Supplementary Submission No 3a

INQUIRY INTO REVIEW OF THE MAA AND THE MAC - EIGHTH REVIEW

Organisation: The New South Wales Bar Association

Name: Mr Alastair McConnachie

Position: Director, Law Reform and Public Affairs

Telephone: 9232 4055

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The New South Wales Bar Association

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22 August 2007

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

Dear Ms. Robertson

Re: Eighth Review of the Exercise of the Functions of the Motor Accidents Authority

By letter of 16 August 2007 the New South Wales Bar Association provided submissions in relation to the above Law and Justice Committee inquiry.

It has subsequently come to the Association's attention that this year the Committee will be focusing its inquiries into the operation of the Medical Assessment Service ("MAS"). It is understood that a number of doctors retained by the Motor Accidents Authority ("MAA") as MAS assessors may be providing evidence to the Committee. In those circumstances the Association would appreciate the opportunity to put additional submissions before the Committee to assist with the Committee's questioning of medical experts with particular regard to the operation of the Motor Accident's Authority's guidelines for the assessment of permanent impairment and the American Medical Associations guides to the evaluation of permanent impairment (4th edition).

A supplementary submission is attached.

The Bar Association appreciates that it is not the role of the Law and Justice Committee to enquire into individual cases. However, it is impossible to come to any proper understanding of the operation of MAS without looking at individual cases where the system does not operate properly or efficiently. To that end the submissions include a

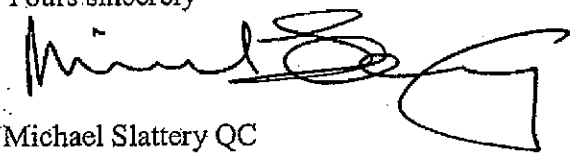
Selborne Chambers, 174 Phillip Street, Sydney 2000
DX 1204 ♦ Tel (02) 9229 1735 ♦ Fax (02) 9222 9678 ♦ E-mail executivedirector@nswbar.asn.au
www.nswbar.asn.au

ACN 000 038 652 ♦ ABN 18 526 414 014

number of de-identified case studies. Should there be any concern regarding the veracity of the case studies then the Association is able to provide further information to the Committee. It is noted that a number of the case studies have resulted in complaints to the Motor Accidents Authority. It is anticipated that officers of the MAA would be familiar with a number of the case study examples used.

Please do not hesitate to contact Mr. Alastair McConnachie, Director, Law Reform and Public Affairs, if you have any inquiries as to the matters raised in the submission.

Yours sincerely



Michael Slattery QC
President

STANDING COMMITTEE ON LAW AND JUSTICE

EIGHTH REVIEW OF MOTOR ACCIDENT SCHEME

22 August 2007

SUPPLEMENTARY SUBMISSION BY NSW BAR ASSOCIATION

THE MEDICAL ASSESSMENT SERVICE (MAS)

INTRODUCTION

The NSW Bar Association ("the Association") provides these supplementary submissions as to the operation of the Medical Assessment Service ("MAS"). The case studies used throughout this submission are all real cases involving the victims of motor accidents. They have been suitably de-identified. The Association is able to provide further information if required.

These submissions raise the following issues in relation to MAS assessments:

1. Delays
2. Mistakes
3. Inconsistencies
4. Areas of unfairness
5. Costs

The submissions then relay some comments made by Scheme users (including insurers, doctors and claimants) regarding the Medical Assessment Service.

It is understood that a number of doctors may be giving evidence at the Committee hearing. It is respectfully suggested that some initial questions which could be put to the doctors include:

a. How could MAS operate more efficiently?

b. How could MAS operate more fairly?

c. What could be done to make the Medical Assessment Service more consistent in its determinations?

d. Are the American Medical Association's Guides to the Evaluation of Permanent Impairment 4th edition ("AMA IV guides") perfect in their relative valuation of injuries? Are there inconsistencies in the guides? What can be improved?

e. The AMA IV guides are modified by the Motor Accident Authority's own Guidelines for Evaluation of Permanent Impairment. Are those guidelines perfect? If not, what could be improved?

f. It is appreciated that it is a policy question rather than a medical issue as to where the line should be drawn for payment of general damages. The 10% whole person impairment ("WPI") threshold figure is arbitrary rather than scientific. Nonetheless, the opinion of medical experts may be of value to the Committee in considering whether that line is fairly drawn. The doctors could be asked

whether, in their opinion, those persons they see receiving assessments of 10% whole person impairment were seriously injured? Were the persons receiving 10% "unworthy" of compensation for their pain and suffering?

1. DELAYS HAVE IMPROVED BUT MAS CAN STILL BE ENDLESS

The Medical Assessment Service was deservedly the subject of considerable criticism in the early years of the operation of the *Motor Accidents Compensation Act 1999*. A MAS process that should take 4-5 months ended up taking 9 months due to bottlenecks in arranging appointments, providing reports, report checking and the like.

The good news is that for a combination of reasons these delays appear to have been reduced. The MAS does now operate more efficiently. A MAS assessment is usually obtained in around 5 months.

Unfortunately however, the MAS process does not always work to bring a rapid resolution to medical disputes. It is essential that within any such process of assessment there be review and further assessment rights. However, determination of those rights can result in matters remaining within the MAS system for years rather than months.

CASE STUDY 1 – Mr. MA

Mr. MA was injured in a motorbike accident on 21 October 2001. His case is still not resolved, principally due to MAS issues.

Mr. MA obtained a medico-legal report from a qualified MAS assessor (acting in a private capacity) in October 2004. The doctor assessed injuries to the knees and back at 13% WPI.

The insurer did not accept this assessment and the matter proceeded to MAS. In a decision of 25 April 2005 a MAS assessor determined whole person impairment at 13%.

The insurer sought a review of this decision. The review request was rejected.

The insurer then sought a further assessment on the basis of video surveillance of the claimant riding his motorbike. It was alleged that the claimant demonstrated a greater range of knee movement riding his motorbike than had been measured by the assessor.

The further assessment was granted. A second MAS assessment took place on 11 March 2006. This time the assessor assessed 8% whole person impairment.

Mr. MA subsequently underwent a further surgical procedure on one knee. The claimant then sought a further MAS assessment. The matter

went back before the MAS assessor for a third time on 19 July 2007. This time injuries were assessed at 12% WPI.

From start to finish the MAS process took over 2 years. Resolution of the claim was delayed in a way that would never have occurred applying section 79A of the *Motor Accidents Act 1988* or section 16A of the *Civil Liability Act 2002*. A judge could and would have awarded damages for pain and suffering and the matter would have been brought to a much more rapid conclusion.

CASE STUDY 2 – Mr. ST

Mr. ST was injured in a motor vehicle accident on 14 July 2000. As a consequence of the accident Mr. ST suffered physical and psychiatric injuries. Most significantly, Mr. ST had an exacerbation of his admittedly significant pre-existing eczema.

Mr. ST's eczema was first assessed by MAS on 26 November 2003. A MAS plastic surgeon found that the aggravation of Mr. ST's eczema was not stabilised but that Mr. ST's condition would likely resolve in short order and that the probable permanent impairment would be 0%.

On 3 February 2004 a MAS psychiatrist found that Mr. ST suffered from an adjustment disorder with anxiety and depressed mood but that again his condition was not stabilised.

In 2006 there was further assessment of both the eczema and the psychiatric condition. This time a different MAS psychiatrist found that Mr. ST was chronically exaggerating and that there had been no psychiatric injury caused by the accident. A dermatologist found that Mr. ST's eczema did constitute a significant impairment and assessed it at 25% WPI. Both assessments were wildly inconsistent with the prior assessments.

The insurer sought a review of the physical assessment findings. The claimant sought a review of the psychiatric assessment findings. Both review applications were refused.

The insurer then sought a further assessment of the dermatological condition (the third such assessment). The further assessment took place on 11 January 2007. Again, the dermatological condition was assessed at 25%.

The insurer has now sought a review of this third dermatological assessment. The review has been granted. The MAA have encountered the difficulty that there are no additional qualified dermatologists who have not already rendered an opinion in the matter who can sit on the appeal panel. A "consultant" has been co-opted to the review panel.

Mr. ST has also had various other injuries (to his back, neck and teeth) assessed. In total Mr. ST has attended 9 MAS assessments over a 3 year period. There have been multiple applications for review and multiple applications for further assessment. It has been 7 years since Mr. ST's accident and his case is still far from resolved.

This case could have been heard by a District Court judge, appealed to the Court of Appeal and perhaps even progressed through a special leave application in the High Court faster than it has progressed through MAS.

These case studies give rise to some important questions.

1.1. Are there cases that become bogged down in the MAS system? What can be done about these cases?

1.2. Does MAS really dispose of cases more efficiently and more quickly than a hearing in the District Court (or even a CARS assessment)? Whilst the standard District Court case is intended to be finalised in 9 months and the standard MAS case is designed to be finalised in 5 months, this is not a fair comparison. It is necessary to add together MAS time and CARS time to have a fair equivalent to the 9 months' average District Court turn around time.

2. MISTAKES

There is no published data as to the mistake rates by MAS assessors. The review rate is not a reliable guide to the number of mistakes made by MAS assessors. Many mistakes may be made that are not "material". The MAA will only allow a review if the mistake made was material in that it was likely to change the outcome (moving to above or below 10% WPI). The Committee may be assisted by asking the MAA and the doctors about what type of mistakes are commonly made and what is being done to prevent those sorts of mistakes reoccurring.

Of particular concern to the Bar Association is the difficulty doctors face in having to make different assessments under different guidelines across an array of different types of personal injury. The Association advocates using one consistent form of assessment (judicially based) for all forms of personal injury.

The difficulty in having different systems for motor accidents, workers' compensation and other forms of injury is that confusion and mistakes occur.

CASE STUDY 3 – Mr. TA

Mr. TA's shoulder injury was assessed at 9% WPI. Mr. TA's scarring was assessed at 1%. The combined total of 10% fell just short of the threshold which requires that injuries exceed 10%.

It was only upon a close review of the plastic surgeon's assessment by counsel that it became clear that the plastic surgeon assessing scarring had used AMA V rather than AMA IV. It wasn't stated in the report that the doctor had used the wrong book – it was only evident upon looking at the page references to tables within the different guidelines. It is fair to say that most insurers and lawyers would not have identified this error. A lay person acting for themselves certainly would have had no chance of identifying the error.

In this case the error was picked up and a review was obtained. Applying AMA IV scarring was assessed at 2%.

As a consequence of his assessment increasing to 11% Mr. TA will now be entitled to recover general damages. As a young man with a serious shoulder injury Mr. TA will now likely recover upwards of $100,000 for general damages.

In this case, a mistake by the MAS assessor that was initially missed by both the insurer and the claimant's solicitor could have cost the claimant over $100,000. Resolution of the case was delayed by over 4 months as the mistake was sorted out and the review conducted.

CASE STUDY 4 – Mr. MD

A MAS assessor found 16% whole person impairment in relation to a serious neck injury. The insurer sought a review on the basis of a number of errors which the doctor had made. Throughout his report the doctor had used the wrong date of accident. There were typographical errors in the table assessing WPI. Significantly, the doctor had allowed 1% for impairment of activities of daily living. This was clearly an AMA V (workers' compensation) allowance. There is no such provision within AMA IV. The doctor had used the wrong criteria for assessment!

The insurer obtained their review. The review panel agreed with the initial assessment of the neck injury at 15% but corrected the mistake of allowing the extra 1% for activities of daily living.

Ultimately the just outcome was obtained but only after considerable expense was incurred by the parties (in addressing the review) and the MAA who had to pay for three doctors to conduct the review assessment.

Questions which the Committee may care to ask the MAA and the MAS doctors include:

2.1. How do mistakes such as those outlined above occur?

2.2. Does the MAA acknowledge that mistakes of this nature impose a considerable cost upon the parties to rectify?

2.3. Does the MAA acknowledge that there may be some claimants who are missing out on significant awards of general damages as a consequence of errors by MAS assessors? Is it acknowledged that the complexity of the AMA IV guides and the MAA's own guidelines make it difficult for non-medically trained persons (including legal advisors) to discern errors made by MAS assessors?

2.4. The CTP insurers each have their own internal rehabilitation departments. This provides them with a ready resource in reviewing MAS assessments looking for errors. Claimant's solicitors are not as well resourced or as well trained in medical assessments. They do not have the medical background that in-house rehabilitation staff have. Does the MAA acknowledge that claimant's legal representatives are at a distinct disadvantage in detecting and addressing errors made by MAS assessors?

3. INCONSISTENCIES

One of the most frustrating aspects of the MAS process is inconsistent results. Both claimants and insurers will frequently use MAS trained and appointed doctors to conduct their own medico-legal assessments. Imagine the frustration when a subsequent MAS assessment comes to a completely different conclusion. Why do MAS assessors in their medico-legal capacity reach a different conclusion to fellow MAS assessors acting for the MAA?

The MAA like to explain these inconsistencies on the basis of possible variations in the claimant's presentation. However, this just cannot explain constant disparity in outcomes. The suspicion is that doctors acting in a medico-legal capacity tailor their report writing depending upon who they are paid by.

However, even assessors acting for the MAA reach radically different conclusions on identical facts. Again, this is party explainable by the subjectivity of the MAA guides. The MAA like to create the impression that the MAS system is objective. The reality is it is not. For example, mild brain injury is assessed on a discretionary basis between 0 and 12%. Clearly different doctors will come to different views as to what constitutes a 10% and what constitutes an 11% mild brain injury.

Other areas of assessment appear equally subjective. The MAA has recently introduced the TEMSKI scale to assess minor scarring. Minor scarring is assessed in a discretionary range between 0 and 9%. TEMSKI is designed to provide greater certainty to modest assessments. Nonetheless, inconsistent results still occur.

CASE STUDY 5 – Mr. RB

Mr. RB was assessed by a MAS assessor on 24 January 2007. The doctor applied TEMSKI and indicated that scarring should be assessed at 1%.

However, the assessor had not been formally asked to assess scarring. His comments were gratuitous. A formal assessment by a plastic surgeon occurred on 20 February 2007. The plastic surgeon also used TEMKSKI and assessed WPI at 3%.

Given that 1 percentage point difference can make a $100,000 difference to a claimant, the variance between two assessors assessing the same scarring condition only 6 weeks apart shows that even TEMSKI does not deliver consistent outcomes.

It is noted in passing that the first assessment was not conducted by a plastic surgeon. To save money the MAA is endeavouring to train a broad array of doctors to do scarring assessments. In this case the use of a non-specialist plastic surgeon may help explain the inconsistent outcome, but may also demonstrate the extreme danger in using non-specialists to assess scarring.

CASE STUDY 6 – Mr. FF

Mr. FF was the subject of a MAS assessment on 25 September 2006. The assessor found 3% impairment to the right knee, no impairment of the left ankle and no impairment of the lumbar spine.

Mr. FF was subsequently reassessed on 17 April 2007, just over 6 months later. Mr. FF had not undergone any surgery in the intervening period. At the second assessment a different assessor found 15% impairment of the right knee, 8% impairment of the left ankle and 5% impairment of the lumbar spine for a combined total of 27% WPI.

It is just not possible to understand how one assessor could find 3% whole person impairment whilst another assessor could find 27%.

It is noted that the first assessor was not an orthopaedic specialist but rather a practitioner in "musculoskeletal medicine". The second assessor was an orthopaedic surgeon. The Association has significant concerns about the use of non-specialists to conduct MAS assessments.

The simple question for the MAA is how do these types of inconsistencies occur? It is very difficult for the legal profession to have faith in the fairness, objectivity and impartiality of the MAS process when results like this are not uncommon.

Additional questions which the Committee may wish to put to the MAA and its medical experts, include:

3.1. What are the areas of subjective assessment under the MAA guides and AMA IV? What can be and is being done to reduce these areas of subjectivity?

3.2. Does bias play any role in leading to inconsistent results? If so, what is the MAA doing to address issues of bias?

3.3. Is the MAA concerned that in allocating scarring assessments to doctors other than plastic surgeons there will be even greater inconsistency in the assessment of scarring?

3.4. What are the qualifications of someone who practices "musculoskeletal medicine"? How do these qualifications render an assessor qualified to make MAS assessments? Does the MAA propose to continue using general practitioners and "specialists" in musculoskeletal medicine to conduct MAS assessments?

4. SUBJECTIVITY AND UNFAIRNESS

The Association's primary submissions to the Committee have already raised a number of issues with regards the operation of the AMA IV and the MAA guidelines. These included the failure to recognise epicondylitis (elbow) as a painful and disabling condition. They also included the inconsistency of assessing a disc prolapse in the neck with radiculopathy at 15% WPI whilst the same disc injury (prolapse with radiculopathy) in the low back is assessed at 10%.

A number of other case studies are illustrative of difficulties, subjectivity and unfairness in MAS evaluations.

CASE STUDY 7 – Mrs. LG

Mrs. LG is in her 70s. She was knocked down by a reversing vehicle. As a consequence Mrs. LG suffered a fracture of the head of the femur (at the top of the leg connecting into the hip).

As a consequence of the fracture Mrs. LG has developed avascular necrosis in the femoral head. In lay terms the bone is deteriorating more rapidly than it otherwise would have.

As a consequence it has been suggested to Mrs. LG that she have a hip replacement. Mrs. LG is reluctant to undergo that surgery. General anaesthetic carries significant risks for the elderly.

Mrs. LG has been assessed at 2% WPI due to restricted range of movement in her hip. There is no medical dispute that Mrs. LG has significant pain in the hip and is restricted in her activities of daily living.

If Mrs. LG had a hip replacement then it is likely that he condition would be slightly improved. Moreover, a hip replacement results in an automatic assessment of 15% WPI. It is both ironic and bizarre that surgery that would lessen Mrs. LG's pain and potentially improve her mobility (albeit with a risk of complications) would result in an assessment over the threshold whilst in resisting the potentially risky surgery Mrs. LG goes without any compensation for her pain and suffering.

Due to her age Mrs. LG receives no compensation for economic loss. If her care needs fall below 6 hours per week, she receives no compensation other than her medical injuries. This is despite Mrs. LG now being unable to walk more than 500 metres whereas previously she had been an active and enthusiastic bushwalker.

Some questions that the Committee may wish to ask based on this case study are as follows:

4.1. Is it "fair" that Mrs. LG goes uncompensated for her pain and suffering?

4.2. The MAS system makes no allowance whatsoever for future degeneration. Imagine Mrs. LG was 20 years younger and that the medical advice was that she was going to need the hip replacement within 5-10 years due to the avascular necrosis. In those circumstances Mrs. LG would still miss out on general damages, even if it was considered medically inevitable that within 5-10 years time she would require the surgery that would put her over 10% whole person impairment. Is this a fair, just or proper outcome?

4.3. Why doesn't the MAA allow the prospects of future degeneration to be taken into account in assessing whole person impairment?

CASE STUDY 8 – Mrs. C

Mrs. C is blind. Mrs. C walked her daughter to the local school each morning accompanied by her toddler son and her guide dog. Walking home, a car reversing the wrong way down a one-way street ran over Mrs. C's son causing serious injuries. The next day life support was withdrawn and the son died.

Mrs. C suffered from chronic and major depression as the understandable consequence of the death of her son. However, the MAA guidelines for the assessment of psychiatric impairment discriminate enormously against parents who have a child killed but who are still required to maintain some semblance of sanity for the purposes of caring for a surviving child.

An assessment at common law of general damages would have yielded Mrs. C in the order of $80-120,000 in compensation for her prolonged depression and grief. However, Mrs. C's case was settled for $15,000 (for future treatment expenses) as Mrs. C could not exceed 10% WPI.

The sheer idiocy of some aspects of the psychiatric assessment guides is illustrated by reference to table 7.1 in the MAA Impairment Assessment Guidelines. A MAS assessor looks at self-care and personal hygiene. The level of impairment that leads to an assessment exceeding 10% is moderate impairment where a person cannot live independently without regular support and needs prompting to shower daily and wear clean clothes. Such a person cannot prepare their own meals and frequently misses meals.

This was not Mrs. C's problem. As a consequence of her grief Mrs. C cleaned obsessively. She would spend up to 3,4, or even 5 hours per day cleaning. Clearly, this was grossly abnormal behaviour that impacted upon Mrs. C and her family. Nonetheless, for MAA purposes, Mrs. C was assessed in class 1 as having no deficit with self-care and personal hygiene.

The Association has previously made submissions to both the Committee and the MAA regarding introduction of a death benefit for parents who lose children in motor vehicle accidents. Such a benefit exits in the UK and South Australia.

The Committee has previously recommended to the MAA that they consider implementing just such a benefit.

Questions that the Committee may wish to put to the MAA are:

4.4. Do the psychiatric assessment guides work in producing fair assessments for parents who have lost a child in a motor vehicle accident? If not, what is being done to fix them?

4.5. Is the MAA giving any further consideration to the issue of a death benefit?

Other more general questions which the MAA may wish to consider include:

4.6. Do the medical experts believe that the MAA guides operate evenly and fairly?

4.7. Does the 10% WPI threshold fairly distinguish between those who deserve compensation and those who don't?

5. COSTS

The motor accident cost regulations provide that the total costs recoverable for all MAS disputes in any claim are capped at $1, 540 (inclusive of GST). No matter how many further applications may be lodged, no matter how many reviews there are, no matter how many submissions need to be compiled in relation to those reviews and further assessments, the maximum costs recoverable remain fixed and cannot be increased.

Any competent solicitor experienced in personal injury law and able to understand and address the complexities of the MAS system charges more than $220 per hour. Accordingly, if the MAS assessment process consumes more than 8 hours of legal time then the claimant ends up subsidising the MAS process and insurer profits.

In most of the case studies referred to above the claimant has suffered a significant financial penalty, often through no fault of their own. With case study number 1 (Mr. MA) the 3 year MAS process has cost in excess of $5,000 in legal costs. Mr. MA is left over $3,500 out of pocket.

Mr. ST's costs situation (case study number 2) is even more alarming. With multiple further applications and multiple reviews there have been lengthy submissions drafted. There have been conferences with Mr. ST to explain the MAS assessments to him and to obtain his further instructions. It takes considerable time just to read the 9 MAS assessments that have occurred so far. The total legal costs of the MAS process (spread over 3 years) exceeds $20,000. However, the maximum Mr. ST can ever recover is $1,540.

In the case studies involving assessor mistakes the claimant has borne the cost of the MAS errors through the review process.

The regulated fee is adequate to cover the costs of a MAS application. However, it is not adequate to cover the costs of a review or a further assessment.

The Association does not seek the recovery of additional costs where the claimant pursues an unsuccessful application for further assessment or an unsuccessful review. However, where the insurer unsuccessfully pursues a further assessment or a review or where the claimant successfully pursues a further assessment or a review why shouldn't the claimant recover those costs. After all, the insurer could always have conceded whole person impairment.

The following questions are suggested for the MAA:

5.1. Is it acknowledged that the fixed costs of $1,540 do not adequately cover the costs of a further MAS assessment or a review? Is it acknowledged that claimants end up cross-subsidising insurer profits where an insurer unsuccessfully

seeks further assessment or review of an initial assessment over 10% WPI?

5.2. What reason does the MAA have for not allowing a claimant to recover costs of successfully defending or successfully appealing to obtain a WPI assessment over 10%?

COMMENTS REGARDING MAS

Lest it be thought that the matters raised above consist solely of complaints by lawyers it may be useful for the Committee to review the findings of the Justice Policy Research Centre in 2004 and 2005. The Justice Policy Research Centre was retained by the MAA to gauge the views of scheme users (including MAS assessors themselves, CARS assessors, insurers, claimants and lawyers) as to the operation of the Motor Accident Scheme (MAS and CARS). The following comments are extracted in relation to perceptions of MAS.

Comments by CTP insurers

- *" Although they rated the system as fair, many interviewees commented on the unfairness of the 10% WPI impairment threshold or the method of assessing it".*
- *"CTP insurers were also critical of the review process and the delays associated with it[1]."*

Comments by the MAS Assessors

- *"A significant minority (of the MAS assessors interviewed) voiced disquiet about the 10% whole person impairment threshold describing it as unjust, arbitrary and difficult to apply with precision."*
- *"There were concerns about the MAA permanent impairment guidelines and the AMA IV, including claims that there are inconsistencies within and between them. Those assessors who also worked for WorkCover preferred the AMA V".*

The whole system of determining whole person impairment and MAS was introduced in 1999 to reduce payouts for non-economic loss. The aim was to reduce the total NEL burden each year from $250 million to $150 million.

This objective has been achieved. However, as addressed in the Bar Associations primary submissions, CTP insurers have profited by over $100 million in surplus profits for each of the first 4 years of the new scheme. In short, even if the changes brought about by introducing MAS had not been made, the scheme would still have been stable and premiums would not have

[1] JPRC Report - Study 2 – October 2004 pg. 50

risen. Insurers just would have missed out on making super profits for those 4 years!

The Bar Association remains of the view that it is preferable to have a uniform approach to the determination of non-economic loss across all injury categories. Section 16A of the Civil Liability Act provides an appropriate model that eliminates the delays and medical subjectivities of the MAS process.

22 August 2007