Submission
No 3

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

Organisation: The New South Wales Bar Association

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The New South Wales Bar Association

00/334

16 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

Eighth Review of the exercise of the functions of the Motor Accidents Authority

Thank you for your letter of 9 July 2007 seeking the New South Wales Bar Association's submission to the above Law and Justice Committee inquiry.

A copy of the Association's submission is attached.

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

Yours sincerely

Michael Slattery QC
President

Disc:16 August 2007

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STANDING COMMITTEE ON LAW AND JUSTICE

EIGHTH REVIEW OF MOTOR ACCIDENTS SCHEME

16 August 2007

Introduction

The New South Wales Bar Association ("the Association") appreciates the opportunity to provide submissions and questions for the Standing Committee on Law and Justice to consider in its annual review of the motor accidents scheme.

The Motor Accidents Authority ("MAA") is required to table its Annual Report by the end of November each year. Initially the Standing Committee conducted its review of the Motor Accidents Scheme in December, leaving little time for scheme stakeholders to consider the MAA Annual Report and make submissions. As a consequence of this difficulty the Committee hearings were shifted to February or March in the year following the tabling of the Annual Report. The Association strongly supported this change as it gave a proper opportunity for detailed comment on the Annual Report to be provided to the Standing Committee.

Unfortunately this arrangement was disrupted in 2007 by the State election in March. The current review has been delayed as a consequence.

The Association respectfully suggests that after this year's review the Standing Committee return to the pattern of conducting its hearings in February or March so that the Standing Committee is considering the most recently available data from the MAA's Annual Report.

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 projects that an insurer would make 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, from any premium collection year the MAA's actuaries regularly provide estimates of likely insurer profit based on claims payments to date and the reserve estimates held by insurers.

The MAA retains Taylor Fry actuaries to conduct this exercise annually and the results as at June 2006 are tabulated on page 89 of the MAA Annual Report for 2005-6. For ease of reference page 89 is annexed to these submissions. Also annexed is the identical table from the 2004-5 Annual Report (page 82).

What immediately stands out upon comparing the two tables is the massive change in profit projections for 2003. The 2005 Annual Report forecasted that insurers would make $264 million in profit (18.9% of premium written) for 2003. Only 12 months later this forecast had been lowered to $135 million (9.7%). In the space of 12 months there has been a $130 million blow out in anticipated claim costs from 2003. However, nowhere in the MAA Annual Report is there any explanation for this increase. The short and simple question is – where has the money gone?

The Taylor Fry estimates show that on current projections the CTP insurers stand to retain up to 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 reach about half a billion dollars. On current projections insurers will be delivered at least double the profits for which they originally filed over three consecutive years (1999-2002).

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 these 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 Association again has a simple question – is it fair that all the road safety dividend be returned to motorists or should part of the benefits be shared with the injured?

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 Does the MAA have up to date profit estimates beyond those set out on page 89 of the 2000 Annual Report? Those figures are now 12 months out of date.

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 Over the history of the motor accident scheme since 1988, has there ever previously been such a period of sustained profitability for CTP insurers?

1.6 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?

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

1.8 Does the cheapest premium also mean NSW has the lowest benefits paid to the injured?

1.9 Have any insurers yet released reserves put aside since 1999? If so, what reserves have so far been released, how much has been released and in relation to which years?

2. The 2006 report of the Standing Committee

The Standing Committee on Law and Justice published its seventh report reviewing the exercise of the functions of the MAA and the MAC in September 2006.

The Association suggests 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 1 suggested that the MAA consider and report on possible scheme changes (including possible legislative changes) so as to further increase the percentage of premiums ultimately paid to claimants. What steps has the MAA taken in the past 12 months to implement this recommendation?

2.2 Recommendation 4 was that the MAA prepare a report on the impact of the 1999 motor accident reforms and provide a copy of that report to the Committee. Was this report prepared? What (if any) changes has the MAA implemented as a consequence of the report?

2.3 Recommendation 6 was that the MAA closely monitor insurer compliance with treatment, rehabilitation and attendant care guidelines to ensure that the medical needs of claimants are not prejudiced by commercial relationships between insurers and service providers. What steps has the MAA taken in the past 12 months in accordance with this recommendation?

2.4 Recommendation 7 was at that the MAAuthority review its information strategy regarding complaints handling procedures. The Bar Association is of the view that the MAA Complaints Handling Procedures are still not well publicised and are still not well accessed. The fact that very few complaints are made ought not to be considered evidence of widespread satisfaction with the motor accident scheme. To the contrary, there is widespread dissatisfaction with a number of elements of the motor accident scheme. The experience of those who make complaints is that little ever actually happens. What feedback has the MAA received with regards its complaint handling procedures? Is there general satisfaction with those procedures? Are complainants deterred by a sense of inevitability that nothing will ever change as a consequence of any complaint being made?

2.5 Recommendation 13 suggested that the MAA report to the Committee on its further efforts to analyse the impact of the cost regulations on claimants with a view to determining whether the regulations significantly disadvantages claimants at the expense of insurers. The Bar Association remains of the view that the cost regulations unfairly penalise claimants in a number of respects. Further submissions are made in that respect below. The Bar Association looks forward to the opportunity to comment further on any report that the MAA may make to the Committee as to its further efforts to analyse the impact of the cost regulations.

2.6 Recommendation 21 was that the Minister of Commerce review the operation of section 81 of the Motor Accidents Compensation Act 1999 in light of the NSW Court of Appeal

decision in *Maile v Rafiq* [2005] NSWCA 410 with a view to determining whether the section should be amended to ensure that motor accident disputes are resolved expeditiously. The decision in *Maile v Rafiq* dealt with an insurer withdrawing an admission of liability. The Court of Appeal have since further considered the question in *Nominal Defendant v Gabriel* [2007] NSWCA 52. The Court of Appeal has held that an insurer can always withdraw an admission of liability in court pleadings. This decision significantly undermines the certainty as to liability determinations which section 81 was intended to provide. What steps has the MAA taken to address the Court of Appeal decision in *Nominal Defendant v Gabriel*? A separate submission on this issue is set out below.

2.7 Recommendation 22 suggested that the Minister of Commerce develop an information strategy to bring the existence of the gap between CTP and public liability insurance to the attention of NSW CTP policy holders and policy brokers. This recommendation was based on submissions that have been made by the Association over a number of years. What progress has been made in implementation of the information strategy? Again, a separate submission is set out below.

3. The 10% Whole Person Impairment Threshold and AMA IV Guides[1]

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.

[1] This submission largely revisits the same submission made to the Standing Committee on Law & Justice for the purposes of its seventh review by the Bar Association. However, the fundamental criticism that the Association has of the use of the AMA IV Guides remain the same. The questions being asked are still perfectly proper and valid questions as to the shortcomings in the AMA IV Guides.

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

3.1 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?

3.2 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?

3.3 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%?

3.4 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?

3.5 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 modify the effect of AMA guides through its own guidelines?

3.6 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 the threshold determination for entitlement to general damages?

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

3.8 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?

3.9 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 based on AMA IV. The 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 making the threshold test fairer?

4. Late allegations of fraud[2]

The Association has continued to receive 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 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.

[2] Again, this submission is similar to that made by the Bar in 2006. Over the past 12 months the problem identified remains unfixed.

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

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

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

4.3 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?

5. Late withdrawals of admissions of liability[3]

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 Association is aware of a number of cases 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:

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

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

5.3 It is noted that in response to similar questions addressed to the MAA by the Standing Committee in 2005 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 breaches by those CTP 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 offending insurers have successfully implemented reforms to ensure the accuracy of their determinations of liability?

6. 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 Bar Association understands that most of the applications lodged are by insurers.

[3] In 2006 the Bar Association submitted that the Motor Accidents Authority needed to address this issue. Recommendation 21 by the Standing Committee in its September 2006 report was that the Minister for Commerce address this issue. Since that recommendation nothing further has occurred except that the Court of Appeal has handed down a decision in *Nominal Defendant v. Gabriel* which emphasises that firmer rules are required regarding insurers' ability to withdraw admissions of liability.

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

6.1 Can the MAA provide a summary to the Standing Committee of administrative challenges issued in the Supreme Court against the MAA as to decisions by MAS and CARS to date?

6.2 Which matters are still in progress? Where matters have been resolved, what was the outcome?

7. 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 2005 in accordance with the operation of s10(2) of the *Subordinate Legislation Act 1989*.

The NSW Association provided the MAA with submissions in relation to the proposed amendments to the costs regulations.

The significant mathematical errors identified by the 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 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 in the nearly two years since 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. This review has still not occurred.

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

7.1 Does the MAA remain committed to annual indexation of legal costs under the costs regulations? If so, why did five years elapse from the commencement of the MAC Act in October 1999 before any indexation was allowed? It has now been nearly two years since costs increased. When will the next indexation occur?

7.2 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?

7.3 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 equivalent to 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?

7.4 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 obtained an award of damages that exceeded an offer that the claimant had made to the insurer? This is the costs regime currently in place in the Supreme and District Courts. Will the MAA consider this proposal?

7.5 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?

Recommendation 13 in the seventh report of the Standing Committee issued September 2006 was that the MAA report on any cost disadvantages to a claimant in circumstances where an insurer forced a rehearing contrary to the claimant's wishes. What is being done to implement this recommendation?

7.6 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?

7.7 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 $165.00 per hour inclusive of GST is significantly less than market rates. The MAA pays CARS assessors $270.00 per hour for their work. Why is the claimant allowed to recover $105.00 per hour less?

The MAA reported to the Standing Committee four 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 ever been concluded or has it been abandoned? If concluded, what were the findings?

7.8 Does the MAA agree that the current allowance for costs represents less than the market rate cost and that the inevitable consequence is to have the claimant cross-subsidise the operation 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?

8. Insurance gap between CTP and public liability insurance

The Association has made previous submissions on this issue to the Standing Committee on Law and Justice. The Standing Committee has three times recommended that the MAA investigate the situation and take action. Unfortunately, progress has been glacial. 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.

Three times the Standing Committee on Law and Justice has specifically recommended that this issue be addressed. The 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 three years the recommendations of the Standing Committee have effectively been ignored.

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

8.2 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?

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

8.3 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?

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

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

9 The Blameless Accident Regime

As at 1 October 2007 Section 7E of the Motor Accidents Compensation Act 1999 will take effect. The purpose of this section is to effectively eliminate the *"inevitable accident"* defence. Pedestrians and passengers who are injured as a result of a blameless accident will not miss out on compensation. Examples of blameless accidents include where a driver suffers a sudden medical emergency (such as a heart attack or epilepsy), sudden mechanical failure and the like.

The Association has raised with the MAA concerns as to the drafting of Section 7E. It is clearly the intent of the legislation to eliminate any claim by the driver of the vehicle which causes the accident. Section 7E(1) provides that there is no entitlement to recover where the death or injury to a driver was caused by an act or omission of that driver.

The Association is concerned that there are significant problems with the drafting and that it remains open for a driver in certain circumstances to recover damages as a consequence of a blameless accident.

For example, due to an unforseen leak in a hydraulic hose a truck's brakes fail. The vehicle runs off the road with the driver having no opportunity to maintain control absent any braking capacity in the truck. The driver is injured.

Assume that there has been no negligence on the part of the owner of the truck. Assume also that there has been a proper program of maintenance. Brake hoses have been regularly inspected and replaced. There was no reason to suspect that this sudden and unexpected incident might occur.

Clearly if the truck ran into a preschool and injured children then those children would be covered by the scheme. However, on the current drafting of Section 7E it is the Bar Association's view that the driver would also be covered. The accident was not caused by any act or omission on the part of the driver.

Does the MAA agree with the Association that there are potential deficiencies in the drafting of the legislation? If so, what is the MAA doing to address those deficiencies?

A further example the Association has raised with the MAA is as follows:

> If a driver suffers sudden onset of a medical condition (stroke, heart attack, epileptic fit) then the front seat passenger is protected by the new provisions in the event of a crash. However, if the front seat passenger grabs the steering wheel or applies the handbrake in an unsuccessful effort to avoid a crash then, on the basis of some current authorities, the passenger becomes a *"driver"*. In those circumstances does the exclusion under Section 7E (unfairly) apply to the passenger who has become driver?

The New South Wales Bar Association supports the principle of removing the inevitable accident defence. However, the Association is concerned that the current provisions are not adequately drafted and do not neatly achieve the desired effect. Does the MAA agree?

2004 annual Report.

Premiums

Scheme development by underwriting year (all figures are in $ millions)

Year ended 30 Sep	Premiums written	Acquisition costs[1]	Estimate of ultimate claims costs in insurers' premium filings		Estimated ultimate claims cost excluding claims handling expenses			Claims cost ultimate claims handling expenses	Estimated profit
			Undiscounted	Discounted +15% prudential margin[2]	Undiscounted	Discounted	Discounted +15% prudential margin	Discounted +15% prudential margin	
2000	1026	200	1053	1211	998	710	732	774	350 (26.5%)
2001	1321	198	977	1122	1033	767	806	852	271 (20.5%)
2002	1348	185	997	1136	1095	796	860	908	248 (18.5%)
2003	1393	197	1018	1171	1211	907	1005	1063	135 (9.7%)
2004	1476	222	1061	1220	1292	935	1053	1117	137 (9.3%)

Claim payments

Year ended 30 Sep	Claim payments to 30/9/06		% of full claims finalised	Estimated proportion of claims costs paid	
	Actual $m	Discounted $m		Undiscounted	Discounted
2000	722	566	98%	72%	80%
2001	614	511	91%	59%	67%
2002	435	372	82%	40%	47%
2003	282	256	66%	23%	28%
2004	159	149	49%	12%	16%

Notes:

1 Including estimated net cost of reinsurance

2 The discounted value of the claims estimate translates the estimated ultimate total claim payments back to underwriting year dollars for valid comparison. The actual amount that insurers pay will be greater than the discounted amount.

3 APRA requires that insurers' estimates of their claim liabilities include a prudential margin that will provide at least a 75% probability that the insurers' provisions are sufficient to cover their liabilities. This represents a prudential margin of approximately 15%.

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Scheme development by underwriting year *(All figures are in $ millions)*

Year ended 30 Sep	Premiums written	Acquisition costs[1]	Estimate of ultimate claims costs and claims handling expenses presented to Board		Estimated ultimate claims cost excluding claims handling expenses			Estimated ultimate claims costs including claims handling expenses	Estimated profit
			Undiscounted	Discounted + 75% prudential margin[3]	Undiscounted	Discounted	Discounted +15% prudential margin	Discounted +75% prudential margin	
2000	1325	200	1165	1211	1041	717	753	796	328 (24.8%)
2001	1321	198	1177	1185	1047	757	815	862	261 (19.8%)
2002	1342	185	1152	1146	1043	743	822	869	288 (21.5%)
2003	1315	197	1018	1121	1061	786	884	935	264 (18.9%)

Claim payments

Year ended 30 Sep	Claim payments to 30/9/05		% of full claims finalised	Estimated proportion of claims costs paid	
	Actual	Discounted		Undiscounted	Discounted
2000	592	476	88%	57%	66%
2001	435	373	88%	41%	49%
2002	236	212	65%	23%	29%
2003	139	131	42%	13%	17%

Notes:

1 Including estimated net cost of reinsurance

2 The discounted value of the claims estimate translates the estimated ultimate total claim payments back to underwriting year dollars for valid comparison. The actual amount that insurers pay will be greater than the discounted amount.

3 APRA requires that insurers' estimates of their claim liabilities include a prudential margin that will provide at least a 75% probability that the insurers' provisions are sufficient to cover their liabilities. This represents a prudential margin of approximately 15%.