Submission No 5

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

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Three attachements

Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

AUSTRALIAN LAWYERS ALLIANCE
SUBMISSIONS TO THE LEGISLATIVE COUNCIL COMMITTEE REVIEW OF THE MOTOR ACCIDENTS AUTHORITY AND THE MOTOR ACCIDENTS COUNCIL

Primary Submission

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).

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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***
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> *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 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]

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

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.

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 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*

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

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.

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 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.

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6 Ibid at 13.47

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

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)[8] 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."***

Proposal for Reform

The Legislative Council Standing Committee on Law & Justice's 2010 Review[9] 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).

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8 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).

9 Above n8

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 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.

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 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[10] 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 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

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10 Above n8

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".

1. 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 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. Access to Court for late claims

Another problem is that in situations where a late claim dispute has been assessed by CARS and the Assessor has determined that the claim can not be made, the claimant is currently 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 means that in many cases, a claimant's rights are being conclusively determined by CARS Assessors with no recourse to a Court.

Proposal for Reform

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%). 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. Claims that have already proceeded through CARS for a late claims dispute, and have been determined adversely to the claimant, should be entitled to a mandatory exemption from CARS so that claimants have the right to have the dispute re-heard by a Judge, if they wish.

The Legislative Council Standing Committee on Law & Justice's 2010 Review[11] 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."*

The ALA endorses this recommendation.

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 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.

11 Above n8

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."*[12]

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 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.*[13]

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

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

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

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.*
- *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[14] recommended (at Recommendation 5):

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14 Above n8

"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.

INSURER PROFITS

The current situation

The Annual Reports of the Motor Accidents Authority[15] have been analysed by Cumpston Sarjeant consulting actuaries. A copy of their report, accepted by the Legislative Council General Purpose Standing Committee is attached. An update report on the Motor Accidents Compensation Scheme is attached to these submissions as well. One of the findings made by Cumpston Sarjeant is that *the claims costs contained in the prospective premium filings were significantly higher than were actually experienced. In turn, the lower than expected claims costs provided significantly higher profits to insurers than were allowed for in the prospective filings."*

At no time has the average prospective profit margin of 8% not been greatly exceeded. The returns in later years are less than in earlier years, but this is explained by the very conservative allowances made for potential future payments. That is why profitability for particular years when followed through on a year by year basis increases over time as risks for which allowance was made never come to fruition. It is simply too easy for insurers to hide excessive profitability in excessively pessimistic calculations as to future payouts. The history of what is now a mature scheme, clearly establishes that there is a capacity to pay much better benefits to the injured than has been the case since its inception.

The scheme collects premiums to properly compensate the injured and adequately reward insurers for risk. The scheme is not meeting these objectives. The injured are not being adequately compensated and insurers are making grossly excessive profits.

The Legislative Council General Purpose Standing Committee noted:

"However, the evidence specifically on the profitability of CTP and public liability insurers does suggest that they have been making strong profits in recent years following the introduction of the Motor Accidents Compensation

15 Available at : http://www.maa.nsw.gov.au/default.aspx?MenuID=136

Act 1999 and Civil Liability Act 2002."[16]

The Legislative Council Standing Committee on Law & Justice's 2010 Review[17] stated (at 3.72 – 3.82):

> *"The Committee is acutely aware that the issue of the level of insurer profits has been raised as a concern in all of the Committee's reviews to date. The Committee notes that for the underwriting years from 2000 to 2005, insurer profits have significantly exceeded their prospective profit forecasts. A comparison of Tables 3.1 and 3.3 shows that the statistics are quite stark, particularly when the actual dollar amount of realized profits is considered. For example, in 2003/04 the prospective profit margin is 8.5% and the realised profit report in 2008/09 for that same period is 30%, or $265 million. The Committee notes that these figures may not be replicated in years of economic downturn.*
>
> *This important issue has implications for the effective operation of the NSW Motor Accidents Scheme, and the provision of appropriate compensation to people injured in motor vehicle accidents and the level of premiums paid by NSW motorists. In light of the inability to 'claw-back' larger than expected profits, the question arises as what can and is being done to ensure that profits significantly higher than the prospective profit approved by the MAA do not continue to be made...*
>
> *The Committee is sufficiently concerned about the issue of perceived excessive insurer profit to have considered whether it is appropriate to recommend that this matter be referred to the Independent Pricing and Regulatory Tribunal (IPART) to examine...*
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> *Unlike the Committee, IPART could avail itself of the necessary technical expertise to examine this issue fully in order to determine whether changes need to be made to the Scheme, or the way in which the Scheme is administered by the MAA. Now that the Scheme is in its eleventh year it may be appropriate that such a review be undertaken."*

Proposal for reform

The ALA's primary proposal is that the excess insurer profits be used to prove better benefits for injured people (as outlined above).

The ALA refers to Recommendation 4 of the Legislative Council Standing Committee on Law & Justice's 2010 Review,[18] particularly Recommendation 4 which states:

> *"That the independent competition review commissioned by the Motor Accidents Authority and the work being undertaken by the Authority to*

16 NSW Legislative Council General Purpose Standing Committee, above n3 at xix.

17 Above n8

18 Above n8

improve the profit assessment methodology involve extensive stakeholder consultation including with the Motor Accidents Council and the stakeholders who have contributed to the Committee's Review in relation to insurer profits.

That the Motor Accidents Authority make publicly available the results of this Review, and any subsequent proposals to change the profit assessment methodology used by the Motor Accidents Authority, as soon as possible."

The ALA endorses this recommendation.

Jnana Gumbert
NSW Branch President
August 2011