

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

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The New South Wales Bar Association

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Ms Carmel Donnelly
General Manager
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Dear Ms Donnelly

In-House Cars Assessors Deciding Late Claims

Section 73 of the *Motor Accidents Compensation Act 1999* ("the MAC Act") provides that a claimant must lodge a claim form within six months. A claim form can be lodged after that date provided there is a "*full and satisfactory*" explanation for the delay.

These legislative provisions echo provisions in place under the *Motor Accidents Act 1988*. The obligation to give early notice of claim and the penalty for failure to do so has been in place for over twenty years.

What is different under the MAC Act is that disputes as to whether there is a full and satisfactory explanation are no longer necessarily dealt with by a court, but can now be dealt with by a CARS assessor pursuant to Section 96. Following recent legislative amendment (designed to overcome the Court of Appeal decision in *Hayek v. Trujillo* (2007) 49 MVR 12), such assessments can be binding:

As a group, the CARS assessors are generally well respected. This is due to their status as senior practitioners with substantial personal injury experience. Most of the CARS assessors have been in practice for twenty or more years. It is a requirement of appointment that solicitors seeking to be CARS assessors hold "Accredited Specialist" qualifications.

The Association's primary position remains that legal rights should be determined by courts rather than tribunals. If an accident victim is to be denied their right to pursue a claim on the basis of delay in lodging a claim form, then such denial should come from a judge, with full rights of appellable review available.

The Association does not support the determination of an accident victim's right to pursue their claim being made on an administrative basis by an unaccountable assessor (however experienced and respected) especially where there are no rights of merit review.

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The recent decision of Justice McDougall in *Gudelj v. Motor Accidents Authority of NSW* [2010] NSWSC 436 reveals an even less satisfactory position. Mr. Gudelj's late claim dispute pursuant to Section 96 was not dealt with by one of the CARS assessors with at least twenty years practical experience and Accredited Specialist status. Rather, the late claim dispute was determined by an in-house assessor at the Motor Accidents Authority.

The In-house assessors

The MAA has traditionally had two in-house assessors appointed to assist the Principal Claims Assessor. Initially, these two in-house assessors were restricted to dealing with straightforward applications for exemption.

Due to the practical experience of the initial holders of these positions, the role was expanded to allow the in-house assessors to determine late claim disputes. However, at that time, the assessment was not considered to be and was not legislated to be binding.

More recent holders of these in-house positions have not had the same legal experience. The Bar Association is unaware as to what (if any) experience the in-house assessor in the *Gudelj* matter may have. It is noted however that the relevant CARS assessor is not an Accredited Specialist and hence would not be appointed a CARS assessor on merit if making an external application.

Recommendation

CARS assessors have now been given the power to terminate a claimant's rights to compensation by finding that there is not a full and satisfactory explanation for delay. There is no access to a merits review of this decision.

In circumstances where a CARS assessor has been given such power, it is reasonable that the power only be exercised by senior and experienced CARS assessors. Having a claimant's rights determined by in-house assessors at the MAA who do not meet the standards for appointment as an external assessor is simply inappropriate.

The Bar Association recommends and urges that all late claim disputes under Section 96 be re-allocated from the MAA's in-house assessors and allocated to independent, senior and experienced CARS assessors.

The foregoing comments do not apply to the Principal Claims Assessor (PCA) who meets the objective standards for appointment as a CARS assessor.

Yours sincerely



Alastair McConnell
Acting Executive Director

cc Ms. Christine Robinson, Chairperson, Standing Committee on Law and Justice
Ms. Mary Macken, President, Law Society of New South Wales