Submission No 10

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

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NEW SOUTH WALES BAR ASSOCIATION SUBMISSIONS

STANDING COMMITTEE ON LAW AND JUSTICE: ELEVENTH REVIEW OF THE MAA AND THE MAC

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1. The New South Wales Bar Association is always pleased to be able to provide submissions to the Standing Committee on Law and Justice as it conducts its statutory review of the operation of the motor accidents scheme.

2. It is noted that for the first time since the introduction of the *Motor Accidents Compensation Act* 1999, there is a new government. There are also a number of new members of the Standing Committee. The Association would be pleased to provide whatever assistance it can to familiarise the Committee with the operation of the motor accidents scheme, including providing a more general briefing as to the operation of the scheme.

3. At all times the Association is conscious that the sole purpose of the motor accidents scheme is to provide compensation for those injured in motor vehicle accidents. The collection of compulsory third party premiums (green slip fees) is not an end in itself, but rather a means to facilitate society taking care of those who have been injured, mostly through no fault of their own.

4. Many of the issues raised by the Association in these submissions have been the subject of submissions to previous reviews. The Association does not apologise for being repetitive – these issues are re-visited because of their importance to the injured. New evidence and new case studies are presented.

5. Topics which this year's submissions cover are:

   (i) The Standing Committee on Law and Justice review process.

   (ii) Medical Assessment Service (MAS) and Whole Person Impairment (WPI).

   (iii) Insurer profits.

   (iv) The CARS review.

   (v) Legal costs.

   (vi) Section 89A *Motor Accidents Compensation Act 1999*.

The Standing Committee On Law And Justice Review Process

6. The Association very much accepts that it is a matter for the Standing Committee to determine the timing and process for its periodic reviews of the motor accidents scheme. The Association simply notes that the Motor Accidents Authority (MAA) is required to table its annual report by 30 November each year. If the Committee continues the timing adopted this year (an October hearing), then stakeholders will be providing submissions to the Committee based on data from the previous year's annual report. Given the lead in time for the MAA to prepare its annual report, the data will be at least eighteen months old.

7. In previous years, the Committee has conducted its enquiries in February/March/April, which has allowed stakeholders to provide submissions based on much more current data from the annual report tabled the preceding November.

8. The Association reiterates a comment made in its submissions last year with regard to follow up by the Standing Committee as to its previous recommendations:

> *"It is disappointing to see the valuable recommendations of the Standing Committee simply fade away with the effluxion of time."*

9. The Association views the Standing Committee review as extremely important. It is a singular opportunity for the Association to directly address the parliamentarians responsible for the operation and oversight of a scheme that exists to provide for motor accident victims.

10. Previously submissions from the Association have been adopted by and become recommendations from the Standing Committee. This in turn has seen changes and improvements in the scheme. Unfortunately, the *"success rate"* for adoption and action on recommendations from the Standing Committee is less than 50%.

11. The Association recommends that, as part of the Standing Committee review process, there be mechanisms for follow up on the Government and MAA response to previous year's recommendations. The Association encourages the Standing Committee to include in its published report, not only the current review's recommendations, but also the preceding review's recommendations printed alongside the Government's response.

12. Identified below are a number of previous recommendations of the Standing Committee which the Association submits should be further pursued.

<u>TENTH REVIEW - 2010</u>

<u>Recommendation 3</u>

13. There has been no action from Government to pursue an amendment to the *Motor Accidents Compensation Act 1999* to require that the membership of the Motor Accidents Council only lapse upon the appointment of a new membership group.

Recommendation 4

14. The Standing Committee had sensibly recommended that the independent competition review commissioned by the MAA and the work being undertaken by the Authority to improve 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. No such consultation has occurred with the Association. The Standing Committee also recommended that the results of the review be made publicly available.

Recommendation 5

15. This recommendation dealt with the review of the Motor Accidents Compensation Regulation 2005 prescribing legal costs. Whilst there has been some consultation with the Association as to the need for reform of the costs regulation, the Association has still not seen the proposed regulation. The new regulation will soon be three years overdue.

Recommendation 13

16. It was recommended by the Standing Committee that the Motor Accidents Authority conduct a review of the decisions made by the Medical Assessment Service medical assessors regarding causation to establish whether there are particular issues associated with challenges to these decisions. It was recommended that the review should determine whether improvements can be made to decision-making on causation issues. It was recommended there be extensive key stakeholder consultation and that the results of the review should be made publicly available. The Association is not aware of any of this recommendation being adopted.

Recommendation 14

17. It was recommended 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 MAC and key stakeholders). It was recommended by the Standing Committee that this examination should give consideration to allowing only external assessors or the Principal Claims Assessor to assess late claims disputes. The CARS review has been completed, but not yet published. The Association made submissions to the CARS review regarding the late claims process. The area of late claims remains a mess which requires attention. There is not yet any visible sign or improvement or reform in this area.

NINTH REVIEW - 2008

Recommendation 2

18. *"That the Motor Accidents Authority, by 30 June 2009, act on the recommendation of our eighth review to undertake a review of whole person impairment assessments to establish the extent of inconsistencies and to identify, if necessary,*

additional quality control mechanisms to improve consistency."

Three consecutive reviews by the Standing Committee, the eighth, ninth and tenth, have all recommended a review of the whole person impairment assessment mechanism. No such review has taken place.

19. Representatives of the Association have drawn to the attention of the Motor Accidents Authority inequities and injustices in the WPI assessment system. In fairness, in response to some of those complaints, the MAA has recently acknowledged deficiencies in the guidelines. Unfortunately, a systematic review or even ad hoc amendments to address the grosser inequities have not occurred.

20. The Association is unable to comment on whether the absence of any drive or determination to implement a recommendation made by the Standing Committee three times lies within the Motor Accidents Authority or government. What the Bar Association can say, on behalf of the injured who are the subject of such injustices, is that we are little closer to addressing the issue than when the Standing Committee recommended a systematic review in 2007.

Recommendation 9

21. In September 2008, the Standing Committee recommended:

> *"That the Motor Accidents Authority, in liaison with the Law Society of New South Wales, continue to make the study of the impact of the cost regulation a high priority, with a view to having the revised regulation in place by 1 October 2008."*

22. It is now nearly three years since that recommendation was made and there is still no new cost regulation.

Recommendation 10

23. In response to a submission from the Association, the Standing Committee recommended:

> *"That the Motor Accidents Authority, in liaison with the Law Society of NSW, ensure that the study of the impact of the cost regulation consider provisions for costs in insurer-initiated court proceedings so that claimants are not unfairly financially penalised for having to participate in such proceedings."*

24. Again, this recommendation has not been implemented, with the practical effect that the same unfair financial penalties for claimants continue to apply.

Recommendation 11

25. The Standing Committee recommended in September 2008:

"That the Motor Accidents Authority monitor trends in insurer claims of contributory negligence to determine whether legislative action is required to address any inappropriate incentives to have Claims Assessment and Resolution Service assessments re-heard in court."

26. The basis for this recommendation was that CARS assessments are binding on an insurer unless the insurer has alleged up to 25% contributory negligence. The Association has seen examples of insurers making seemingly spurious allegations of contributory negligence simply to generate and preserve a right to re-hearing.

27. The Association had suggested to the Standing Committee that there was no logic in a system where an insurer is bound by an award of $1 million in damages from a CARS assessment, but could seek the re-hearing of a $50,000 CARS assessor award just because the insurer had alleged 10% contributory negligence. The Association is not aware of any monitoring by the Motor Accidents Authority as to insurer claims of contributory negligence. Nor has there been any indication of the Authority showing interest in effectively regulating this issue.

Medical Assessment Service ("MAS") And Whole Person Impairment

28. The starting point to consideration of the whole person impairment (WPI) threshold is an appreciation that the sole purpose of measuring WPI is as a gateway to compensation for pain and suffering.

29. There is no argument between scheme stakeholders (including insurers) that those significantly injured in a motor vehicle accident should be compensated for their pain and suffering. The political debate (which unfortunately never seems to happen) is just how many of those injured should be considered *"worthy"* or *"seriously injured enough"* to receive such compensation.

30. The Association fully appreciates that the provision of compensation for pain and suffering comes at a cost to motorists through the green slip price. However, the Association's position is that in this area *"user pays"* should be the dominant philosophy. The road user should pay for the social cost of driving which includes the pain and suffering imposed on motor accident victims. Otherwise, it is the accident victim who ends up subsidising the social cost of driving through lower green slip prices.

31. The *Motor Accidents Act 1988* moved away from assessing general damages at large as had been the case under the 1942 legislation. Instead from 1988, injuries were assessed "*as a percentage of a most extreme case*". There was a deductible so that minor injuries received no compensation or minimal compensation for pain and suffering. A judge or arbitrator determined the severity of injury compared to a most extreme case.

32. With concerns as to inflationary pressures on the scheme, section 79 and the regime for assessment as a percentage of a most extreme case were amended in 1995 to introduce

higher thresholds and greater deductibles at the bottom end of the range (section 79A) The Association understands that following introduction of the 1995 amendments, significantly less than 50% of those who made motor accident claims received any compensation for pain and suffering.

33. The introduction of the 10% WPI threshold in 1999 introduced a radical shift in the balance between compensation for the injured and cheaper premiums for the motorist. The 10% whole person impairment ("WPI") threshold is designed to ensure that only 10% of those injured in motor vehicle accidents received compensation for pain and suffering.

34. The threshold has been effective in ensuring that 90% of those injured in motor vehicle accidents receive no compensation for pain and suffering. Repeated calls by the Association (and the Standing Committee) for the MAA to review the fairness of the operation of this threshold have been steadfastly ignored by the Motor Accidents Authority and the former government. As will be demonstrated further below, the thresholds have an arbitrary and capricious effect that would not occur with judicial assessment of pain and suffering.

35. Before turning to case studies, there are two further matters of note.

36. The Association's representative on the Motor Accident Council had the opportunity earlier this year to engage in discussions with the MAA scheme actuaries. The actuaries conceded that looking back on payments for non-economic loss for accidents occurring between 1995 and 1999 (compensated under section 79A), it was clear (admittedly in hindsight) that the 1995 amendments had worked in terms of stabilising payouts for non-economic loss. The tragedy for the 90% of motor accident victims who have missed out on compensation for pain and suffering since 1999 is that the 1999 amendments were not financially necessary.

37. Instead, as will be seen below when discussing insurer profits, the primary beneficiaries from the 1999 amendments have been the CTP insurers, who will pocket over $1.5 billion in excess profits for the period 1999-2009. It turns out that premiums could have been kept at the same level that they have been without the need to introduce the 10% WPI threshold at all. A scheme intended to compensate the injured has instead directed windfall profits to the insurers at the direct expense of the injured.

38. The second matter worth noting is that for non-motor accident cases, the then government introduced section 16 of the *Civil Liability Act* in 2002 to regulate payments for pain and suffering. Section 16 provides for assessment of pain and suffering in accordance with a percentage of a most extreme case, as the *Motor Accidents Act* 1988 used to do. The process of assessment under section 16 is identical to the assessment that was conducted between 1995 and 1999 under section 79A of the *Motor Accidents Act* 1988.

39. There is no logical or coherent reason why 90% of those involved in a motor vehicle accident should receive no compensation for pain and suffering, whilst those injured

people who have claims under the *Civil Liability Act 2002* have a different and less restrictive regime apply.

40. The Association continues to urge the parliament and the government to consider a unified system of tort law in which accident victims are not discriminated against on the basis of the mechanism of injury. The fact is that if some of the excessive profits paid to insurers over the past decade were cut out of the system, the motor accidents scheme could afford to scrap MAS, scrap the 10% WPI threshold gateway and re-institute section 79A at no cost to premiums.

41. The best way to illustrate the inequities of the 10% WPI threshold is to look at case studies. These have been de-identified, but the Association is willing and able to provide the MAS assessment reports concerned to the Standing Committee and has the permission of those individuals involved to do so. It should be remembered that these are not hypothetical case studies. These are real people with real injuries and very legitimate grievances about the operation of the 10% WPI threshold, the AMA IV guides and the MAA Medical Assessment Guidelines.

A. Mr KF and his fractured leg

42. Mr KF was knocked off his bicycle by a car in 2007. His injuries included a bi-malleolar fracture dislocation of the left ankle and a fracture to his left tibia and fibula. It took four rounds of fusion surgery over a lengthy period to get the ankle re-set in an anatomically correct alignment. The MAS assessor accepted that Mr KF continued to have pain and loss of function in his left ankle and restriction in mobility. He was restricted with walking (maximum distance of about 500 metres). He had been unable to return to riding a bicycle (which was particularly punishing - he did not hold a driver's licence). He needed to wear special boots with two pairs of socks to provide ankle support.

43. The MAS assessor observed that Mr KF had minimal movement in his left ankle, was unable to get up on his heels or toes or perform a squat and had lost the spring off his left foot when ambulating.

44. The ankle fusion was properly assessed in accordance with AMA IV (page 80) and Table 3.1 on page 16 of the MAA Permanent Impairment Guidelines. An ankle fusion to optimum position attracts 4% WPI.

45. Mr KF's injury did not even get him halfway to the 10% WPI threshold. Members of the Standing Committee are invited to consider how they would feel if following a motor vehicle accident, they could never again jog or run, could no longer squat, could no longer walk more than 500 metres, could no longer ride a bicycle and were told they got nowhere near the 10% WPI threshold such as to provide compensation for these life altering restrictions.

46. Members of the Standing Committee are encouraged to ask:

- *Did Mr KF really suffer a modest injury that is unworthy of*

compensation for pain and suffering?

- *Should Mr KF and others who suffer similar injuries such as his go uncompensated for their pain and suffering so that green slips can be a few dollars cheaper?*

47. It is noteworthy that in this case, it took four operations (with the associated months of recovery after each operation) to get Mr KF's foot aligned in an anatomically correct position. Under the MAA Guidelines, it doesn't matter whether Mr. KF had four operations or forty – there is no allowance in the calculation of WPI for the number of surgical procedures endured in arriving at the final surgical result.

B. Ms. MT and her teeth

48. Ms MT suffered dental injury in a motor vehicle accident. She was 17 years old at the time of accident. Ms MT lost seven teeth including six in a row in the upper right side of her mouth. Ms MT now wears a denture, although due to instability in the denture, she removes it while eating.

49. Ms MT does most of her chewing on the left-hand side of her mouth. She is not particularly restricted in the food that she can eat, provided she only chews on the one side. Ms. MT faces sixty years of needing to wear a denture. It may be that she can have crowns and implants fitted to fill the gap. If so, she will be required to undergo extensive dental work every decade for the rest of her life.

50. Under AMA IV (p231) and the MAA Guidelines (p32), loss of teeth is only assessed by reference to deterioration in mastication (ability to chew). As Ms. MT could still chew on one side of her mouth, the MAS assessor assessed 0% WPI despite the gross disability on the right-hand side of the mouth.

51. The Proper Officer at MAS rejected an application for review. The claimant submitted that the MAS assessor had failed to assess her area of injury. The Proper Officer responded:

> *"The MAA Guidelines and AMA IV Guides in my view do not require the assessor to qualify on which side the claimant masticates, rather he is required to assess whether or not the claimant can masticate and what she can masticate."*

52. To summarise bluntly, it doesn't matter how many teeth get knocked out in a motor accident – it will be 0% WPI unless ability to chew is compromised.

53. Again, Standing Committee members are invited to consider how they would feel if they or a family member were involved in a motor vehicle accident, lost 7 teeth, faced years of painful dental treatment to manage the injury and were told that they had 0% WPI because they could still chew on the other side of their mouth.

54. The Association's representative on the Motor Accident Council specifically drew the MAA's attention to this case. It has been discussed at the Motor Accident Council. There is as yet no commitment from the MAA to address this issue. There is certainly no timetable to fix what appears to be a gross injustice in the Guides.

55. It should be noted that the Association is not necessarily arguing that Ms MT's injuries should be over 10%. The criticism is that the loss of seven teeth can be assessed at 0%.

C. Mr DG, Mr AM and Scarring

56. AMA IV provides for minor scarring to be assessed on a discretionary basis between 0% and 10%. The MAA have modified the operation of AMA IV through their own guidelines, introducing TEMSKI – the Table for the Evaluation of Minor Skin Impairment. The purpose of TEMSKI is to provide greater consistency for assessors in addressing minor cases of scarring. Whilst the effort to better define what is a 2% scar as against what is a 7% scar is understood and appreciated, TEMSKI contains a fundamental flaw which the MAA appears unwilling or unable to address promptly.

57. Mr DG suffered extensive injuries to his left shoulder, left leg and pelvis in a motorbike accident. Each of the three areas had a significant scar; a 12cm oblique scar on the left shoulder, a 27cm surgical scar that was 1cm wide on the left hip and a 27cm surgical scar that was 2cm wide on the left leg.

58. Applying TEMSKI, the MAS assessor assessed the scarring on the left leg at 3% WPI. Other scars were assessed at 2% and 1% WPI.

59. Rather than adding the scores for the three scars together, the assessor said:

> *Assessment of the scarring sustained in the subject accident views the skin as the entire organ. As such, scarring assessments are not done on each region and then combined, but the area which attracts a whole person impairment is then used to define whole person impairment in regards to scarring from a motor vehicle accident.....*
>
> *The highest value is therefore the assessment of the left knee and the scarring rating, therefore is 3% WPI.*

60. In short, only the worst scar counts and all other scars don't add to the WPI total, despite adding to injury, pain and suffering. Put bluntly, as far as the CTP insurers are concerned, every scar after the worst one costs them nothing.

61. Lest the result in Mr DG's case be considered anomalous, there is the case of Mr AM. Mr. AM had some eleven separate scars covering his right shoulder, right leg, back, left hand, left elbow, right elbow and left knee. Most of the scars were small (between 2cm and 5cm). Nonetheless, they covered a fair portion of his body.

62. The MAS assessment for scarring was 2% WPI. This is exactly the same result as would have been obtained had only the worst scar been assessed and the other ten not existed. Every scar other than the worst one has effectively not been counted or included in the assessment of whole person impairment.

63. These cases have been drawn to the attention of the MAA with the submission that TEMSKI doesn't work as a graduated scale when there are multiple scars, as only the worst scar counts. It was urged that this patently unfair manner of assessment be revised. The Association is not aware of any timetable for a solution to be implemented.

64. Again, Standing Committee members are invited to consider how they would feel if they suffered wide-spread scarring in a motor vehicle accident and were told that due to an unfixed anomaly in the Guidelines, only the worst single scar would be considered when determining whether their injuries cleared the 10% whole person impairment threshold.

D. Mr RT and his injured neck

65. The MAA Guidelines and AMA IV can produce capricious and unjust outcomes when addressing pre-existing impairment. The correct methodology is to assess the whole person impairment immediately preceding the subject accident and deduct pre-accident WPI from the post-accident WPI.

66. Whilst this methodology appears sensible enough at first blush, it can produce capricious outcomes when combined with other aspects of the Guidelines.

67. The Guidelines provide that each section of the spine - cervical/neck, thoracic/mid-back, lumbar/low back is to be assessed as one unit.

68. Mr. RT had an operation in 1985 to fuse his C5/6 disc which had ruptured. Twenty years later in May 2005, Mr. RT was involved in a motor vehicle accident and sustained serious injury to his C6/7 disc. It was necessary for a neurosurgeon to operate, performing a new fusion at the C6/7 disc level.

69. Mr RT was incorrectly assessed by MAS. That is not the issue of principle. The proper assessment should have been

Multi-level structural compromise (the C6/7 fusion) in the cervical region from the accident	DRE IV	25%
Less multi-level structural compromise (disc fusion to a different part of the cervical Spine - C5/6-) pre-accident	DRE IV	25%
		0% WPI

70. The effect of the Guidelines treating each section of the spine as a whole is that anyone who has a pre-existing fusion in their cervical, thoracic or lumbar spines and receives

further injury to that area is most likely to go uncompensated for the additional pain and suffering, where, following a motor vehicle accident, fusion surgery is required for different discs in the same region.

71. A claimant may have had a lumbar fusion twenty years before their motor vehicle accident, which caused no pain and no restriction in activity. Severe disc injury in a motor vehicle accident requires further surgery and an additional and much more significant fusion occurs. Proper application of the AMA IV and MAA guides leads to an assessment of 0% WPI.

72. This outcome is clearly anomalous and unjust.

E. Ms Jane Warrener and the death of her son, Kallem

73. Ms Warrener's 13 year old son, Kallem, was killed in a motor vehicle accident near Moree on 2 February 2007. Ms Warrener does not wish her name to be de-identified - she has readily agreed for her name and the facts of her case to be used in the hope that other parents might one day receive a fairer deal from the motor accidents scheme than she received.

74. Ms Warrener was at work when she was advised that her son had been involved in a motor vehicle accident. Kallem was still alive when Ms Warrener arrived at Warialda Hospital. He was subsequently airlifted to the Children's Hospital at Randwick. Ms Warrener had to drive to Sydney to see him.

75. In Sydney, she was told that there was no hope for Kallem's survival. Ultimately, life support was removed and Kallem's organs were donated for transplant. Ms Warrener suffered a significant psychiatric injury from the experience. The MAS assessor noted that Ms Warrener was sobbing when she reported that she still had the last text message from her son ("*Luv ya mummy*") on her phone. The assessor noted that she "*essentially did not stop* [sobbing] *for the remainder of the interview.*"

76. The MAS assessor concluded:

> *"The major feature of Ms Warrener's presentation was her unremitting grief and sadness concerning the death of her 13 year old son, Kallem. I believe she was in tears for one and half hours of the two hour interview and at times, sobbing very deeply.....Ms Warrener was not anxious or suicidal, but was deeply and unremittingly sad and depressed."*

77. The assessor went on to say:

> *"Ms Warrener's presentation is entirely consistent with the history of the loss of her son and with the documentation provided. I believe Ms. Warrener was genuinely grief-stricken and there was no element of simulation or embellishment of symptoms."*

78. The assessor concluded:

> *"I believe her symptoms of grief are normal and expectable and to some extent will continue for the rest of her life. However, beyond this, her life has been seriously disrupted by the ongoing sadness she experiences, the loss of motivation to engage in life, the loss of social relationships and the increase in her level of alcohol use."*

79. The assessor scored Ms. Warrener's grief using the Psychiatric Impairment Rating Scale (PIRS), a system created by the MAA for assessment of psychiatric injury set out in the Permanent Impairment Guidelines. Without going into particular detail as to the methodology, there is an assessment across six different categories of impairment. Within each category Class 1 is not impaired, Class 5 is grossly impaired. If a claimant has three Class 3 impairments (moderate impairment) across the six categories, then they will be over 10% WPI. If they do not have three Class 3 scores, they will not be over the threshold.

80. Ms Warrener had two Class 3 impairments (social functioning and recreational activities). She also had two Class 2 impairments. Had just one of those Class 2 impairments been assessed at 3, then she would have been over the 10% whole person impairment threshold and would likely have recovered over $100,000 for pain and suffering.

81. This illustrates just how crude and capricious the operation of the PIRS and the 10% WPI threshold can be – one score in one category as determined by one assessor in a one-off appointment can make a $100,000 difference.

82. Members of the Standing Committee are invited to contemplate how emotionally gut-wrenching the experience of having a teenage child killed in a motor vehicle accident might be. Then contemplate how you would feel upon being advised that in order to keep premiums down for NSW motorists, you did not make it into the 10% of those that the motor accidents system deems worthy of compensation for pain and suffering.

F. Ms NB and her left hip and knee

84. Ms NB was riding a bicycle in the company of her husband in 2008 when she was clipped by a truck and knocked down. Both Ms NB and her bike were dragged along the road after part of the bicycle became entangled with the trailer of the truck.

85. As a consequence, Ms NB suffered an acetabular labral tear of the right hip (that required arthroscopic debridement) and probable chondral trauma to the right knee. Stripping out the medical jargon, Ms NB continues to experience variable pain in her right hip, with a feeling of instability and a *"popping and cracking"* sensation in the joint. There is variable pain in the right knee from a moderate to strong degree. The pain causes difficulty with sleeping and there are intrusive thoughts and nightmares of the accident.

86. The MAS assessor observed that Ms NB walked with a permanent limp. The assessor found permanent impairment in both the hip and knee and assessed each at 4% for a total of 8%. An assessment of psychiatric trauma caused by the accident came in at 7%.

87. It should be noted that the psychiatric assessment cannot be added to the physical assessment to get over the 10% WPI threshold. Ms NB receives no compensation for pain and suffering as she has 8% impairment for physical and 7% impairment for psychiatric injury.

88. The above summary does not do justice to just how close Ms NB came to clearing the 10% WPI threshold. The MAS assessor found 50° flexion in the right hip as compared to a normal hip which can flex to 130°. Ms. NB was 1° of flexion or millimetres of movement away from recovering damages for pain and suffering.

89. Loss of hip flexion is assessed using Table 40 on page 78 of AMA IV. If the injured person is able to flex their hip between a normal 130° and 100° then there is no assessable WPI. For loss of flexion to between 99° and 80°, the score is 2% WPI. For loss of flexion to between 79° and 50°, there is *"moderate"* impairment assessed at 4% WPI. If there is less than 50° hip flexion, then the injury is considered *"severe"* and there is an assessment of 8% WPI.

90. Ms NB was measured as having precisely 50° loss of flexion. An additional 1° in a range of 130° (i.e. less than 1%) and her injury would have been categorised as severe and her hip injury would have been assessed at 8% rather than 4%. Add this to the 4% assessment for the injury to her right knee and Ms NB would have been over the threshold and, given her young age and serious injury, likely recovering upwards of $150,000 for pain and suffering.

91. Members of the Standing Committee are invited to consider how they would feel if seriously injured in a motor vehicle accident and told that following assessment, they were 1° of hip flexion out of 130° away from recovering upwards of $150,000 for pain and suffering, but instead just missed out? Would knowing that missing out helped keep down green slip prices a few dollars provide any emotional succour?

92. Just how arbitrary is a system that has an "*all or nothing*" result that can hinge upon 1° of hip flexion? Surely, a graduated system assessing impairment as a percentage of a most extreme case, applied by a judge, arbitrator or assessor, would have to be fairer than the random capriciousness of the result in Ms NB's case.

93. Both MAS and MAS assessors readily concede that measurements such as the one made by the MAS assessor of the degree of hip flexion in this case can produce different outcomes on different days, depending upon the temperature, the time of day and just how flexed or stiff the claimant feels on that particular occasion. It may well be that measurement of Ms NB's hip flexion by a different MAS assessor an hour earlier or a week later would have produced a slightly yet critically different result. Unfortunately, that possibility is not enough to obtain a review or further assessment for Ms NB.

94. When you look at results such as that in Ms NB's case, it is difficult to conclude other than that on cases close to the borderline, the 10% WPI threshold produces arbitrary and capricious results. The Association recommends and urges a return to section 79A and assessment as a percentage of a most extreme case, rather than the random capriciousness of the MAS lottery.

G. Mr MB at MAS

95. Mr MB's son was killed in a motor vehicle accident on 28 November 2008. Mr MB had suffered some psychiatric illness prior to his son's death, although it had not prevented him working or maintaining a healthy relationship with his son.

96. Following his son's death, Mr. MB suffered a major depressive disorder. This was first assessed by MAS on 5 July 2010. The MAS assessor assessed Mr. MB as having 13% whole person impairment, but deducted 10% for pre-existing impairment for a net score of 3% WPI.

97. The MAS assessor made methodological errors in reaching this conclusion, which resulted in the matter proceeding (with the permission of the Proper Officer) to a review panel. The review panel determined the matter on 9 January 2011. The review panel again assessed current impairment at 13% and this time deducted 5% for pre-existing impairment, rather than the original assessor's 10%. The net result was an impairment of 8%, still falling below the threshold.

98. Mr MB's lawyers were of the view that the MAS review panel had made significant errors and failed to take into account evidence that had been put before them. A Motion was filed in the District Court in Nowra to quash the decision of the review panel and have the matter sent back to MAS pursuant to powers granted by sections 61 and 62 of the *Motor Accidents Compensation Act* 1999.

99. The Motion came before Judge Cogswell in the District Court Nowra in May 2011. The CTP insurer for the driver who killed Mr. MB's son opposed the application. Judge Cogswell found that the review panel had not properly considered the evidence before them and that the review had been procedurally unfair. The judge quashed the review panel's decision and sent the matter back to MAS.

100. The matter never proceeded to a further MAS assessment. By this stage, Mr. MB was not only suffering from the trauma of the death of his son, but the further emotional trauma inflicted on him by the MAS process. He significantly compromised his claim and accepted a modest settlement offer from the CTP insurer. Mr. MB effectively gave up; worn out and exhausted by the MAS system.

101. It is noteworthy that consideration of this matter by four separate MAS assessors (one in the first assessment and three on review) resulted in major methodological errors and a major breach of procedural fairness. Whilst it is reassuring that the District Court and Supreme Court can and will send appropriate matters back to MAS to be re-done, the

reality is that by the time they do, many claimants are worn down and worn out and compromise their claim rather than continue fighting for their rightful entitlements.

102. These stories are not the anomalies or the extremes – they are a selection of the day to day injustices that the MAS system and the 10% WPI threshold impose on motor accident victims. The Association recommends against trying to patch up an unfair system. The Association recommends abolition of MAS and application of the section 16 Table from the *Civil Liability Act* to determination of pain and suffering.

103. It is impractical to expect the MAA to make a critical analysis of the effectiveness of the MAS system – there is a bureaucracy at the MAA based on the creation and maintenance of the MAS system. The MAA is emotionally invested in and attached to MAS and accordingly, incapable of independently and fairly reviewing whether MAS works or doesn't. The Association recommends an independent inquiry to review the operation of the MAS system and whether it should be replaced by a reversion to assessment of a most extreme case by a judicial officer or CARS assessor.

104. It is acknowledged that more claimants would receive compensation for pain and suffering if a section 16 table is applied, but given insurer profits under the current scheme, there is scope for such compensation with minimal impact upon premiums.

Insurer Profits

105. Over the last ten years the MAA has steadfastly refused to acknowledge, let alone address, excessive insurer profits. Each year insurers have to have their proposed premium approved by the MAA. The MAA do not permit insurers to charge a premium that allows (on projections) for the insurer to keep as profit more than 8% of the premium collected.

106. Unfortunately for the injured, then MAA's regulatory supervision has not prevented insurers keeping much more than 8% of the premium written between 1999 and 2007.

107. Standing Committee members are invited to consider the table produced on page 59 of the MAA Annual Report for 2009/10. When considering the table, committee members are reminded that a reasonable return for insurers is 8% of the premium written each year.

108. Using column 2 in the estimate of discounted value of profit for insurers, it can be seen that for the underwriting year ended 30 September 2000, insurers have and will keep 30% of the premium written rather than 8%. For the years 2000 through 2006, insurers have and will profit to the tune of between 18% and 30% of premium written.

109. Looking at the bottom of the same column, new members of the Standing Committee might be inclined to think that the scheme has returned to balance with the projection that insurers will only keep 5% of the 2008 premium as profit and will in fact make a loss on the 2009 premium year. However, if ten years of historical experience is any guide, Standing Committee members should not place any faith or credence in the projection that insurers will not make substantial profits from 2008 and 2009.

110. Tables such as that found on page 59 of the 2009/10 Annual Report have been appearing in MAA annual reports since 2003/04. The Association has consolidated each year's projections into one table which is Annexure A to these submissions. What the summary shows is that initial projections as to low profitability inevitably becomes substantial projected and actual profits two or three years later.

111. For example, take the premium collection year ended 30 September 2006. The initial report on that year was contained in the 2006/2007 MAA annual report. The profit projection for that year was 5%. If this were accurate, then insurers would have been making less than the approved 8% return.

112. However, by the time of the 2009/10 report, the 2006 premium collection year was projected to return 18% of the premium to insurers as profits. There were ten percentage points as "super profit" – over $120 million above a reasonable return.

113. What is even more concerning is that there are significant increases in profit projections in relatively well developed premium collection years. The 2008/09 profit projection for the 2006 premium collection year was 13%. That increased to 18% (5 percentage points or 38%) between 2008/09 and 2009/10. The change in estimate as to profitability is $82 million within twelve months.

114. The question can and should be asked, *"What happened between 2008/09 and 2009/10 such that the scheme actuaries suddenly 'found' an extra $82 million in insurer profits in the 2006 premium collection year?"*

115. The MAA assessment of the profitability of the motor accidents scheme between 2000 and 2009 has jumped by $309 million between the 2008/09 and 2009/10 annual reports [see the far right-hand column on the Association's table]. **Why?**

116. What the Association's table very clearly demonstrates is that initial MAA profit projections just aren't reliable. The projection in 2009/10 that insurers will not make any profit simply cannot be treated as reliable on the basis of prior actuarial estimating performance.

117. In all, the "*super profit*" for 2000 through 2006 is in excess of $1.5 billion. The Association repeats a submission put to last year's Standing Committee review – that if CTP insurers did not make a single cent in profit for the rest of this decade, then they would still have made more than 8% return over the first twenty years of operation of the scheme. The Standing Committee is encouraged to ask the MAA to confirm the accuracy of this statement.

118. It might be thought that this sort of gross imbalance in profit results would be the subject of discussion in the MAA Annual Report. However, in a report of some 100 pages, the words "scheme imbalance", "excessive profits" or "super profits" never appear.

119. It appears as if the MAA is unable to acknowledge a fundamental flaw in scheme design. It may well be that the MAA thinks premiums are being set in anticipation of

insurers keeping 8% of premium written, yet the insurers inevitably seem to end up with a profit in excess of 25% of premium written. For this to happen once or twice might be an understandable anomaly. For it to happen year after year points to systemic failure in the premium approval process.

120. The Association invites the Standing Committee to ask the MAA:

(i) Why is there such a gap between premiums setting (8%) and the ultimate percentage of premium kept by the insurers as profit (upwards of 25%)?

(ii) What does the MAA propose to do about this?

(iii) Why has the projection as to the historical profitability of the scheme increased by $309 million in the twelve months between 2008/09 and 2009/10?

(iv) Why does the MAA have any faith in its current premium setting process, given the previous efforts at premium projection?

The CARS Review

121. The Association fully participated in the CARS review process. Detailed submissions were presented which are attached as Annexure B. These submissions address the Association's concern with a number of operational procedures at CARS including the late claims regime.

122. The CARS review process has been concluded and it is understood that a report is in the hands of the Motor Accidents Authority. It has not been said when the report will be released or indeed, if it will ever be released. The Association has yet to receive any indication as to whether this time consuming and expensive review will lead to positive improvements in the operations of CARS.

Legal Costs

123. The Association has made submissions to previous SCLJ reviews on how unjust the current costs regulations are. In most litigation, the successful party recovers well over 60% if not 70% of their legal costs. The only independent evidence about the CARS system is that claimants are recovering no more than 40% of their legal costs.

124. There is no suggestion that lawyers are systematically overcharging. Rather, the costs regulations are so miserly that claimants end up paying the majority of their own (reasonable) legal costs out of their compensation – a subsidy of the system by the injured so that insurers can make excessive profits and motorists can have cheaper premiums.

125. For several years, the Association has been urging that the costs regulations be reviewed. The MAA keep promising that something will happen and to the frustration of the injured, no new regulation appears. The costs regulations should have been

amended to allow for substantial procedural amendments to the Act by 1 October 2008. Nearly three years later, the regulations have still not been amended.

Section 89A *Motor Accidents Compensation Act 1999*

126. One of the significant procedural amendments to the Act in 2008 was the introduction of 89A. This requires compulsory settlement conferences between the parties prior to proceeding to CARS. There is no issue with compulsory settlement conferences. However, there is the additional obligation that the parties fully prepare their case for these settlement conferences. Rather than the parties trying to resolve the case at a reasonable cost, the Act is requiring parties to incur unnecessary expenses prior to trying to settle claims.

127. Moreover, insurers are now taking technical points in almost every case that there has not been a proper Section 89A conference. The requirements of the Act appear almost impossible to comply with at reasonable cost. The Association urges the Standing Committee to recommend that the MAA monitor the operation of section 89A so as to observe its efficiency and cost. If section 89A is imposing undue burdens on the parties and proving an actual impediment to the progress of cases, then it should be removed.

CONCLUSIONS

128. The Association again notes how pleased it is to be able to have the opportunity to provide these submissions to the Standing Committee on Law and Justice. If further clarification of any of these submissions is required, then the Association would be delighted to assist.

18 August 2011