**CORRECTED**

**REPORT OF PROCEEDINGS BEFORE**

**STANDING COMMITTEE ON LAW AND JUSTICE**

**Review of the exercise of functions of the Motor Accidents Authority and the Motor Accidents Council**

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**At Sydney on Monday, 8 May 2000**

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**The Committee met at 10.00 a.m.**

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**PRESENT**

The Hon. R. D. Dyer (Chairman)

The Hon. P. Breen
The Hon. J. Hatzistergos
The Hon. J. F. Ryan

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**RICHARD JOHN GRELLMAN**, Chairperson, Motor Accidents Authority and Chairman, Motor Accidents Council, 45 Clarence Street, Sydney, sworn and examined, and

**DAVID BOWEN**, General Manager, Motor Accidents Authority, 580 George Street, Sydney, affirmed and examined:

**CHAIR:** Mr Grellman, what is your occupation?

**Mr GRELLMAN:** I am a chartered accountant.

**CHAIR:** Did you receive a summons issued under my hand in accordance with the Parliamentary Evidence Act 1901?

**Mr GRELLMAN:** I did.

**CHAIR:** Are you conversant with the terms of reference of this inquiry?

**Mr GRELLMAN:** Yes.

**CHAIR:** Could you please briefly outline your qualifications and experience as they are relevant to the terms of reference of this inquiry.

**Mr GRELLMAN:** Primarily having served the Motor Accidents Authority as Chairman of the Board for the last five years and, as I mentioned earlier, currently chairing the Board and the Council.

**CHAIR:** You will be aware that the Motor Accidents Authority has made a written submission to the Committee in response to the material we forwarded to it. Is it your wish that that MAA submission be included as part of your sworn evidence?

**Mr GRELLMAN:** Yes, it is.

**CHAIR:** Mr Bowen, what is your occupation?

**Mr BOWEN:** Public servant.

**CHAIR:** Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

**Mr BOWEN:** I did.

**CHAIR:** Are you conversant with the terms of reference of this inquiry?

**Mr BOWEN:** I am.

**CHAIR:** Would you please briefly outline your qualifications and experience as they are relevant to the terms of reference of this inquiry?

**Mr BOWEN:** As the General Manager of the Motor Accidents Authority I have had responsibility to both the Board and the Council to assist in the development of the guidelines that implement the legislation and in putting the structures and processes in place in the Motor Accidents Authority to report on the operation of the motor accidents scheme.

**CHAIR:** Is it your wish that the written submission of the MAA to which I referred a moment ago be included as part of your sworn evidence?

**Mr BOWEN:** Yes, it is.

**CHAIR:** If either of you should consider at any stage during your evidence that in the public interest certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee would be willing to accede to your request.

**Motion by Mr Ryan agreed to:**

That the following documents be tabled and made public by the Committee:

(i) Chair's letter to stakeholders and others, dated 9 March 2000, inviting them to nominate issues or questions that they would like the Committee to raise at this hearing.

(ii) Responses to the Chair's invitation received from:

Law Society of NSW
Australian Plaintiff Lawyers Association
Australian Medical Association (NSW)
Professor Nikolai Bogduk
NRMA Insurance
Insurance Council of Australia
Injuries Australia
Mr John Walsh
Brain Injury Association
Australian Quadriplegic Association
Ms Judie Stephens
Bar Association of NSW

(iii) Chair's letter to the Special Minister of State, dated 19 April 2000, seeking a written response to questions on notice and the issues raised by stakeholders.

(iv) The following documents received from the Motor Accidents Authority on Thursday 4 May:

Answers to Questions on Notice
MAA General Response on Impairment Guidelines and Medical Assessments
Answers to Questions Raised by Stakeholders
Draft Corporate Plan 2000-2003.

**CHAIR:** The effect of that motion is that all of the documents I have enumerated are now tabled and made public. Mr Grellman, I now invite you to make a brief opening submission to the Committee.

**Mr GRELLMAN:** It will be brief. The General Manager and I are obviously very pleased to be here. It is the first opportunity to interface with the Upper House on this new piece of legislation. The legislation came into effect, as you all know, on 5th October last year. I have been quite pleased with the way in which the Board and the Council and the various stakeholders and interested parties have engaged in very fulsome dialogue over the last seven or eight months. The Board meets quite regularly, every month or two, and the Motor Accidents Council meets equally regularly.

In terms of trying to monitor the progress of the scheme, the concept of having a Motor Accidents Council in existence gives us an opportunity to have the widest variety of interested parties represented to help with the process of discussing and analysing developments as they unfold, with a view to determining whether or not the legislation is working as we would like it to work and you would like it to work. The purpose of the Council is really to provide us with sectoral representation – interested parties, service providers – to give them a seat at the table and to have their concerns and thinking communicated through the Board to the Minister. Supporting the Motor Accidents Council, other than quite a few dedicated Motor Accidents Authority personnel, are a number of specialist reference groups, which are themselves made up of very eminent practitioners from a wide variety of professions, who are all combining to give a very good and broad overview of the legislation as enacted.

This is obviously very young legislation. The CTP scheme provides benefits which are quite long tail in nature. The timing of this hearing is quite appropriate. It is worthy to note at this opening point that quite a few of the developments within the legislation and in a practical sense, the practical out-working of the legislation, are still coming through. The trends that might become evident as a result of the new Act are still developing, and in some cases we are not yet in a clear position to be able to determine how well aspects of the scheme are in fact operating. That is an issue that we must continue to monitor and I know this Committee will also be monitoring. At this early stage I think we will find – and it would be evidenced from our written submission – that there are still developing trends which preclude us from making any definitive judgments about a variety of issues within the legislation at this point in time.

Having said that, we are watching carefully, we are monitoring actively and we are

determined as an authority to be quite aggressive in looking for developments which might be inconsistent with the philosophy of the legislation or, indeed, if we think that there are trends developing that might have inappropriate consequences, be they developing inequity on behalf of a section of the claimant population or developing trends that might give rise to a shift in premiums, particularly an upward shift.

My final comment is that because the legislation is so new, whilst we are aggressively monitoring unfolding events we would be inclined to suggest to the Minister that care is taken before there is too much amendment to the legislation. With a new Act like this our view would be that it would be appropriate to give the legislation time to settle, all parties and service providers to become familiar with the important and different aspects of the scheme and then after careful thought and experience, unless a crisis emerges where we really feel that we have to move earlier, we would be inclined to suggest to the Minister that we hasten slowly in regard to confronting the legislation, until clear trends have developed. That covers what I wanted to say by way of opening comment.

**CHAIR:** Mr Bowen, you are at liberty to make an opening statement if you choose to. I invite you to do so, or do you prefer to go straight to questions?

**Mr BOWEN:** I do not have anything further to add.

**CHAIR:** In embarking on the questions, I indicate to the witnesses that either or both of you may respond as you choose to any question that might be asked. The second thing I should say is that in an endeavour to maintain some sort of structure to the hearing it is my intention, if possible, to work through the three documents the Motor Accidents Authority has provided in response to the material we forwarded to it from various interested groups. That might help us to keep the questioning in a structured form.

I start by referring to the first document the MAA provided, "Answers to Questions on Notice". There are some issues that arose from the inquiry into the motor accidents scheme conducted by the former Standing Committee on Law and Justice that existed prior to the last State election. Regarding structured settlements, is it your belief, or is it at least possible, that in tomorrow's Federal Budget a favourable announcement might be made about structured settlements?

**Mr GRELLMAN:** I have no idea. I do not know whether Mr Bowen has any insight into that.

**Mr BOWEN:** It is my belief that the issue has well and truly been put before the Federal Government. I have been chairing a group called the Structured Settlements Group, which has been lobbying for tax changes on this issue. Up until recently the key expert in this area, Ms Jane Ferguson, has been engaged by the Motor Accidents Authority to promote that lobbying on behalf of the group. The group is very diverse. We have represented on it the Law Council of Australia, the Insurance Council, Plaintiff Lawyers, the Australian Medical Association, Medical Defence Union NSW, Brain Injury Association and Injuries Australia. All of those groups, collectively and individually, have put submission to the Federal Government. Ms

Ferguson has spoken before the key Treasurer's committee from the coalition, and she felt that they were quite receptive to it. But it is very difficult to predict whether or not it will be accepted by the Federal Government and announced as part of the Budget. Certainly all of the submissions that have been put forward to the Federal Government have been promoting it as a change to be adopted in the Budget. We would hope that there will be a decision one way or another.

**CHAIR:** At page 3 of the MAA's "Answers to Questions on Notice" there is reference to the matter of performance indicators. I note that two of the proposed performance indicators for the new scheme are transaction costs and benefit levels. Is the MAA currently able to estimate the percentage of premiums collected that is consumed in transaction costs and the percentage that is paid out in benefits to injured persons under either the new or the old scheme?

**Mr BOWEN:** I certainly can indicate that under the old scheme the amount of the premium returned by way of benefits could vary from accident year to accident year, but it was round about 52 to 55 per cent. The need to increase that is reflected in what we have called our efficiency measure, which is about the amount of the premium returned by way of benefits. I have no information at this stage on the new scheme. There are not sufficient claims in to make any estimate of that at this stage.

**CHAIR:** I suppose one of the difficulties we are facing in this hearing is that the experience is of such short duration that in some respects it is not lengthy enough to give definitive responses.

**Mr BOWEN:** No. It may assist the Committee if I indicated that the MAA's costing on the new scheme would suggest that we need to achieve an efficiency measure of round about 60 per cent, and over time we would certainly like to see that increase. By way of comparison with other schemes around the world, they seem to fall within a range of between 50 and 75 per cent; 75 per cent is more often than not achieved in no-fault or defined benefits schemes. The involvement of common law tends to increase the transaction costs. But even so, the New South Wales scheme has been at the very lower end of that range. I would certainly like to see that increased.

**Mr RYAN:** I want to ask you a couple of questions about insurer profit margins. We have noted that in your response to questions on notice you have made reference to the fact that two papers are being prepared in relation to insurer profits. Are you prepared to make copies of those papers available to the Committee as soon as they are released?

**Mr BOWEN:** Absolutely. I am expecting to get the publication mock-up later this week to check, and I would anticipate that they will be available for release within, I will say three weeks, to allow for any errors that might occur in publication.

**Mr RYAN:** Whilst I accept that it will take some time to get a complete trend, given that one of your roles is to ensure that the scheme is prudentially sound, I imagine that I am virtually flying blind, but do you have some impression as to whether or not the scheme

is operating satisfactorily in that regard?

**Mr BOWEN:** The MAA's Prudential monitoring is based upon returns that the insurers provide us, which are duplicates of their returns to the Australian Prudential Regulatory Authority. The problem for assessing costs and profit in any one line is that the return to APRA is not separated like that into different lines of business, and even when it may be possible to derive information on lines of business from the APRA returns, it is then not separated into the different States.

So for the CTP insurers in New South Wales that also operate in Queensland, we can get from the APRA information some indication of how they are performing with that aspect of their line of business, but for Australia really what we have identified in these papers is the need for additional information to be provided to the MAA to allow us to report on the companies in relation to the CTP business in New South Wales.

**Mr RYAN:** That was one the of the rocks we ran into the last time this Committee examined this question, and we do note that there is some resistance from the insurance industry to disclose profit margins experienced for this line of business in this State.

What arrangements are you making with the insurance companies to ensure that you will be in a position to accurately assess profits from the current scheme, given that reluctance? Because that level of reporting is not going to be sufficient to give you that information, is it?

**Mr BOWEN:** No, there is going to need to be additional information obtained by the Motor Accidents Authority. One of the historical problems in this area has been determining the amount of capital allocated to the CTP component of the insurer's portfolio.

We are perhaps at a reasonable point in time in that the internal allocation of capital is something the insurance companies are now looking at, which they have not previously, and we also have the benefit of a number of overseas jurisdictions which have, in the context of what might be called adversarial regulatory conditions, put in place requirements for reporting on allocation of capital return to the business.

The proposals we are putting forward will not be without controversy within the industry, I think that is fair to say, and we need to achieve a balance between obtaining sufficient information to report properly to the Committee, to Parliament, and more generally to the community on profit, but at the same time recognising that the position that companies take in the market place will reflect different approaches, different decisions as to the risk, and that will also impact upon the allocation of capital.

So it is not a "one size fits all" type of equation. You have to recognise different approaches to the market place.

**Mr RYAN:** That might be the case generally, but are you able to give the Committee

some sort of more specific idea as to what information will be required from the insurance companies?

**Mr BOWEN:** The proposal that we are looking at will require insurers to report on the allocation of capital to the CTP business, and there are a number of leading factors to that. That will then allow us to make some comparisons between the insurers.

We need that for the purpose of assessing premiums, because there is a statutory obligation to ensure that the premiums are not excessive, but in doing that we have to make allowance for - I believe the legislation says "an adequate return on capital". So both the allocation of capital, and then assessing the return on capital, and then assessing what is adequate, is the first leg of our paper.

Secondly, and as a result of the legislative changes, there is an obligation now to report to this Committee on what have been the actual profit results. The first one is looking at profit prospectively, at the time the premiums evolve, and the second one is looking at what have been the actual results in terms of profitability of the industry. For that we looking at requesting additional information to the APRA returns, so it will allow the MAA to report.

There is quite a bit of detail in the paper, and I do not want to go into too much more detail on it for fear of misleading the Committee by trying to recall it off the top of my head rather than waiting for the papers to be available to provide to you.

**Mr RYAN:** I guess finally, are you proposing to draw a line under the old scheme? There was a fairly significant amount of funds, I recall, being classified as being claims incurred but not yet reported, and so on, and it was basically said whether or not this was going to be a reasonable amount of premium to have collected, and the old scheme would require later experience to be compared against what had been anticipated by the actuaries. Are you people going to continue to monitor the results of the old scheme, at least for the purpose of informing yourself as to what happens under the new one?

**Mr BOWEN:** The answer is yes, absolutely.

**Mr GRELLMAN:** Perhaps I could just make an additional comment about the position of the underwriters on the relationship that they will have with the MAA going forward.

One of the fundamental changes in this legislation was to increase the powers that the Authority has in terms of the way it interfaces with the underwriting community. As Mr Bowen has already said, the discussion paper on profitability will no doubt extract a bit of debate, but my impression is that the underwriters do understand that there is a more intrusive MAA now with which they are going to be interfacing, and early indications are that they are showing every inclination to co-operate and provide information.

We will again have to live with this to see how the information unfolds and what it is

telling us, but it is very important for us to ensure that our relationship with the underwriters is open, and there is full and free access and information. We need to be conscious that they are competing with each other, so there is some market sensitive information, but I am confident that we can tread that fine line in getting the information we need, you need, Parliament needs and the community needs, without interfering too much with the market place that they are operating in.

**CHAIR:** If I could turn to the document headed "MAA General Response in relation to Impairment Assessment Guidelines and Medical Assessments and answers to questions raised by stakeholders", could I refer initially to pages one and two of the MAA general response dealing with the development of impairment assessment guidelines?

Could I ask you to please outline the process of selection of the members of the advisory committee, and the reference groups which developed each chapter of the guidelines? Could I also ask you, was any attempt made to include on the advisory committee, or the reference groups, any leading specialists with sceptical views about the AMA guidelines, or unorthodox views about the assessment of impairment?

**Mr BOWEN:** I could answer first in relation to the advisory committee. The advisory committee was established on an ad hoc basis pending the appointment of members of the Motor Accidents Council, at a time just after the legislation has passed, and when we were working towards the preparation of the impairment guidelines within the statutory time frame of three months after commencement, and it was put together by request to the relevant associations or organisations that are mentioned, and they nominated their appointments.

The advisory committee brought a variety of different views as to the better, or other, approaches to impairment, but it did not act as a decision making body. It was there to ensure that the full range of views on the guidelines were canvassed, and I am confident from the membership of the committee, and my knowledge of how it operated, that it did do that.

There were sceptical views as to whether the American Medical Association Guidelines should be adopted, and there were a number of issues which were raised then, and continue to be raised, about the operation of the American Medical Association Guidelines, which were either addressed in developing the MAA guidelines, or which were acknowledged as issues which would need to be continued to be monitored.

So far as the membership of the reference groups are concerned, the reference groups and the details of the membership of those are in the MAA guidelines; they are listed as an appendix to the MAA guidelines. They were chosen by the Project Management team which the MAA engaged to prepare the guidelines, and essentially that team was putting together a group around Professor Ian Cameron, from the School of Rehabilitation Medicine at Sydney University, with Jim Stewart as a Project Manager, and with the input of a couple of experts on how these impairment guidelines operate in Victoria.

They went through the colleges, and sought their knowledge of who were the leading specialists in the field. We did not attempt to direct them as to who they should chose.

The charter for the Project Management team was to prepare guidelines in relation to whole body impairment, and they took an early view that the best way to do that was by taking the American Medical Association Guidelines and working through them, looking at different body systems, and addressing what they regarded as any deficiencies in it.

I cannot comment on the level to which the members of those reference groups were, if you like, pro or against. They came on board to do a job to try and make the best set of guidelines we could get in New South Wales. I suppose where I got some satisfaction that the process was reasonable is that when the advisory committee considered the people on the reference groups, there was an acknowledgment - given that the advisory group had quite different views on it - there was an acknowledgment by the members of the advisory group, who did seem to know that these were the top people in the field, that they were not bringing a particular bias to it.

So there was no selection in favour of a particular view in putting the reference groups together.

**Mr BREEN:** In what circumstances would it be either mandatory or optional for parties to use the MAA's Medical Assessment Service? In what circumstances will parties be able to elect to have a medical dispute resolved in an alternative forum, or by an alternative dispute resolution service? And finally, are there any implications of competition policies for the Medical Assessment Service and Claim Assessment Resolution Service?

**Mr BOWEN:** There are a few questions there; I will go through those individually. In terms of the mandatory use of the Medical Assessment Service, the Medical Assessment Service is there to be used in circumstances where there is a disagreement between the insurer and the claimant, so to the extent that the system is working well and there is no disagreements, there will not be any need to refer matters to the Assessment Service.

It has jurisdiction in relation to five different matters, which are listed in the Act itself, and I might just find the reference so I get that right for you.

The reference is at section 58 of the Act, and the five areas are: first, whether the treatment provided or to be provided is reasonable and necessary; second, whether the treatment relates to the injury caused; the third is whether the injury has stabilised; the fourth is the degree of permanent impairment; and the fifth is the degree of impairment to earning capacity. Where the legislation mandates the use of the Assessment Service is where there is a dispute over the degree of permanent impairment, because the decision of the Medical Assessment Service in those circumstances is final and binding on both CARS and the court. It is also the case that the decision of the Medical Assessment Service on past treatment is final and binding. All other decisions of the Medical Assessment Service are persuasive but not binding. However, it seems to me that there

is no limitation upon an insurer and the party agreeing to appoint an independent assessor outside of the system and agreeing to be bound by that person's decision.

I suppose to try to achieve some consistency in the result, in outcome, it would be the Motor Accidents Authority's preference that that did not happen, but we would not seek to constrain parties from making that choice. That is perhaps the same answer that I would give in relation to question 2, which was about the use of alternative dispute resolution outside of the CARS process. There is nothing to prevent it; indeed, the MAA has had discussions with a number of mediation service providers and recognises that the parties may continue to make use of those services, particularly perhaps in those larger claims which might otherwise be exempt from the CARS process. There seems to me to be a continuing role there, but there is no limitation upon the parties except that any agreement is binding only so far as the parties agree it is binding, whereas CARS can introduce an element of conclusiveness in relation to its decisions.

**Mr BREEN:** Is that conclusiveness likely to alter as a result of this proposed amendment to section 61(6)?

**Mr BOWEN:** It does leave it open for a certificate from a Medical Assessment Service to be set aside by a court, but that is already there. That is the result of an earlier part of section 61. What the amendment will do is to allow the court to substitute its own decision when it has set aside the impairment certificate. But I think that it is unlikely to have a major effect, unless there are significant procedural problems in the way that medical assessments are undertaken, because the ground on which it can be set aside is that the original assessment was procedurally unfair. If that is the case, then that would point up some shortcoming in how the Assessment Service is undertaking those medical assessments. We hope that is not the case. If we do have any cases that fall into that category, we will need to look at how that Assessment Service operates.

I suppose it does add a little bit more uncertainty and I imagine that in the course of the development of this legislation there will be some testing out in the court, and maybe some direction from the court, as to what constitutes procedural fairness in the context of a medical examination.

**Mr BREEN:** There is a school of thought that there is no such thing as procedural fairness in the context of a medical examination.

**Mr BOWEN:** That might add a great deal of uncertainty to it. We have obtained Crown Solicitor's advice as to the general approach to procedural fairness. We will be making sure that that is a key element of the training for the medical assessors, so that they understand that – and I will not try to outline all of my understanding of the law of procedural fairness - the information upon which they are making decisions is clear and transparent; that the claimant has had an opportunity to comment on it and put submissions; that they are not taking into account extraneous material; and that they are providing reasons for their decisions which can be looked at on reviews and appeals.

**Mr BREEN:** Have you looked at the comparable legislation in Victoria in that context of medical assessments and appeals?

**Mr BOWEN:** It is some time since I did. I had a look at it at the time we were preparing the proposals for the legislation in New South Wales. There they have appeals going to their now renamed Administrative Appeals Tribunal. I am not sure of the current name of that tribunal in Victoria. They treat them as administrative decisions and appealable on that basis. I think there was further a question, which was about competition policy?

**Mr BREEN:** Yes.

**Mr BOWEN:** I must admit that I have not thought of that in this context. When I was at the Attorney General's Department I did chair the competition policy review of the then motor accidents scheme as it was at the beginning of 1998. It was not an issue that arose in that context. I would have thought there were no particular problems that arise in setting up a statutory adjudicative scheme. In that sense it is no different to many other similar schemes that are sanctioned by legislation throughout this State, notwithstanding that the assessment system is not a tribunal.

**Mr BREEN:** I would like to ask some questions about the selection of assessors. What level of interest has been shown by medical practitioners for recruitment to the disputes panel? What incentive will exist for leading specialists to become members of the disputes panel or the impairments panel? What guarantee is there that the positions on these panels will be taken by leading specialists rather than the same practitioners who are providing medico-legal reports under the old scheme?

**Mr BOWEN:** The appointment of the medical assessors has been staged by way of discipline, so that we go through a selection process for each of the various health professional disciplines. We have already appointed physiotherapists and occupational therapists, and I believe we have completed the list of occupational surgeons. With the medical practitioner members the selection process has been to call for expressions of interest, to then do an internal review of those applications within the Motor Accidents Authority to see how a person best fits the selection criteria; to then discuss it with the relevant college, and we have the involvement of people at a very high level from within the various colleges; to make sure that the person is known and accepted and respected within their profession; and then to look at the formal appointment in conjunction with a variety of interested parties, including the legal profession and the insurers.
The end result of all of that is that we are finding that in most disciplines we are getting very experienced practitioners who are applying. We are getting people who do not fall into the pattern of being only medico-legal experts. Indeed, one of the critical selection criteria we have is that these people are clinical practitioners, that they have hands-on experience and deal with patients, as distinct from simply preparing reports. My recollection is – and certainly I would like to take an element of the question on notice because I can provide a more detailed answer about where we are up to with all of that – that we are getting very good applicants who do not fit that traditional medico-legal mould.

**Mr BREEN:** Are you getting the people who were in the traditional medico-legal mould and who were quite renowned for their reports, with one group supporting one side of the argument and the other group supporting the other side? Are those people applying?

**Mr BOWEN:** In some cases they are, but they will be hard pressed to survive the selection process, particularly if they have been regarded as being partial in that they have been either plaintiffs' doctors or defendants' doctors and if they are not seen to be able to rise above that. Some are; some practitioners who have done quite a bit of work in this area and have done it primarily for one side or another are nevertheless highly regarded within their profession. People say that it does not matter that they have mostly done plaintiffs' work; this person will rise above that and give a fair and impartial estimate and assessment on each occasion. I have forgotten the second and third legs of your question.

**Mr BREEN:** What incentive will exist for leading specialists to become members of the disputes panels and what guarantee is there that the positions on these panels will be taken by leading specialists? It may be that you have covered that.

**Mr BOWEN:** It may be that I have. I just make one point. I have not been involved in the selection process, but the discussions I had with the colleges in round about October or November last year gave me the very clear impression that the specialists would much prefer to be in a position of being engaged to do an independent assessment in which they are making the decision than being engaged to prepare a report for use in an adversarial setting where they may find themselves at some later point in the witness box. That is something that most of them do not like, giving up a day of practice to go off to court. So there is a very strong view that they would much favour a system in which these medical decisions were being made by the medical specialists rather than by a judge where they are being presented in an adversarial setting.

**Mr BREEN:** Could I move on to another area: future deterioration. I know that is being considered by the Motor Accidents Council. The general question is: what sort of changes to the Impairment Assessment Guidelines might arise from consideration of this issue? I ask that question in the context of a question that has been raised along the same lines by the Bar Association. Why do the Medical Assessment Guidelines make no allowance for the prospect of future degeneration in a currently stated position? It is appreciated that there is some degree of uncertainty in making such a prediction as to the likely development of a medical condition, but it is a prediction that medical practitioners and judicial officers are called upon to make daily. The fact that the assessment of the prospects of deterioration is not a scientific certainty is no reason, the Bar Association says, to avoid making allowance for it. The Bar Association says also that it is unjust that a person who currently has an 8 per cent whole body impairment but who is likely to experience substantial future degeneration that would carry them over the 10 per cent threshold for non-economic loss is denied compensation for non-economic loss. Do you have a comment on that?

**Mr BOWEN:** I might comment in opening that I agree it is a very difficult issue, and I

suppose I have a lawyer's bias towards thinking that this is something that can be done, because courts have traditionally made these forms of assessments. However, it is something that the Project Team development the impairment guidelines, and indeed the reference groups, were quite averse to doing, and there are two responses to it.

Firstly, before an impairment assessment can be undertaken, the injury has to have stabilised, and so there has to be no prospect of any immediate deterioration. If that is the case, then the injury has not stabilised, and you wait until it has stabilised before the impairment assessment is undertaken.

Secondly, the medical practitioners say that they can make an estimate of deterioration for a population of people who have this injury. So they can say for a particular sort of knee injury, 30% of these people will end up with some arthritic pain, and 10% may need a knee reconstruction in ten year's time. But they cannot say that for any individual who presents before them, and as soon as they are asked to start to make that assessment they are moving away from something that they feel comfortable with, which is a clinical examination of the person and an assessment of their impairment as they present, into predicting what may or may not happen in the future. That is something that they have indicated they would feel uncomfortable with doing in the context of a clinical examination.

I agree, it is probably one of, if not the most critical and criticised component of the impairment guidelines at the moment, and that is why the Council has asked the experts group to go away and have another look at it, and try to provide a further report on it.

Of course, if a person is over the 10% then the prospect of future deterioration is something that can be taken into account by the court in assessing the amount of their compensation, and certainly a person is able to be compensated for potential future medical costs and future treatment costs associated with the deterioration of an injury.

I might add, the converse is also true of course, in that a person is assessed as they present when their injury is stabilised, and if they are over, the prospect of some simple surgery or some technique that they may undertake in the future that would bring them under the 10% is not taken into account either.

**CHAIR:** Mr Bowen, on the matter that Mr Breen has just raised with you, the Bar Association's letter to me dated 4th May indicates that early this year the Motor Accident Council invited submissions from interested parties to allow further consideration of the Medical Assessment Guidelines. In relation to this issue of future degeneration in a currently stable condition, the Bar says that the Motor Accidents Council briefly discussed the submissions that had been received, and ultimately deferred any consideration of the submissions pending a further review of the scheme.

Do they correctly state the position there? The Council will be giving further consideration to the matter in due course?

**Mr BOWEN:** Indeed, the Council at the time it recommended the guidelines to the Board of the Authority specifically noted that it was recommending the content of the guidelines, but that there were outstanding issues as to the operation of the guidelines that would need continued attention.

It is not only on the issue of future deterioration, it is on a number of the other issues that have been raised in these submissions, and which were raised in submissions to the Council, such as whether the guidelines should take into account broader concepts of disability. That is the other major one which should be looked at.

The Council agreed they should be, but we needed to put these impairment guidelines in place, and they are in place but the Council has recognised its responsibility to continue to look at all of those issues.

**Mr GRELLMAN:** Mr Chairman, I think there is a very delicate balance required here. The guidelines are just guidelines, they are certainly not set in stone. They are what we are working with at the moment. We, as a Council and the Board, are taking a very clear view, and have taken a very clear view, that as we learn to live with them, as we watch experience under the guidelines, that there will inevitably be a need to change them, and the Council can and will play an active role in debating the nature of that change.

That desire for change though, in the interests of equity and fairness and affordability, etcetera, does have to be considered in light of the imperative to try to ensure that the scheme has a degree of stability. So on the one hand we are going to be hastening slowly in terms of review and change, but on the other hand, if we feel that there is a compelling case for change - and as Mr Bowen said, the area of degeneration is one area where there is a lot of thought and discussion - then we need to have a very careful think about that, and where we think that the case is compelling then that can be discussed and recommendations brought forward.

**CHAIR:** So you would say to the Bar Association, I take it, that they should not lose hope, that you are in fact giving continuing attention to this problem of assessing degeneration of a currently stable condition?

**Mr GRELLMAN:** Indeed, and as you would have noted, the Bar have a representative on the MAC, so they do have a seat at the table. There is therefore that very open and active dialogue that is possible on this issue with the Bar appropriately represented at the Council table.

**CHAIR:** I think you would be aware that at some times in the past judges have been known to comment that medical reports prepared regarding the same plaintiff or applicant, by the defence and the plaintiff, could not be regarded as relating to the same person. Do you think that under the assessors who are selected by the Motor Accidents Authority, that that will become less of a problem, that the medical assessments can be clearly discerned as relating to the applicant, from whomever they come?

**Mr GRELLMAN:** Well, I am sure that there will be the odd anomaly that causes a study to scratch their head, but the beauty of the system conceptually is that the right person is going to be making the assessment. It is a very difficult situation for a judge, who is not medically qualified, usually, but clearly is legally qualified, when confronted with two eminent practitioners giving completely diametrically opposed views. So the judge has to make a determination, and they have often made the best determination in the circumstances.

I think with this philosophy that the opportunity for more predictability in terms of assessment of outcome is quite high.

**MR RYAN:** I will first of all just ask you one basic question, which I guess we will get into trouble if we have not asked. Can you tell us how many claims have been lodged since the new scheme commenced?

**MR BOWEN:** I cannot at this point in time. We will have a return to the end of March shortly which will show that. It may assist you if I give an indication at this stage of what is only anecdotal evidence, and that is that the claim numbers are well down. To some extent that would be expected because a number of these claims, or a number of matters that previously would have been claims, will now be finalised in the context of the Accident Notification Forms.

Indeed, it has been suggested to me that insurers are making an effort to resolve those which can be resolved at that level, even if it means payment in excess of the $500 statutory amount. My discussions with the plaintiff lawyers suggest that there are not as many people coming through their door, but they are not sure themselves at this stage whether that is an overall reduction in people who are intending making claims, or a reduction in the number of people who are making use of lawyers, or whether it is again a timing issue, because people are still going through that Accident Notification Form process.

It is something I hope to be in a position to give you a much clearer response by the anniversary date of the scheme, but even then, because of the normal lag in times to lodge claims, it will still be at a very preliminary stage.

**Mr RYAN:** I will come back to that, because there is a question about the Accident Notification Forms I wanted to ask you later. I want to ask a question with regard to the definition of disability and impairment, or how those two terms are used in the Medical Assessment Guidelines. I had the benefit of going to the seminar that was conducted down the road - I think you conducted a couple - and I have to say I was very impressed with how the guidelines are developing, but I could not help but notice that with regard to measuring behaviour disorders the impairment guidelines appear to be quite - or the way in which the assessment is carried out is more essentially concerned with disability rather than impairment, and a lot of the submissions we have had to us have been somewhat critical of using impairment rather than disability.

So what we wanted to ask you was, since it has been possible to develop guidelines along those lines for people with behaviour disorders, is it not possible to develop guidelines for the assessment of disability for other impairments that are currently dealt with under the MAA Impairment Guidelines?

You seem to be indicating that you might even be thinking of that yourselves, in answer to a question from the Law Society where you said, apparently, "The MAA acknowledges that impairment does not take into account the effect of injury on a person's lifestyle, but it believes the legislation would need to be changed if disability were to be measured as part of the threshold test. This is an issue which is being considered by the Motor Accident Council."

**Mr BOWEN:** Perhaps if I could comment first on the Mental and Behavioural Guidelines. The problem there that needed to be addressed was not only a matter of diagnosis of a mental or behavioural disorder, but the need to be able to put a percentage impairment figure with the diagnosis in a way that was objectively measurable, and the group working on those guidelines felt that it could only do that by looking at the effects that that disorder had upon the person's day to day living. So that was the approach taken for those.

It certainly is possible to put together disability guidelines, but where they do operate, they operate in a different statutory environment, and the clearest example we have of that in Australia is perhaps the ComCare guidelines which are an amalgam of both an assessment of impairment and an assessment of disability, but the two guidelines are used jointly to provide a fixed benefit to the claimant.

That is not the context in which this scheme operates; this scheme operates by having impairment as a threshold test for whether or not a person is eligible for non-economic loss, and if they eligible they have their entitlement to compensation determined on common law grounds, which as far as I am aware would probably cover all of those issues of disability.

So I am not sure what benefit is gained, other than trying to look at it to answer some of these questions, by going down the track of developing a disability guide, unless there is some contemplation of moving towards a ComCare type scheme, where the assessment of disability with the assessment of impairment was used to determine compensation.

**CHAIR:** Could I direct attention to page 6 of the MAA's answers to questions from the stakeholders? There is a reference to deeming injuries as being over the 10%. I note in particular that the Authority's answer to question 1.5(b), refers to the deeming of injuries as over the 10% permanent whole person impairment threshold. Can I ask you which injuries are currently deemed as being over the 10% threshold?

**Mr BOWEN:** It is probably preferable if I take that on notice so that I can give a comprehensive answer. The one that I recall, because it was raised in the context of debate on the bill, is loss of both breasts is deemed to be over. There are others that are deemed

to be over and not coming immediately to my mind.

**Mr RYAN:** The Bar Association gave us a list of ones that they recommended. They said complete or partial quadriplegia, complete or partial paraplegia, loss of sight, loss of hearing, loss of an arm by amputation, loss of a hand above the wrist, loss of a leg by amputation above or below the knee including the complete loss of a foot, loss of sense of taste or smell, significant brain injury, significant permanent scarring or disfigurement of a substantial portion of the body, loss of sexual organs, loss of kidney, loss of the liver, neck or back injury requiring bone fusion of the spine. Does that sound like a more extensive list than you would have?

**Mr BOWEN:** There are two issues here, and we are working on both. One is: which of those are over and, if you like, manifestly over? One of the things the Authority is working on as an aid to practitioners in this area is a list of injuries that are manifestly over the 10 per cent if a person sustained this sort of injury, and nearly all of them on that list are over 10 per cent and it really should not be a matter of argument for the great majority of claimants. Then there is a much smaller list of other injuries which, on application of the guides, would be below 10 per cent whole body impairment but which are deemed to be over. I now recall two from that list. One is the loss of breasts, which seems odd because the loss of sexual organs in a male is clearly over, and the second is total loss of smell and taste is deemed to be over as well, whereas according to the guidelines it would otherwise be just under.

We are looking at some other injuries still, such as loss of the smaller two fingers. At the moment loss of the thumb or the first two fingers is over 10 per cent but loss of the fourth and fifth fingers is not. We are now considering whether that should be deemed to be over. I am just trying to recall whether any of those others from the Bar's list are included. Loss of a kidney is not over. Indeed, it is probably not necessarily even a disability, provided your other kidney is functioning.

**Mr RYAN:** I recall there being some discussion about that one, in that you could lose the other one later in life and you could go back to the accident to say that was the reason the later accident in life was catastrophic.

**Mr BOWEN:** Yes, and for that reason we are continuing to look at that. I think the spleen falls into a similar category. Nearly all of the rest on that Bar list fall into the first group which are things that are manifestly over. We are proposing to produce a list of those as a guide to practitioners in the area.

**Mr RYAN:** Does your current list include the loss of an unborn child?

**Mr BOWEN:** This was a very difficult one. The loss of a foetus is included in the Victorian guides as stand-alone, although it is in the context of a statutory scheme there where they provide a statutory death benefit. If you lose a child, a born child, you get a statutory death benefit, which we do not have. So it was included in earlier versions of guides and it was then taken out and it is currently under continued review. It occupied

quite a bit of discussion at the Council as well. We recognised that there was a prospect of creating an anomaly if you put in loss of a foetus as an impairment to the woman, which automatically meant the mother was compensated for non-economic loss, whereas loss of a child would not attract any automatic compensation unless it had an effect that got you over 10 per cent or a mental behavioural disorder.

**Mr RYAN:** Is it not reasonable to consider that both of those things should be deemed to be more than 10 per cent?

**Mr BOWEN:** There is a strong argument that way, and it has been put to the Authority and the Council, and the discussions with the reference groups are ongoing and we will come back to that.

**Mr HATZISTERGOS:** It would if there was a psychological injury that brought it over 10 per cent.

**Mr RYAN:** The argument is that it would not necessarily do so, because the psychological injuries are assessed by means of disability rather than impairment. It is difficult for a parent who has lost a child to demonstrate a disability.

**Mr BOWEN:** Yes. There clearly will be occasions where a parent has lost a child and it has led to a significant disability which translates to a greater than 10 per cent impairment. There will be other cases where parents do get on with their lives, often because they have no option if there are other children and family members to look after, and on that sort of test they would not necessarily get over the 10 per cent mental and behavioural impairment. So it is an issue that needs to be looked at. It probably needs to be more broadly looked at in the context of statutory change to see whether a death benefit should be introduced rather than trying to fiddle with the impairment levels as a means of achieving that end in a roundabout sort of way.

**CHAIR:** Could I ask you about mental and behavioural disorders. I refer to page 8 of the AMA answers to questions from stakeholders. This is a question about the combination of the two aspects relating to the impairment threshold. I attended one of your series of seminars, as Mr Ryan did, as he commented a short time ago. Is it the case that a person cannot meet the 10 per cent permanent whole person impairment threshold by combining scores in relation to mental and behavioural disorders, on the one hand, and other impairments on the other hand, while a person may combine scores from any of the other physical impairments to meet the threshold? That is a matter that I understood to be stated at the Authority's seminar down at the Masonic Centre. If what I have just stated is correct, could you explain to the Committee the reasons for that approach of not being able to combine the mental and physical impairments to reach the threshold of 10 per cent?

**Mr BOWEN:** That is the case, but it is a result of the operation of the legislation, not the guidelines. I will just try to find that.

**Mr RYAN:** I attempted to move an amendment to the bill, but that was defeated.

**Mr BOWEN:** There was no shortage of amendments. I am very confident that it is a section in the legislation, but I cannot put my finger on it at the moment.

**CHAIR:** That is the answer to the question, that it is a legislative provision rather than a decision of the Authority?

**Mr BOWEN:** Yes.

**(Short adjournment.)**

**Mr HATZISTERGOS:** The major function of the assessments to be undertaken by the MAA Medical Assessments Service is to resolve disputes as to whether or not a person meets the 10 per cent threshold for compensation for non-economic loss. The answer that you gave on page 18 to Professor Bogduk's question refers to the decisions of assessors in relation to the treatment and the management of patients. Are you able to explain the role that assessors play in relation to the treatment and management of patients?

**CHAIR:** Mr Hatzistergos is referring to a passage on page 18 of the Authority's answers to questions from the stakeholders.

**Mr BOWEN:** I just cannot find the reference.

**Mr HATZISTERGOS:** The answer that you give on page 18 of Statement 2 basically talks about referring people back after an assessment has been given, revising the assessment if necessary, and court rejection of the certificate in certain circumstances. The question I ask is what you see as the role that assessors can play in relation to the treatment and management of patients, bearing in mind that they can resolve disputes other than disputes about whether or not the person meets the threshold?

**Mr BOWEN:** Yes. I think perhaps in due course one of the key areas where the Assessment Service will provide some more general benefit than in relation to specific cases is to assist in identifying what is reasonable and necessary treatment, for both past treatment and future treatment, bearing in mind that definition of treatment under the Act is very wide. It includes not only specific medical interventions but issues particularly of care. Certainly disputes over care, appliances and assistance to people, either technical or human assistance to people, have been the main area of complaint to the MAA in relation to section 45 of the old Act, which placed the obligation upon insurers to provide rehabilitation services, and in fleshing out exactly what was encompassed by those services. That was the major area of complaint.

The MAA was very limited in the powers that it could exercise. It could treat it as a breach of licence, but it could not necessarily do anything to resolve an individual dispute, other than on an informal basis. I think this area of assessment lends itself to providing a much more accessible earlier decision so that the person can go ahead with

either a course of treatment or engagement of care or purchase of appliance, paid for by the insurer, rather than leaving it all to the court at a later date and, as I mentioned, again setting some standards in this area as to what is reasonable and necessary. Does that answer the question?

**Mr HATZISTERGOS:** Yes, I think so.

**Mr GRELLMAN:** That is one of the reasons why in selecting the assessors themselves we are looking for clinicians who have some practical experience, and can bring that wisdom to bear on the issue, rather than make a straight determination as to the level of impairment.

**Mr HATZISTERGOS:** Can I some questions about costs, Mr Chairman?

**CHAIR:** Yes, certainly.

**Mr HATZISTERGOS:** I wanted to ask some questions referrable to concerns which have been raised by the Bar Association, firstly as to the impact of the GST, and I understand that at the moment the Authority was waiting on some advice from Treasury, is that the case? Has that advise come? We are only two months away now.

**Mr BOWEN:** That advice has not come. The question put to the MAA was whether regulated fees are inclusive or exclusive of GST. Our advice is that the issue is somewhat open to interpretation, and in due course we will need to get a position, but quite clearly this is not the only area in government where there are regulated fees for service providers, and it is absolutely necessary that government take a consistent position, even in terms of legal fees.

As you know, worker's compensation fees are also regulated. It would be a nonsense if in the Motor Accidents Scheme the regulated fee was deemed to be exclusive of GST, and in another regime was deemed to be inclusive. So there is an issue of consistency across government, and then secondly in interpretation of the Commonwealth legislation, so that once the government position is taken the regulations, if they need to, can be adjusted. As soon as I have received Treasury's advice we will take that up further.

**Mr HATZISTERGOS:** The insurance companies, I take it, will be charging 10% on premiums?

**Mr BOWEN:** They have already started.

**Mr HATZISTERGOS:** So you will be collecting the tax revenue. In terms of the input costs to the insurers you will be entitled to claim a tax credit?

**Mr BOWEN:** The insurer will be, yes.

**Mr HATZISTERGOS:** The insurer will be, which will no doubt will be paid for out

of the premiums that you collect, which include the 10%. Someone is going to end up having to pay the 10%, and it is either going to come off the regulated fee, therefore reducing the fees that practitioners collect, in which case the insurers will be making a profit out of it, or you should change the fee structure so as to allow the 10% to be collected.

**Mr BOWEN:** Yes. I am not sure the insurers would make a profit. If there is no adjustment in that, they can only claim input tax credit for the fee actually paid. But certainly, if the view was taken that regulated fees were inclusive of GST, then that would represent a reduction in the amount paid to service providers. But that would be true across a whole range of regulated areas.

**Mr HATZISTERGOS:** In which case you would be making an extra income, wouldn't you? You would be able to claim a tax credit on the regulated fee, and that would come off when you have to pay the tax office?

**Mr BOWEN:** The insurer could only claim input tax credit on what they pay, and what they pay will either be the regulated fee or --

**Mr HATZISTERGOS:** Less 10%?

**Mr BOWEN:** Or the regulated fee plus 10%.

**Mr HATZISTERGOS:** That's right, you would pay the regulated fee less 10%, when you are claiming 10% on your policies?

**Mr BOWEN:** Yes.

**Mr HATZISTERGOS:** Then you are making more money than if you are paying the regulated fees plus the 10%. Isn't that the case?

**Mr BOWEN:** I am not sure I am able to provide any more advice on that.

**Mr RYAN:** In any event, you would think it would be reasonably urgent for the scheme to have a decision made about what is going to happen with the GST?

**Mr BOWEN:** Absolutely, but it is not only for this scheme, it is for a whole range of areas in government. My understanding is that much of the regulations to give effect to the GST are still in stages of development. I am not sure whether it is something like that that has led to the difficulty in interpretation, but certainly I am not the only person to have required this sort of advice, and there is no certainty in it at this stage.

**Mr HATZISTERGOS:** What about the question that has been made by the Bar Association about the inability at present, under the regulations, to be able to collect additional disbursement such as court filing fees, witness' expenses and interpreter's fees?

**Mr BOWEN:** That is all agreed, and it is in a amended regulation that is currently being drafted. The regulation making power in relation to these fees picked up and applied definitions under the Legal Profession Act, whereby legal costs include all disbursements, so that it was necessary, when putting in place regulated fees, to identify what additional disbursements might be paid for outside of those fees.

I had undertaken to the Bar and the legal profession generally at the time the first regulation was made, that we would consult them about those additional matters. It was agreed at that time that interpreter's fees, court filing fees, would be paid in addition. It has now been agreed that --

**Mr HATZISTERGOS:** Are witness' expenses included in that?

**Mr BOWEN:** Witness expense fees, yes, those also. It has now also been agreed that accident investigation costs and accountant's fees should be paid in addition, in that. While they may be paid for by the solicitor, they are clearly not what a claimant would consider to be part of the legal costs. So they are all listed in the re-drafted regulation.

**CHAIR:** That is a regulation that is about to be made?

**Mr BOWEN:** I am only in a position where I can recommend it, of course, to the Minister, but yes.

**Mr HATZISTERGOS:** Will it be retroactive?

**Mr BOWEN:** It will in effect be, unless a solicitor has completed a matter and already submitted a bill of costs, which I think would be highly unlikely.

**CHAIR:** Can I turn to another matter? Can I ask you first of all about chronic pain? The MAA's Impairment Assessment Guidelines, I think I am correct in saying, are based on the American Medical Association's guide to the evaluation of permanent impairment. However, you would agree with me that there are significant departures from the AMA's guides.

Can I ask you, why is Chapter 15 of the AMA's guides, dealing with chronic pain, not used? Does not the development of Chapter 7 of the Authority's guides dealing with mental and behavioural disorders demonstrate that it is possible to develop guidelines for the assessment of disability arising from chronic pain? This was a matter, I think, that was mentioned during the Authority's seminar.

**Mr BOWEN:** The position taken by the Project Team developing the guidelines was that Chapter 15 on chronic pain would be used as a clinical and diagnostic tool to assist in assessing the person, but that it is not possible to put any impairment percentages against pain because it cannot be objectively measured. It is a matter of how the patient presents.

There are secondary indicators of when a pain is present, and those secondary indicators will go towards assisting determination of a person's overall impairment, so it is more looking at what is causing the pain rather than the pain being allowed for in the impairment assessment.

**CHAIR:** I understand what you are saying; pain certainly is difficult to objectively assess. Is it any more difficult though than assessing a behavioural or psychiatric disorder?

**Mr BOWEN:** In terms of assessing it by the impact it has upon a person's life?

**CHAIR:** Yes.

**Mr BOWEN:** That's an approach. It starts to move these guidelines again away from the objective physical impairment into looking at issues of disability, because pain is quite clearly a factor that relates primarily to disability. It is for that reason perhaps better looked at in that context, rather than trying to extend the impairment scales.

I might add - this is a little bit off the point, but I think it is relevant to this - the MAA also has a responsibility to develop some treatment guidelines, and we are just about to complete and hopefully promulgate some guidelines in relation to whiplash treatment. We have identified the treatment of chronic pain as being the next area to address, and have had discussions with the Pain Clinic which is at Royal North Shore Hospital and associated with Sydney University, about getting into this, what is a fairly vexed area for the medical profession, not only in terms of assessment but in how to treat chronic pain.

We again would not be looking at developing prescriptive guidelines, but something that might assist practitioners in how they put a course of treatment together. That is a little bit of an aside, but I am hoping that that process may help us flesh out what the particular problems are with the diagnosis of pain and its relationship to both impairment and disability.

**Mr RYAN:** That is one of the areas though where the inability to add scores together for mental and behaviour disorders and physical injuries together, is going to have an impact, isn't it? Because a person might have a back injury which might qualify for 8% disability, but cannot add the difficult to measure pain threshold, the chronic pain they might suffer at the same time.

**Mr BOWEN:** Yes.

**Mr RYAN:** Both scores might be 8%, but because it is impossible to add them together they are not able to make a claim for non-economic loss?

**Mr BOWEN:** That's correct.

**CHAIR:** We will come back to whiplash in a moment. Can I ask you another matter

relating to the AMA guidelines? Why does Chapter 4 of the MAA's guidelines specifically exclude the use of range of motion assessments for spinal impairment, while these assessments are permissible under the AMA's guides?

Would you outline for us, if you can, the decision making processes of the reference group which developed Chapter 4 of the Authority's guidelines, and the MAA Impairment Guidelines advisory committee, in relation to the matter I am raising, that is the excluding of range of motion assessments for spinal impairment?

**Mr BOWEN:** The American Medical Association Guidelines provides two alternative means of measuring spinal impairment, being either diagnostic related estimates or range of motion. The view of the reference group that looked at the spine was that diagnosis related estimates was by far the preferable means of doing it, because it was more accurate than range of motion, given that there can be a whole host of other impairments that can limit movement in the spine.

Perhaps a more important question was whether the range of movement should have been maintained as a means to flesh out the diagnostic related estimate, and I know, and I think this was also well discussed at the Impairment Seminars, that that was looked at in some detail.

I am simply going to have to rely upon the judgment of the experts when they looked at this, that it was preferable to go down the path of relying entirely upon the DRE methodology rather than range of motion, in that while being aware that there is an issue as to whether range of motion should be used to augment the first assessment, I would not want to second guess the experts who took the opposite view.

They seem to also be suggesting that range of motion was perhaps more of an historic overhang, because up until this last set of guides it was a method used - it is still used in those compensation schemes in Australia which rely on earlier editions of the AMA - so they thought perhaps because of that had been retained in the AMA for tradition, but that was clearly on the way out as being inferior to the diagnostic estimates.

**Mr BREEN:** One of the objectives of the legislation was to take these claims for whiplash injuries out of the schedule of injuries for the purposes of compensation. As a practitioner in the area my experience before this legislation was that if you had an accident in Queensland and it involved a whiplash injury, you might get $30,000; in New South Wales for the same injury you might get $15,000 and in Victoria you would get nothing. The object of the scheme, very broadly, was to take New South Wales closer to Victoria, rather than what was happening in Queensland. I am interested to know what has been the impact of the legislation in the context of whiplash injuries, given that there is no longer a claim for economic loss with whiplash injuries. Has that had any impact, or was that part of the $100 reduction that the Government says is the saving on premiums? Are whiplash injuries included in the calculation to determine that $100?

**Mr BOWEN:** The reduction in overall non-economic loss is included in that, and

certainly one of the areas that was expected to be a reduction in payment was for non-economic loss for whiplash injuries, bearing in mind there is no reduction at all for economic loss. To assist in fleshing out these impairment guidelines the Motor Accident Authority has now completed round about 70, and we are on our way to completing 100, case studies of completed files where non-economic loss payments have been made. That would show that without something additional, straight forward whiplash will not get over 10 per cent whole body impairment, and therefore a person presenting with just that injury will not get non-economic loss. With some additional complications or another impairment they may get over.

The costings for the new scheme assume that round about 10 per cent of claimants, about 1,800 claimants per year, will get greater than 10 per cent whole body impairment. Given that whiplash constitutes 38 per cent or 40 per cent of motor accident vehicle injuries, certainly it is clearly the case that the great majority of people presenting just with whiplash will not be getting over the 10 per cent whole body impairment. The case studies bear that out. I might add that the case studies show also that under the pre-existing scheme there was a huge range in non-economic loss payments, sometimes to the point of being unexplainable, not even on factors that one would think would relate to disability, such as age or restriction on the person.

**Mr BREEN:** This is under the old scheme?

**Mr BOWEN:** Under the old scheme. Part of the purpose of doing these case studies was to provide a case book for people as to matters where a fairly typical range of injuries was round about the 10 per cent mark, and secondly it was allowing the MAA to make comparisons between what people were previously getting for non-economic loss, their entitlement under the new scheme and how much they might get in the future. It is suggesting to us that there was a huge range of non-economic loss payments which may have had more to do with the level of representation a person had and their propensity to pursue litigation, rather than the level of impairment or disability they had.

**Mr HATZISTERGOS:** The level of preparation?

**Mr BOWEN:** Yes.

**Mr BREEN:** Can I conclude that line of argument with the question whether the $100 reduction in the premium is due to savings from whiplash injuries not being included, or is it due to the fact that lawyers' fees are no longer part of the payments? What specifically is the $100 and how has it been achieved?

**Mr BOWEN:** It is a combination of both of those, and other savings. In regard to the actual figures, I will have to take that on notice and get back to you, because I do not want to misestimate it. There is a significant component of it that comes from the reduction in overall non-economic loss. My recollection is that the new scheme seeks to reduce the total amount of non-economic loss payments by about $100 million, from about $280 million to about $180 million. I would wish to confirm those figures before

they are relied upon by the Committee, but that is indicative.

The other savings come from reduction in transaction costs, including legal and medical costs, partly by simplifying the process for the finalisation of a claim so that for small claims people do not need to have a lawyer, or the amounts that they are spending on legal costs are significantly reduced; and then otherwise from trying to reduce some of the litigation in the system, including in the larger claims by having a range of what currently litigated matters such as assessment of future treatment and the like determined through an assessment process so that those issues can be finalised earlier and they can promote earlier settlement of matters. That is perhaps the harder area to assess savings and it really will not be until some years down the track that we will be able to say that the new scheme is or is not meeting those assumptions. Although there are certain milestones along the way, that will give good pointers to it, including informed feedback from both insurers and plaintiffs' lawyers as to what is happening with the claims.

**Mr RYAN:** I think you said that 38 per cent of the old scheme was made up of whiplash claims. Is there any possibility that $100 might be an underestimate as to what effect the new scheme might have on premiums?

**Mr BOWEN:** That $100 might be an underestimate?

**Mr RYAN:** Yes. In other words, is there likely to be any chance of even more savings, given that the new scheme may well have taken so many claims out of the scheme, in that whiplash is highly unlikely to make the grade and was 38 per cent of previous claims? That is a fairly significant chunk out of the old scheme that is no longer there?

**Mr BOWEN:** It was 38 per cent of total claims, and of total claims previously about 50 per cent were receiving non-economic loss. I am not sure how all that weighs up. Probably a great number of those whiplash claims were not previously receiving non-economic loss either. I would expect that to be the case, unless there was something that fitted into the previous statutory definition that took them beyond 12 months - it was a significant impairment; it had to be at least 15 per cent of the most serious case. You would think that a lot of simple whiplashes would not have passed that test either, and so would not have previously been getting non-economic loss.

**Mr GRELLMAN:** The new legislation actually continues the trend that was commenced with the 1995 amendments to move the compensation field more towards the more seriously injured, and that is not to dismiss or trivialise whiplash. At the end of the day it is a mathematical equation to determine how to achieve a significant reduction in premiums and what benefits or other costs you can take out of the scheme to achieve that reduction. Certainly whiplash and the smaller claims have been largely removed.

**Mr BREEN:** The point is that if the 1995 amendments took whiplash out of the range of claims and benefits and this new scheme does not include some significant reductions as a consequence of there being no whiplash claims, how do you achieve the $100 reduction? That question still remains outstanding.

**Mr BOWEN:** Undoubtedly people with whiplash were presenting with very different effects, and what they were being compensated for or not compensated for under the old scheme was the effect of the injury and the level of disability. One of our concerns also has been that the previous compensation scheme provided incentives towards disability, particularly with injuries such as whiplash, because if you could argue a more significant disability then you could pass the previous subjective thresholds and get awarded compensation. Because of that, we intend to undertake a study specifically on whiplash to see whether the changes to this scheme reduce the level and length of time for which people are proceeding with treatment for whiplash.

We are doing this because we have just received – and I will make it available to the Committee; I regret that I did not bring it today – a study undertaken in, and I cannot recall the jurisdiction but it was a study by one of the medical colleges which showed that when they moved from a fault-based to a no-fault system there was a massive reduction in the length of time for which people were receiving treatment for whiplash because there was no longer a compensation payment at the end; there was ongoing treatment and payments for treatment. The conclusion they drew from that was that the existence of compensation can have the effect of prolonging and entrenching the disability in people and that you need to tailor your compensation systems to avoid that. That is, I think, one of the areas we need to be alert to. I would like to do a similar sort of study in relation to whiplash injuries in New South Wales.

**Mr HATZISTERGOS:** In relation to medical impairments, I noticed when looking through the table that you are actually requiring the medical assessors to work out the impairments by a process of addition of various components. Do I take it that the certificates will indicate the precise amount of impairment assessed in accordance with these guidelines? Or is it anticipated that the certificates will simply indicate whether or not the person exceeds the 10 per cent, which is really the only statutory purpose of that assessment. Bear in mind in particular that Part 3.4 of the Act does not talk about a specific percentage but talks about whether a certificate indicates whether the degree of impairment or injury to a person is greater than 10 per cent. The reason I ask that question is because in my experience it has been demonstrated that sometimes if you assess specific percentages of impairment, that can affect a decision in relation to the amount of non-economic loss one would award, at least subconsciously.

**Mr BOWEN:** The intention is that the certificate will comply with the statutory requirement and indicate whether or not the person is above or below the 10 per cent. But the certificate will have attached to it a statement of reasons, and in that statement of reasons there will be a list or an accounting of all the information that the assessors had before them, an indication of the procedure that they have undertaken doing the assessment. That will, of necessity, include the results of the full assessment. Bear in mind though that a person may present with a number of injuries. The process of the Motor Accidents Assessment Service will be, in conjunction with that person and their treating doctors, to identify what is the most significant injury and send them to the appropriate assessor for that first. As soon as they are over 10 per cent, you will not proceed to send

them around to a whole number of other specialists. As soon as they are over 10 per cent they will get a certificate to say they are over 10 per cent.

**Mr HATZISTERGOS:** What then needs to be tendered in court to prove the resolution of the dispute? Is it just the certificate?

**Mr BOWEN:** The certificate.

**Mr HATZISTERGOS:** The attachments do not get tendered?

**Mr BOWEN:** The statement of reasons would need to be provided if there was any suggestion that the certificate be overturned, was not procedurally fair or the like. Let me say that it is open to the court, of course, to require that the statement of reasons be tendered as well. We have had now a couple of discussions with the District Court Rules Committee about this, but recognise in the long run that it is the court's decision as to what information it wants. We are telling them what we are producing and making sure that the systems mesh as well as possible, but if the court requires a statement of reasons to be submitted by operation of their rules, then it will have to be so. But there needs to be some caution about relying upon the total impairment shown in a statement of reasons to assess the level of benefits, because it might be incomplete.

**Mr HATZISTERGOS:** What would be the relevance of the reasons?

**Mr BOWEN:** I do not think there is any relevance, but I thought you were suggesting that.

**Mr HATZISTERGOS:** No, I am just suggesting that in terms of the statute the only thing required is certification as to when it is over 10%.
**Mr BOWEN:** That is right.

**Mr HATZISTERGOS:** There is no dispute about the certificate; there is no point in handing out the reasons.

**Mr BOWEN:** I would agree with you, but if the court requires it we provide it.

**Mr HATZISTERGOS:** I am wondering what in fact is going to happen once the court gets it. The other thing I want to ask you is about s 135 of the Act, "The Authority may publish information or promote the publication of information which is according to the terms the appropriate level of damages and non-economic loss as a result of motor accidents". You are accepting that non-economic loss would be assessed in accordance with common law principles.

The High Court has previously stated that in the determination of non-economic loss or general damages it is inappropriate for a court making that assessment to have regard to what may or may not have happened in other cases, as every case has to be looked at individually and on its merits, and the court should not be guided by assessments of non-

economic loss in other cases.

Does s 135 in your view cut across that, and bearing in mind that this all going to be generated by the Authority, flowing on to my next question is, what information do you propose should be supplied pursuant to that section? Have you got a list at the moment? If you have not, what do you intend to put in the package, and how do you intend to distribute it?

**Mr BOWEN:** If I can answer the second question first, I think that the case books that we are preparing, and intend to keep preparing, go part of the way to meeting or complying with that requirement, or enabling provision to provide information, although those case books are being primarily prepared for the insurers and legal practitioners so they can avoid there being a dispute. What additional information --

**Mr HATZISTERGOS:** Sorry - case books of assessments in other cases?

**Mr BOWEN:** Case books of completed assessments that - we have done it in two parts. We have engaged a barrister to prepare a case summary. These are completed matters, but we are changing names and identities. So there is a summary of the circumstances of the case and presentation of the claimant, factors such as that. Then there is an assessment at this stage of the case, because they are done on completed files, that they will move to live matters in due course.

The intention will be that they will provide some guidance, but clearly only guidance because of the points you make. Every injury can be quite individual, but nevertheless it can be some guidance as to - "Well for this sort of injury it is going to be around about this level of impairment", and what are these other factors that may bear upon the assessment of non-economic loss.

**Mr HATZISTERGOS:** Sorry, do these books then get quoted as some form of authority?

**Mr BOWEN:** They are produced by the Motor Accidents Authority. They will also provide or be a training tool in the process of training the assessors, so the assessors have some knowledge of this going into a new scheme. Otherwise we would be talking in theory and not in practice.

It is trying to also get more detail on the profile of motor accidents claims, particularly round about that 10% impaired, given that we accept that there will be a whole range of injuries which are manifestly over the 10%, and we would not expect them to be coming in for impairment assessment.

There will be a whole range of injuries where people recover and have no further impairment. We do not expect them to present, but we would like to try and find a lot of information cases that will fall round about the 10%, sort of the 5% to 15% range, or maybe a little bit lighter.

**CHAIR:** Can I just break in? It seems to me that given the language used in s 135 of the Act, that the court does retain a very wide discretion, given that subsection 2 does provide that a court may have regard to any such information, that is information supplied by the Authority, but is not bound to act on it. So would I be correct in assuming that the intention of the legislation is that the Authority's information is to assist the court, but certainly is not definitive or binding?

**Mr BOWEN:** Yes, I certainly think that is the preferable interpretation, but I am conscious of the point that is being made, the direction by the High Court. It could be, notwithstanding that legislative provision, that if a judge was to way "Well, I have been informed by the Motor Accidents Guidelines on non-economic loss" that it would be a point of appeal.

So I would see the better use being made of these as perhaps a training tool, to just give acquaintance with motor vehicle injuries and the range of issues relevant to impairment assessment, and then the range of issues that flow from that into the assessment of the non-economic loss.

**Mr HATZISTERGOS:** I suppose I am troubled by the section, as to whether you expect practitioners to be quoting this material.

**Mr BOWEN:** I might mention it is a section that is a carry forward. The Authority has never produced guidelines in the past, but I think to the extent these case books go toward anything, they may go towards that section.

**Mr HATZISTERGOS:** Would you be able to supply us with any information that you have prepared yourself for that section?

**Mr BOWEN:** Certainly.

**Mr HATZISTERGOS:** I would just be interested if you could regularly inform us as to what information you are going to be supplying to the courts.

**Mr BOWEN:** By all means.

**Mr HATZISTERGOS:** Will it be publicly available information?

**Mr BOWEN:** Absolutely. The Board and the Council had some discussion about this, and have taken the view that everything that is produced, or that is even background information relevant to the preparation of the guidelines, should be available.

**Mr RYAN:** Just to clean up a couple of matters with regard to whiplash, what is the status of the MAA's draft guidelines for the management of whiplash?

**Mr BOWEN:** They have been sent out for final comment, and subject to any further issues that arise in that comment, I would expect we would be promulgating them in

May.

**Mr RYAN:** If we go back to a couple of questions you answered earlier with regard to whiplash, where I think we suggested that whiplash is not likely to be an area of claim for non-economic loss, largely as a result of Chapter 4 of the MAA's impairment assessment, it is likely that claimants will no longer receive compensation for non-economic loss for whiplash.

What are the implications, if any, for compensation for claimants for future treatment, or economic loss for persons with whiplash arising from a motor accident?

**Mr BOWEN:** There should not be any implications at all. A person who has been injured in a motor accident, whatever their injury, should have their medical costs, including future treatment costs, met.

**Mr RYAN:** Right. The old scheme apparently provided for a maximum amount of non-economic loss of $273,000, and the new scheme apparently limits it at $260,000. Is there some reason as to why there are the two figures? Is it not appropriate that the old scheme and the new scheme should have the same figure?

**Mr BOWEN:** I think that I would accept that, and draw that to the Minister's attention. It is a more extreme difference than I think was taken into account, in that by coincidence the old figure was indexed each year on the 1st October, so at the time the legislation was presented it was working off the maximum that was less than the $273,000, it was about 4% less, so whatever it was.

But I do not have an explanation as to why it is different, and I must say that I had not consciously noted that previously to the receipt of these submissions, and I will draw that to the Minister's attention.

**Mr RYAN:** In relation to Mr Bowen's answer which referred to the role of the Medical Assessment Service concerning reasonable and necessary treatment, why is it that s 61(6) of the Act as it currently stands, and will also remain as a result of the amending bill that is currently before the house, which only provides scope for this court to substitute its own determination in those limited circumstances where there has been procedural unfairness in the medical assessment, in respect of decisions about the 10% of whole person impairment threshold - in view of the controversy surrounding that case we talked a lot about in the last Parliament, the *Stubbs v. NRMA* case, would it not be reasonable for the court to have a capacity to substitute its own determination in those decisions as well?

**Mr BOWEN:** In fact the decision of the medical assessor on future treatment, which would include future care, is not binding upon the court. So if we had the *Stubbs* case or an equivalent come to medical assessment, then there would be the ability for an assessor to make a determination as to what is reasonable and necessary levels of care, but that would only bind both the parties insofar as it was care already provided prior to that

assessment.

I would take the view that it be necessarily be persuasive, and in terms of the MAA's regulatory responsibilities over the insurers, if there was a circumstance in which an assessor made a determination on past care, I would expect the insurer to continue to meet that level of care into the future, unless there were good grounds to go back and appeal. But it would not be binding upon the court when the court came to determine the matter.

**Mr RYAN:** The Committee has been asked by means of correspondence from the Bar Association about the recovery of party/party costs when matters have been reheard, and essentially their concern is that if for example a claimant represented themselves, and wound up with a fairly modest CARS assessment of say $500, and then decided as a result of getting some more information from a legal practitioner they would go before a judge and get a substantially increased assessment, the difficulty is the Table B which sets out the regulations for legal fees is sufficiently modest, and it is likely that the claimant is going to spend - a lot of the money that they get in the redetermination of the matter is going to be eaten up by the legal fees.

It has been suggested to us that whilst there is provision in the Act for a penalty for a claimant who seeks a rehearing and fails to improve their position, there is no corresponding bonus or benefit provided with the scheme where the claimant does make a substantial improvement.

Are there some that ought to - I am not sure that I necessarily agree with the idea of an improvement, a bonus, but it seems to me that any legal costs a person incurred in having a matter reheard, and where they were successful, ought to be claimable at a reasonable rate?

**Mr BOWEN:** A couple of points in response to that, if I may. There is a live issue as to what matters, what level of matters, should go to CARS. There was a lot of discussion in the process of preparing the guidelines for it as to whether there should be any monetary jurisdictional limit. The view was taken by the MAA, not by the legal profession, that there should not be a limit on CARS because mere size of the claim did not necessarily reflect the degree of complexity of dealing with it.

So instead there was a provision put in there that provides that matters that have complex legal issues, or complex factual issues, should be excluded from CARS, and the consequence of that is that they are taken right outside of the legal costs regime. They do not have regulated costs if they are exempted from CARS. The expectation is that the matters that come to CARS are reasonably simple, straightforward quantum matters, even though they may embrace rather large quantum matters.

So if a claimant is going to CARS unrepresented, and they then go and see a lawyer, the nature of the matter is such that the level of fees in Schedule B is sufficient to meet the costs of providing some advice to them as to whether or not their claim has merit to

proceed, and if so, to provide some compensation for running that matter on to court, given that it should not be a case that has a lot of legal complexities in it.

There is a provision in the Act, however, in addition to that, for matters that go to court, that allows a court to override cost provisions where it thinks it is appropriate to do so. I am sure I will struggle to find it but I think it says "Having regard to the circumstances" and the like. In fact, the wording of the statutory provision is based upon the District Court Rules provision that allows it to set aside an offer of compromise or to allow it to override the normal operation of the offer of compromise.

**Mr HATZISTERGOS:** Section 153(1): "in order to avoid substantial injustice"?

**Mr BOWEN:** Yes. I am reasonably comfortable that the operation of those two sections in conjunction does not cause too much of a problem.

**Mr HATZISTERGOS:** It leaves it open to a situation where the claimant goes to CARS by himself and then engages a lawyer who supplies the initial information that was not supplied to CARS and could get caught up by the provisions and be liable to be sent back to CARS to present that information.

**Mr BOWEN:** I suppose there are two responses to that. Firstly, for unrepresented litigants at CARS the Motor Accidents Authority has its advisory service, and we see the operation of that service as being really critical to this component of the scheme. If there is an assumption, as there is in the costings, that there will be more unrepresented litigants, then there needs to be proper assistance to get them through the procedures, even though there will not be the provision of legal advice as to their level of entitlement. Secondly, the legislation has within it appropriate provisions to take matters further, but the real success of it will be having a proper assessment in the first place and not relying upon needing to go to court to get matters corrected. Again there, I think that the selection of the assessors, which has been completed, has left us with a group of very, very strong assessors who, I am comfortable, will find general acceptance from both plaintiffs and insurers that they are fair and just and will be providing proper impartial assessments at the appropriate level. Relying upon and having confidence in the assessors rather than putting all sorts of systems in place to overcome poor assessments is a better approach.

**Mr RYAN:** The final question I want to ask you relates to the completion of the Accident Notification Form. This arises from correspondence to myself, not to the Committee, although I should pass it on to the Committee. Essentially what the suburban lawyer who wrote to me was saying was that they are not convinced that medical practitioners are giving appropriate advice to people who might come in with an injury, to ensure that they complete that form quickly enough. I understand it is critical that they complete it within a particular period of time, and if not they forfeit all opportunities to make a claim. The argument they put to me is that doctors feel that their job is to provide medical advice not legal advice. They are exerting some resistance on their part to raise that as an issue. What sort of training are you providing to medical

practitioners and do you see that as a potential emerging problem?

**Mr BOWEN:** It has the potential to be a problem. We have been monitoring the use of the Accident Notification Form and have noted that there is a great range in the usage of it. By doing some sampling we have found that there is a great divergence of knowledge in the medical profession about the existence of this form, secondly how it is used, and thirdly what happens with it.

At the time the forms were initially sent out, and they were sent to each registered medical practitioner not to their surgeries, we provided some information. We supplemented that with articles in the various medical journals and with forms and training throughout New South Wales. We had what we called our first road show in late October, early November, which drew reasonable audiences. However, it would appear that some practitioners said that they got it in September, so it starts in October and they put it in the drawer and it has possibly remained there. So we are in the process of developing a further mail-out, this time to the surgeries as distinct from to practitioners, and we are going to supplement that with targeted visits to surgeries to make sure that the person at the desk or reception is aware of it. We have posters to put up in waiting rooms. We have submitted a further article to the journal. At the moment, during May, we are having a further round of training courses throughout the State where we have been in correspondence with the local, I think they are called, chapters of the AMA - I am not sure of that – as well as the regional law societies to try to get audiences to those.

It will be an ongoing issue to make sure that medical practitioners are aware of it. I have to say we suspected that we would have some problems in this area because we have had quite a bit of discussion with WorkCover. WorkCover has had a similar medical certificate in place for some years and they had even more teething problems than we have, because if was very new at that stage and we have had at least the WorkCover precedent as being one that practitioners were getting acquainted with and getting used to. It is ongoing.

In terms of what happens if there is a delay with the ANF, it is to be lodged within 28 days; if it is not, then the person simply has to lodge a claim form instead of the Accident Notification Form. Whilst we cannot require it, the Motor Accidents Authority has been encouraging insurers to accept the Accident Notification Forms even if they come in late. My understanding is that the majority of them have been doing that, for the very good reason that it is considerably cheaper for them if they can finalise the matter with the Accident Notification Form instead of a claim form. It is certainly considerably easier for the claimants if they have to fill in a 2-page ANF as distinct from a 10-page claim form.

**Mr RYAN:** Is there any usefulness in having the 28-day limit at all?

**Mr BOWEN:** A person who is going to be pursuing a claim needs to make that claim within six months. This is the existing scheme and we wanted to put in something earlier that triggers a very early notification, to allow the person to get that early treatment. The 28 days was arbitrary, but it seemed to be reasonable, in that most people who had

suffered an injury would attend their doctor within that period. It would be unlikely that they would not. So long as the system is working properly, they go to the doctor and he asks, “Is this a motor accident matter?” He will say, “You will need this form. Fill it in, phone the call centre and find the insurer and send it straight in." If that system is working, the 28 days should be okay. I would say that is another area where you have to monitor. If we find out that it is not working, that there are a whole lot coming in just afterwards, then that is a good reason to have a look at that period.

**Mr RYAN:** Some people might feel too ill to fill out a form.

**Mr BOWEN:** Anyone who has had a serious injury and is hospitalised will not use the Accident Notification Form, because they might as well proceed straight to a claim form stage. Their hospital treatment is all paid for.

**Mr RYAN:** They might not be hospitalised, but they might feel generally malaised. The other final thing arising from that is whether there is not some value in communicating with motorists about the importance of this form, perhaps through the registration system?

**Mr BOWEN:** Yes. In fact, the new guide is going out with registrations. We already issue a guide that goes out with each of the recent renewals and with the registration certificate. It now has information on how to make a claim. The fact is that people do not ever think about what they will need to do if they get hurt in an accident, until they are hurt, and at that stage they do not necessarily think about going back to something they got with their registration papers.

**Mr BREEN:** Could I just say anecdotally that I know a law firm which had something like $2 million monthly turnover in this kind of work a year ago and now they do not see people at all. They literally send them off to the doctor. What you have done is created a completely different system of claiming. To my observation the doctors are not nearly up to the speed that the lawyers were in filling out the form, complying with the statutory requirements and that kind of thing. I do not even know that they under the same obligations as the lawyers were. That could be one reason why the number of claims you have is so much down on what they were previously. I know of two people personally; one was a hitch-hiker I picked up recent. He had a pin in his leg as a result of a motor vehicle accident in which he was a passenger. I asked him what he had done about claiming and he said he went to see a lawyer and a doctor and both of them simply said that he would have to go and see the Authority. Six months later he was still wandering around looking for the appropriate place to go. To my mind that would suggest that there is a problem, and it will suddenly present itself if a whole lot of people are making out of time claims.

**Mr GRELLMAN:** There is probably a bit of new scheme knowledge acquisition required by the community as a whole, as well as the professionals who are meant to service this. I think it is a very good point, and we need to stay alert as an Authority as to whether or not there is more we can do to ensure that the public are aware of the implications of

these issues.

**Mr BREEN:** That might be one reason why you have been able to achieve the $100 savings, simply by not having people coming into the system.

**Mr BOWEN:** I would hope not. Indeed I might mention that the insurance industry I think has responded to this side of the new scheme very well. For example, the NRMA will take an Accident Notification Form over the phone. You do not need to fill out the form and send it in. You will need to get a doctor's certificate to complete it at some point in the future. But if you have a claim against one of their drivers you can ring them up and they will take the details over the phone. That type of innovation is to be massively encouraged. It really is making life much easier for the claimant.

**Mr RYAN:** Is this an area of study that is going to constitute some of the monitoring that you require? Are you going to expect the insurance companies to provide some statistical information about out of time claims?

**Mr BOWEN:** Yes. In addition to the statutory time frames there are other time frames that are imposed under the Motor Accidents Authority's claims handling guidelines, which is how they deal with claimants once they are into the system. There are a couple of points about that. In my view it is not sufficient to simply provide quantitative information – how many people are inside and outside time frames. What is critically important is how they are treated when they are in there. For example, with the three month period to admit liability, our performance indicator for the insurers is not the number who are inside that time frame; it is whether or not they have made that decision at the earliest possible time they can when they have all the information. So it is not good enough to say you have all the claims after 21 days, but you do not make the decision for three months and you might get a tick because you are inside the time frame. Really the decision should be made at the earliest possible moment, and that is an element of qualitative assessment that we are going to do.

**Mr HATZISTERGOS:** Previously it was the case that in order to be paid following an injury, a doctor needed to alert the patient to the fact that he may meed to seek the advice of a lawyer, in order that a claim could be initiated and ultimately the doctor was paid from the insurance money. Now there is an alternative, which is to file an Accident Notification Form and get the costs paid. As you have indicated, in some cases the insurers are paying more than the $500. The doctor's prime interest, I suppose from an economic point of view, is to ensure that he is paid rather than necessarily to see that lawyers enter into the picture or that the patient, for that matter, is appropriately compensated for the effect of the injury, and therefore doctors do not see their role as it may have been previously, to act as some form of referral service. Therefore that has an impact on whether or not people ultimately claim. This would not be unusual, because it happened when lump sum compensation came into the workers compensation scheme. You had situations where people who were injured in work accidents got compensation, medical expenses and weekly benefits but never bothered to claim lump sum compensation, because the insurers never bothered to let them know their rights. It is

much more dangerous in this situation, because you have a time limit, whereas you do not in the workers compensation situation. You have a time limit with motor accidents as to how long you have to make a claim for injury.

**Mr BOWEN:** I am not so sure that the previous scheme did rely upon medical practitioners referring people to lawyers. They may well have done that, but in most cases for small claims that amount was recovered through Medicare, and then if the person pursued a claim they had to repay that amount through the health insurance contribution scheme, which should ask for recovery of the Medicare payments. That would seem to me to have been generally what happened.

The intention here is that the earlier notification will in fact prompt more claims, or more people to notify, than was previously the case. Where a person may have only had bruises, fairly minor soft tissue injury, they go to the doctor, they may have one form of therapy, and the costs were such that it was not worth the bother of putting in what was quite an extensive and detailed claim form.

They can now go and present with that same injury, same forms of therapies, and because they have got a much simplified form - the Accident Notification Form is one page filled in by them with details of the accident, one page filled in by the doctor on how they are presenting - they can get that paid for, and often what that means is that if the insurer gets involved in the rehabilitation they can get more direct rehab earlier.

**Mr HATZISTERGOS:** I would not say that is a bad thing.

**Mr BOWEN:** No. But I think there is in fact an expectation under this new scheme that the level of total notifications will be higher than it was under the previous scheme, because it is bringing some of those smaller matters at the earlier level, even though it sees hopefully finalising them and taking them out of the system fairly quickly.

**Mr HATZISTERGOS:** I am not saying it is a bad thing, I just think it is important also to make them aware of what their other rights may be through referral to your service, or if necessary to the --

**Mr BOWEN:** Yes. I can mention that as we made more information about our Claims Advisory Service available, and that is a responsibility we had, the number of calls coming into that area is virtually doubling every month, and it is now running into the hundreds of calls per month, which would mean that people are finding out about it and they are getting on the right place, and hopefully they are then getting their claims in.

**Mr HATZISTERGOS:** Well, it is a change of culture.

**Mr BOWEN:** It is, it will take time.

**Mr BREEN:** It is a radical change of culture. The ambulance chasers are gone. They used to tell you, they used to knock on the window of the ambulance. Now they have

got to rely on the doctor, and as Mr Hatzistergos said, a doctor is going to get a scheduled fee presumably for a consultation, and may not get any extra money for filling out the form.

**Mr BOWEN:** In fact they do. They get an extra $16 for filling in the form, and their consultation fee is considerably higher than under Medicare. So they in fact have an incentive to make sure their motor accidents patients come through the motor accidents scheme, and not through Medicare.

**Mr BREEN:** That is fair enough.

**CHAIR:** Mr Bowen, I would like to formally place on notice some questions posed to the Committee by the Bar Association. The questions are as follows, and I am not expecting you to respond on the spot because they do seek statistical information:

(a) How many staff does the Authority have employed monitoring insurers performance under the scheme? When does the Authority anticipate that the complaints unit will be fully staffed and operational?

(b) What statistical data is available regarding the performance of the scheme during the first six months, that is October 1999 to March 2000? For example:

(i) How many claims have been lodged during that period?

(ii) How many of those claims have been settled?

(iii) What premium revenue have the insurers collected during that period?

(iv) What has been the expenditure on claims under the new scheme in that period? What proportion of that expenditure is on legal costs?

(v) What profit levels have insurers experienced during those six months?

(vi) Have the insurers been complying with the guidelines under the scheme requiring that they respond to correspondence, make offers and determine liability within set time periods?

(vii) What arrangements have insurers reached regarding contracting out with their panel solicitors? Are claimant's solicitors the only legal representatives being asked to accept reduced costs?

So if I may, I place all of those on notice for response in due course.

**Mr BOWEN:** If I can make just perhaps one comment, the answers to some of those require audit of the insurers' performance. As you may have picked up from our response on performance indicators, we intend for a number of areas of the scheme to engage external auditors. We are proposing to do the first assessment of the insurers'

compliance with the new scheme in June, and that will be undertaken by Professor Ted Wright from the Justice Research Centre.

So some of that information I will not have available until that audit is undertaken. I mention that now, and that will form part of our reply, but I give you a clear undertaking that as soon as we get the audit results we will make that available.

**CHAIR:** Thank you, the Committee understands the position in that regard.

Mr Grellman and Mr Bowen, thank you very much indeed for your assistance to the Committee this morning. We will conclude the hearing at this point, and look forward to seeing you later in the year.

**(The witnesses withdrew)**

**(The Committee adjourned at 12.50 p.m.)**