Submission

No 11

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

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Theme:

Summary:

The New South Wales Bar Association

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27 January 2006

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

Dear Ms Robertson

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

I refer to your letter dated 5 December 2005.

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

We appreciate your advice that the participation of the Bar Association has greatly assisted the committee to determine the issues to examine in previous reviews.

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

Yours faithfully

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STANDING COMMITTEE ON LAW AND JUSTICE

SEVENTH REVIEW OF MOTOR ACCIDENTS SCHEME

27 January 2006

1. Excessive insurer profits - Where is the money going?

Under the NSW CTP scheme insurers are required to lodge a premium filing annually. The MAA has the capacity to reject any premium that provides insurers with excessive profits. To date, the MAA has approved insurer filings allowing for projected profits ranging between 7.5% and 10% of the premium filed.

Given that the annual premium collection between CTP insurers is approximately $1.4 billion, the proper operation of the scheme should see insurers keeping no more than $140 million (10%) from each premium collection year (after meeting acquisition costs, claim handling costs and claim payments). Whilst it is acknowledged that it can take 10-15 years for the last of the claims payments to be made, the MAA's actuaries could provide it with estimates of the likely insurer profit based on claims payments to date and the reserve estimates held by insurers.

The MAA retain Taylor Fry Actuaries to conduct this exercise annually and the results as at June 2005 are tabulated on page 83 of the MAA Annual Report.

The Taylor Fry estimates show that on current projections the CTP insurers stand to retain in excess of 20% of the premium collected over the first four years of the scheme's operation. The excess profit over that period (over and above the MAA's designated reasonable profit of 7.5% to 10% of premium collected) is forecast to exceed half a billion dollars. On current projections insurers will be delivered at least double the profits for which they originally filed over four consecutive years (1999-2004).

It is acknowledged that part of the reason for these excess profits is falling claim numbers. The CTP insurers are benefiting from a road safety dividend as claim numbers fall. Factors likely to have influenced this outcome include improved car safety (more airbags, seatbelts in interstate buses), some tighter regulation of the trucking industry, increases in the amount of dual carriage highways around NSW and 50km per hour speed limits in built up areas.

However, part of the reason for the massive excess profits can also be attributed to the design and operation of the *Motor Accidents Compensation Act 1999* (MAC Act). The MAC Act has proved far more effective in reducing benefits to the injured than had been anticipated. Claims payments are well down on actuarial projections at the time of instigation of the new scheme.

Motorists have benefited from the road safety dividend. Premiums have fallen and continue to fall. NSW now has amongst the cheapest premiums in the country.

The Bar Association believes that the Motor Accidents Scheme should be reviewed so that the current excessive profits which CTP insurers are projected to receive can be redirected towards proper compensation for the injured.

Last year the Bar Association provided a series of specific questions for the Standing Committee to consider putting to the MAA on the issue of insurer profits. It is understood that those specific questions were put to the MAA by the Committee but were not answered. The Bar Association requests the Committee to consider asking the MAA these

questions again which are repeated below and updated to reflect more recently available data.

The following questions relate to the MAA's responsibility under s5 of the MAC Act to report on estimated profit based on current liability valuations rather than the MAA's role under s28 of the MAC Act to verify premium filing information (including an allowance for a reasonable return on capital):

1.1 Mr David Bowen, General Manager of MAA, has previously given evidence to the Standing Committee that 6-8% of total premium written represents a reasonable rate of return to CTP insurers. Does the MAA remain of this view?

1.2 Does the MAA accept that on current projections insurers are going to make profits in excess of 6-8% of total premium for the first four years of the new scheme's operation?

1.3 Does the MAA agree (subject to the accuracy of reserve estimates) that on the projected profit figures of their actuaries, Taylor Fry, CTP insurers are likely to receive excess profits in relation to the first four years of operation of the new scheme in the order of $500 million?

1.4 What is the MAA's view as to current projections that CTP insurers will average over 20% profit (as a percentage of premiums written) over the first four years of operation of the new scheme? How does this figure compare with the MAA's target of 6-8% of premium retained as a reasonable profit level?

1.5 What view does the MAA take of the current projections by Taylor Fry that the new scheme will deliver profits to insurers (on current projections) in excess of $500 million over its first four years of operation?

1.6 In the history of the various Motor Accident Acts has there ever previously been such a period of sustained profitability for CTP insurers (dating back to the origins of the current scheme – 1988)?

1.7 Whilst insurers have been cutting CTP premiums in response to these high profits, has any of the excess profit been redirected to accident victims in NSW? Does the MAA have any plans or recommendations to restructure the scheme to ensure that insurers do not continue to retain in excess of 20% of premium written as profit from the scheme?

1.8 Does the MAA agree that NSW now has amongst the cheaper CTP premiums in Australia?

1.9 Whilst the Association is aware that policy is ultimately a matter for the Minister, has the MAA made any recommendations to the Minister to restructure the CTP scheme so that insurer profit levels fall back to within the desired target range?

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

2. The 2005 report of the Standing Committee

The Standing Committee on Law and Justice published its sixth report reviewing the exercise of the functions of the MAA and the MAC in May 2005.

The Association requests that the committee consider asking the MAA to advise what progress, if any, has been made in pursuing the following recommendations contained in that report:

2.1 Recommendation 2 suggested that the MAA investigate methods to analyse the effects of the cost regulation and review the legal costs scale.

2.2 Recommendation 5 suggested that the Minister provide the Committee with further details of what action, if any, the MAA might be required to take to address the issue of the gap between CTP insurance and public liability insurance for certain accidents involving motor vehicles.

2.3 Recommendation 6 addressed the need to amend s33(5) of the MAC Act relating to claims against the nominal defendant for vehicles that were unregistrable.

2.4 Recommendation 9 suggested the MAA develop and implement a code of conduct for surveillance operative under the NSW scheme.

2.5 Recommendation 10 requested that the results of a review of the MAA Guidelines for the Assessment of Permanent Impairment be provided to the Standing Committee for consideration as part of its next review. New guidelines for the assessment of permanent impairment were gazetted and took effect from September 2005. Did the process of developing the new guidelines have any regard for their fairness or equity or was the review simply directed to administrative issues and clarification of ambiguities?

2.6 Recommendation 11 set out the Standing Committee's endorsement of a proposal by the Bar Association to allow for awards of interim damages in motor accident cases.

2.7 Recommendation 12 suggested that the MAA conduct further research into the issue of the adequacy of damages being awarded to meet the lifetime needs of the catastrophically injured. The Bar Association is aware of the MAA's Lifetime Care and Support scheme (LTCS). However, the Committee's recommendation arose in part from submissions by the Bar Association regarding the effects of the 5% discount rate and subsequent questioning of Mr Bowen on that issue in evidence before the Committee. It is noted that the 5% discount rate is a statutory creation. The High Court had determined that a 3% discount rate was appropriate; the UK government recently dropped the applicable discount rate to 2%.

Has the MAA addressed the issue of the effect of the 5% discount rate on the capacity of the catastrophically injured to ensure that their damages meet their lifetime needs?

3. The General Purpose Standing Committee No. 1 - Inquiry into Personal Injury Compensation Legislation

The General Purpose Standing Committee No. 1 (GPSC) *Inquiry into Personal Injury Compensation Legislation* tabled its report in December 2005. That inquiry heard detailed evidence as to the operation of compensation schemes in NSW including the Motor Accident Scheme. The Bar Association made detailed submissions to the GPSC, a number of which were adopted as recommendations in the Committee's report.

Specifically addressing the recommendations of the GPSC, the Association would like the committee to consider asking the MAA for its comments on the following issues:

3.1 Recommendation 4 of the GPSC was that the MAA discontinue the use of its Medical Assessment Guidelines and the AMA Guides (4th edition). It was subsequently proposed that damages for pain and suffering be awarded in accordance with a table similar to s79A of the *Motor Accidents Act 1988* or s16 of the *Civil Liability Act 2002*. What is the MAA's view of this recommendation? Given the current level of projected insurer profits, would it increase premiums to make such a change?

3.2 Recommendation 7 specifically addresses replacement of the 10% whole person impairment (WPI) threshold with a provision equivalent to s16 of the Civil Liability Act. What is the cost of such a change having regard to the current projected levels of insurer profits under the MAC Act?

3.3 Recommendation 11 suggests that the MAC Act be amended to reduce the 5% discount rate to a 3% discount rate. What is the MAA's view on such a change? What would be the cost of implementing such a change?

3.4 Recommendation 11 also suggests repeal of s124 of the MAC Act which prohibits recovery of damages for the first five days lost earnings post accident. What would be the cost of implementing that recommendation?

3.5 Recommendation 13 suggests amending the MAC Act to provide for the recovery of Sullivan v Gordon type damages, possibly based on the provisions of s100 of the *Civil Law (Wrongs) Act 2002* (ACT). What would be the cost of implementing this recommendation?

3.6 Recommendation 14 suggests the Government amend the nervous shock provisions of s30 of the Civil Liability Act (which also applies to motor vehicle cases) so that rescuers who arrive at the scene of an accident after its occurrence are entitled to recover damages when they suffer serious psychological injury. Does the MAA agree with this recommendation? What would be the cost of implementation?

3.7 Recommendation 15 suggests that the MAC Act be amended to change the definition of motor vehicle so that transport accidents (where no CTP insured vehicle is involved) are assessed under the Civil Liability Act. It is understood that the MAA has already recommended such a change to the Minister. Has any progress been made with implementing this change?

4. The 10% Whole Person Impairment Threshold and AMA IV Guides

The most significant change in the assessment of motor accident cases introduced by the MAC Act was the adoption of the AMA Guides to the Evaluation of Permanent Impairment (4th edition) (AMA guides) as the tool for the assessment of entitlement to damages for pain and suffering. The AMA guides are heavily modified by the MAA's own Permanent Impairment Guidelines.

The Bar Association does not believe that the AMA guides are (as is claimed by the MAA) objective, but rather inconsistent and in many aspects subjective. One straightforward example of that subjectivity is in relation to mild brain injury. Under the AMA guides a mild brain injury can be assessed anywhere between 0% and 14% WPI. It is of enormous significance to a claimant as to whether they are assessed at 9% or 11% but this determination is ultimately in the subjective hands of the assessors.

The introduction to the AMA guides states:

> 'Impairment percentages derived from the guides should not be used as a direct estimate of disability. The impairment percentages estimate the extent of the impairment on whole person functioning and account for the basic activities of living, not including work. The complexity of work activities requires individual analysis. Impairment assessment is a necessary first step in determining disability'.

A further example of inconsistency within the AMA guides is the treatment of injuries to the neck and back. Damage to a disc in the spine can cause the disc to protrude or collapse with the consequence that part of the disk may press against nerves in the spinal cord. Nerves from the cervical spine (the neck) run through the arms to the fingers. Nerves from the lumbar spine (low back) run through the legs to the feet.

A damaged or prolapsed disc pressing or impinging on a nerve can cause pain not only at the point of impingement but also through the nerve into the arms or legs – radiculopathy.

Injury to the spine (cervical, thoracic and lumbar) is assessed in the AMA guides using a scale known as DRE (Diagnostic Related Estimates). The mildest injury to each of the three levels of the spine is DRE 1 which gives 0% WPI. Mild injury at each level of the spine is assessed at DRE II which carries a weight of 5% WPI.

A prolapsed disc with nerve root impingement that can be objectively measured as causing radiculopathy is assessed at DRE III. For the cervical spine (neck) and thoracic spine (rear of the chest) DRE III is assessed at 15% WPI. However, for the lower back, the exact same injury is, whilst still being DRE III, assessed at 10%.

In short, a disc prolapse in the neck causing shooting pains into the arms will see a claimant recover general damages. The identical injury in the lower back causing shooting pains into the legs will leave the claimant one percentage point short of recovering general damages.

To all effects and purposes these are comparable styles of injury yet they are treated differently under the AMA guides. Why? The tragically comic answer is that different groups of surgeons met in the USA to draft the different sections of the AMA guides in relation to the cervical and lumbar spines. The two groups of surgeons reached different conclusions as to the relative weighting to be given to a disc prolapse with radiculopathy.

There is no fundamental difference in the nature of the two injuries – just two different committees reaching different conclusions with the consequential capricious outcome for the injured.

The MAA Permanent Impairment Guidelines set out four 'objective' criteria for the assessment of radiculopathy. Two of the criteria must be met for a MAS assessor to make a finding that radiculopathy is present. One of the four criteria is that a relevant limb (an arm for radiculopathy from a neck injury, a leg from radiculopathy from a low back injury), has wasted by at least two centimetres compared to the other unaffected limb. The MAA guides provide for rounding to the nearest half centimetre. So, 1.6mm of muscle wastage is insufficient for a finding of radiculopathy, 1.8mm muscle wastage in the arm may make the difference in leading to a finding of DRE III for a neck injury and 15% WPI. It is incredible to think that upwards of $100,000 in general damages may be at stake on a 2mm variation in a doctor's measurement of muscle wasting in the arm.

One final example of the ineffectiveness of the AMA guides is the well known condition of tennis elbow (epicondylitis). There is no medical dispute whatsoever that tennis elbow is a painful and debilitating condition. Unfortunately, it can also be a permanent condition. Whilst those suffering from tennis elbow can usually obtain a full range of motion, they can only do so whilst experiencing significant pain. However, the AMA guides make no allowance for pain. Provided a full range of motion can be obtained, an assessment under the AMA guides would yield 0% WPI for the epicondylitis sufferer.

The Bar Association requests that the committee consider putting the following specific questions to the MAA:

4.1 Does the MAA believe that the AMA guides, in conjunction with the MAA's own Permanent Impairment Guidelines, are an adequate tool for the assessment of an objective gateway to accessing general damages?

4.2 Has the MAA conducted a review as to the fairness and consistency of the AMA guides and the MAA Permanent Impairment Guidelines? If so, can that review be provided to the Standing Committee?

4.3 Can the MAA offer any explanation as to why the AMA guides assess a disc prolapse with nerve root impingement (DRE III) in the cervical spine at 15% whilst the same injury in the lumbar spine is assessed at 10%?

4.4 Does the MAA agree that it is capricious or arbitrary to award general damages for a disc prolapse with radiculopathy in the neck and to award no general damages for a disc prolapse with radiculopathy in the lumbar spine?

4.5 If the MAA agrees that it is capricious or arbitrary that a finding of DRE III in the neck and lumbar spine lead to different results in eligibility for general damages, will it use its capacity to overrule the effect of AMA guides through its own guidelines?

4.6 Does the MAA agree that a 2mm difference in measurement in muscle wasting in the arm (between 1.6mm and 1.8mm) can make the difference between clearing the 10% WPI threshold and not? If so, does the MAA believe it fair that such a minute variable form part of the threshold determination for entitlement to general damages?

4.7 Does the MAA agree that epicondylitis is capable of being a permanent and painful condition?

4.8 Does the MAA agree that permanent epicondylitis with significant pain can nonetheless result in an assessment of 0% WPI? If so, does the MAA believe that this is a fair and equitable result? If not, will the MAA use its regulatory powers to address this issue?

4.9 Has the MAA considered the recommendation of the GPSC that the AMA guides be abandoned so that a return can be made to judicial assessment of disability rather than impairment?

4.10 It is appreciated that Parliament set the 10% WPI threshold in s131 of the MAC Act. However, it is the MAA that makes the choice to utilise the AMA guides and has developed its own Permanent Impairment Guidelines. The Bar Association believes that these guidelines are a blunt instrument which can operate in an arbitrary and unfair fashion. Does the MAA agree that the guidelines can operate in an arbitrary and unfair fashion? If so, what suggestions does the MAA have for a fairer test?

5. Sullivan v Gordon type damages

The recent High Court decision in *CSR Ltd v Eddy* [2005] HCA 64 abolished the common law entitlement to recover *Sullivan v Gordon* type damages (*Sullivan v Gordon* was a NSW Court of Appeal case which provided that where a parent was seriously injured and was no longer able to care for their child, damages could be recovered to allow for an alternate carer to be hired or for money to be available to compensate the alternate family carer. In short, a young mother rendered paraplegic or quadriplegic in a motor vehicle accident could recover the costs of a nanny or housekeeper or a family member looking after the children that she could no longer care for herself).

Following the High Court decision, the Bar Association provided submissions to the Attorney General, the Minister for Commerce, the MAA and the GPSC recommending that the government legislate to reinstitute *Sullivan v Gordon* type damages.

The GPSC endorsed the Bar Association's submission and recommended that a legislative solution be pursued (page 162-164 of the GPSC report).

The Bar Association would like the committee to consider inviting a response from the MAA to the following specific questions:

5.1 Has the MAA received the Bar Association's submission on reinstating *Sullivan v Gordon* damages? If so, what has the MAA done with that submission?

5.2 Does the MAA agree with the recommendation of the GPSC that *Sullivan v Gordon* type damages should be reinstated? Does the MAA believe it fair or reasonable that the quadriplegic or paraplegic mother of young children recover no damages to provide for her children's care?

5.3 Does the MAA agree that NSW CTP insurers have been filing for premiums over the past five years on the basis that *Sullivan v Gordon* was the law of New South Wales? If so, does

the MAA further agree that CTP insurers will now receive a windfall profit as a consequence of the abolition of *Sullivan v Gordon* type damages?

5.4 Having regard to the stated objectives of the MAC Act in providing proper compensation for the seriously injured, can the MAA offer any argument as to why the MAC Act should not be amended to reinstate *Sullivan v Gordon* type damages? Is there any case to be made against the proposition?

5.5 Does the MAA agree that reintroducing *Sullivan v Gordon* type damages by statute would have no effect on premiums, as current premiums filings are based on an expectation that *Sullivan v Gordon* type damages were payable?

6. The Discount Rate

In Australia the discount rate was set at 3% by the High Court in *Todorovic v Waller* (1981) 150 CLR 402. The setting of this rate was based on actuarial evidence before the High Court as to rates of investment returns and interest (less tax) as against inflation. In short, an accident victim's damages are discounted for the benefit of receiving a lump sum at the designated rate.

NSW has longstanding legislation imposing a 5% discount rate in relation to motor accident claims. However, the final report of the *Review of the Law of Negligence* (the Ipp Report) recommended a 3% discount rate. A recent review of the rate in the UK resulted in the Lord Chancellor reducing the applicable rate from 2.5% to 2%.

It should be noted that those most significantly affected by the imposition of a 5% discount rate are the seriously injured, in particular those with catastrophic injuries requiring long term care.

It is appreciated that the Long Term Care and Support Scheme (LTCS) may eliminate such awards for damages in some major claims but that is not going to occur for at least another 12 months, if at all.

The GPSC concluded the following in its December 2005 report:

> 'The Committee is concerned that the current 5% discount rate on damages for economic loss paid as a lump loss under … the *Motor Accidents Compensation Act 1999* is too high, and is contrary to the government's intention that the pool of capital available to fund damages should be a targeted at the severely or catastrophically injured. The Committee believes that a 3% discount rate would be more appropriate, consistent with the recommendation of the report'.

The Association should like the committee to consider posing the following questions to the MAA in relation to the discount rate:

6.1 What response does the MAA have to the findings of the GPSC?

6.2 Does the MAA have any actuarial evidence available to suggest that the 5% discount rate will leave an adequate lump sum to provide for the lifelong care needs of the catastrophically injured?

6.3 Has the MAA considered the UK review that led to a decrease in the discount rate applicable there from 2.5 to 2%? If so, is there any basis to differentiate the position in NSW from that in the UK?

6.4 Does the MAA have any rationale for supporting the 5% discount rate other than it assists in keeping premiums down by reducing payouts to the seriously injured?

7. Late allegations of fraud

The Bar Association has received feedback from members that there seems to be an increasing trend of insurers making late allegations of 'false and misleading statements' by claimants or alleging 'fraud'. Such allegations are made in the days preceding a CARS assessment and have the effect of requiring the matter to be exempted and sent to court. Nine months delay often ensues. The Bar Association's members have the impression that some insurers are making these allegations without the false or misleading statement being of a serious nature simply for the purpose of derailing the CARS process and delaying the claim.

The Association should like the committee to consider asking the MAA the following questions:

7.1 In how many cases during the reporting period have there been late allegations by an insurer of fraud or false or misleading statement?

7.2 Has the MAA made any investigation of such cases, and if so, what was the outcome of those investigations?

7.3 Has there been any follow up by the MAA in such cases to determine whether the allegations of fraud or false and misleading statements were pursued by the insurer in court proceedings or whether they were dropped once the exemption was obtained?

8. Late withdrawals of admissions of liability.

An insurer is required to issue a notice under s81 of the MAC Act within three months of receipt of a claim form either admitting or denying liability. The Bar Association is aware of some CTP insurers seeking to withdraw an admission of liability years after an initial admission was made. A number of such cases have resulted in complaints to the MAA.

The Association should like the committee to consider posing the following questions to the MAA:

8.1 How many cases does the MAA know about where insurers have withdrawn admissions of liability?

8.2 Has the MAA conducted any investigation into these cases? If so, what findings has the MAA made?

8.3 It is noted that in response to similar questions addressed to last year's Standing Committee Inquiry, the MAA advised of 13 cases they had investigated with 11 breach notices having been issued to two insurers for non-compliance with s80 of the MAC Act.

Have there been any further offences by those two insurers over the last 12 months? Has the MAA done anything more than issue more breach notices (formal warnings)? Does the MAA believe that the two offending insurers have successfully implemented reforms to ensure the accuracy of their determinations of liability?

9. The MAA and procedural fairness

The principal mechanisms whereby parties can challenge an absence of procedural fairness in the CARS assessment process is by administrative appeal to the Supreme Court.

The Association requests that the committee consider asking the MAA the following questions:

9.1 Can the MAA provide a summary to the Standing Committee of administrative challenges issued in the Supreme Court against the MAA and CARS to date?

9.2 Which matters are still in progress and where matters have been resolved, what was the outcome?

10. Legal costs

In 2005 Parliament gazetted new costs regulations applicable to motor accident cases. This action was necessary as the *Motor Accidents Compensation Regulation (No. 2) 1999* would have been automatically repealed effective 1 September in accordance with the operation of s10(2) of the *Subordinate Legislation Act 1989*.

The NSW Bar Association provided the MAA with submissions in relation to the proposed amendments to the costs regulations. A copy of those submissions is attached at 'A'.

The significant mathematical errors identified by the Bar Association in the proposed amended costs regulations were addressed by the MAA and corrected prior to new regulations being gazetted. The MAA also adopted the Bar Association's submissions indexing the allowances paid for travel to country venues for the purposes of a CARS assessment.

However, nothing further has been heard from the MAA with regard to the second part of the Association's submissions raising broader issues for concern in relation to legal costs.

It is noted that for some years the MAA has been advising the Standing Committee that the costs regulations would receive a proper and thorough review. We are not aware that such a review has been undertaken.

The Bar Association would like the committee to consider inviting a response from the MAA to the following specific questions:

10.1 Does the MAA remain committed to annual indexation of legal costs under the costs regulations? If so, why five years elapse from the commencement of the MAC Act in October 1999 before any indexation was allowed?

10.2 Does the MAA believe that the current costs regulations adequately cover the cost of legal work required in preparing a motor accident claim and presenting a case before a CARS assessor? Although the Law Society would be better able to address this issue, it is understood that the current scheme has seen a significantly wider gap between solicitor/client costs and recoverable party/party costs than in any other forms of civil litigation. Claimants seem to be subsidising the operation of the scheme and insurer profits. Does the MAA agree that this is occurring?

10.3 The costs regulations were predicated on the belief that CARS would operate as a cheap and efficient method for resolving disputes. The system is no longer quick, efficient or cheap. In particular, CARS assessors have imposed onerous requirements upon claimants as part of 'standard direction' for the preparation of a CARS assessment. In addition to a claim form, a Statement of Particulars and a completed CARS Application, a claimant is now regularly directed to provide:

(i) a list of all documents before the CARS assessor;
(ii) a schedule of out-of-pocket expenses;
(iii) a submission on the technical application of the MAC Act to the economic loss claim;
(iv) statements from all witnesses;
(v) a chronology;
(vi) a complete schedule of damages; and
(vii) written submissions in support of the schedule of damages.

This level of preparation is beyond that required for a court hearing.

Does the MAA believe that the current costs regulations adequately allow for the amount of work that is required to prepare for a CARS assessment?

10.4 The costs regulations make no allowance for the awarding of additional costs to a claimant where unnecessary delay is caused by an insurer. Nor is there any incentive for the insurer to engage in settlement negotiations as there are no costs penalties imposed on an insurer if the claimant obtains a better result from the CARS assessor than they had offered the insurer in earlier negotiations.

Does the MAA believe that the costs system would be fairer if a claimant could recover party/party costs if they beat an offer that had been made to the insurer? Will the MAA consider this proposal?

10.5 The costs of court proceedings after a matter has proceeded through CARS are also heavily regulated and restricted. This is presumably intended as a disincentive for claimants to take a matter to court. However, not all cases are litigated because the claimant wishes to reargue the case. An insurer who has alleged contributory negligence can force a claimant to litigate in circumstances where the claimant wishes to accept the assessor's award.

If it is the insurer who triggers the rehearing, why should the claimant's costs be restricted? Does the MAA agree that this situation requires amendment of the costs regulations?

10.6 Section 111 of the MAC Act compels a court to refer a matter back to a CARS assessor if there is significant new material put before the court. This provision was designed to prevent a claimant 'running dead' before a CARS assessor. However, cases are now being referred back to CARS assessors because the insurer introduces new evidence. There are no provisions in the costs regulations for the claimant to recover any costs when a matter is referred back to a CARS assessor.

Does the MAA agree that this is an unfair situation? How does the MAA propose to fix this problem?

10.7 The hourly rate allowed by the costs regulations bear no relation to the real cost of the provision of legal service. The current rate of $150.00 per hour inclusive of GST is significantly less than market rates.

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

10.8 Does the MAA agree that the current allowance for costs represents less than the market rate recoverable and that the inevitable consequence is to have the claimant cross-subsidise the costs of the scheme out of their award of damages? Does the MAA believe this is fair? When does the MAA propose to finalise (and publish) its promised review of the reasonableness of the costs regulations?

11. Insurance gap between CTP and public liability insurance

The Bar Association has made previous submissions on this issue to the Standing Committee on Law and Justice. The Standing Committee has twice recommended that the MAA investigate the situation and take action. Unfortunately, it seems this has yet to occur. The MAA appear to adopt the view that inadequacies in public liability insurance policies are not a matter for the MAA.

It was the MAA that has created the insurance gap. Until 1 January 1996 all accidents that arose out of the 'use or operation' of a motor vehicle were covered by the CTP policy of the vehicle. However, with amendments to the definition of *injury* inserted into the *Motor Accidents Act 1988*, the coverage provided by the CTP policy shrank, so the policy only answered claims when an injury arose out of the 'use or operation' of the vehicle **and** where the accident involved the driving of the vehicle; a collision with a vehicle; the vehicle running out of control or a defect in the vehicle.

Many public liability policies have not been amended to reflect this change and still contain a broad exclusion clause which rules out any indemnity under the policy for an accident arising from the 'use or operation' of a vehicle. It follows, therefore, that an accident which arises out of the use or operation of a vehicle that does not fall within the scope of driving, a collision, running out of control or a defect, may fall within the insurance gap.

This gap penalises both the injured (who may not have an insurer to recover against) and the insured (who may unwittingly find himself or herself personally liable). The gap is not just

theoretical as cases are starting to come before the courts on just this point, for example, *AMP General Insurance Ltd v Kull* [2005] NSW CA 442.

The Association submits that the MAA has the responsibility to address rather than ignore the situation it has created. To date, the MAA's response appears to have been limited to asking the Insurance Council of Australia (ICA) to issue a general circular on the issue. This occurred on 28 November 2002. However, many public liability policies continue to maintain inappropriate wording that creates the gap.

Twice the Standing Committee on Law and Justice has specifically recommended that this issue be addressed. The Bar Association has identified the following steps that could be taken by the MAA:

(a) write to the public liability insurers direct encouraging them to reword their policies;
(b) providing material to the Minister for Commerce so that warnings regarding the existence of the gap could be raised in Parliament or be released to the media;
(c) taking out newspaper advertisements to alert consumers to the existence of the insurance gap;
(d) taking out advertisements in specialist trade journals to alert insurer brokers and corporate policy holders as to the insurance gap;
(e) enclosing a notice with the CTP green slip renewals advising as to the existence of the gap and urging consumers to check their public liability policies as to whether such a gap exists;
(f) seek further meetings with the Insurance Council of Australia to work towards elimination of the gap; and
(g) as a last resort, have the Minister name in Parliament those public liability insurers who have refused to amend their policies with the suggestion that better public liability insurance can be obtained elsewhere.

None of these suggestions appear to have been considered or acted upon. For two years the recommendations of the Standing Committee have effectively been ignored.

The committee may wish to consider asking the MAA the following questions in relation to the insurance gap:

11.1 What steps has the MAA taken in the past 12 months to address the 'insurance gap' issue?

11.2 Has the MAA conducted any review of public liability insurance policies over the last 12 months to determine whether the gap still exists and whether public liability insurance policies are being amended to eliminate the gap?

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

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

11.5 What comment does the MAA have on the proposals raised above by the Bar Association as to steps that might be taken to encourage public liability insurers to amend their policies to eliminate this gap?

12 Statement on MAA website

The MAA website states that 'the priorities of the Motor Accident Council are set by the Board'. The Act does not provide that the Board has this power.

The Committee may wish to consider asking the MAA what is the authority for – and meaning of – this statement.

27 January 2006