2008-09* (the MAA Report). The Insurance Council submits that the current operation of the CTP scheme in New South Wales is largely achieving the aims of the government's reforms in 1999 and thereafter. We submit that the CTP scheme is meeting public expectations to ensure that more of the compensation dollar is going to meet the needs of injured people, which has been estimated to be 64% of total premiums in the period commencing 1 July 2009.<sup>1</sup>

We also take this opportunity to raise a number of matters for your consideration concerning specific aspects of the scheme.

### NSW CTP Insurance Market

The MAA notes that the CTP insurance market remains competitive notwithstanding the advent of the global financial crisis<sup>2</sup>. The Insurance Council submits that an open and competitive CTP insurance market continues to operate in New South Wales for the benefit of motor vehicle owners. Owners have a choice of insurer, each of which offers a range of prices depending on the insurer's assessment of the price required to fund the risk exposure provided by the CTP policies they underwrite. At all times, insurers offer prices in accordance with the *Motor Accidents Compensation Act 1999* (the MAC Act), and the MAA's Premium Determination Guidelines.

### Affordability

Despite the recent increases in premium the MAA Report continues to illustrate that the market share weighted best price for greenslips at below 32% of average weekly earnings as at June 2009 compares very favourably to the situation in 1999 before the introduction

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<sup>1</sup> Motor Accidents Authority Annual Report 2008-2009, page 73

<sup>2</sup> Motor Accidents Authority Annual Report 2008-2009, page 72

of the MAC Act. At that time the market share weighted best price for greenslips was 50% of average weekly earnings.<sup>3</sup>

The Insurance Council submits that this affordability of CTP premiums has been sustained despite:

- ongoing community wage inflation averaging 4% over eight quarters to December 2009<sup>4</sup>
- ongoing consumer price inflation averaging 3% for the period March 2008 to December 2009 (inclusive)<sup>5</sup>
- ongoing growth in health expenditure averaging 4% over inflation rates for the period 1995-1996 to 2008-2009<sup>6</sup>
- inflation allowances normally assumed by insurers being at rates that are higher to include provision for superimposed inflation
- the large drop in investment returns by insurers as a result of the global financial crisis.

MAA data indicates that since the September quarter 1999 the typical premium for Sydney metropolitan passenger vehicles (Metro Class 1) has fallen by 3.8% to around \$416 in the December quarter 2009.<sup>7</sup> That compares with a 36.3% increase in the Sydney CPI.

The Insurance Council submits that as a consequence, the real premium (that is, after taking into account inflation) has fallen by 29.4%. Put another way, had CTP premiums kept pace with inflation over that time, the average premium in the December quarter of 2009 would be \$590, - 41.9% more than the actual rate.

We also believe that the relative shift in premiums and average earnings has resulted in a marked improvement in the affordability of CTP insurance measured against the growth in average earnings. The average CTP premium as a proportion of average earnings has fallen from just under 55.0% in the September quarter 1999 to just over 33.0% in the December quarter 2009 - representing a 39% improvement in affordability.

### Profit

The issue of insurer profits cannot be understood merely on the basis of a simple equation being the amount of premiums minus claims paid totals insurer profits for that year. Almost all claims cannot be paid out in full immediately. This is because it takes time for injuries to stabilise and therefore time for the insurer to determine the extent of a person's injury and a person's need for subsequent rehabilitation. If the claim was settled immediately, the pay out may well be insufficient to meet all of the costs associated with the injured person's future treatment, care and rehabilitation.

To ensure that injured people receive the appropriate level of ongoing support (both medical and financial), insurers make financial provision for future payment of that support over a period of time. This ensures that money is available to provide the appropriate level of compensation when the injured person needs it, and when a person's injuries and rehabilitation needs are more completely understood.

**This type of financial provisioning by the insurance industry is vital and is also *mandated* for legal and regulatory purposes.** It ensures that the insurance industry can

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<sup>3</sup> Motor Accidents Authority Annual Report 2008-2009, page 73

<sup>4</sup> Average year to year increases in the average weekly ordinary time earnings over 8 quarters to December 2009

<sup>5</sup> Australian Bureau of Statistics catalogue number 6401.0 Consumer Price Index Australia

<sup>6</sup> Australian Bureau of Statistics National Accounts catalogue number 5206

<sup>7</sup> Motor Accidents Authority Annual Report 2008-2009, page 72 and 73

make financial payments to an injured person when they are required by the person. It is incorrect and ill informed to claim that funds set aside for provisioning are simply profit for insurance companies. An example of how this works is in the situation of a child injured in a motor vehicle accident whose injuries can take years to stabilise. If the insurance companies treated as profit the money received in the year the policy was sold, there would be no funds to pay the claim years later when the injury stabilises and the full extent of damages are known. Thus, this is the reason for the extremely strict statutory prudential requirements for claims provisioning.

The MAA ensures that the CTP scheme is fully funded from year to year and that CTP insurers are in a financial position to meet *all* claim costs as they arise *and* for the full duration of the claim. Over the last six years (2003-2004 to 2008-2009) insurer profit margins have averaged between 6 and 8.7%. The MAA considers this range of profit margin to be reasonable.<sup>8</sup>

### Claims

The MAA report contains statistics which indicate a reducing claims frequency and propensity to claim since the accident year 2003/2004 to the accident year 2007/2008. Our members however, have observed an increase in the utilisation of Accident Notification Form (ANF) benefits since the introduction of the amendments in the *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Act 2007* (MACA 2007) which increased the provisional payment of benefits under the ANF Scheme from \$500 to \$5,000.

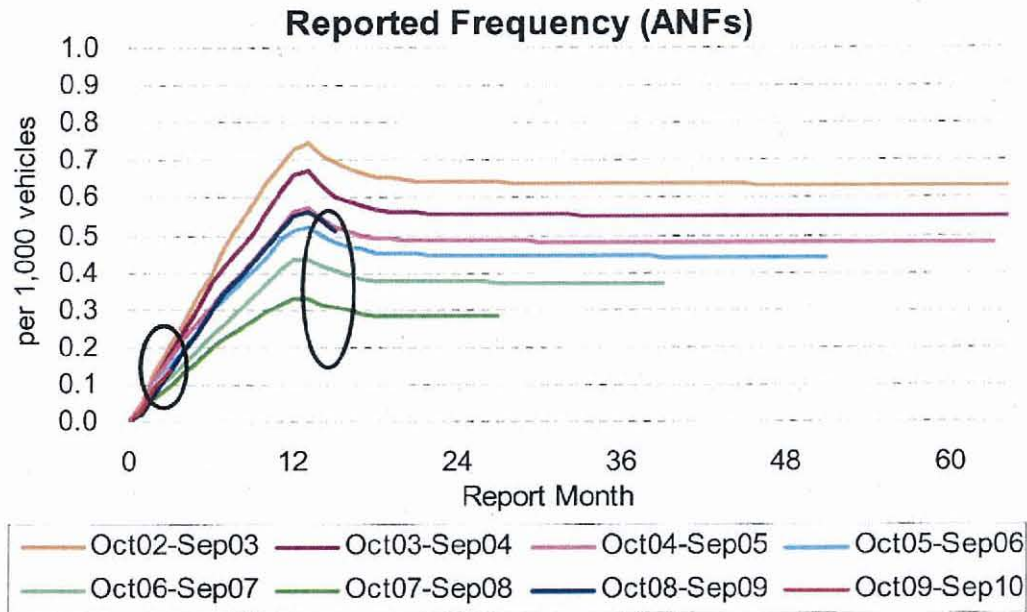
Graph 1 below shows a significant increase in the number of ANF applications for the 2008/2009 year following the introduction of MACA 2007. Although only early data is available for the 2009/2010 year, it also seems to be following the same trend at a higher level than previous years. This is an expected occurrence having regard to the greater level of benefits available.

The tapering off of the curve also shows a consistent level of conversion from ANF to full claims throughout the period 2002/2003 to 2007/2008. Our members have however experienced a greater increase in conversion to full claims which apparently follows an increase in legal representation. The Insurance Council submits that any change in the rate of conversion should be monitored closely in the coming years. We submit that a greater conversion to full claims is not consistent with the scheme's aims to improve early resolution of claims with reduced friction costs.

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<sup>8</sup> Motor Accidents Authority Annual Report 2006-2007, page 75

**Graph 1 – ANF Frequency**



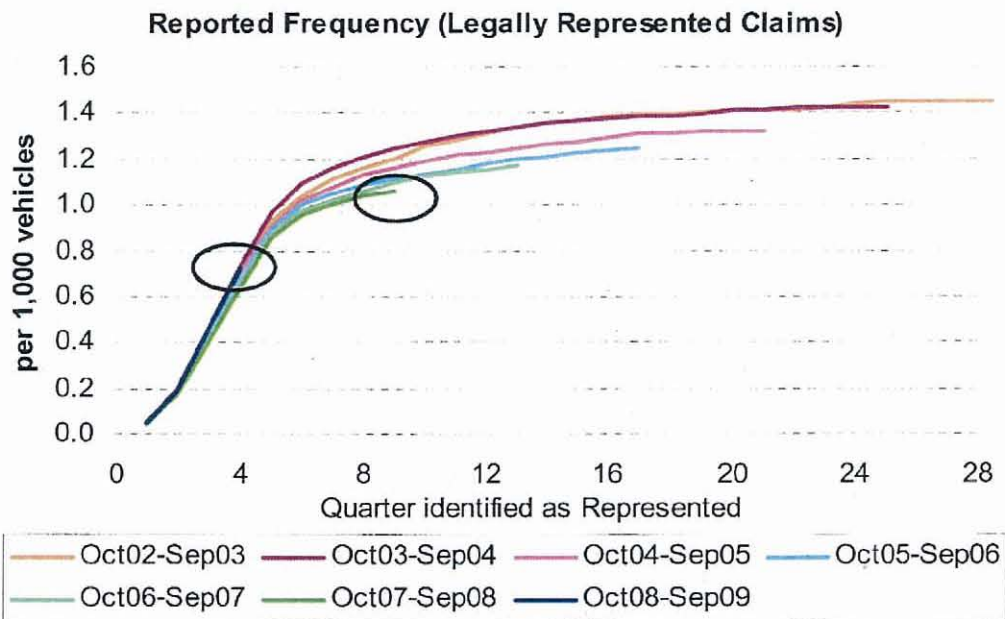
Source: Insurance industry data using information obtained from licensed insurers

The MAA report indicates that the percentage of legal representation of all claims has remained steady at 58%.<sup>9</sup> However recent industry data indicates that the frequency of legally represented claims is significantly higher in 2008/2009 than it had been in 2007/2008 and is showing a similar trend to the 2003/2004 and 2004/2005 years.

Graph 2 overleaf shows that while the frequency of legally represented claims had been slowly reducing in the years 2003/2004 to 2007/2008, the latest figures indicate a significant reversal in that trend.

<sup>9</sup> Motor Accidents Authority Annual Report 2008-2009, page 79

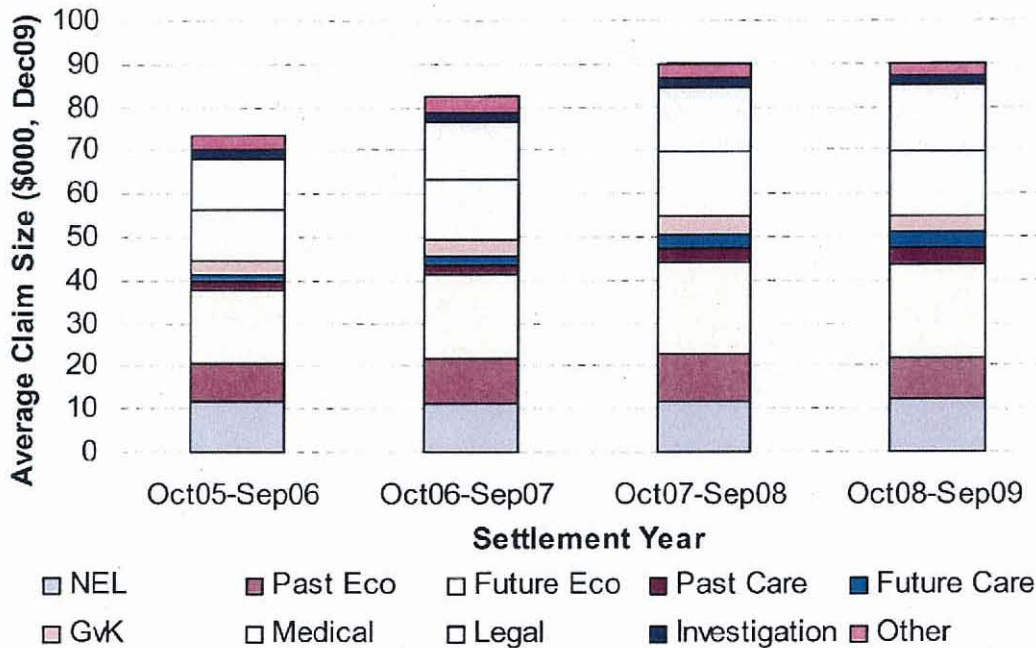


**Graph 2 – Represented Claim Frequency**

The Insurance Council submits that this trend should also be closely monitored as it may impact on the proportion of total premiums being paid to claimants as benefits under the scheme. In this regard, the Insurance Council is currently working with the MAA on a new costs scale for claimant legal fees. We submit however, that any significant increase in scale legal costs, particularly at the lower end of claim size, may have unintended consequences, impacting on the frequency of these claims.

The MAA Annual Report contains details of the number of claims and their frequency over a period of years. However data available to the Insurance Council indicates that there has been a steady increase in the size of the average claims for the last 4 years. Graph 3 overleaf contains details of the average claim size and individual heads of damage for the settlement years 2005/2006 to 2008/2009. The data excludes claims with no payments and those over \$1million.

The Insurance Council submits that Graph 3 shows that the heads of damage which are driving this progression in average claim size are economic loss, care, medical expenses and legal fees.

**Graph 3 - Average Claim Size by Head of Damage – All Claims**

Source: Insurance industry data using information obtained from licensed insurers

#### Medical Assessment Service (MAS)

The Insurance Council submits that the main benefits of MAS are that the medical assessments are independent and objective. In relation to important issues such as determining whole person impairment, MAS assessments are definitive and binding.

We further submit that a greater use of evidence based medical assessments should be made. This is particularly the case where considerable academic expertise has been used to develop treatment protocols such as those in place for Whiplash Associated Disorder.<sup>10</sup>

The Insurance Council supports the reduction in the use of competing medico-legal reports when independent reports from MAS are available. The process, we submit, could benefit from a greater use of treatment reports and records from treatment providers as their opinions not only assist MAS Assessors but also CARS Assessors. The current system does not adequately provide a mechanism for these to be provided and as a result these relevant records are often not available for consideration by MAS and CARS.

#### Claims Assessment Resolution Service (CARS)

The Insurance Council made detailed submissions to the Committee's Ninth review of the MAA concerning various aspects of the CARS process. Briefly the Insurance Council continues to be of the view that there are pockets of superimposed inflation in the areas of future economic loss and care in particular as indicated in Graph 3 above.

<sup>10</sup> See Motor Accidents Authority Annual Report 2008-2009, page 18 for details of the expanded use of the MAA's 2007 whiplash guidelines.

The Insurance Council submits that this escalation is driven by the CARS process as it allows individual assessors to make their determinations without providing sufficient reasons for some assessments. The insurance industry continues to work collaboratively with the MAA on appropriate feedback mechanisms to ensure that CARS Assessments are transparent and as consistent as possible.

In this regard we note the final report of the Committee's Ninth review which concluded that the CARS process fulfils its role as an independent, inexpensive and efficient early dispute resolution service. Nevertheless the Committee made a number of suggestions intended to improve the effectiveness of the CARS process.<sup>11</sup>

In addition we note the Committee's support of the MAA's decision to conduct a new study to thoroughly investigate the preliminary data about the emergence of 'superimposed inflation' in the CARS system. The Committee considered that a comprehensive and well designed study would confirm whether comparable assessments have been increasing over time, and if so, the factors that may be at work.<sup>12</sup>

The Insurance Council agrees that this will in turn facilitate an informed discussion about the implications for the scheme and any appropriate action. The industry will continue to work collaboratively with the MAA on this issue.

The Insurance Council also welcomes the specific recommendation of the Committee on this issue and looks forward to working with the MAA on its scope and implementation as follows:

**Recommendation 5** - *That the Motor Accidents Authority, in undertaking the new PricewaterhouseCoopers study of Claims Assessment and Resolution Service assessments, including when the study's findings and implications are considered, continue to work collaboratively with all relevant stakeholders, and implement any necessary recommendations.*<sup>13</sup>

#### Proposed CARS Review

The Insurance Council will also welcome the MAA's forthcoming review of the CARS process generally. One issue which we would like to raise in respect of this is the issue of time limits for the commencement of CARS matters. At present, there is no time limit in which a matter is to be lodged at CARS although applications to court must be made within 3 years under section 109 MACA.

As a matter of broad principle the Insurance Council and our member insurers submit that the CARS process should be consistent with the laws across Australia in this area.

The High Court (in *Brisbane South Regional Health Authority v Taylor*<sup>14</sup>) confirmed that there are 4 reasons why limitations periods are set:

- As time goes by relevant evidence is likely to be lost.

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<sup>11</sup> Standing Committee on Law and Justice, Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council Ninth Report, page x.

<sup>12</sup> Standing Committee on Law and Justice, Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council Ninth Report, page xiii.

<sup>13</sup> Standing Committee on Law and Justice, Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council Ninth Report, page xvi.

<sup>14</sup> [1996] HCA 25

- It is oppressive to a defendant to allow an action to be brought long after the circumstances of the claim occurred.
- It is desirable for people to be able to arrange their affairs and utilise their resources on the basis that claims cannot be made against them after a certain time.
- The public interest requires that disputes be settled as quickly as possible.

In line with these principles, the Insurance Council submits that CARS matters should be prosecuted expeditiously and we submit that the scheme incorporates the provisions in sections 55 to 60 of the *Civil Procedure Act*, to apply for matters going to CARS.

Finally we refer to our earlier submissions on the question of complex cases in the CARS system. We submit that these issues should also be canvassed as part of the CARS review by the MAA. The Insurance Council submits that if they are not to be exempt from the CARS process that there may be put in place additional avenues for referral to the courts for review.

### **Lifetime Care and Support Scheme Review**

Although the Committee is undertaking its third review of the Lifetime Care & Support (LTCS) Scheme, it remains in relatively early stages. We suggest however that some of the LTCS Scheme's care arrangements are likely to set precedents for claims in the CTP scheme generally. Therefore, we recommend that as stakeholders in that process, insurers should be involved in determining what sort of care will be provided. We submit that this has a flow-on effect to the CTP scheme in which our insurers operate. We remain keen to work with the LTCSA as the scheme progresses.

### **Inconsistency between the operation of the LTCS Scheme and Damages Claimed in the Motor Accidents Scheme in NSW**

Nevertheless, the Insurance Council would like to bring to your attention our insurer members' concerns with recent claims which are being made ostensibly outside the scope of the LTCS Scheme resulting from an apparent inconsistency of operation under the CTP and LTCS Schemes in NSW.

In most cases the interaction of the LTCS Scheme and the CTP Scheme in which the CTP insurers operate has been progressing smoothly. In many cases our member insurers' involvement in the LTCS Scheme is limited to the management of heads of damage not covered by the LTCS Scheme but claimable under the CTP Scheme under the MACA.

However our members are concerned that not all treatment and care needs that are recoverable under MACA from insurers may be fully funded by the LTCS Scheme. Our members have been served with pleadings claiming damages in respect of treatment and care needs in addition to those provided under the LTCS Scheme.

These have included claims for gratuitous attendant care services, attendant care whilst an inpatient in hospital and the capital cost of purchasing a house and/or a motor vehicle. Other claims which have been made involve additional attendant care holiday support in respect of an injured person residing overseas, the difference between the overseas cost of care and the cost of care that the injured person would have required had the care provision occurred in New South Wales. These claims are arguably not funded under the LTCS Scheme.

The Insurance Council has raised this issue with Minister Daley and submits that this is contrary to the initial intention of the LTCS Scheme which was for all such treatment and

care to be covered under the scheme:

*Acceptance into the scheme as a lifetime participant will **prevent** a person from recovering common law damages for treatment and care needs. The scheme will provide for all the reasonable treatment and care expenses of participants. These reasonable expenses include medical treatment, rehabilitation, attendant care services, and home and transport modification. This is consistent with current entitlements in the CTP motor accidents scheme, which provides for an injured person's reasonable and necessary medical treatment, rehabilitation and care expenses. The LTCS guidelines will determine what are reasonable and necessary treatment and care needs for participants.*<sup>15</sup> (Emphasis added)

The Insurance Council submits that this objective has not been achieved by the wording of section 130A MACA as follows:

**130A No damages for expenses covered by Lifetime Care and Support Scheme**  
*No damages may be awarded to a person who is a participant in the Scheme under the Motor Accidents (Lifetime Care and Support) Act 2006 for economic loss in respect of the treatment and care needs ... of the participant that relate to the motor accident injury in respect of which the person is a participant in that Scheme and that are provided for or are to be provided for while the person is a participant in that Scheme.*

As the section is expressed in negative terms, we submit that it is ambiguous in its operation. The section states what a participant in the LTCS Scheme **cannot** claim in damages; it does not however specify what the victim **can** claim.

We submit that this section is open to the interpretation that, if a participant in the LTCS Scheme can prove that his or her treatment and care needs are not being met **in full** by the LTCS Scheme, the participant **remains** entitled to claim the cost of any treatment and care needs which are not covered from the CTP insurer.

This ongoing inconsistency, we submit, is likely to add to the delay experienced by catastrophically injured participants in receiving appropriate care and treatment if some aspects of their treatment can only be resolved through the courts as part of a litigated CTP claim. The Insurance Council submits that this is inconsistent with the mechanisms for dispute resolution under the LTCS Act including Dispute Assessors and the Review Panel which are designed to deal with issues of eligibility and treatment needs rather than the courts.<sup>16</sup>

#### **Proposed Legislative Amendment**

In order to resolve these inconsistencies in the operation of the two schemes, the Insurance Council has suggested to Minister Daley that section 130A MACA be amended to clarify that no additional damages can be claimed for treatment and care apart from those available under the LTCS Scheme. We submit that the following wording will achieve this aim:

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<sup>15</sup> Minister for Transport, John Watkins, second reading speech introducing the LTCS Act, NSWPD (LA) 9 March 2006, p 21,402

<sup>16</sup> Part 3 LTCS Act

**130A Only damages for non-economic loss and past and future loss of earnings may be awarded to participants in Lifetime Care and Support Scheme.**

*The only damages that may be awarded to a person who is a participant in the Scheme under the Motor Accidents (Lifetime Care and Support) Act 2006 are:*

- (a) Damages for non-economic loss (subject to Part 5.3), and*
- (b) Damages for past economic loss due to loss of earnings (subject to Part 5.2);*  
*and*
- (c) Damages for future economic loss due to the deprivation or impairment of earning capacity (subject to Part 5.2).*

We submit that the references to Parts 5.2 and 5.3 will preserve the impairment threshold for damages for non-economic loss and the "cap" on damages for past and future economic loss.

The LTCS Scheme is funded by a levy on motorists, which is separate from and additional to the premium paid by those motorists for CTP insurance. The Insurance Council submits that, in accordance with the stated legislative aim, any expenses for treatment and care needs for those catastrophically injured should be paid out of the levy set up for that purpose. We believe that the CTP scheme should not be called on to pay these expenses out of the greenslip premiums.

We submit that the current wording of MACA will continue to cause confusion as to the appropriate pathways to claim reasonable care and treatment needs for catastrophically injured claimants which will in turn put pressure on the cost of CTP greenslips in NSW.

The Insurance Council would welcome the Committee's consideration of our submission that amendment to section 130A of the Motor Accidents Compensation Act 1999 (MACA) is required to ensure that the provision of treatment and care needs to the catastrophically injured responds as intended and is only available through the provisions of the Motor Accidents (Lifetime Care and Support) Act 2006 (LTCS Act) when making your recommendations at the conclusion of your review.