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REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO THE MOTOR ACCIDENTS AUTHORITY AND MOTOR ACCIDENTS COUNCIL

Corrected transcript

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At Sydney on Monday 27 August 2007

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. C. M. Robertson (Chair)

The Hon. J. G. Ajaka
The Hon. D. J. Clarke
The Hon. G. J. Donnelly
The Hon. A. R. Fazio
Ms S. P. Hale

CHAIR: Welcome to the public hearing of the Standing Committee on Law and Justice's eighth review of the exercise of the functions of the Motor Accidents Authority [MAA] and the Motor Accidents Council [MAC]. Today we will be hearing from witnesses from the Motor Accidents Authority and the Motor Accidents Council and from three medical assessors who work for the Motor Accident Authority's medical assessment service. We will also be hearing from the Law Society of New South Wales, the Insurance Council of Australia and the New South Wales Bar Association.

Before we commence I will make some comments about aspects of the hearing. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing broadcast of the proceedings are available from the table by the door. In accordance with the guidelines, a member of the Committee and witnesses may be filmed or recorded. However, people in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee, the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee.

Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. I also advise that, under the standing orders of the Legislative Council, any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or by any other person. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to Committee witnesses under parliamentary privilege should not be abused during the hearings. Therefore, I request that witnesses avoid the mention of other individuals unless it is absolutely essential to address the terms of reference. I ask everyone to turn off their mobile phones, including mobile phones on silent, for the duration of the hearing as they still interfere with Hansard's recording of the proceedings.

Before we start I want to ensure that people recognise that in some ways I have been through this particular insurance process. Therefore, I must register that I have been a recipient of the Motor Accident Authority's program and this law in recent times.

CARMEL MARY DONNELLY, Deputy General Manager, Motor Accidents Authority, Level 25, 580 George Street, Sydney,

DAVID BOWEN, General Manager, Motor Accidents Authority, Level 25, 580 George Street, Sydney, and

CAMERON DOUGLAS PLAYER, Assistant General Manager, Motor Accidents Authority, Level 19, 1 Oxford Street, Sydney, affirmed and examined, and

RICHARD JOHN GRELLMAN, Chairman, Motor Accidents Authority, Level 25, 580 George Street, Sydney, sworn and examined:

CHAIR: What is your occupation?

Mr PLAYER: Assistant General Manager of the Motor Accidents Authority.

Mr GRELLMAN: I am a non-executive director of various entities.

Mr BOWEN: Public servant.

Ms DONNELLY: Public servant.

CHAIR: In what capacity are you appearing before the Committee? Are you appearing as an individual or as a representative of an organisation?

Mr PLAYER: I am appearing in my capacity as assistant general manager of the Motor Accidents Authority.

Mr GRELLMAN: I am appearing in my capacity as chairman of the Motor Accidents Authority and also as chairman of the Motor Accidents Council.

Mr BOWEN: As general manager of the Motor Accidents Authority.

Ms DONNELLY: I am appearing as the deputy general manager of the Motor Accidents Authority.

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

Mr PLAYER: Yes.

Mr GRELLMAN: I am.

Mr BOWEN: I am.

Ms DONNELLY: I am.

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. However, the Committee reserves the right to publish that information if it should so wish. If you take any questions on notice, the Committee would appreciate it if the response to those questions could be forwarded to the secretary by Friday 14 September 2007. Would you like to make an opening statement?

Mr GRELLMAN: It is probably appropriate for me to commence with an overview of the governance of the Motor Accidents Authority scheme. Reporting through to the Minister, the primary governance body is the board of directors. There are six directors on the board, two of whom are myself and David Bowen. That is the body. It has the primary responsibility to keep an eye on the operations of the scheme, the functionality of the scheme, bring recommendations to the Minister and generally accept responsibility to try to ensure that the scheme is operating in the most functional way

possible. I thought I might spend a moment longer on the council. The Motor Accidents Council was established as part of the 1999 reforms, when the new scheme came in. It is a 12-member advisory council. Those 12 members consist of two legal practitioners, two medical practitioners, two insurance company representatives, a person nominated by the NRMA, an injured persons representative, a consumer representative, the general manager, myself, and the deputy chair of the board, Penny Lacota. That makes 12.

The council reports to the Minister through the board of directors but it is very much an advisory capacity. Because it primarily consists of service providers and people closely interested in the working of the scheme, it is a very good forum for issues to be aired with people who understand the finer details of the scheme so that those issues can be well discussed and often debated. Although the council has no decision-making ability, as I said before, it nevertheless is a very good forum to bring out issues that might be relevant to the board. So as a result it is not at all unusual for issues that the board may be contemplating resolving to run past the council first. That gives the service providers an opportunity to ensure that their views are factored into the thinking of the board, which of course can be reported through to the board from the three board members who sit on the council.

The sorts of matters that the council has reviewed lately—to give you a feeling for the sorts of issues that come before that group—are, firstly, the scheme data itself, how the scheme is performing, whether there are any apparent signs of fragility in the scheme that may need addressing, and how the assessment centres are operating and whether they are achieving their goals in a timely fashion. But, more particularly, recently there was a study by PricewaterhouseCoopers on superimposed inflation and whether or not that is becoming a factor in the scheme again. It is quite a heavy document but it was pre-circulated and then discussed by the council. The permanent impairment guidelines underpin a lot of the philosophy of the scheme. We rely very heavily on medical assessors—eminent people from various medical specialties. A number of Motor Accidents Authority council members have very generously assisted in the recruiting of medical practitioners: interviewing and then helping with the whole recruitment process. So we think it is very appropriate to have members of the council, if they are willing, help with that exercise.

There are issues such as learner driver road safety, which has been occupying the authority for some time. As to health outcome monitoring, obviously if there is a claimant against the scheme the scheme is primarily directed at ensuring that they are rehabilitated and their health is returned to a stable condition as quickly as possible. So there is monitoring in broad terms of the outcomes that we are seeing coming through the scheme. We rely very much on the insurance sector to assist with claims handling. There are claims-handling guidelines so there is an overview of how the insurers have been performing—whether there are any issues that may have required further dialogue with insurers generally or an insurer. Then of course there are the whole-person impairment guidelines, which are a very key underlying ingredient of the scheme.

I hope that gives the Committee some feeling for the operations of the council. It is a group that has a quite interesting dynamic because you have, if you like, naturally opposing points of view—for instance, often the legal profession and the underwriters will have different views on a topic. That can be made even more interesting if the medical profession has a further point of view that might be not quite on all fours with either of the other two stakeholders. It is quite a robust environment for these different points of view to be put on the table. I think that makes for a very healthy environment. I know that David and his people get quite a lot of benefit from some of the debates that occur within the council. That covers the matters that I wanted to raise by way of opening comments.

CHAIR: Thank you. Mr Bowen.

Mr BOWEN: Thank you, Madam Chair. I want to reflect on the fact that, with the commencement of the lifetime care scheme in October last year, in this report we are really at the end of a period of the scheme of operation, from 1 October 1999 to 30 September last year. We will be reporting on a new base from that point onwards. Looking over that period under various areas of activity, I think it is worthwhile this morning to draw attention to how significant the change has been during that time.

In terms of the regulatory environment, the critical issue for the MAA in that period was the collapse of HIH and the consequences of that. It is pleasing to us—and it was dealt with by this

Committee previously—to note that the MAA was commended by the royal commission into HIH for the action that we took. But it nevertheless remains a very sore point that, despite the fact that, due to our regulation, we know that FAI and CIC, as licensed CTP insurers, had collected sufficient premiums to fully fund the liabilities in relation to CTP, those funds were not quarantined and they went into the mix of HIH. This resulted in the State Government picking up $500 million worth of liability. That has been a significant issue for us to deal with, and we have been managing the claims run-off for that period, which probably still has at least 10 years to go.

It did alter the regulatory environment for insurers in a very good way. Post HIH the Commonwealth Government responded very positively. APRA was heavily resourced. It put into place much more significant regulatory framework, and I think that the general insurance industry has never been healthier than it is at the moment. There is very little prospect of a similar HIH incident happening, certainly in the immediate future. We enjoy a very good relationship with APRA. We have that formalised through a memorandum of understanding. But it is certainly clear to us that, despite provisions in our Act that say that the MAA has a prudential role, we cannot prudentially supervise an insurance company through a single line of business. The size and complexity of the insurance industry today is such that, even though we keep a very good eye on the CTP business, the prospect of a company making decisions elsewhere that influence its entire portfolio is beyond our control. We look to our MOU with APRA for them to do that.

In terms of the market and premiums, they are covered in our report. We have a short summary of the key points there. Certainly the market has contracted in terms of the number of players. But even after the most recent merger—the acquisition by Suncorp of Promina, which includes the AAMI brand—we are confident that there are sufficient players in the market to continue to be competitive in CTP. In fact, it has possibly created a situation where we have three very good-size market players and two others that have sufficient size to be good, aggressive competitors. Premiums have tracked very well over this period of time. Ms Donnelly will deal with that in a little more detail.

As you know, we have spent a lot of time on insurer profits and given a lot of reports to this Committee on that. Again, we can present an update on that this morning. We will be guided by you as to where you want to go with that. But we are confident that at each point in time, when we have been looking in terms of the premium, we have been making correct decisions. The factors that have led to high profits when you look backwards were beyond our contemplation at the time the filings occurred. Just as importantly, as the industry has tracked forward and that information has led to refiles and further premium reviews, the premiums have dropped to reflect the position in the marketplace—the pricing of the risk.

The 1999 reforms were driven by a number of imperatives. One of them was a political imperative to cut the price of green slips by $100 because it was reaching a point where it was becoming unaffordable for average mums and dads. That was certainly achieved. But there were a number of other very significant changes in the scheme to deal with the management of claims. Some of those I think now, seven years later, we can say have been very successful.

The introduction of the accident notification form provided a mechanism for people to notify small claims very quickly. It has been tremendously successful and we have taken on board this Committee's recommendations that we examine an extension of that. We have provided a paper to the recent Motor Accidents Council meeting looking at the profile of small claims, claims up to about $5,000, to see whether the types of damages lent themselves to being dealt with in an expanded ANF [accident notification form] scheme. We got a very positive, in fact, a unanimous response from the Motor Accidents Council—which, as the Chairman has alluded to, is quite rare. We got unanimous support for an expansion of the ANF scheme. We are developing a proposal to put to the Minister on that at the moment.

The other significant change was a real focus on early treatment—that this scheme cannot be just about providing people with monetary compensation at some point in time, often years down the track; that there has to be active management of the claim and provision of services to the injured person to help them get better, to help them recover as quickly as possible. Through medical guidelines produced by the Motor Accidents Authority and treatment-rehabilitation-attendant care guidelines that prescribe the way in which insurers deal with claims and treatment issues we have seen

a significant improvement in decisions upon treatment, the time of the provision of first treatment and the time of payments for treatment. All of those have meant people getting in and out of the system quicker, which is a very desirable outcome and, in fact, leads to a reduction in the scheme's costs. If people get better quickly the claim is cheaper. That is understandable and it is a good result.

The motor accidents assessment service was an attempt to say that whilst we want to retain court as a forum of last resort, court is a very expensive proposition for dealing with the great bulk of disputes in this scheme, which are disputes over quantum decisions on what the claim is worth. They are not disputes over liability or complex legal issues. They are disputes over what the claim is worth. Through the institution of the claims assessment and resolution service we have provided a forum for that. The philosophy behind it was that the assessors should not be officers of the MAA or public servants; they should be practitioners who are specialists in the area of personal injury who currently practise in the area and who have a very good understanding and ability to value claims. I think that that has been also a very successful initiative, even though we believe there is scope for further improvement by bringing forward some of the time frames.

Similarly the medical assessment, which I will not go into in very much detail because you are looking specifically at that, had its teething problems. The intent behind it was to recognise that there are lot of disputes about issues of treatment, impairment and the stabilisation of the injury and that it is preferable to determine on an as-you-go basis rather than leaving it all to a final point of resolution before a court, or wherever. The issue here was turning medical practitioners into decision-makers. I think over a period of time we have succeeded in doing that. We have got away from the significant early delay problems and we are now generating good consistent decision-making in that area. We have got away from what the doctors themselves always hated which was the concept of adversarial medicine where each side lined up their own doctors and battled it out in front of a judge. We have tried to focus on what is a proper medical decision to make on any one matter. We have encouraged the medical assessors to have a collegiate ownership of that system. I am hoping that they will give evidence to you today that that is, in fact, the approach they take and that we encourage them to take.

It has been a very interesting period. I suppose I am foreshadowing that from the next annual report. Because of the advent of the lifetime care scheme, we necessarily have to change the way in which we report on the scheme as a whole. The seven years have not been without their difficulties. I sit here feeling quite confident that we have delivered on most of the objectives from the 1999 reforms and have the scheme well placed to move into its next phase. Ms Donnelly has extracted from our annual report some key slides and we have put them onto a handout for you. We are happy to hand those around. Whether you would like Ms Donnelly to speak to those or just throw us questions on them we leave entirely up to you.

CHAIR: The Committee accepts those slides. Ms Donnelly, if you keep it brief it would be very useful. Before you do so, for the information of this process, the Committee has resolved not to review the life care and lifetime support this year because of the short time frame. We will be resolving it from the annual report next year. We were given that role when the law was introduced.

Ms DONNELLY: We anticipated that the Committee would be interested in some updated information on affordability, profit and the CTP [comprehensive third party] market. You have slides in front of you. As to the first one you can see that we have historically good green slip affordability. This data is later than our most recent annual report. It shows two measures—the weighted best price and the average premium for our metropolitan class 1. They are related to average weekly earnings. As a percentage when you look back over some 15 or 16 years, indeed beyond that slide, it is the best green slip affordability historically over that period of time and much better at 26 to 28 per cent, around that range, than obviously the over 50 per cent shown in the late 1990s.

The next slide also has some information that is later than our last annual report. It shows the projected distribution of risk premium, which includes the estimated underwriting profit, which is now being estimated at 6.5 per cent. This is consistent with filings being within what the MAA [Motor Accidents Authority] considers to be a desirable range. The following slide is not updated but it will be updated in our next annual report. It really is an indication that we monitor what happens with actual profit and the estimates of profit as claims develop. It can be difficult to estimate this as claims come in over a period of time. You will see from the early years there were some high percentages

reflecting the uncertainty in the early years of the scheme and that those percentages have followed the claims frequency down. In the later years, as there are so many claims that are not yet resolved, there is a very much lower estimate of profit because there is a prudential margin included there for, essentially, contingency.

Moving quickly to the next slide, we thought that the Committee would be interested to know that the market is very competitive at the moment. It is an indication that the best price available has, in fact, changed about five times over a recent nine-month period between different insurers. Every insurer has refiled several times over the last nine-month period, certainly more frequently than in the previous annual report. Why is it so competitive? Part of that is about risk premium assumption, the insurer estimate of their risk. Part of that is about investment returns with a buoyant stock market and interest rates. Part of that is to do with average weekly earnings assumption with the actual average weekly earnings being lower than expected. There is an impact from the lifetime care scheme, which has enabled a deduction in the risk premium borne by insurers. Also frequency of claims has been dropping over some time and superimposed inflation is reasonably stable.

The next slide shows the trend that claims frequency has been dropping since 2000-01, and that this has been occurring in other jurisdictions as well as in New South Wales. The reductions most noticeable are in very-low to low severity claims. We anticipate that a number of factors would influence that around road safety, and as there is a continued commitment to road safety there is not an expectation that it would move back up.

In terms of superimposed inflation, the MAA commissioned PricewaterhouseCoopers to undertake a detailed report, which was delivered to us in December. It shows there is an average claim cost increase of 6 to 7 per cent over recent years. However, the indications are that that was primarily the result of a more severe injury mix due to those decreases in the low and very-low severity claims, and overall superimposed inflation is low. Claims for similar injuries are receiving similar benefits over time. We have observed that in "insurer filings" the superimposed inflation assumptions have dropped from 4 to 4.5 per cent to be now down to a 2 to 3 per cent range, tending more towards 2 per cent.

So, in summary, to update the Committee, affordability of green slips is at historically good levels; profits are estimated to be in what the MAA considers to be the desirable range; and we have a very competitive market, which we are monitoring closely to ensure that the scheme is sustainable.

CHAIR: You have at least partially answered the first question I had intended to ask on the affordability issue.

Ms SYLVIA HALE: Chair, could I ask a question about that?

CHAIR: Certainly.

Ms SYLVIA HALE: Regarding the projected application of scheme funds, about 17 per cent are for acquisition expenses. What do they comprise?

Ms DONNELLY: Those are the costs incurred by an insurer in obtaining and recording policies. They include commissions and brokerage paid to agents and brokers, selling costs, advertising, and so on, underwriting costs, expenses associated with assessing risk and determining the premium rates, levies and so on, and administrative costs and collection costs.

Mr BOWEN: And re-insurance.

Ms DONNELLY: And re-insurance.

CHAIR: Could the Committee have this on disk so that it can be included as part of the information?

Mr BOWEN: Certainly.

The Hon. JOHN AJAKA: If I may direct a question on the next issue to Ms Donnelly. You have noted legal and investigative costs at 9.4 per cent. Are those the legal costs paid in relation to claimants only, or is it a combination of those costs for both claimants and the insurers?

Ms DONNELLY: It is an estimate of the proportion of the premium that would need to go to all legal and investigative costs, including medico-legal costs.

The Hon. JOHN AJAKA: Do you have a breakdown of the different percentages of those costs what would comprise the claimants and what would comprise the insurers?

Ms DONNELLY: I do not have one with me. We could follow that up.

CHAIR: Is it information that could be extracted?

Mr BOWEN: We could make an estimate of it.

CHAIR: Would you obtain an estimate for the Committee?

Mr BOWEN: Yes.

The Hon. DAVID CLARKE: Mr Grellman, you spoke about the activities of the Motor Accident Authority council. How many times has it met in the past twelve months?

Mr GRELLMAN: It is scheduled to meet every other month, so it should have met six times in the past twelve months. But I would need to check to confirm that.

The Hon. DAVID CLARKE: Could you take that on notice and get back to us?

Mr GRELLMAN: I will, Mr Clarke.

The Hon. DAVID CLARKE: Mr Bowen, you referred to the fact that FAI collected sufficient premiums to fund its obligations under the Act but that those funds were not quarantined, as they should have been. Is there legislation in place to ensure that those funds are quarantined in the first place?

Mr BOWEN: No. There was no requirement that the insurers quarantine funds from a particular line of business. The way they operate under the Commonwealth legislation is that they collect funds, premiums on a number of different lines of business, and they hold those and invest them, and they are required under Commonwealth legislation to have sufficient funds there to meet their liabilities for all of the different lines of business, plus a prudential margin.

What we know is that, in relation to CTP, FAI and CIC, which were the two HIH companies, were collecting sufficient CTP premium to be able to meet all of the liabilities. So they were fully funding their CTP liabilities, but they were accumulating losses in other lines of business. And when it all came out in the wash in the liquidation, they had accumulated massive losses, I think close to $3.5 billion worth of losses, through a combination of insufficient reserving for liabilities in most other lines of business, and big losses particularly in international business, and through poor investment. They were not getting the sorts of returns they should have been getting on their investment as well.

The Hon. DAVID CLARKE: Did the authority foresee that the failure to quarantine sufficient funds could result in this fiasco that did occur with FAI?

Mr BOWEN: The issue about quarantining funds has been discussed within the industry and amongst ourselves and other State regulators, in particular the Motor Accident Insurance Commission [MAIC] in Queensland. The problem with it is that it would require each insurer to set up a single line of business insurer and to only keep the funds for that line of business in that stand-alone insurance company. The capital requirements that would go with that, because there would not be the ability to diversify the risk and diversify the investment strategies, would mean that they would have to have a return on capital that is significantly higher, so they would have to generate far more profit. We did

not believe that was worthwhile, particularly since post-HIH there is now a very rigorous prudential supervisory scheme in place for the whole of the general insurance industry.

The Hon. DAVID CLARKE: So, in effect, are you saying that realistically we cannot get a policing situation in place to ensure that in the future we do not have a recurrence of the FAI situation?

Mr BOWEN: I think that we can say that no regulatory regime—and I believe APRA would say this—can guarantee against failure, because you cannot regulate against poor management at times, but the level of monitoring that now occurs, and the requirement to have significant margins, requirements to have independent actuarial valuations, independent audit certificates, really reduces the risk of that occurring. I think that the general insurance industry in Australia has probably never been in a healthier position than it is at this point in time. I think APRA has done quite an excellent job over the last five years.

The Hon. DAVID CLARKE: Mr Bowen, you spoke of the significant changes that have occurred in this area since 1999. I guess one of the most significant of all is that 80 per cent of those injured in motor accidents who previously would have been entitled to compensation for pain and suffering are now barred from receiving such compensation because they do not get over the 10 per cent threshold. I guess that is probably the most significant factor arising out of the new system.

Mr BOWEN: It was a deliberate strategy. It really was intended to put the scheme back to the position it was when it was set up in 1988, in that the Motor Accidents Act 1988 has provisions that introduced the concept of a verbal threshold for pain and suffering, and the intention was that that limit pain and suffering payments to only those who were most seriously injured. Over a period of time, what constituted most serious injury deteriorated; more and more people got over that threshold. So, by 1999, I believe around 60 per cent of claimants were getting a pain and suffering payment. The profile of that often was a claim of someone who had a soft tissue injury, and had a couple of weeks off work, so that that person's actual loss would have been in the $5,000 to $10,000 range, But they were getting an additional $10,000 to $15,000 for pain and suffering, and they were incurring legal costs in the $10,000 to $15,000 range. So, really, that was the quick fix to make the premiums more affordable.

The Hon. DAVID CLARKE: People can sustain very extensive pain and suffering even though their injuries do not exceed the 10 per cent threshold. There is not necessarily a direct correlation between injuries over the threshold and their pain and suffering.

Mr BOWEN: There is clearly a correlation. The level of impairment will be an indication of the extent to which the person has been injured and has suffered. Most people who previously received pain and suffering payments and now do not are those with soft tissue injuries. Some people with orthopaedic injuries who previously received payments no longer receive them because they have made a full recovery.

The Hon. DAVID CLARKE: But they could still be suffering severe pain.

Mr BOWEN: Yes.

The Hon. DAVID CLARKE: For an extended period.

Mr BOWEN: There will be some cases in which people have pain but do not get compensation.

The Hon. DAVID CLARKE: Including severe pain?

Mr BOWEN: People measure pain subjectively. There is no scale to measure pain.

The Hon. DAVID CLARKE: Do you not believe that there is an objective way of assessing someone's pain level?

Mr BOWEN: That is a good question to put to medical assessors. I think they will say that there is no way to measure pain objectively.

Ms SYLVIA HALE: Has any consideration been given to reducing the threshold from 10 per cent?

Mr BOWEN: We review the impact of that threshold. We started by looking at the consequences of introducing the threshold. The consequence is that only the 10 per cent of people who are most seriously injured now get payment for pain and suffering. Necessarily, the trade-off is that if more people receive that head of damage we must either restrict how much they get and spread it a little further—that is, cut the pie differently—or increase the size of the pie, and that has an impact on affordability. At the end of the day, it is the balance between affordability to motorists and how much compensation is paid to people injured in motor vehicle accidents, and it is a political judgment for governments and parliaments to make.

The Hon. JOHN AJAKA: Do you not feel there is a very strong argument that the system has gone too far? There seems to be almost an obsession about reducing premiums and excluding the vast majority of injured people suffering pain who cannot get over the 10 per cent threshold. The fixation is reducing premiums, but people are suffering through no fault of their own.

Mr BOWEN: As the premium has reduced the Government has been looking at ways of increasing benefits. Rather than saying it will give more to existing claimants, it has expanded the scheme. We now provide no-fault benefits for medical care for children and people who are catastrophically injured. The defence of inevitable accident will be abolished on 1 October, which will allow people injured in a blameless accident to get compensation. They are all expansions of the scheme. Is there scope given that the scheme is at a historically low level to look for further benefit expansion? Yes, quite probably.

The Hon. JOHN AJAKA: Notwithstanding those measures—which are wonderful—a large number of people—80 per cent—do not satisfy the threshold and receive absolutely no compensation. I know pain is subjective, but they are suffering pain and receive no compensation simply so that we can keep reducing the premium by another $5 or $10.

Mr BOWEN: No, our focus is on providing advice to allow government to balance this, and we do that continually. The issue is discussed within the MAA. We do analyses on different mechanisms to provide for non-economic loss through, perhaps, allowing more people to receive it but defining the benefit, which is a workers compensation-type approach. One provides a statutory benefit for both disability and pain and suffering. There is no shortage of different mechanisms to do that and we explore them. We have taken some of those ideas to the council on a reasonably regular basis.

CHAIR: Does this discussion include loss of wages and cost of health care and rehabilitation?

Mr BOWEN: All of that is met in full.

CHAIR: That is included, but this is funding for—

Mr BOWEN: This is specifically the head of damage for pain and suffering, loss of amenity of life, loss of expectation of life and general damages.

The Hon. GREG DONNELLY: I refer to premiums in New South Wales vis-a-vis other jurisdictions. Can you enlighten the committee on that?

Mr BOWEN: We will take that question on notice and provide an indication of the premiums in the other jurisdictions. All other States have a single premium, or with a few variations. There may be a single plus one premium with a discount for seniors or a slightly different country loading or discount. New South Wales is the only jurisdiction that has full-risk pricing, but we can provide an indication. Perhaps the best one is our average class 1 premium compared to what a motor vehicle driver driving a similar vehicle in each other State would pay. New South Wales is in the

middle at the moment. The premiums in the Australian Capital Territory and South Australia are considerably higher, and in Queensland they are about the same or slightly higher for a comparable system. Victoria has a slightly higher premium but a very different system; it is a full no-fault statutory benefit scheme. Western Australia has a lower premium off the back of a massive increase in the number of registrations over the past few years.

The Hon. GREG DONNELLY: In the past we have had a debate between the MAA and the insurers about profitability. Are the MAA and the insurers still at odds in a fundamental and significant way about profitability? Has there been some change in attitude since we last spoke?

Mr BOWEN: We are still at theoretical odds, but the practice in the market is now well within the MAA's range. Our advice was that an adequate return on capital—that is the term used in the Act—translated to a percentage of premium would be about 5 to 6.5 per cent. Our view was that an amount above that was not excessive. We have an obligation to ensure that they get at least an adequate return on capital, but not an excessive return. That creates a range, and that is between 6 to 10 per cent. Over the years of that debate, the insurers were filing in the 8.5 to 9.5 per cent range and arguing that they would be getting a return on capital that would have translated to about 12 or 13 per cent of the premium. In practice, driven by competition, they are all now filing in the 6 to 7.5 per cent range. They have adopted in practice what we believe is the proper range, and we will be holding them to that in the future.

The Hon. GREG DONNELLY: Is it likely that new players will enter the market?

Mr BOWEN: There are no immediate prospects. There are no sizeable general insurers in Australia other than those already in the marketplace. It would depend upon an international insurer deciding to create a presence in Australia. No-one is going come into Australia to write New South Wales CTP business; it would require an international insurer to come in and write general insurance across the board. Given the level of competition, not only in CTP but also in the rest of the general insurance industry, I do not see that as a likely prospect at the moment. The last discussions that we had with any overseas companies were as long ago as 1999-2000.

The Hon. GREG DONNELLY: A while ago?

Mr BOWEN: Yes.

The Hon. AMANDA FAZIO: I want to ask you some questions about the promotional work you do in terms of trying to get the message across about safe driving, so that you will have fewer claims to deal with. How is the Road Safety and Rehabilitation Strategic Plan going? You have put a fair bit of work into that.

Mr BOWEN: I will make some opening comments and Miss Donnelly, who is taking responsibility for some of these, will add to it. We have separated those two areas within the MAA from 1 July in relation to injury management. The rehabilitation side of it is something where statutory obligations of the Motor Accidents Authority are also shared by the Lifetime Care and Support Authority. The chairman and I are across both of those. We felt we should formalise that, so there is an arrangement between those two authorities for a shared rehabilitation injury management strategy. In terms of the road safety strategy for the current year, we have continued to focus on the priority areas of young people, both as drivers and injured people, because young people are highly disproportionately represented both as at fault drivers and their level of injury accidents. We continue to be very active with a variety of mechanisms to try to deliver road safety messages to young people. The other area is vulnerable road users, in particular children, pushbike riders and motorcycle riders. We continue a number of programs there.

The young driver issue, obviously, has had a very big focus over the past 12 months. I was on the Younger Driver Working Party that led to recommendations for the changes to vehicle occupancy and night-time curfew for red P-plate drivers. We are now looking at strategies that will augment that. One of the ones that I volunteered to the working party is that, with the extended hours that a learner driver now has to do, there is really a need for a mentor and support system to provide an opportunity for those young people who, because of their social economic background, may not have the opportunity to get into a car and get trained. Over the next 12 months we will work with committee

organisations, Lions clubs and Rotary clubs to see if we can put some mentoring system in place. We have done that on two occasions in specific indigenous communities and on one other occasion with a local council. It is hard work, but it is an area we feel we could provide some input into.

The Hon. AMANDA FAZIO: With whom did you consult when you were coming up with your road safety plan?

Mr BOWEN: We have the same sorts of liaison with road safety organisations. Clearly, we speak to NRMA motoring services. Obviously, we speak to officers of the RTA. We speak to Government road safety officers. We have had a long-term relationship with local government road safety officers. We fund a number of positions and initiatives. We fund their award every year. That is a very big forum for us. We have our own Young People's Advisory Group because each year we advertise what we call Arrive Alive grants that are aimed at providing any group of young people in a community area with some financial assistance to identify a particular problem in the area and come up with something. We do not put any particular boundaries on that. We think that encouraging creativity and a little bit of natural thinking in that area is good. It is amazing the response we get to that, and quite amazing the product we get out of it. We quite often showcase that in our annual report. On really very small dollars they do some very creative work, and that has been targeted geographically so that a lot of it has gone out into rural areas and particular ethnic groups. Sometimes it is video production. Sometimes it is a play. Sometimes it is a film that is shown in and around all the local high schools in the area. Other times it is posters. Sometimes it is just an activity. It is fairly diverse.

The Hon. AMANDA FAZIO: Do you consult with peak groups for pedestrians, motorbike riders and bicycle riders as well?

Mr BOWEN: Yes. We have, I suppose, a talking relationship with the Pedestrian Council. A lot of our work with motorcycle riders has been through the Motorcycle Council, I think it is called. I will check that. We work closely with them. For example, last year or later the year before we funded, through the Motorcycle Council, some advertising in its magazines based on drivers wearing protective gear and helmets. We fund, with the RTA, other advertising aimed at drivers to make them aware of the need to look around and be alert to the dangers of motorcycles being nearby.

Ms DONNELLY: I would like to add a little to that. Given this restructure that has come into the division for which I am responsible, there are opportunities going into the future for us to ensure that the work the MAA is doing with injury prevention fits fruitfully within what other agencies, government and non-government, are undertaking. There is an opportunity at the moment, given that the RTA is a lead agency for the State Plan priority of reducing the road toll and improving road safety. We are working with them. I think the other area of opportunity is to work with experts in research to identify which interventions are really most effective. There are some players, including the Injury Risk Management Research Centre and the George Institute, and looking at what is happening in other jurisdictions and internationally in road safety that you would work with into the future to look at not just what is working and the ideas in New South Wales, but where there is evidence that a current program will reduce injuries.

The Hon. AMANDA FAZIO: You mentioned the Arrive Alive grants. Can you provide the Committee with advice and the reasons for your decision to discontinue general road safety research grants and the merits of your funding the scheme to promote the development of early career road safety researchers?

Mr BOWEN: We discontinued with annual research funding for road safety, not to withdraw from the area of road safety research, but really to target a little bit more. It was an issue that was discussed extensively at the board. What we found was that through that grant program we were getting a lot of research reports, and the unfortunate conclusion of the great bulk of them was that more research was then warranted and it was not leading to any interventions or activities to reduce the risk that we had. At the same time we had a fairly large commitment to ongoing research through the Injury Risk Management Research Centre at the University of New South Wales and we felt we could use that to be a little bit more targeted in our approach. It was a deliberate decision of the board. Through the Injury Risk Management Research Centre we provide both core funding for unspecified

research in the area and then we provide a lot of targeted research looking at specific areas of interest. Young driver cohort studies is one of the big ones that came to fruition recently, but again we do a lot.

Some of the other recent ones are the use of child restraints in motor vehicles. We kicked that off a couple of years ago, did some research, and identified the issue that most parents were not using the restraints properly, were not fitting them properly, and were using them not to the appropriate ages. Then we designed a campaign around that, the Choose Right, Fit Right Campaign, which we ran with the RTA, to focus on providing the information to parents about how to fit them and what ages you use them. I am much more interested in research like that, which identifies a problem and the solution, and then we can implement something that gets out into the community, rather than do some sort of analysis of risk that does not lead to any intervention at all.

The Hon. AMANDA FAZIO: Do you generally channel the results of the research that you fund to the RTA?

Mr BOWEN: We share all of our research findings with them.

The Hon. AMANDA FAZIO: With regard to the Country Roads Safety Summit, can you tell us about your response and the implementation of any of the summit recommendations?

Mr BOWEN: I think that question was one of the questions we took on notice, and we have a response which should be tabled. I do not really have anything further to add to that response.

CHAIR: I would like to extend the question in relation to insurer profits. If the claim frequency continues at this level or falls even further, do adjustments need to be made to ensure the insurer profits reflect the situation, or is there a process in train for this to be picked up if it continues?

Mr BOWEN: What has happened is that the file rate for insurer profits has reduced more than the reduction in the claim frequency, so that it is well within our boundaries of being adequate and not excessive. It is very hard to see where there is much scope for a continuation in the frequency drop. It is a very, very low claim frequency at the moment, and I would hope that it would plateau. I think a big component of it is, as Ms Donnelly said, a road safety dividend, so I would hope that that would be ongoing. It is hard to see it dropping much further, but certainly profit has dropped, particularly over the last two years. This will be more apparent when we finish our work for the current year's annual report, that the profit estimates have dropped even further.

CHAIR: Expanding on that question a little further in relation to the number of claims, the accident notification form system says $500, and that was the original price set. Health expenses have gone up quite considerably from that costing. Has any consideration been given to extending that price range of $500?

Mr BOWEN: Yes, very much so. As I said, we put a paper to the Motor Accidents Council recently and we looked at what were the heads of damage in small claims, claims of up to $5,000. The great bulk of those claims are medical expenses-type claims and a little bit of past income loss. So we are looking at mixtures of damages that would allow an expanded ANF to include past payments up to a particular dollar amount, so that those types of matters could come in and out of the system very quickly.

The Hon. JOHN AJAKA: Mr Bowen, I refer to the submission from the Bar Association of 22 August. The association states, for example, that the motor accident cost regulations provide that the total costs recoverable for all MAS disputes in any claim are capped at $1,540. The association then gives an example of case study No. 2, Mr ST. If I could summarise the case study, the accident occurred in 2000, Mr ST was first assessed in 2003, and there were further psychiatric assessments. In relation to the skin condition alone, it was assessed at 25 per cent WPI.

The insurer sought a review of the physical assessment findings, the claimant sought a review of the psychiatric assessment findings, and both review applications were refused. The insurer then sought a further assessment of the skin condition, and again it was confirmed at 25 per cent WPI. The insurer then sought a further review, which has been granted, and a consultant has been co-opted to the review panel.

According to the Bar Association, Mr ST also had various other injuries assessed, to his back, neck and teeth. In total Mr ST has attended nine MAS assessments over a three-year period. There have been multiple applications for review and multiple applications for further assessment. It has been seven years since Mr ST's accident and his case is still far from resolved.

We go back to the issue of costs. Put simply, the Bar Association says that with multiple further applications and multiple refusals, and lengthy submissions drafted, MAS assessments have been explained to him, further instructions have been obtained, considerable time has been taken to read the nine MAS assessments, the total legal costs in a normal period would have been around $20,000; however, the maximum Mr ST can recover is $1,540. My concern is that with these limited capped costs, the insurers are not limited in the same capacity. Of course, they have full access and a full discretion to incur whatever costs they want to incur, yet the applicant is limited to this $1,540. Is that correct?

Mr BOWEN: That is correct. I will ask Mr Player to answer the substantive part of that question because he is possibly aware of the case, although we will not comment on that, but he has also convened a working party with the Bar Association and the Law Society to look at legal costs. On the issue of the capping of costs for claimants but not for insurers, we do keep an eye on insurers costs and we have other mechanisms through our claims handling guidelines to try to make sure they are not excessive in the level of legal representation, but we do not have strict caps in place.

The corollary to the cap on the claimant is that the insurer has no discretion as to whether or not they accept a PARS decision. They are bound by it, they have no right to go to court; it is only a claimant's right to accept or reject a PARS assessment and go on to court. So there is an attempt to, in different ways, achieve some sort of a quality and positioning for the two there. But I take your point: those sorts of cases where there are multiple assessments driven by the insurer are not properly compensating the injured person for the legal costs they necessarily incurred as a result of the insurer's behaviour, and that is one aspect that is being looked at by Mr Player's committee.

The Hon. DAVID CLARKE: In fact, it would be fair to say, would it not, that it is a very, very unsatisfactory situation?

Mr BOWEN: I would not say it is an unsatisfactory situation; the concept that you have that many review applications is unsatisfactory. That is a fairly atypical type of matter, but it really is at the exaggerated end of the range.

The Hon. JOHN AJAKA: If we are looking at a system of a fair playing field for all players, how can a claimant possibly match the resources of an insurer—who has unlimited resources, an unlimited right to use and obtain legal advice, et cetera—and you are saying to him, "We are going to give you a fair playing field, but we limit you to $1,500 in legal costs." I just do not see how that is fair.

Mr PLAYER: I do not think I can take that any further than what Mr Bowen has already said, about the costs issue and the issues with that. As part of the review of the assessment services that has been going on over the last three or four years, we are looking at the cost regulations with a view to recognising earlier preparation of disputes and any discrepancies there might be in the cost regulations that provide either adverse incentives or disincentives at different stages of the scheme. Those type of issues will be something we look at, but I do not think I can address the specific issue any further than Mr Bowen has taken it. But on the medical side of things—

The Hon. JOHN AJAKA: At this stage I am more interested in limiting our discussion to the cost aspect, if I may. Would you not feel that there would be a greater incentive to the insurer companies to also come to the table and fairly resolve an issue rather than letting it drag out, as they seem to be so concerned that that is what the legal profession is doing, if they realise that there is a penalty to them if they matter is not resolved, the penalty being that they would be responsible for far greater legal costs of the applicant?

Mr PLAYER: That may well be the case, but I think that the example you have given is, as David Bowen has said, a very atypical situation. It needs to be recognised that if a case or medical

issue of that magnitude has required that much work by that many specialist medical assessors, it is not the type of case that, under the old system, would have been in and out of the old scheme in five minutes flat. It is a difficult case. It has, obviously, very complex medical issues. Under the previous scheme, those issues would not have been determined along the way during the course of a claim. They would have been determined at the end of the case on the very last day that the court handed down a determination. At that point there is nothing the claimant or the insurer can do to try to resolve that case. They have gone through an entire legal proceeding to get to that point and the decision is then made by a judge in a court with their background and their specialties.

The difference is that this medical issue, as complex as it is, is being determined or at least is attempted to be resolved along the way by coal face expert medical practitioners who are trying to resolve those issues. The fact that a difficult case like that might need to come back for those types of disputes is in some ways a difficult problem that we need to deal with, but in many ways it is a sign that the system is actually working because those further assessments and reviews are fallbacks designed to protect both parties from inaccurate assessments or from problems with the assessment process.

The Hon. JOHN AJAKA: Just on that point and so that I can understand it, how is it that an insurance company which keeps asking for a review fails, with the initial reviews and assessments being confirmed, and the applicant is punished because he cannot claim the costs of all of the additional work by his legal representative? How is that in any way an incentive to the insurance company, or something that maintains a level playing field? I am sorry, I just do not understand that.

Mr PLAYER: In terms of the level playing field, what I was trying to get to is that the tests that apply to a further assessment or review apply equally to both parties, and they are very tough threshold tests. If a person is unhappy with an assessment, the insurer cannot simply apply to have another assessment because they are not happy. There is a very tough materiality test that they have to be able to satisfy. They have to be able to prove that there is a material error or reasonable cause to suspect that there is a material error in the original assessment that could result in a change in the outcome of the dispute. In the case in question such as this, where the medical issue is a hotly debated issue and is a very difficult one to resolve, reasonable minds will differ. I think that is perhaps something we can take up with the medical assessors when we hear from them later this morning.

The Hon. JOHN AJAKA: But at the end of the day, the insurer is well aware that if he fails he is not meeting the applicant's additional costs.

CHAIR: Legal costs.

The Hon. JOHN AJAKA: Yes, legal costs.

Mr BOWEN: Picking up the point you have made, I point out that we have discussed with the Motor Accidents Council and with the insurers the prospect that there will be cost penalties on insurers when we introduce the new scheme changes that are intended to bring everything at an earlier point in time and have full disclosure so that, if the insurers are not abiding by those obligations and are not disclosing, of course they should not only pay the costs but they also should incur penalties for breaches.

Ms SYLVIA HALE: When do you anticipate those changes will come into effect?

Mr BOWEN: We have hopes that they will hit the Parliament in the next session.

The Hon. DAVID CLARKE: You agree that there is a very big injustice in the situation that has just been put to you by my colleague?

Mr BOWEN: I agree.

The Hon. DAVID CLARKE: And that has been pointed out by the Bar Association.

Mr BOWEN: I agree.

The Hon. DAVID CLARKE: So you agree that there is an injustice?

CHAIR: They have recognised that. Is this issue a component of the work that you are currently doing with the Law Society and the Bar Association?

Mr PLAYER: I think it will be picked up in discussions as we progress the next stage of the reforms, if they come through Parliament, yes.

The Hon. DAVID CLARKE: Have you put a recommendation already to the Minister on that particular injustice that we have referred to?

Mr BOWEN: The Minister has picked up and adopted the recommendations to make changes to the claims process, which has been through a very long consultation and has in principle agreement from both the lawyers and the insurers. The cost regulations are done by regulation changes. We have not put that up because we formed the committee before we put a recommendation to the Minister. Really, that is a matter for engagement with the legal profession. Our position is that lawyers have a role to play in this scheme. We want that role to be value adding to the claimant and, when they do that, they should be properly recompensed for it. Similarly, if insurers do not behave properly and as a result the claimant incurs additional costs, the claimant should be recompensed for that by way of a penalty against the insurer. We agree to both those propositions.

The Hon. DAVID CLARKE: It is not only an issue about lawyers getting paid; it is an issue of applicants being able to conduct their cases properly.

Mr BOWEN: Yes, I agree.

The Hon. DAVID CLARKE: If they have to stop a claim midstream because they just do not have the resources to carry on to meet legitimate legal costs, they are at a disadvantage under the law, are they not?

Mr BOWEN: We agree with you on that.

Ms SYLVIA HALE: In relation to whole-person impairment, I understand that the Motor Accidents Authority has been in consultation with the insurers about the provision of clear reasons for the rejection of claims when they are below the threshold.

Mr BOWEN: Yes.

Ms SYLVIA HALE: What stage has that reached?

Mr BOWEN: That is part of the legislative change. That will be an obligation on the insurer when they reject the claim to a person being graded under 10 per cent—that they not only reject it but that they provide reasons. That is to assist those matters where a claimant has brought the claim and they wish to pursue the head of damage, but they get a rejection from the insurers and they do not know quite on what grounds. Quite clearly, they can go off to medical assessment and have the impairment assessed, but that causes a delay. If you are not even in the ballpark, we do not want to put people through the process of an unnecessary medical assessment. The legal profession or solicitors tell us that they would like more information because they do not want to be in the position of saying to their own client, "Look, you are at 1, 2, or zero per cent. You are not going to get anywhere." If the person says that they want to go on and they say, "No, don't do it", they are exposing themselves to liability. We think that more information should be available.

Ms SYLVIA HALE: When that additional information or those reasons are provided, will they be required to give detailed information, rather than just general information?

Mr BOWEN: Yes, it will have to be by reference to the impairment guidelines. It would refer to the nature or the type of the injury and where it is, and it would have to say something like, "On the basis of your treating doctor's report, we do not believe that this injury would meet the requirements of that part of the guidelines that will get you greater than 10 per cent whole-person impairment."

Ms SYLVIA HALE: Do any of the insurers provide that information at the moment?

Mr BOWEN: Yes. In fact, we had a trial of this with Allianz and it worked quite well in particular in reducing the number of matters where there was a zero percentage of impairment going to medical assessment just to get a zero whole-person impairment assessment. We are also hoping, although there are not as many of them but occasionally some get through, is that a person who is clearly graded at 10 per cent will not have insurers sending those sorts of cases for medical assessment. Anything that is clearly over 10 per cent we want the insurer to accept and to recognise their responsibility to make payment. That is another area where we think there is scope for penalties for insurers who do not accept their responsibility for a person's whole-person impairment without sending it to medical assessment where the person is clearly over 10 per cent, based on the nature of their injuries.

The Hon. JOHN AJAKA: We have looked at one aspect of what I would consider in effect to be a costs penalty to an applicant, but there is also a second area that is just as viable, and that is the area of the medical reports. Looking at the Law Society's submission of 22 August, one of the things it indicates is that where the average specialist is now charging a fee of in excess of $1,500, the regulations provide only for an applicant to recover $667, which means that the applicant has to come up with a difference. One of the things that concerns me is that we seem to be tying an applicant's hands not only on the issue of recoverable legal costs but also we are tying his hands on the aspect of recoverable medical costs, yet again insurers do not have that same restriction.

Mr BOWEN: The rates we have prescribed for medical reports are those recommended by the Australian Medical Association [AMA] and agreed annually by the Australian Medical Association and the Law Society.

The Hon. JOHN AJAKA: But if an applicant has no choice but to go out to the medical profession and obtain an opinion for a fee, again you do not think the claimant is being disadvantaged?

Mr BOWEN: Presumably the Australian Medical Association is saying that there are practitioners who provide reports at Australian Medical Association rates.

The Hon. JOHN AJAKA: But the insurers are not limited by the same problem, are they, in obtaining their reports? If they want to spend $3,000, clearly they will have that $3,000.

Mr BOWEN: Yes.

The Hon. AMANDA FAZIO: You mentioned before about consulting with the Motorcycle Council. They have put a submission in to us and in that submission they raise several concerns and queries about the premiums paid by motorcycle riders in New South Wales and the Motorcycle Council argues that premiums for motorcyclists are too high and that there is a lack of information about the methodology for calculating motorcycle premiums. That could raise the question are motorcycle riders contributing to these accidents or are they more likely to be hit by other vehicles and why they are deemed to be such a risky prospect to insure? I have a series of questions flowing on from their concerns, not necessarily my comments. Are you aware of the Motorcycle Council's concerns and if so can you comment on them?

Mr BOWEN: I certainly can. I am not sure whether we have received anything directly from them but we have certainly had questions along this line. Over the years I have reasonably regularly met with the Motorcycle Council and we have shown them all the data we have on the frequency of accidents which are caused by motorcycle riders and the cost of the injuries resulting from them. The fact is post lifetime Comcare motorcycle premiums are being subsidised because we have not passed on the full cost of lifetime care because it is so prohibitive for large motorcycles. We will be phasing it in over the next five years and motorcycle riders, over and above whatever other premium increases occur through inflation, will be getting an additional increase each year as we slowly make up that subsidy that is in place.

You only have to look into a spinal or a brain injury unit and you will see where the true costs of motorcycle accidents are; they are very high contributors and they are very big beneficiaries for a lifetime care scheme. There is an enormous difference though in the profile of motorcycles between the large ones and the small cycles, and that is reflected in our premiums and it will be reflected in the lifetime care levies. We are more than welcome on any occasion with any industry group—we have done this with the Bus and Coach Association, we have done it with the Road Transport Association in relation to large trucks—to sit down and show them the data on the number of injuries caused and the cost of those injuries, and large motorcycles are very dangerous; they are very dangerous to pillions; they are very dangerous to pedestrians, and with lifetime care we are now picking up the medical costs of riders themselves. They are not going to get good news; it is only going to get worse, I'm afraid, for large motorcycle riders over the next five years.

The Hon. AMANDA FAZIO: I have got a series of other questions flowing on from this issue, which perhaps we will place on notice with you.

Mr BOWEN: By all means. We are happy to answer them.

The Hon. GREG DONNELLY: The Bar Association in its submission says, "The principal mechanisms whereby parties can challenge an absence of procedural fairness in the CARS assessment process is by admission of an appeal to the Supreme Court", and it notes that most applications lodged are by insurers. Can you either answer or take this question on notice: How many CARS decisions have been challenged in the Supreme Court on the basis of procedural fairness?

Mr BOWEN: I do not believe we can answer that question this morning but we can answer it; we do have that answer.

The Hon. GREG DONNELLY: What kinds of procedural fairness issues have been raised in those challenges? Can you provide us with any information about that?

Mr BOWEN: We will take that question on notice if you do not mind. It is more than just one.

The Hon. JOHN AJAKA: Just following on from what the Hon. Greg Donnelly has said, in answering those two questions asked by the honourable member could they be divided into two clear categories of the insurer and the applicant so we understand how many there are from each category?

Mr BOWEN: They are overwhelmingly from insurers, but we will certainly characterise those for you.

The Hon. DAVID CLARKE: When you say they are overwhelmingly from insurers, could a major factor in that be because applicants are restricted in their capacity to bring appeals for cost reasons?

Mr BOWEN: If a claimant is dissatisfied with the CARS theory they can just go to the District Court: they are not bound by the CARS decision whereas an insurer is bound by the CARS decision. So, if they are really unhappy with it their only basis is to challenge the procedures in the Supreme Court.

CHAIR: The information you are asking for will be distorted if the claimant can go to the District Court. Are you able to supply information on District Court matters?

Mr BOWEN: We will take that on notice. We have been looking at this. We do not have direct access to the District Court database—it is something we have talked with them about—we have to extract that information back from the insurers. We have done some studies on it on a sample basis. I will see what we can find out on that, on the numbers of matters that go through to the District Court and what the outcome is.

The Hon. DAVID CLARKE: With the Supreme Court could you also indicate the percentage of the insurers' success rate? It would be interesting to know the outcomes.

Mr BOWEN: It is pretty low because we are quite often a party to these.

CHAIR: Just in graph form for the percentage.

Mr BOWEN: We will just identify it and give you a list of cases if you like, that is the easiest. In fact, the publications are on the record; we will give you a list of the cases.

CHAIR: As Ms Hale and Ms Fazio have previously pointed out we do have some further questions before we compile our report. They will be forwarded to you and we would be very grateful to have the answers by 14 September.

Mr BOWEN: Could I check, do they also relate to the submissions that you have received? Of course, we have not seen those submissions at this stage.

CHAIR: Yes, and as well you will have access to the submissions. We have agreed today to make all of the submissions public in toto, so they will be available to you as soon as possible. I am sorry but due to the break we did not meet in time to give you all those. It would be good if you could comment on those as well. I thank you very much indeed for coming this morning and giving us so much important information.

(The witnesses withdrew)

(Short adjournment)

CAMERON DOUGLAS PLAYER, Assistant General Manager, Motor Accidents Authority**,** on former oath:

DWIGHT KEE DOWDA, Occupational Physician, Medical Assessor, Motor Accidents Authority, Post Office Box 545, Broadway,

KATHLEEN MARGARET McCARTHY, Rehabilitation Physician, Medical Assessor, Motor Accidents Authority, Sydney West Area Health Service, Westmead Hospital, Westmead, and

GEORGE PAPATHEODORAKIS, Medical Practitioner, Medical Assessor, Motor Accidents Authority, Burwood Road, Burwood, affirmed and examined:

CHAIR: Thank you for attending this Committee today. I have already outlined the broadcasting guidelines. If you have any messages or documents to be tendered to the Committee please ask the secretary or attendants to deal with them. Under the standing orders of the Legislative Council any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or any other person. The Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection accorded to Committee witnesses under parliamentary privilege should not be abused during these hearings. I therefore request witnesses to avoid the mention of other individuals. Please turn off mobile phones, not just to silent, because they interfere with the Hansard recording system.

CHAIR: In what capacity are you appearing, as an individual or as a representative of an organisation?

Dr DOWDA: As an individual medical assessor for the Motor Accidents Authority.

Dr McCARTHY: I am an individual and a medical assessor for the Motor Accidents Authority.

Dr PAPATHEODORAKIS: I am a medical practitioner in musculoskeletal medicine. I am appearing as an individual, but I am an assessor for the Motor Accidents Authority.

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

Dr DOWDA: I have them before me, I believe.

Dr McCARTHY: I am.

Dr PAPATHEODORAKIS: Yes, I am.

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact. The Committee will consider your request. However, it is important to note that the Committee may decide to publish your information, although it will consider any request to not do so. If you take questions on notice the Committee would appreciate that the responses to questions be forwarded to the Secretariat by Friday 14 September 2007. Would anyone like to make a short statement?

Mr PLAYER: I will talk very briefly about the philosophy behind the Medical Assessment Service [MAS] to put this into context for this discussion. Clearly, the intent of implementing the Medical Assessment Service when the Act came in was, as we spoke about this morning, to move away from the approach that has been described by medical practitioners as "adversarial medicine" of duelling doctors for medico-legal reports to the approach that we have of coalface expert medical practitioners making determinations about medical disputes during the course of a claim rather than at the end of a court hearing, where a judge might be forced to make those medical decisions.

There are two primary examples I want to give about that, which are probably the two main disputes that come through the Medical Assessment Service. First, the treatment disputes. Previously a dispute might arise about whether an insurer should pay for a course of treatment, whether a claimant could have treatment that the claimant may be seeking to improve, or try to improve, his or her condition. In the former regime the determination on whether that treatment was required and could be undertaken and paid for, was made at the very end of the case by a judge rather than as now can occur in a medical dispute during the course of the claim. Obviously that allows an opportunity for much earlier rehabilitation and treatment, and improvement of the injured person, during the course of a claim.

Similarly, in the former scheme the issue of entitlement to non-economic loss was determined by a judge at the very end of the case. The way the system runs now with the Medical Assessment Service, that decision can be made much earlier in the claim's process. It is now based on a medical determination of the degree of impairment, which then enables the opportunity for a case to be resolved without the need to proceed to a full Claims Assessment and Resolution Service [CARS] assessment or a full CARS hearing. In those situations the intent was to have those medical issues determined by medical experts and brought forward to a much earlier point in the claim process.

CHAIR: My question relates to the appointments. Recently you were all appointed, or reappointed, as medical assessors. What procedure did you undergo and what criteria did you have to meet to be appointed as an assessor? How did it happen?

Dr McCARTHY: This time the process was a little different from the original process. This time there were strict criteria in terms of references that we had to address in our application. As I understand it, that went to, or is going to, a panel that will look at the selection criteria and determine whether an interview is needed and then the reappointment or appointment may be made.

CHAIR: Who is on the panel?

Mr PLAYER: The panel consists of seven persons. There is the Medical Assessments Manager, Jennifer Kirkby; the Review and Reassessments Manager within the MAA, who looks after all the reviews of MAS assessor's decisions, Sue Freeman; the Assistant General Manager of MAAS, myself; two representatives from our users group; one representative from the Insurance Council of Australia, Mary Madey; one representative from the Bar Association of New South Wales, who was representing the legal representatives on our group and that includes solicitors, Andrew Stone; one representative from the Assessors Practice Group, which is the management group of all the assessors that helps lead and develop their training, Dr Dowda. Between the seven of us that was the selection panel committee.

I will elaborate on the process for their reappointment. The assessors have not been reappointed at the moment; their terms of appointment expire on 30 September. The reappointment process is happening as we speak, but we are expecting it to be completed on 1 October. All the existing assessors and people seeking to apply as new assessors were required to reapply, there was not an automatic rollover. There were very strict selection criteria, which included that applicants had to be qualified medical practitioners registered in New South Wales and a member of the relevant college of their area of speciality.

They had to have had at least five years experience as a practitioner in the college. They had to demonstrate that they had completed the Royal North Shore training in evaluation of permanent impairment and have completed the MAA additional training on conducting of impairment assessments under the MAA regime. A number of applicants have not yet completed that. The course is run in conjunction with the appointment process, so that is happening as we speak.

Another criterion was that they needed to demonstrate superior ability and experience in the impartial assessment of permanent impairment and in certifying degrees of permanent impairment. Also they had to demonstrate a commitment and ability to comply with MAA medical guidelines and also their terms of engagement and code of conduct. They are quite extensive selection criteria. For those assessors who conduct treatment disputes we added an additional layer to the process. The treatment assessors had to display superior knowledge of current evidence-based practices and experience in their particular specialty area and be a member of whatever college they were a part of.

They had to display an ongoing commitment to their professional development relevant to that area of specialty, so there were very strict and very clearly defined selection criteria.

CHAIR: The peer review process relates to the college of whatever specialty, does it?

Dr DOWDA: People who are fellows of an appropriate or a learned college or faculty, such as the faculty of rehabilitation medicine—

CHAIR: The all powerful?

Dr DOWDA: Yes, or the college of surgeons or the college of physicians, those who are applying need to be active fellows of those specialty colleges and/or faculties, so that they are actually accepted in the general parlance of being a specialist.

CHAIR: What attracted each of you to be a medical assessor?

Dr PAPATHEODORAKIS: I had been doing a lot of musculoskeletal medicine for many years and inevitably the issue of impairment would come up and I always had an interest in trying to understand how it was all assessed. When the opportunity came to use a system, which I felt was interesting, I took it on and I basically continued on and felt it was something that interested me since I did a lot of this type of work and I was asked to make assessments on behalf of my patients.

Dr McCARTHY: My reasons are fairly similar. I was interested in learning how to formally and objectively assess a particular impairment. Rehabilitation medicine is strongly interested in impairment and we have used various measures in the past. I found it very interesting and I found it an opportunity to develop my professional expertise. I found the training useful and I continued.

Dr DOWDA: My involvement with respect to impairment evaluation was back in the early nineties when Comcare was using a set of impairment guidelines and I realised at that time from the perspective of my specialty that very little was happening in Australia so I started going to America on a regular basis, which was the only focus for learning in a formal setting how to do impairment evaluations.

As the decade progressed through the nineties to ultimately in New South Wales the MACA in October 1999 and the requirement for impairment guidelines, I saw this as quite a sensible focus on formalising an impairment process in a medical setting so there was not only Comcare, but the Motor Accidents Authority and subsequently with the workers compensation system there has been a general rolling towards a way of assessing impairment.

Part of my medical specialty has been to focus on impairment evaluation, to the extent that I am involved in designing and co-designing the guidelines in different jurisdictions and currently I am an overseas reviewer for the next edition of the American Medical Association guidelines. I have had quite a longstanding interest in impairment evaluation.

The other side of the coin for me has been that not too long ago—and once again I am talking about the nineties—very poor medical reports were often something upon which were based decisions that were quite important decisions in terms of compensation in the work situation or compensation for motor accidents. I found it quite distressing that professionals and peers were applying perhaps objectives and very emotive ways of doing assessments without having a formalised set of guidelines to follow. I saw this as a very exciting development of helping doctors who were floundering with this kind of thing to actually formalise the way they did medical assessments, in this case impairment evaluations.

The Hon. AMANDA FAZIO: How many people do you envisage will be appointed in the current assessment appointment process for medical assessors as at 30 September?

Mr PLAYER: Around 200.

The Hon. AMANDA FAZIO: What is the geographical spread of those people? Are they all based in Sydney or are they spread across regional areas as well?

Mr PLAYER: No, we have a very good coverage across New South Wales and in fact nationally. We have assessors in almost every State and most capital cities, in particular. I think our coverage will probably be improved in this recruitment round for this round of assessors. We had a few gaps in some areas such as Wollongong and Newcastle where the population has grown dramatically over the last few years but I think we have addressed those in this round of recruitments. We have around 200 assessors at present and I think we will still have around the same number of assessors, perhaps with some shift in the people on the list.

Ms SYLVIA HALE: But you expect that to be adequate?

Mr PLAYER: Yes.

The Hon. DAVID CLARKE: Dr Papatheodorakis, can you reasonably assess a person's level of pain arising from a motor vehicle accident?

Dr PAPATHEODORAKIS: When we use the guidelines, we basically assess the physical injuries. Pain itself is a subjective measure. With the type of work that I do most of the assessment tries to be as objective as possible and we look at the physical signs we need to assess it per category for each of the musculoskeletal structures.

The Hon. DAVID CLARKE: But there would be physical signs and techniques you could use in examination which would confirm or otherwise to you whether a person is experiencing substantial pain, you would agree with that, would you not?

Dr PAPATHEODORAKIS: Just observation and inspection when we examine them. There are pain behaviours exhibited by the patients or the claimants that we assess. We have various measures of ascertaining that, but it is still one of just being cautious about using those measures as a degree of severity.

The Hon. DAVID CLARKE: There would be certain specific injuries that one would sustain that would actually incur a high level of pain?

Dr PAPATHEODORAKIS: Not necessarily. Could you give me an example?

The Hon. DAVID CLARKE: You do not think there are particular types of injuries that result in a high pain level?

Dr PAPATHEODORAKIS: Certainly. Certain nerve injuries, of course, but when you are talking about the musculoskeletal system any number of structures can give pain and it varies depending on the person that we assess. What seems to be a similar injury presents very differently.

The Hon. DAVID CLARKE: Would you agree, therefore, that someone could experience extensive pain and suffering from a motor vehicle accident even though they are not considered to be in the top 10 per cent threshold to receive compensation for pain and suffering?

Dr PAPATHEODORAKIS: That is a difficult question. All the assessments that we do, with very few exceptions, people do express that they have experienced a lot of pain and suffering but that is the only measure we have.

The Hon. DAVID CLARKE: Have you personally had any cases where someone has not reached that 10 per cent threshold but you are quite satisfied in your own mind that they are experiencing substantial pain and suffering?

Dr PAPATHEODORAKIS: Below the 10 per cent threshold?

Ms SYLVIA HALE: Yes.

Dr PAPATHEODORAKIS: In my experience I feel that it is not due to the physical injuries alone.

The Hon. DAVID CLARKE: Really? You are saying it is psychological.

Dr PAPATHEODORAKIS: There is a large psychological component to their presentation. It does not mean that they do not experience pain. It is their perception that it is quite severe.

CHAIR: Dr Dowda, do you have something to add?

Dr DOWDA: May I make a comment about that?

CHAIR: Yes, that is why I called your name.

Dr DOWDA: I take it back to the issue of pain, which is obviously an important issue, and point out that certainly time and again attempts have been made to quantify pain and by trying to quantify pain, then relate it in some way to an impairment evaluation. For example, Professor Cousins over at Royal North Shore Hospital is acknowledged worldwide as a pain specialist and the advice has been: is there any way we can find to quantify satisfactorily and objectively what a person's pain is and his response consistently has been that at this stage we do not have an instrument, by which I mean either a medical bit of fancy scientific apparatus or an instrument question wise that allows us to quantify pain satisfactorily.

The other side of that coin is the individual aspect of pain and the experience of pain. People who have pain manifest it in different ways. Some, you might say, have a stiff upper lip and say, "it didn't really hurt that much", yet they may be having the same pain where another person is manifesting all sorts of behaviours suggesting that they are in dire straits with the pain. It is not something which is satisfactorily objectifiable. It certainly is an important issue. I know a fractured bone is a very hurtful thing to have; there is a lot of pain out of a fractured bone, and that heals. But they say, "I had a lot of pain then; now I don't have so much pain." On the other hand a person may progress down the path where the initial pain has given way to a chronic pain state where all sorts of issues—bio, psycho, social issues—are having an impact on how that person presents. The level of science for us, at this time, is just not satisfactory for us to be able to say with confidence, "I can measure that pain."

The Hon. DAVID CLARKE: But the truth of the matter is that the medical profession can assess whether somebody is experiencing substantial pain, can they not?

Dr DOWDA: They can assess on a history that the person is saying, "I have substantial pain." They can assess by observation that the person is behaving in a certain way but they cannot say, other than the fact that, "What I see from the person, what I get from their history, is that they have substantial pain." It really is, more than anything, based upon the historical presentation and the observation of the person's behaviours. That can then further be dissected out into: Are these behaviours based upon an organic thing, or are they based upon a non-organic? In other words, are there psychological factors that are causing the person to promote their presentation in a certain way?

The Hon. DAVID CLARKE: But in regard to nerve injury, there is more than that. You have medical science that tells you that somebody with some of these injuries would be experiencing a high level of pain.

Dr DOWDA: Yes. There are two circumstances in particular. Pain in nerve damage is assessable under the guidelines provided, and also in the very unpleasant situation of what is called complex regional pain syndrome or previously called reflex sympathetic dystrophy or causalgia. In those circumstances, providing that a person meets the diagnostic criteria to satisfy the diagnosis, then there is a way of assessing that particular nature of pain and quantifying it and giving it an impairment rating.

The Hon. DAVID CLARKE: Taking that example, we could have somebody who has suffered nerve injury who could have a very high level of pain but not get to the 10 per cent level where they can get compensation for the pain.

Dr DOWDA: I put it back to you that the medical assessment is looking at the objective findings of the person. Certainly, I will not speak for my colleagues, because I cannot do that, but I know that our training is not one of saying, "Can you put this person over the threshold or under the threshold?" The training is: How do you objectively assess this individual? Certainly, within the guidelines there are very clear directions as to how to assess nerve pain utilising, in the case of the guidelines, table 11 as found against the specific nerve that has been damaged or, in the case of what is called complex regional pain syndrome, against a particular set of examination criteria to use.

The Hon. DAVID CLARKE: Dr Papatheodorakis, when I put to you that you come across those referred to you who are in the bottom 80 per cent who have substantial, in your mind, pain and suffering, unless I am wrong I think you said that in virtually every instance there would be a functional overlay—I am using that term.

Dr PAPATHEODORAKIS: No, I did not use that term.

The Hon. DAVID CLARKE: No. You did not use the term "functional overlay" but inferred that there were other psychological factors that came into it. Am I misunderstanding what you said?

Dr PAPATHEODORAKIS: No, I did not say in "every instance".

The Hon. DAVID CLARKE: In most instances, was it?

Dr PAPATHEODORAKIS: No. I think basically—are you talking about the people who are below 10 per cent?

The Hon. DAVID CLARKE: Yes.

Dr PAPATHEODORAKIS: In many instances I found that many of the claimants in the 80 per cent who I assess do not present with excessive or severe pain behaviours.

The Hon. DAVID CLARKE: Do you find that there are a lot who do present with those?

Dr PAPATHEODORAKIS: A few, but then again on examination the physical signs do not fit with the severity of the pain they express.

The Hon. DAVID CLARKE: You do not feel that you are being unnecessarily tough, do you?

Dr PAPATHEODORAKIS: No. I follow the guidelines as they are presented, and I basically assess each claimant on their merits.

The Hon. DAVID CLARKE: Dr McCarthy, do you agree with Dr Papatheodorakis?

Dr McCARTHY: I do indeed.

The Hon. DAVID CLARKE: And Dr Dowda, what about you?

Dr DOWDA: Yes, certainly. You are talking about the people who are under that 10 per cent. When you do see a person presenting in an extreme fashion—and I use the term "extreme" because that is what highlights the presentation—there are certain parts of the examination protocol or process that one does that can identify the likelihood that non-organic factors are augmenting this presentation, rather than an underlying reason. If a person has a damaged little finger, the fact that they cannot walk out of the consulting room without limping is not medically consistent, not medically logical, unless they had something else happen which is not related to the crushed finger. So the situation of the overall presentation—I know that all assessors look at the person as a holistic presentation before focusing on the specific injuries. That is a very important part of the presentation and is what is being seen holding together neatly in terms of the clinical presentation. Are there other factors that might be causing this person to behave in this way?

The Hon. JOHN AJAKA: Mr Player, once a practitioner is appointed to the panel, if I can call it that, is that practitioner still permitted to undertake work directly for insurers or directly for applicants through local firms?

Mr PLAYER: Yes.

The Hon. JOHN AJAKA: You do not feel that in that situation, since the panel is supposed to be independent, it may create a conflict of interest?

Mr PLAYER: Yes, it may.

The Hon. JOHN AJAKA: If you have someone on the panel who takes his income almost entirely from work that he is receiving from insurance companies, he is suddenly sitting on an independent panel reviewing it.

Mr PLAYER: That would be absolutely correct. If they were receiving the majority of their income from a source that was providing it, I would agree with you completely. We monitor the issues of conflict and potential conflict and potential perception of conflict very carefully because we think it is very important. As I said before, the underlying philosophy behind the scheme is to ensure that we have coalface practitioners undertaking these assessments. We could have taken the alternative approach of saying that they cannot have any experience or ongoing work within the scheme. The quality of the assessments we might receive might be very different if these people are no longer on the table to take that work. We may not be able to get any assessors willing to do that type of work; all the good practitioners would be out there doing their thing.

On the issue of conflict specifically, I will address that in specifics. We require assessors to disclose to us any work they do for any parties in the scheme, law firms or insurers. If the extent of their work is—definitely not majority—anything more than a majority it would certainly be a conflict. We have set the bar at 20 per cent, and that is just a setting we have and we monitor that closely. Anybody who is doing more than 20 per cent of their work for any party within the scheme is unable to do any assessments that relate to that party, absolutely. There are other potential areas of conflict that might arise, and the assessors are all alive to that and we monitor that and train them on it very carefully. If they have previously treated the claimant in any way, related to this injury or not, and then they receive an assessment that we refer to them that might be for that claimant, obviously they would disclose a potential conflict and would not proceed. Similarly, after they have conducted an assessment from us, it would not be appropriate for an assessor to then go and treat the claimant or provide a medical and legal report after they have conducted and acted as an independent expert in conducting an assessment. So conflicts, I agree with you.

The Hon. JOHN AJAKA: How is an assessor chosen for a particular applicant, whether it was requested by the insurance? Is an application submitted to you and you just choose one?

Mr PLAYER: Applications are submitted to the authority; they are lodged with the authority. A whole range of factors come into the determination of what type of assessor is appointed. They are in descending order; they are all mixed together, depending on the individual circumstances of the injured claimant. These include the types of injuries involved, the degree of injury involved, the location of the claimants, the availability of the claimant to attend appointments—they may only be able to come on Tuesday afternoon after 3.00 p.m. or whatever—the availability of assessors, the workload of the current assessors and a range of other factors.

The Hon. JOHN AJAKA: So in reality neither the insurer nor the applicant has any real say as to who—

Mr PLAYER: None at all.

The Hon. JOHN AJAKA: So that helps with some of the conflict of interest.

Mr PLAYER: Absolutely.

The Hon. JOHN AJAKA: If a practitioner is then chosen by you do either the insurer or the applicant have a right to object to that person?

Mr PLAYER: Absolutely. Both parties have the opportunity to object—it is in our guidelines; I will have to take the exact date on notice—and apply and set out any reasons that they might think this assessor might not be the appropriate assessor to conduct the assessment.

The Hon. JOHN AJAKA: The doctors do not have any of this material, but I was looking at the Bar Association's submission, which contains a case study. It is interesting to note that the first time an assessor looked at the patient that assessor came up with a 3 per cent whole-person impairment but when a second assessor looked at it that assessor came up with a 27 per cent impairment. Clearly that is a huge gap and obviously one that will cause the applicant a huge amount of distress. In that situation alone had the applicant, his attorney or someone else not had the foresight to seek a second assessment that applicant would have lost a huge amount of fair and reasonable compensation. What is being done to prevent those sorts of situations occurring again? Is the first assessor brought back in and asked, "How could you possibly be 24 per cent out"? I am sure the doctors would agree that that is a huge margin.

Dr DOWDA: It is a big difference, yes.

Mr PLAYER: I will address that issue first and then I am sure the doctors will jump in. The first issue is that that may not be a bad thing. It may be because the claimant's injuries have significantly worsened. For example, at the time of the original assessment the claimant's back was not causing them too many problems and they were fine. Then six months later there has been a significant deterioration and instead of being bound by that earlier assessment the claimant has been able to come back for a further assessment, been re-evaluated and had their injuries assessed properly. The whole point of this is to find the right medical assessment at the time the assessment is made.

The Hon. JOHN AJAKA: I understand that. But I am being told, firstly, that the time frame was less than six months and, with all due respect, Mr Player, I cannot imagine anyone deteriorating from 3 per cent to 27 per cent in that time. Secondly, I am also told that one of the problems is that a non-specialist undertook the first assessment and a specialist undertook the second assessment. Are you looking at ways of preventing that happening again?

Mr PLAYER: Absolutely. There are two issues. The first is that there could be a multitude of reasons for the discrepancy in the figures—one could be a time delay, another could be a deterioration or an improvement in the degree of injury, and another could be a complete set of new information from the treating medical records or hospital records that has become available. A fundamental reason could be the issue of causation. If an injury—particularly a knee injury, for example—or part of the injury is found not to be causally related, that means that whatever percentage of impairment the injury might be is not considered. So if another assessor makes a different finding and finds that it is causally related that would obviously have the potential to make a significant difference in the percentage. I think that is more likely to be the situation rather than a deterioration or improvement.

The Hon. JOHN AJAKA: I would like to hear from the doctors, if I may. Is there a huge difference between a non-specialist assessment and a specialist assessment?

Dr McCARTHY: I will answer from my own field. When someone has no evidence of causation—so there is no contemporaneous medical evidence—someone may have a zero or minimum percentage whole-person impairment. But if the following assessment had that information available they would then have causation attributed and they would have a different impairment. From my point of view, if a non-specialist or a specialist saw a person but they have done the training and they were equivalent in their expertise, I do not think that would make much difference.

The Hon. JOHN AJAKA: I know we have only limited facts in this case but it seems a little extraordinary that within a four- or five-month period a patient who clearly, at 27 per cent, must have been suffering some very severe impairment would have absolutely no evidence for the person conducting the assessment who came to a conclusion of 3 per cent. Then five or six months later the patient suddenly has a 27 per cent impairment.

Dr McCARTHY: In the case of traumatic brain injury, for example, there are very specific guidelines and criteria to state that someone has a brain injury. If you do not have the contemporaneous evidence for such injury you cannot find that the person has a brain injury even though you think they may. So you could say, "If I had this available then I might reconsider", and so the person goes off and gets the medical records, for example, or some other form of assessment. Then you can do that. Causation is important.

The Hon. DAVID CLARKE: Dr McCarthy and Mr Player, are you aware that the Law Society has expressed concern about the wide variation in assessments by MAS assessors? They would also be aware that an applicant's condition can deteriorate, but I am sure that they have factored that in and they are still deeply concerned at the wide variation between assessors. That is a real problem. Do you see it as a problem?

Mr PLAYER: Absolutely; consistency is a fundamentally important measure of the scheme. We have done an enormous amount of work over the first seven years of the existence of MAS to focus on three things. They are, in order of importance: first, transparency and fairness to get the scheme operating in a fair and open manner; and, secondly, to get the timeliness of the dispute resolution happening in a way that means that it is delivering something to the people in the scheme who need it. We are now into the more mature phase of the assessment service where we are focusing a significant amount of development, training and resources on ensuring as much consistency and accuracy in the assessment as we can. We do that in a number of ways. We have a conference every year for assessors that focuses on a specific issue. This year's conference will be at the end of October, and we have the assessors working on specific issues, such as accuracy, consistency, gravity, report writing and those sorts of things. We have bimonthly training for assessors. The most recent one we had was on treatment disputes and we had some pre-eminent medical experts come in and talk to them about those sorts of issues to try to make sure that we can encourage a degree of consistency. But every case must be treated on its merits.

The Hon. JOHN AJAKA: I have a final question on that point. Another case study involved scarring. The initial MAS assessor applied the Table for the Evaluation of Minor Skin Impairment [TEMSI] indication and came up with only 1 per cent. The patient was then referred to a plastic surgeon, who used the same system and assessed it at 3 per cent. That may not sound much to many people but according to this it was a difference of more than $100,000. If we are going to have this system it should, in fairness to the applicant, give the benefit of the doubt to the applicant rather than the other way around. One per cent can make a huge difference.

CHAIR: I think your question is quite clear.

Mr PLAYER: I am glad you raised the issue of the TEMSI because I think that is a prime example of how we have endeavoured to get a greater degree of consistency in the assessment. Without the TEMSI process, the first range—or bracket, if you like—of scarring assessment provided a discretionary range of, I think, between one and nine.

Dr DOWDA: Zero to 9 per cent.

Mr PLAYER: The introduction of the TEMSI was designed specifically to address that issue: dragging that consistency in and providing much narrower bands for assessment. So the range in the case that you cited would be between one and three as it falls into that band rather than in the previous situation where it was a potential range of zero to nine. So I think—we agree with you—that every percentage point is important, particularly around those issues.

Ms SYLVIA HALE: Mr Player, do you do random checks of assessments whereby one medical officer performs one and then someone totally independent who is unaware of what the first person has done performs an independent assessment?

Mr PLAYER: Absolutely. We have a far more comprehensive QA program than that. There are a couple of fallbacks that feed into the development and training of assessors. Probably the primary examples are review assessments. If an assessor is thought to have made a material error in an assessment a party can apply for a review. The original assessor gets a copy of the application for

review, the decision of whether or not to accept the review and the review panel's determination, and so does the Medical Assessment Service. The review team is obviously completely separate from the medical assessment side of it but the assessor is absolutely clear about what is being reviewed, why it is being reviewed and what the decision is. So it is a very direct and very clear process for those errors that come through that way. Apart from that, we have a very strategically targeted quality assurance program that we are implementing once the new panel of assessors is formed in October. That will be up and running from late this year, targeting those areas of high risk for errors that make a material difference to the outcome.

Ms SYLVIA HALE: Presumably there is the option of declining to reappoint an assessor.

Mr PLAYER: Absolutely. The terms of engagement for the assessors are very clear that they are required to meet a set of performance standards and we monitor their review rate and overturn rate.

Ms SYLVIA HALE: Is there sufficient work for assessors to spend their full time on the assessment process? What proportion of their activities does the assessment take?

Dr DOWDA: I would like to take that question, if I may, Ms Hale. It is quite a long process for the assessor. I currently have in my cupboard in my rooms, pending a case on Wednesday, a five kilograms set of notes relating to that person. Reading those is no mean feat because each page has to be read to do the assessment correctly. I know this is what other assessors do because we have it pounded into us that you must take into account every bit of information that is available. So there may be two hours of reading in that. Then the assessment takes as long as it takes. How long is a piece of string? It may take an hour, an hour and a quarter. It may be shorter than that. But there is the thorough history taking, the examination, getting the information together and correlating that information with the evidence before us in terms of the documentation. Then I prepare the report, the so-called statement of reasons, dictate that and correct it. As you can imagine, that then has filled out the time to some four hours perhaps for that case. I do not think there is any assessor who spends 8.00 a.m. to 5.00 p.m. seeing MAA cases. I am sure there is not. I find interspersing it with my other general occupational medicine practice that I will allocate one case per day to an MAA case for the first three days of the week. That for me is more than sufficient, on top of my panel responsibilities as well because I sit on the panels.

Ms SYLVIA HALE: On the conflict of interest question, Mr Player, you say that you monitor very carefully the sources of work for the assessing officers. You say that you aim at 20 per cent of work from one party. If there were, say, five insurance companies, is that 20 per cent of work from all insurance companies or 20 per cent of work from just the one company? Do you look across the whole field for people whose income is derived primarily from, say, the legal fraternity or the insurance fraternity? Do you monitor it in that sense?

Mr PLAYER: Not yet. We have done it 20 per cent per party because the disputes we receive are obviously per party. So we have been looking at it from the point of view of conflicts of interest with an individual party to a dispute. I think there is scope to look at that further. There are very difficult issues, which we talked about before, about the balance of the assessor panel that you want in this type of scheme. If we conflicted out every assessor who conducted medico-legal work we would not have a panel. It is a question of balance, trying to draw the right line. I think that is an issue, if you look at it from an overall perspective, we can look at down the track.

Ms SYLVIA HALE: Returning to the assessment of pain, Dr Dowda, you say there are objective criteria for nerve or complex pain. In the guidelines is there any room for subjective assessment? Presumably if pain is so subjective, this is an incredibly important element. Do the guidelines attempt to eliminate the objective assessment entirely and replace it with a formal objective approach?

Dr DOWDA: The guidelines are based on the American Medical Association guides fourth edition. The chapter on chronic pain there does not, in fact, of itself do any assessment or give any values to pain. It does some very interesting talking on what chronic pain syndrome is and so forth, but there is no way of quantifying that particular issue out of the chronic pain chapter. From the point of view of an assessor, none of the guidelines allows us to make quantification other than in those

very specific circumstances of nerve damage or complex regional pain syndrome. The philosophy of the AMA guides was that contained within the impairment evaluations given for each particular medical condition is an aliquot, that they are acknowledging that pain may be associated with the condition. The later editions of the American Medical Association guidelines have attempted to give a value for impact on activities of daily living and so forth. But at this time the MAA guidelines, based upon AMA 4, do not have any particular instrument that takes into account pain other than objectively quantifiable pain from nerve damage and complex regional pain syndrome.

CHAIR: Is a review process under way to extend those guidelines?

Dr DOWDA: The heads of workers compensation authorities—and I know this is not necessarily workers compensation—met in Queensland only a couple of weeks ago. This whole issue of multiple jurisdictions having different guidelines is a point that many doctors raise to me—I do a lot of the training—and ask why do we not just have one Australian guide. It is true, it can be a confusing situation where you have AMA 4 here, AMA 5 there, the compare guides here, the social security guides there. Certainly there is a groundswell for harmonising the guides and trying to have a guide system that could be used in whatever legislature you happen to be operating under. At the present time I suspect that the complications are the legislation dictating the use of whichever guidelines rather than any non-acceptance on the part of the medical community to say yes. If you cut a thumb off, whether you cut a thumb off in New South Wales through a motor vehicle accident or in Tasmania through a workers compensation accident you have still lost your thumb. In fact, the impairment is exactly the same. How that impairment is treated is obviously different according to what thresholds the different legislatures exert which add artificial imposts onto an impairment rating system. They have cut-off points that come in from the side, as it were, from the legislation rather than from any medical threshold. There is no threshold in the AMA guides.

Ms SYLVIA HALE: My final question is to any member of the panel. On the basis of your experience, have you identified any shortcoming? Have you identified areas that you believe need further revision or modification?

Dr PAPATHEODORAKIS: The forums that we hold basically try to address those issues. There are certainly a lot of grey areas in the AMA guides. The MAA guidelines try to address these. Every time we come together there are some issues we need to discuss and iron out, not just for our sake but basically for the assessors who do impairments to give them an idea of how we see the guides should be appropriately used for assessing impairment. The importance of that is that all the assessors want consistency. It is something we strive for. Whether we achieve it or not is another matter. We do try very hard. Recently we have identified a problem with the assessment of the knee where we feel that we combine an assessment rather than just use one or the other table. That is what we try on a regular basis to do.

Dr DOWDA: I would like to make the comment that we are approaching the third edition of the MAA guidelines. October 1 will see that edition being used. It is already, I believe, gazetted. Three editions have happened since 2000, the reason being exactly what you are describing has happened. People have looked where there is a grey area or ambiguity and tried to improve the guidelines or make it clearer to the reader of the guidelines. Therefore, the use of the guidelines becomes more consistent. That is why there is now a third edition just on the horizon to be used. It has addressed some of the issues to clarify for the reader, whoever that might be—a medical assessor, a lawyer or an insurance person—that this is exactly what that means. It does not mean this or possibly that. That is certainly reflecting the striving for improvement. I would say that in all of the guidelines I have ever been involved with, not only in this jurisdiction, no guideline is perfect. You will never find an impairment guideline system that satisfies every single situation. What we are trying to do is to improve it and keep improving it so that the users of the guides are feeling more comfortable that ambiguities are ruled out and that there are clear instructions on how to approach the process of impairment rating.

CHAIR: You mentioned forums. Is that a regular process? Is it part of the quality and training process?

Dr DOWDA: Yes.

CHAIR: Can you give a quick overview how often they occur?

Dr DOWDA: Bi-monthly forums for medical assessors are run. Those are the ones that Mr Player was mentioning. In those forums of two hours there is usually a half an hour presentation from each of four presenters. It is interactive as well, so we are able to talk with the presenters and nut out some of the issues that are raised.

CHAIR: Are the assessors made to come?

Dr DOWDA: I guess it is part of the quality assurance for assessors for them to be actively involved in ongoing training. They are not made to come; they are encouraged to come.

The Hon. GREG DONNELLY: On the issue of reliance on the AMA guidelines—and I understand we are up to the fourth edition of those—is there a view about the foundation of or the reliance on the guidelines? Obviously, these are the foundation stone upon which assessment is made, read in conjunction in the MAA zone guidelines in New South Wales. Is there any comment about the AMA guidelines? For example, is there anything happening internationally to which the Committee should be giving consideration?

Dr DOWDA: You might be aware that the sixth edition of the American Medical Association guidelines is currently being worked up. Internationally, the trend has been to utilise those as the basis for guidelines that have been developed. In America, for example, much the same as in Australia, not every State uses only the AMA guidelines, whichever edition happens to be in the legislation. Many States—California, New York, Florida and so forth—have their own set of guidelines, as with the MAA guidelines, and through those guidelines they interpret AMA.

So, while they use the AMA as the model or basis for assessing—and, in essence, nothing better has come out internationally at any level—generally, what has been happening is that people have said: Look, while we think these AMA guides are very good, we can modify them to our purposes to improve the interpretation of this, or making this or that clearer. Hence, the evolution of MAA guidelines, or the Florida workers compensation guidelines, or the Utah workers compensation guidelines, which interpret and look at AMA guides and says: This part of them is really good, but this part is quite unclear and we need to make it better for our purposes.

The Hon. GREG DONNELLY: Could you comment on the training that assessors get in regard to both the AMA guidelines and the domestic MAA guidelines?

Dr DOWDA: I have done all of the training for the musculoskeletal system since the inception of training in 2000. I do not know how many hundreds or thousands of doctors have passed through the halls of Royal North Shore Hospital on a weekend for that training. The training consists of a core module, which everyone has to do, that explains the basis of the whole program, the legislation behind it and the basis of impairment evaluation. The modules conducted subsequent to that are spinal modules, upper and lower extremity modules, nervous system modules, psychiatric, mental and behaviour modules, and neurological modules. These consist of a didactic portion, which is about an hour to an hour and a half of teaching out of the MAA guidelines, and through them the AMA guidelines. So it is done in a synchronised fashion.

That is followed by an intense, tutorial-based learning process of working through cases and applying the guidelines, under tutorship, so that people are able to see how to utilise the guidelines. So it works well. Many doctors have gone through it, quite a few lawyers have done it, and a lot of many non-medical people, such as insurers and claims management staff, have done it. The feedback is that it helps people to understand the somewhat intricate interrelationship of the AMA guides and the MAA guidelines and how they are applied in the practical setting.

The Hon. GREG DONNELLY: I return to the issue of the 10 per cent threshold. Obviously, there are debates about where things are at the margin but, in terms of the integrity of overall consideration, what is the general view about the 10 per cent threshold?

Dr DOWDA: It is a legal impost, not a medical decision. I would stand by that. It is an artificial construct that is placed across a rating system. For the medical practitioners doing the

assessments—apart from the fact that at the end of the process they realise they are over 10 per cent or not over the threshold—it has no medical bearing whatsoever in the process that is carried out. I have to say, without being facetious, that the threshold means nothing to me at all in the process of impairment evaluation other than that I know at the end of the process of evaluating someone they either will be over this artificial threshold or they will not be. I do not construct my examination to try to put a person over or to keep a person under; the threshold is irrelevant to me in the examination process.

CHAIR: Is that the same for all of you?

Dr PAPATHEODORAKIS: Yes.

Dr McCARTHY: It is. A claimant may have multiple assessments, so the fact that the claimant may have only 3 per cent for one assessment does not mean he or she will not in the long-term be over the threshold because of the cumulative effect. But I agree with Dr Dowda: it is a legal impost and has no meaning medically.

The Hon. GREG DONNELLY: In terms of refinement of the domestic MAA guidelines—and I think you said the third edition is coming out shortly—is there much change between the editions? Are we progressing in dealing with a number of issues, and will they tail out over time? Are we seeing major progress in clarifying certain areas in moving from edition to edition?

Mr PLAYER: It is doing a bit of both.

Dr DOWDA: It is not as though dramatic changes are being made. Certainly, there is no tampering with values given for an impairment rating. It certainly is clarifying the process of impairment evaluation. In some areas, after a period of experience over several years, people are saying: How do we assess this particular condition? The AMA guides do not mention it, and the MAA guidelines do not mention it, but we are being confronted with this situation. How do we deal with this, and what is the best way of approaching it? That sort of situation might arise.

Classically, in the new, third edition of the MAA guidelines, the TEMSI scale is included, that is, the Table for Evaluation of Minor Skin Impairment. Notwithstanding Mr Ajaka's commentary about the 3 per cent and whatever happened there—because I do not know the story behind that—what this does is tease out a range of zero to 9 per cent that is bunched into one particular group. So that one person might say, "Well, I'm going to call that zero" and another person might say, "I'm going to call that 9 per cent", but both of them are calling it a category one skin impairment. What it is trying to do is guide the assessor in an assessment based on best fit, whether they are zero per cent or 1, 2, 3 or 4 per cent—or, if they are higher than that, they go off to a plastic surgeon. That is actually helping the assessors to fine-tune the assessment process for a minor skin impairment. That is the kind of thing that is happening in the guidelines as these practical kinds of problems crop up. How do you deal with it, and how do you best make it an unambiguous, clear process for the assessor to follow?

Ms SYLVIA HALE: Dr Dowda, I think you said you drew a lot upon American experience in terms of formulation of guidelines.

Dr DOWDA: Yes.

Ms SYLVIA HALE: Why American rather than say European, British or whatever?

Dr DOWDA: The Europeans use the American guidelines, South Africa uses the American guidelines, parts of the British system use the American guidelines, Italy uses the American guidelines, and German uses the American guidelines. Whilst no guideline is perfect, the AMA guidelines have given us a very good, systematic approach to each organ system. In the sixth edition they have been striving to improve the impairment evaluation process with each subsequent chapter. It is just that there really is nothing else of that nature. And they are a big work. It takes a lot of time to get them up and running. There is nothing of that nature elsewhere that is comparable.

So our European counterparts, and in particular the South African counterparts, are utilising the same approach that we have adopted. So it is not really saying it must be good because it is the

AMA guidelines; they happen to have a very systematic arrangement of organ systems—though with their faults, which is why they have gone through subsequent editions, and why the MAA guidelines have actually interpreted and said: We can see what the fault is in the AMA guides, and this is the way we will do it, a much better way, with peer review, consensus around the table, with a whole bunch of orthopaedic surgeons saying, yes, this is a much better way of assessing this particular condition than the AMA guides do. Okay, if that is what medical practice in Australia wants, that is what we will put into it. It is not blindly following the fact that it is AMA guides, but they remain the authoritative guides generally drawn upon in many different countries outside America as well.

CHAIR: AMA guides are approaching their sixth edition. If we still use the AMA guides, are developments incorporated through the MAA guidelines?

Dr DOWDA: This has happened. For example, they reflect what is in AMA5. It is not as though the guidelines have stuck with AMA4 only and not ventured into the new edition. I know about AMA6 but I am not allowed about to talk about it. I had to sign an agreement with the American Medical Association not to discuss it publicly. All I can say is that it is quite different from AMA4 and AMA5.

CHAIR: So the MAA will be busy again?

Dr DOWDA: It could be. If there is any involvement by the MAA in harmonising—I adopted that term; I did not develop it—the impairment guideline systems in Australia, I imagine that the MAA will be at the forefront.

Ms SYLVIA HALE: Presumably the forum identifies problems with the modifications and then tries to work towards common agreement about the criterion to be used.

Dr DOWDA: I am not the author. The back of the MAA guidelines refers to working parties consisting of eminent specialists in the field relevant to the organ system.

Ms SYLVIA HALE: Do the working parties then determine the final format?

Dr DOWDA: Yes, they nut it out.

Ms SYLVIA HALE: Does that then go to the Minister for approval?

Mr PLAYER: It is gazetted.

CHAIR: Thank you very much indeed for appearing before the committee today. I know that you are all very busy. The committee has wanted more detail about the process for some time. Some questions have not been asked because, as usual, we have pursued one or two issues. Those questions will be forwarded to you for reply. Once again, thank you very much indeed for appearing today.

(The witnesses withdrew)

(Luncheon adjournment)

CHAIR: I will not go through the entire procedural process, because I did it at the beginning of the day. There are broadcasting guidelines, which are available at the table. Any documents or messages to be tendered to the Committee or between persons who have come to inform us and people who are not witnesses will be transferred by the secretariat or attendants. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to witnesses under parliamentary privilege should not be abused during these hearings. I therefore request that witnesses avoid the mention of other individuals, unless it is absolutely essential to address the terms of reference. I ask everyone to turn off their mobile phones, and that includes not leaving them on silent, because they interfere with the ability of Hansard to record the information.

DENIS JOSEPH MOCKLER, Solicitor, Level 2, 222 Clarence Street, Sydney, and

SCOTT JOHN ROULSTONE, Solicitor, 66 to 68 Goulburn Street, Sydney, both sworn and examined:

CHAIR: In what capacity are you appearing before the Committee, that is, are you appearing as an individual or as a representative of an organisation?

Mr MOCKLER: I am a member of the Injury Compensation Committee of the Law Society of New South Wales.

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

Mr MOCKLER: Yes, I am.

CHAIR: In what capacity are you appearing before the Committee, that is, are you appearing as an individual or as a representative of an organisation?

Mr ROULSTONE: A representative of an organisation, as Chair of the Injury Compensation Committee of the Law Society of New South Wales.

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

Mr ROULSTONE: Yes, I am.

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. The Committee, however, can make a decision to public that information if it feels it is in the public interest. If you take questions on notice—if we do not get through all of our questions and we have some more—we would appreciate it if your response to those questions could be forwarded to the secretariat by Friday 14 September. Would either or both of you like to start with a short statement?

The Hon. JOHN AJAKA: Before that happens, for the record I indicate that I am currently a member of the Law Society.

CHAIR: For your information, because you were not present earlier, I have been through this process recently.

Mr ROULSTONE: On behalf of the New South Wales Law Society we thank you for the opportunity to address you on this important piece of legislation and the review thereof. On a general basis, the Law Society has a close and harmonious relationship with the Motor Accidents Authority. We have particularly strong relationships with the General Manager, Mr David Bowen, Cameron Player and Belinda Cassidy. In fact, recently Mr Player attended the Injury Compensation Committee meeting to address the committee, which comprises approximately 20 personal injury lawyers, on current procedures, proposed changes to legislation and statistical matters, et cetera. In that capacity he also made himself available to take questions and provide answers. It was a very harmonious setting. That is a general statement as to the relationship between the Law Society and the authority.

However, having said that, the Law Society continues to have serious concerns in relation to levels of compensation that are provided under the Motor Accidents Compensation Act. In our submission we specifically referred to whole person impairment issues, which, to us, is the single area of most concern in relation to the legislation. I am aware today that the Bar Association has provided you with very comprehensive submissions. In fact, it has provided many case studies, all of which the Law Society supports. We, however, have focused on one or two issues today, bearing in mind time frames, et cetera, but it comes back to whole person impairment, we think, and the adjudication of such and, basically, the level to which an injured person may be entitled to receive pain and suffering damages, known in the legislation as non-economic loss. That is where we have continuing and critical problems with the operation of the AMA 4, the American guidelines upon which assessments are based. As a general and opening statement, that is the current position of the Law Society of New South Wales. The Bar Association certainly picks up many procedural points and issues, and we fully endorse and support those submissions.

CHAIR: Would you briefly outline the role that solicitors play in the motor accidents claims process? We have not previously had you as witnesses in this process.

Mr ROULSTONE: Solicitors have been heavily involved in personal injury law generally since time immemorial. In this particular piece of legislation that we are discussing today solicitors currently represent around 52 per cent of claimants. It is trite to suggest that injured claimants who are represented by lawyers will achieve far better outcomes than they would if they remain self-represented. Case studies abound on this particular issue, and I will give a general example of an injured claimant who may be entitled to non-economic loss damages, that is pain and suffering loss and damages, where particular insurers might offer $5,000 to $10,000 to, let us say, buy out a particular claimant who is unrepresented. That claimant ultimately goes to see a solicitor and the case is then properly prepared, albeit over 12 to 18 months, and often these cases can then settle for in excess of $100,000 or $200,000. In a case I am aware of it was a $750,000 for a client who was offered $15,000. The role of solicitors in this piece of legislation is crucial, as they play an effective role in achieving adequate compensation for injured persons.

The Hon. JOHN AJAKA: I refer to your last comment about whether you were aware of one case in which the insurance company almost bought the applicant out for $15,000, but the matter was subsequently settled for $150,000. In that situation were the legal costs payable at the fixed rate of $1,540?

Mr ROULSTONE: That is a very pertinent question. The legal costs in that case were higher. There were significant investigations. I think something like six or eight medical reports were required to be obtained on behalf of the claimant, including rehabilitation and occupational therapy assessments, all of which came at a relatively high price. The current cost regulations go nowhere near to compensating—and I use the word "compensating" in a different sense here—the claimant in relation to the vast proportion of the legal costs associated with that matter. It has been raised in our submission that the scheduled or scaled costs in no way properly reflect what might need to be done in relation to it.

The Hon. JOHN AJAKA: Does the practitioner look to the applicant for the difference in the costs?

Mr ROULSTONE: That is correct.

The Hon. JOHN AJAKA: From your experience and understanding, does that create problems between the solicitor and the applicant, whereby the applicant is thinking, "Why am I paying you? Should you not be receiving your money from the insurance company?"

Mr ROULSTONE: Absolutely. There are often many questions from claimants to their solicitors as to why these costs are so high. If you look at costs regulations under, say, the Civil Liability Act—which we assert are much more fair—if a cost assessor had to look at party-party legal costs, as in costs payable by the defendant, they would be proportionately much higher than the costs currently scheduled under the present regime.

The Hon. JOHN AJAKA: You have a situation where an applicant who may have ended up with $15,000, as compared with $7,500, suddenly finds that he has to meet his own legal costs because the system does not allow the legal practitioner to say to the insurance company, "You started this scenario; you offered $15,000. Had you offered fair compensation to start with— You should be penalised, not the applicant."

Mr ROULSTONE: That is entirely correct. Under the current legislation there are not effective or adequate cost penalties against the insurer so as to allow that not to occur. In other words, a competitive offer might be placed by the claimant through his or her lawyer. If that is rejected and the claimant goes on to beat that offer, there are usually in place, under other regimes, costs penalties against the unsuccessful party.

The Hon. JOHN AJAKA: Are you aware of situations where the MAS assessments from the panels are coming up with varying assessments? The Bar Association gave an example where there was initially a difference of 3 per cent, and then subsequently it was 27 per cent. Are you finding that to be a common occurrence?

Mr ROULSTONE: Very often; that is a common experience among solicitor members acting for claimants. The degree of disparity between assessments is alarming, to say the least.

CHAIR: I understand you are working with the MAA on a study and assessment on the cost regulation on claimants. Can you tell us a little about that and how it is progressing?

Mr ROULSTONE: A subcommittee has been formed as part of the injury compensation committee. It comprises a group of four members who have specific expertise in motor accident claims, who have already liaised with Mr Cameron Player of the Motor Accidents Authority with a view to advancing and agreeing upon a methodology by which a better cost regime may be promulgated. It is in its reasonably early phase at this stage. However, there is an agreement in place, and we have jointly agreed upon a commercial organisation, who provide external consultancy advice—the group is known as FMRC and they are well known within the industry—to conduct such a study, which might require face-to-face interviews with solicitors, and also perhaps with claimants, with a view to compiling sufficient data so as to look at the cost regulations as a whole.

CHAIR: Are you fairly hopeful about this process?

Mr ROULSTONE: As I said, it is in its early stages, but there is a good degree of co-operation between the parties, so I think the answer to that would be yes.

The Hon. DAVID CLARKE: Mr Roulstone, would it be fair to sum up the scheme by saying that reduced premiums have been achieved as a result of slashing benefits to injured parties?

Mr ROULSTONE: I could not have thought of better terminology myself, and I agree entirely with that comment.

The Hon. DAVID CLARKE: Would it be fair to say that under the new system it is far more difficult for applicants to be represented by solicitors because of cost restraints, and therefore that is not good for justice or for fairness?

Mr ROULSTONE: Absolutely. You often find, in country towns and suburban practices, that many solicitors who operate in this area, or who remain operating—mind you, this is an area where many, many of our members have dropped out—are in the unsatisfactory position of having to sometimes attempt to fund the litigation. In other words, if you are going to do a proper job on behalf of your client, you would be required to obtain medical reports, which sometimes can run into the tens of thousands of dollars for a large case. In that case, the member cannot afford it, the claimant certainly cannot afford it, and there are many examples also of those types of cases disappearing—for what reasons are incredulous, quite frankly—whereby a claimant misses out entirely on a claim whereby they have just expectations and would be otherwise compensated adequately.

The Hon. DAVID CLARKE: One glaring example of this is that applicants are faced with escalating legal costs merely to deal with further reassessments sought by insurers who have unlimited

funds. Would you be aware of cases in which applicants have had to discontinue proceeding in matters because of these escalating costs and further reassessments?

Mr ROULSTONE: Yes.

CHAIR: May I ask for clarification. Is this in relation to objecting to the original assessment process?

The Hon. DAVID CLARKE: Yes.

CHAIR: It is after the normal solicitor process?

The Hon. DAVID CLARKE: Yes.

Mr ROULSTONE: I think you might be alluding to situations whereby an insurer with unlimited funds can force matters back to the Medical Assessment Service. There are many instances of situations where there have been three or four occasions where these things have gone back. That is time-consuming and entirely cost-ineffective. The Bar Association specifically refers to some of those case studies in its submissions before you today.

The Hon. DAVID CLARKE: Eighty per cent of those injured in motor vehicle accidents who previously would have been entitled to compensation for pain and suffering are now excluded from receiving such compensation because they do not get over the 10 per cent threshold. The truth is that extensive pain and suffering can arise from injuries which do not reach the 10 per cent threshold. There would be many cases, would you agree, where there is severe pain and suffering but the claimants get no compensation for pain and suffering?

Mr ROULSTONE: Yes. Again, I entirely agree with you. I thought the figure was more like 90 per cent, in fact.

The Hon. DAVID CLARKE: I thought it was 80 per cent, but 90 per cent would not surprise me. It was suggested by someone from the MAA that there is a difficulty in assessing pain and suffering. Would it be your experience that pain and suffering can be assessed and quantified?

Mr ROULSTONE: Yes, it certainly would be. In fact, the Law Society's enduring position on the issue is that it should be assessed by a CARS assessor, an arbitrator or a judge. Lawyers are properly trained in this area so as to adequately assess pain and suffering damages; it does not necessarily need to be done by doctors.

The Hon. DAVID CLARKE: Where there is a will, there is a way?

Mr ROULSTONE: Absolutely.

The Hon. DAVID CLARKE: But there needs to be the will to start with.

Mr ROULSTONE: Absolutely.

Ms SYLVIA HALE: Mr Roulstone, further on this question of non-economic loss, in your submission you refer to psychiatric injury being able to be taken into account in some instances, particularly where the injury exceeds the 10 per cent threshold.

Mr ROULSTONE: Yes.

Ms SYLVIA HALE: But not taken into account in other instances.

Mr ROULSTONE: Yes.

Ms SYLVIA HALE: When the injury is taken into account, is that by the judge and the solicitors? How is it taken into account if the medical assessors say that there is no way of objectifying things such as pain?

Mr ROULSTONE: Ms Hale, the psychiatric assessments are very controversial because whereas the AMA4 guidelines really strive to obtain objectivity, psychiatric illness, by its very definition, is often required to be assessed perhaps somewhat more subjectively. You may have a battery of psychiatrists who would all differently assess a psychiatric injury. Whereas some might put it at below 10 per cent, therefore no pain and suffering damages, some might put it above 10 per cent, therefore substantial damages, and the difference in that 10 per cent can often be $100,000 or $150,000. Does that adequately answer that question?

Ms SYLVIA HALE: Yes. I am just wondering what tests they use when you are above the 10 per cent threshold that are not available or cannot be objectively assessed below the 10 per cent threshold?

Mr ROULSTONE: They use a battery of tests—DSM4s, for example.

Ms SYLVIA HALE: But would they not be applicable in both circumstances? Why are they applicable in one case, but not in another?

Mr ROULSTONE: That may depend upon the history from the claimant, such as pre-existing psychiatric histories, et cetera. There are a number of bases. Psychiatrists invariably take different approaches when attempting to ascertain the level of impairment.

Ms SYLVIA HALE: This morning we heard from medical assessors that they attempt to determine objective guidelines to remove the subjective or emotive elements from the assessment of injury.

Mr ROULSTONE: Yes.

Ms SYLVIA HALE: Do you or the Bar Association or the Law Society have any input into the formulation of those guidelines?

Mr ROULSTONE: We have made submissions before in relation to guidelines. You must remember that these guidelines have been created in the United States for purposes which, we argue, are not relevant to compensating accident victims.

Ms SYLVIA HALE: Why are they not relevant?

Mr ROULSTONE: These guidelines came about from the fifties and sixties and are more to do with the assessment of servicemen, in fact.

Ms SYLVIA HALE: Today we heard that in fact they are at the forefront of the development, and that virtually every country in the Western World adopts similar guidelines or is very much influenced by them.

Mr ROULSTONE: Well, they say they assess impairment. The extent to which they assess disability can be debated for hours. We do not think they are necessarily suitable in psychiatric injury or across the board, as a matter of fact. The Law Society will continue to argue that the Civil Liability Act test is an appropriate test to properly quantify pain and suffering damages.

Ms SYLVIA HALE: Has there been research done or is there a sufficient body of evidence to show that the civil liability test is an adequate test, or is that criticised by the medical profession?

Mr ROULSTONE: I would not have thought that that would have been criticised by the medical profession. You have to recall the history of this, I suppose, and the so-called litigation explosion of the late nineties and early two thousands whereby the Government, to a large degree in my view, fully supported the insurers' arguments in relation to the litigation explosion. Well, there has been research since, such as by Professor Ted Wright from Newcastle, who said that that was absolutely incorrect; in fact, if anything, there was a tapering off of claims towards the end of the nineties. Perhaps through political expediency at the time, this is the system that was brought in. There was consultation with those involved in the Canadian model. Ms Miller QC was one of the input

providers at the time. This is the system we have now got. This is the system we have to deal with—the system that we would like modified.

Ms SYLVIA HALE: One of the other matters that came out this morning was the possibility of conflict of interest between assessors who might derive 80 per cent of their income from either the insurers or the legal fraternity, or a mixture of both, and their response to the people they examine. Have you noticed any indication that the assessors do not act in an impartial manner?

Mr ROULSTONE: That is a very interesting question. You can sometimes find a medical practitioner who both sides think has provided a comprehensive and an excellent report. The problem that can happen then is that one side can start using the practitioner on a very regular basis, countless times. It seems to be the case that some biases start developing because I guess when you put the commercials into the equation, a particular practitioner might say, "I am getting X, Y and Z amount of work from this particular institution", whether that is a plaintiff's law firm or an insurer, and the reports may be not perhaps as independent as they otherwise may have been at the initial phase.

Ms SYLVIA HALE: Does the Law Society or the Bar Association have any opportunity to comment on the people who are appointed as assessors, or have any input into the selection process?

Mr ROULSTONE: There is a consultation process.

The Hon. AMANDA FAZIO: In relation to the assessors and their impartiality under the old system, whether it was worker's compensation or motor accident claims, insurance companies and people who had a vested interest in denying the claim would have a raft of specialists to whom they would refer people for assessment, and the lawyers who were representing people also had a raft of specialists who were well known to be more pro-claimant.

Mr ROULSTONE: Yes.

The Hon. AMANDA FAZIO: You ended up with perpetual conflict between the pro-claimant specialists and the pro-insurer specialists. Surely the system now, where you have the medical assessors appointed, would mean that a person's initial assessment will be far more impartial than any assessment they would have had under the old system.

Mr ROULSTONE: Ms Fazio, I understand that question. You have a situation also where the Motor Accident Authority's medical assessors prepare reports for either side—that is, often for one and not the other. But often in larger claims in the early preparation of evidence from both sides, it is still not unusual to see certain medical practitioners associated with certain sides.

The Hon. GREG DONNELLY: Would you like to comment about the Motor Accident Authority's own guidelines, which are used in conjunction with the AMA guidelines, and whether or not in your assessment they are a useful contribution in the whole process of making an assessment?

Mr ROULSTONE: Mr Donnelly, I might defer on that question to Mr Mockler, if that is acceptable to you, who has much more practical experience with that particular aspect.

Mr MOCKLER: I think the modifications are a major improvement. The other way was a way of assessing impairment only. There has been a very real attempt to try to make it much more workable and much more effective. I think that has been achieved. Whether it is as good as AMA5 or the Comcare system or a combination or hybrid of all of those is a moot point. Workers compensation is now using AMA5. I think we are modifying AMA4 and are looking at AMA5 down the line and they are already working on AMA6. I suppose the question is where does it start and where does it finish.

CHAIR: In an earlier conversation I think the term "slashing benefits" was used. Are we just talking about non-economic loss? Were the benefits the actual loss of wages and health care, or are we talking about the non-economic loss component?

Mr ROULSTONE: I think there may be some proposals in the pipeline in relation to economic loss, which would make it slightly more generous to accident victims. The main focus of our submission is more to do with non-economic loss.

CHAIR: So it is the definitions of the percentage for the total.

Mr ROULSTONE: I think the maximum is around $366,000, which is statutorily available for those of the more serious cases.

The Hon. JOHN AJAKA: Mr Roulstone, do you consider that the MAA gives your society a fair and appropriate say in matters that you raise with them and that they take them duly into consideration and act on them or do you find that—I do not want to use the term "closed workshop", but are you obtaining a fair say in the matter?

Mr ROULSTONE: The levels of consultation both ways are good and harmonious. The outcomes, however, are not being achieved.

CHAIR: Quickly enough or at all?

Mr ROULSTONE: At all.

Ms SYLVIA HALE: Why not?

Mr ROULSTONE: Accident victims are not able to argue their own cases in a political forum nor within the system they have unfortunately been forced to be in. It is entirely up to the Law Society and the Bar Association to argue the cause because there is no-one else left out there to do it, and we are more than happy to take that role, and we will jump up and down and bring tort law reform campaigns and we will do everything we can, but often it is falling on deaf ears within the political institutions.

The Hon. DAVID CLARKE: Mr Roulstone, the Law Society has expressed concern about significant variation between MAS assessments and they gave the example, which was quoted by my friend, in their submission of one impairment of 3 per cent and then subsequently the same person receiving an impairment of 27 per cent. When that was put to a representative from the MAA they suggested that this could reflect deterioration in the applicant's condition. I assume you took deterioration of an applicant's condition into consideration but you were talking about a more serious situation than just a deteriorating condition. Would that be correct?

Mr ROULSTONE: That would be correct.

The Hon. AMANDA FAZIO: It was the Bar Association.

The Hon. DAVID CLARKE: It was the Bar Association. You would agree with the Bar Association on that?

Mr ROULSTONE: Absolutely. My successor here today, Mr Stone, when he gets a chance to talk, has prepared numerous examples, which I have read, of case studies—anonymous case studies, of course—but there are multiple examples of that type of scenario.

The Hon. DAVID CLARKE: Not due to deterioration in condition?

Mr ROULSTONE: No.

CHAIR: Did you have anything specific that you wanted to say that we have not asked you about yet? What we will do, if it is all right with you, is forward you the remaining questions we have not put to you and hopefully you can get answers to those back to us by 14 September. But did you want to say anything else?

Mr ROULSTONE: No, thank you, Madam Chair.

CHAIR: Thank you very much indeed for coming today. You have certainly added value to our work and we know you have a major part to play in this process.

(The witnesses withdrew)

MICHAEL JOHN SLATTERY, President, New South Wales Bar Association, 7/180 Phillip Street, Sydney, sworn and examined:

ANDREW JOHN STONE, Barrister, representative of the Bar Association Common Law Committee and member of the Motor Accidents Council, 31/52 Martin Place, Sydney, affirmed and examined:

CHAIR: I welcome you to the eighth review of the annual report from the Motor Accidents Authority and the Motor Accidents Council. Are you conversant with the terms of reference for this inquiry?

Mr SLATTERY: I believe so.

Mr STONE: Yes, I am.

CHAIR: If you should consider at any stage certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee please indicate that fact and the Committee will consider your request. However, it is important to note that if the Committee perceives it to be in the interest of the public it may still publish that information. If you take any questions on notice the Committee would appreciate it if the response to those questions could be forwarded to the Secretariat by Friday 14 September. Would either or both of you like to make a short opening statement?

Mr SLATTERY: I would like to make a short opening statement. I am conscious of the fact you have questions and I will not be very long. Could I firstly say how much we appreciate the opportunity to come and speak to you on important issues that are before this Committee. This moment, of course, is an important moment to create public accountability of the operation of the Motor Accidents Scheme. There are not many opportunities for the people of New South Wales or representatives of interests associated with the people to speak about the system and we are grateful for this opportunity.

Andrew Stone and I come in slightly different capacities but we have overlapping expertise. I am not a personal injuries expert but I have been very heavily involved in the A Fair Go For Injured People campaign, which was run by the New South Wales Bar Association leading up to the last election. Much of the information that came to my attention in the course of that campaign and from many of the people I met and the information I gleaned was about people who had been very badly treated by and had grievances about the operation of this system. In addition to the examples in our submissions I am in a position to talk to you about some of those examples and, if you wish, to provide information about those. Mr Stone is an expert more in some of the technical aspects of the scheme.

In summary, I wish to make these few points in opening. Firstly, the important thing is people injured by motor accidents cannot organise in this State and the prospectively injured are not a class that can unionise, collectivise or in any way speak for themselves. So, it is voices like ours and the people who we have heard and can convey their stories to you that are very important. Secondly, barristers, as do solicitors, act on both sides of the record and we speak on behalf of the system to a large extent and can make observations. As doctors would about the hospital system we can make observations about what is wrong with this system.

The points I would like to make, in summary, are these: what has really emerged in the last seven years or so is that this system is far more efficient than anyone had ever imagined in cutting benefits to injured people and it has worked not in the way that it was intended. What has resulted generally from the fewer number of claims due to the smaller number of accidents that has occurred than was anticipated was there is really a safety dividend here.

The real question on planning for now and the future is who gets the benefit of that? Is it going to insurers' profits or is some of it, just some of it, planned to go back to injured people? That is what our submission emphasises. Secondly, there is a massive problem with the application of the whole person impairment guidelines about inconsistency. We have given some examples in our submission. There is inconsistency of two kinds: firstly, between assessments, that is the same person

being assessed on two, three, four, and dare I say even five or six occasions, as I encountered in the course of the campaign that we ran; and secondly, inconsistency in the guidelines themselves.

Inconsistency is actually embedded in the legislation, in the guidelines, where, for example, an assessment for upper body radiculopathy where you have a disk impinging upon a nerve root and causing pain in the shoulder area being assessed at 15 per cent, within the low back 10 per cent. The pain is the same, the mechanism is the same, but the guidelines are inconsistent. Why is this so? There is no good medical reason; in our submission it ought to be neutralised. There is complete costs inflexibility, which disadvantages applicants, claimants. An offer can be made early to settle for a particular sum of money. In effect, there can be multiple assessments and the lump some costs that are awarded through the system ultimately will not satisfy the reasonable legal costs of a claimant in those circumstances. We say that that needs to be looked at more closely.

My next point is that we have put in some detailed submissions about the fairly major change to the assessment of insurance profits in 2003. We do not understand why that has occurred. If you look at the profitability from this scheme in the first three years, it is way beyond the 7.5 per cent to 10 per cent profitability regime that was forecast. In our submission we calculate it at approximately half a billion dollars over and above what is in effect a reasonable rate of return on what is being received in the years that we can currently measure.

I would like to comment on what I have just heard arising from some questions that were asked so I can finish my opening remarks. We agree with everything the Law Society has said to you. On the comment by the Deputy Chair that about 80 per cent of persons miss out on general damages, I agree with the Law Society. In fact, that figure was quite conservative; we think it is more like 90 per cent. We agree with the Law Society on that, Mr Deputy Chair. The situation is actually worse.

The question asked by Ms Hale is of great significance also. When the guidelines were done in the United States they came with a warning, and the warning said, "Do not use these for assessment of damages for compensation". The legislation here has basically shorn off that warning which applies and added them as a schedule to the legislation. They came with a very clear and stark warning. The fact that they might be inappropriate is hardly surprising, in our view, given that that warning was ignored when they were added to this legislation.

My only other response is to Ms Fazio's question about the differences between the old system and the new, and experts being at war in the old system. There was one huge difference between the old system and the present system; that is, in the old system—leave aside the war between the experts that might take place—you had an independent judge sitting in a public courtroom who made a decision in the end. He or she was not an expert for either side, but was someone who was there to do one simple thing, in public, with reasons and with immediate accountability for an appellant process, to make a decision for the benefit of both sides that was neutral. If there was any suggestion of bias it could be raised immediately and dealt with and examined immediately, or on appeal. That is all I want to say by way of opening.

CHAIR: In relation to the current review of the MAAS assessment process, you have been somewhat involved with that review process. We are awaiting new guidelines.

Mr SLATTERY: They have been given to us for comment.

CHAIR: Are you hopeful about the new guidelines?

Mr SLATTERY: Hopeful that they—

CHAIR: In the outcome for the claimants?

Mr SLATTERY: They do not make any substantial change to some of the major concerns that we have identified in our submission.

Mr STONE: If I could add to that. The one positive is that we came to this Committee last year, if you might recall.

CHAIR: We do not ignore anybody.

Mr STONE: We came with some photographs of a Korean lady who had lost an ear. At least in response to that they have deemed that the entire loss of an ear will be over 10 per cent. To us, that is a bandaid solution rather than core reform, but at least that is some good news arising out of last year's hearing.

CHAIR: Could you inform the Committee of a barrister's role in the motor accidents claims scheme?

Mr SLATTERY: Yes, it is mainly to provide a specialist advocacy role. It is a very important role and it is a role that can, in many cases, be fulfilled by an expert solicitor. However, the relevant skills are usually those possessed by barristers. Essentially it is to formulate the claim, finalise the evidence, put submissions as to how the relevant legislation applies, present the case orally, ask any questions, deal with any questions from the bench or the assessors or in relation to witnesses. Essentially that role is fulfilled, rather like the roles fulfilled by barristers in court, but it is a role which, in our experience, is rewarded in that most assessors in the process have indicated to us both publicly and privately that they like that sort of specialist advocacy in the process.

The problem we have is that with a lump-sum cost system and cases that go on and the more complex ones are not properly rewarded for the application of that expertise. That means that ultimately the difference comes out of the pocket of the injured. So, in effect, the regulations are penalising them, not the insurance industry or anyone else.

The Hon. JOHN AJAKA: I am sorry we do not have a little more time. Mr Slattery, I have read your submission thoroughly. As I asked Mr Roulstone earlier, do you consider that the MAA gives you a fair say, comment, et cetera? Do you consider that there is any positive result from that? Or is it simply a matter of nothing changes?

Mr SLATTERY: In answering your important question I make a distinction. The people we deal with at the MAA treat us well, they are excellent, they are highly professional. I want to make that very clear. However, I suppose over time we often say that not a lot changes, we are not sure why. Mr Stone is probably more closely involved in the day-to-day dealings by reason of his position with the MAC. He might comment.

Mr STONE: I have been to an awful lot of meetings down there and certainly I have no complaints about the degree with which they consult. They will ask my opinion about everything. The wins you have in terms of changing their mind about anything are very far and few between, you certainly savour those.

The Hon. JOHN AJAKA: The case studies in your submission are very thorough on behalf of the Bar Association. Would it be fair to say that that is typical of the problems that are arising, or are they simply the only five cases that have problems and you are just simply giving us one really limited view?

Mr SLATTERY: I think we should both answer that question, if we may. I am not a personal injuries practitioner, I am a commercial lawyer. I happen to be President of the Bar Association at the moment, but I have immersed myself in this issue. I did practice in personal injuries law in the 1980s, which is all too long ago. I was amazed at the depth and number of people who came forward at various marginal electorates meetings to respond to the campaign, which was essentially a non-party political awareness campaign.

We could readily give you 50 or more examples from our files, if you wanted them, and from that campaign—certainly campaign-associated examples of people who have gone through inconsistent assessments. I do not think I have another one that is quite as bad as the example in the submission of 3 per cent to 27 per cent—and Mr Stone, who was involved in that, will make it clear that there was no change in the underlying condition—but we had people who went through half a dozen assessments, which still doubled and sometimes trebled the percentage impairment assessment, and Andrew might be able to add to that.

Mr STONE: They are not the average case, by any means. We wanted to highlight where the problem areas were, but suffice to say that for the purpose of drawing this up I did not trawl through every barrister's files. Almost all the case studies I gave are mine, so it is my practice alone that has encountered those problems, and most of them are over the last 12 months, so they are not the average but they are not uncommon.

The Hon. JOHN AJAKA: I am a bit confused because I have not practised in this area for over 20 years, but you hear of situations of persons in wheelchairs who are terrified of settling their case because they will lose all their future medical benefits and the amount for which they may settle their case could result in them no longer being able to seek medical treatment. Could you explain that?

Mr STONE: I think that is predominantly a concern that now arises in workers compensation where you have an election of either collecting the loss of wages or staying on the system collecting future treatment expenses. That is not a motor accidents problem. It is a workers compensation problem, as I understand it.

Mr SLATTERY: That is one problem we do not have here. That is an horrendous problem for many injured workers in this State right now.

The Hon. JOHN AJAKA: I am glad that I qualified the question by saying I have not practised in this area for many years.

The Hon. DAVID CLARKE: I put a couple of questions to you, Mr Slattery, representing the Law Society to see if there is general agreement between those bodies who represent the injured parties under this scheme. Would you agree that, first of all, the substance of the scheme is that it is one that has reduced the premiums by slashing compensation to injured parties, in particular in the area of pain and suffering; in fact, I think removing compensation from 80 per cent to 90 per cent of people who otherwise would have been entitled to compensation for pain and suffering under the old scheme?

Mr SLATTERY: I agree with that.

The Hon. DAVID CLARKE: Would you agree that the scheme has made it more difficult for applicants because it has made it more difficult for them to obtain legal representation because of cost restraints?

Mr SLATTERY: I regret to say I agree with that too.

The Hon. DAVID CLARKE: There has been concern expressed about the variation between MAS assessments on what constitutes whole person impairment and I think your association gave the example of one assessment of 3 per cent and subsequently there was another assessment of 27 per cent. When that was put to the representative from the MAA this morning it was suggested that could have something to do with a deterioration in the condition of the person. Presumably you have factored that sort of situation into your assessment and you would still express deep concern, notwithstanding in the occasional situation there may well have been some deterioration in the injured party's condition?

Mr SLATTERY: I can answer that in two ways, one, in a moment. That particular example was one that Mr Stone dealt with. It was a client of his and I will get him to put that problem to bed, but in general terms throughout the Fair Go for Injured People Campaign and all the examples here, we have tried to get examples where there has been no major change in the underlying medical condition of the claimant concerned, but perhaps Andrew can deal with that.

Mr STONE: Mr FF was a client of mine and if you are sufficiently interested I will ask if he is happy to have the two reports released to the Committee so you can see them for yourselves. No, there was no major deterioration; it was the difference between assessor A and assessor B and assessor A's way of looking at things and assessor B's way of looking at things.

The Hon. DAVID CLARKE: We would be most appreciative if you could have those reports released to the Committee.

Mr STONE: Perhaps on the basis that he can remain being referred to as Mr FF because his case has been resolved and his privacy ought to be protected to that extent.

The Hon. DAVID CLARKE: Concern has also been raised that it is very hard to quantify pain and suffering. Would you agree with the representative of the Law Society that it is possible to quantify pain and suffering; that in fact the judges have been doing that for decades and the situation could be summed up that where there is a will there is a way, but there has to be a will to want to do it in the first place?

Mr SLATTERY: I agree with that. Judges have been doing it for many, many years and so have juries, interestingly; members of the community, who are doing that one fundamental thing. When you are assessing pain and suffering, you are looking at some objective evidence and then making an independent decision whether or not you believe what the person is saying and many medical judgments are made on the same basis. There is a kind of false objectivity to some extent in the system that we are operating under here. The reality is that genuine pain of a severe kind is suffered by people sometimes with fairly minimal objective signs.

Ms SYLVIA HALE: Presumably the success of the system relies upon the assessors being independent and lacking in bias and there has been no obvious conflict of interest, yet Mr Roulstone from the Law Society said that there appeared to be an association of some assessors at least with one party or another, whether it is the medical or the legal fraternity. Is that your experience and can that be said in any way to explain the varying assessments and, if it is the case, do you have any suggestions as to how the independence of the assessors could be maintained?

Mr SLATTERY: That very important question is dealt with directly by the recent paper to the insurance industry by Justice Ipp, who expressed a similar concern to that one. One of the possibilities he contemplated was that people who do assessments should not also be permitted to undertake other work of a private kind in the field that at least isolates or quarantines them from other work. We can get a copy of that paper, if you would like.

It is very hard to track down cause and effect here. It is really a perception problem, which really independent people like judges and juries do not have. The system is, in effect, a system based in a bureaucracy, not in open court, not scrutinised quite the same way and to the extent that there are difficulties or perceptions about bias, they can fester. It is one of the consequences of a system where the assessments are not done as a result of reasons in an open court. How can it be fixed? Have a look at what Justice Ipp says; that may help a little. Our solution really is in the Fair Go for Injured People Campaign. You have to get some of the final assessments back into the open court process.

Mr STONE: At the risk of disagreeing with my learned leader—and I am not really disagreeing but I just point out a practical difficulty. Somebody may walk through my door and I have to say whether we will go to a MAS assessment or there is no point because they will not get over 10 per cent. Often I would want a medicolegal report that will give me some clue as to what the answer is. If I had to send them to someone who is not a trained MAS assessor, acting in their private medicolegal capacity and I had to use somebody completely outside, I do not get a reliable answer because this system is so complex and the MAA have so many bits and rules, that anybody I use who is not a MAS assessor in their private capacity does not give me a particularly reliable answer. If you say to the MAS assessors, "You can only do our work or you can only do outside work", it means that we lose that crossover in training, so I am cautious about going down that route.

Ms SYLVIA HALE: Given that there will be about 200 assessors, is there any scope, rather than having part-time assessors, as it were, for having salaried assessors? Would you be happy with that?

Mr STONE: No, because one of the things is whether treatment is reasonable and necessary and I would like to have people who are not full time down at the Motor Accidents Authority. I would like to have people in hospitals getting treatment.

Ms SYLVIA HALE: You said that under the American guidelines there was a warning that they are not to be used for the assessment of damages. Why is that? Why did they give you that warning? What purpose do they serve?

Mr SLATTERY: Because they are likely to lead to the very problems we are having here now, that is, they are not regarded as creating, for compensation purposes, the degree of certainty that is now being attributed to them and because there are gaps in them in terms of assessing perceptions of pain. They set out some other reasons. We can give you the warning; we can have that put before the Committee so you can see exactly what they said. They qualified it quite clearly.

Ms SYLVIA HALE: Have they been critiqued by other organisations outside, say, Australia or outside this State for those reasons, or are they not used for the same compensation purposes?

Mr SLATTERY: Are you asking me whether they have been critiqued for the purposes of using them in a compensation system or critiqued for some other purposes?

Ms SYLVIA HALE: Critiqued in terms of their use in compensation systems.

Mr SLATTERY: Of course, the guides were altered somewhat before they were incorporated into our system. Mr Stone may be able to answer what critiquing was done, either here or in other jurisdictions. I am not aware of any.

Mr STONE: There are a couple of academic studies that look at the unsuitability of the AMA guides for the purposes for which they are being put. I think I have those tucked away in a folder somewhere; I will see if I can find them.

Mr SLATTERY: This may be of assistance in answer to that question. When the Committee was sitting in relation to a review of the personal injuries legislation generally I gave evidence then and we put before it a list of problems with those guides, which were problems pointed out to us by medical specialists. You may already have these files but we are happy to pull out that part of our submission and show you what we pointed out.

The Hon. GREG DONNELLY: In your submission on page 7 it is noted that, "The principle mechanisms whereby parties can challenge in absence of procedural fairness in the CARS assessment process is by admission to the Supreme Court and most applications lodged are by insurers". Can you elaborate on that point and explain your concerns about that?

Mr SLATTERY: I will say one thing and then perhaps ask Mr Stone to take up an answer to that. Most of these are filed by insurers, not by claimants, for the simple reason that claimants cannot afford it in the process. It is an extra cost burden. The other comment is that administrative law procedural arguments are usually quite remote from the merits of the case and not something that claimants really want to take on, although the system may be unfair. The fact that this has to be done shows that the system is not operating fairly to both sides. This is really the tip of the iceberg for what we think claimants would want to take on.

Mr STONE: I was here earlier today when you asked the same question of the Motor Accidents Authority, and they said the reason insurers have to go to the Supreme Court is that they do not get a right of rehearing in court. What we are talking about is largely interlocutory steps before you even get to court. I can illustrate it with a clear example. You have looked at our case study—it was the second case study—of the chap who has had nine CARS assessments.

CHAIR: We talked about him this morning.

Mr STONE: In his case he is in the CARS system. Liability is admitted and he will be assessed at CARS, but because he has had a rule of this MAS process he is going rapidly backwards on costs because of the cap. We asked the CARS assessor for an exemption: can we take this case to court because if we go to court we will get party-party costs and at least he will not be so badly off? The CARS assessor said, "No, I'm keeping it in the CARS system." I did not get to rehear that decision in court because I did not get to court at all. That is the sort of decision that we think is unfair and would like to run an administrative appeal against but the insurer in our position would be able to

afford to run an administrative appeal and I cannot ask him to stump up the $20,000 that is necessary if we want to take it to the Supreme Court to object to the decision not to let us go to court. Does that illustrate the sorts of things that we cannot afford that insurers can?

The Hon. AMANDA FAZIO: As in previous years, in your submission you raised the issue of insurer profits, and I think earlier the Law Society was talking about insurer profits as well. Given the protracted nature of the issue and the Motor Accidents Authority's firm position in relation to insurer profits, what positive steps could be undertaken by both the Motor Accidents Authority and legal groups like your association and the Law Society to reach a better understanding on the issue?

Mr SLATTERY: A better understanding would be promoted if there were greater transparency in the profit assessment process, and we give one very good example of this in our submission. It is incomprehensible to us—no doubt you might like to ask the insurance industry this—how it could be that, if you look at the change between the Motor Accidents Authority's 2004-05 report and the 2005-06 report, the profitability for the 2003 year has gone from 18.9 per cent down to 9.7 per cent in one year. There is no transparency for us as to how that change took place. If there is a reason that can be explained, let it be explained to a committee like this so that understanding can start. We are all in favour of understanding but we do not have the data to do it. That is the problem.

CHAIR: What percentage of claimants are represented by barristers rather than solicitors, or as well as solicitors?

Mr STONE: When it gets to the CARS assessment process in terms of a hearing, I can think of three or four solicitors in town who would do it themselves and over 95 per cent would be represented by barristers. On the insurers' part, it is slightly less but it is still high. They could probably give you some figures on that.

CHAIR: So these are the persons where there is a dispute?

Mr STONE: Where there is a dispute, yes. If there is no dispute and the case settles for $5,000, it never gets near a barrister.

CHAIR: Not always just $5,000. Excuse my knowledge.

Mr STONE: Indeed, if it is a case that is simply incapable of settlement, then there is no need for barristers to get involved—no different to the way it was before. The more complex cases, and especially where some solicitors are specialists and others are not, the bar is a resource available to them that is well utilised.

CHAIR: That is one reason why today we made a decision to have those groups of persons—because of the Committee's need to understand the interaction for this issue. Do you have anything else that you felt we have not asked you?

Mr SLATTERY: No.

CHAIR: We have a couple of questions that we will get to you on notice.

(The witnesses withdrew)

(Short adjournment)

MARY MAINI, Chair, CTP Claims Committee, Insurance Council of Australia, Level 3, 56 Pitt Street, Sydney,

PHILIP WILLIAM COOPER, Chairperson, Motor Accidents Insurance Standing Committee, Insurance Council of Australia, Level 15, 2 Market Street, Sydney, and

JOHN ARTHUR DRISCOLL, General Manager, Policy Consumer Directorate, Insurance Council of Australia, Level 3, 56 Pitt Street, Sydney, sworn and examined:

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

Ms MAINI: Yes, I am.

Mr COOPER: Yes, I am.

Mr DRISCOLL: Yes, I am.

CHAIR: Welcome. I understand that the witnesses have been present for most of the day so I do not need to outline the formal procedure. If you wish to give evidence that you want to remain private you can ask the Committee, although we may decide to make it public. If you take any questions on notice we will need the replies by Friday 14 September. Would any, or all, of you like to make a brief opening statement?

Mr DRISCOLL: Yes please, Madam Chair. I would take this opportunity to thank members for allowing us to give evidence before the Committee. The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 per cent of total premium income written by private sector general insurers. Before I begin, I would like to point out that the Insurance Council, as an industry body, does not collect information on the operations of our member companies. Our comments today are limited to the information as presented in our submission to the Committee. You have already seen that I have with me today Mr Philip Cooper and Ms Mary Maini.

Let me start by saying that the New South Wales scheme is performing well in our judgment. The current operation of the CTP scheme in New South Wales is achieving the aims of the reforms in 1999. The scheme is performing well: not only is more of the compensation dollar going to meet the needs of injured people but the cost of green slips it at an historically low level. The CTP insurance market in New South Wales is an open and competitive one, operating for the benefit of motor vehicle owners. Owners have a choice of insurer, each of which offers a range of prices. The average premium for a Sydney metropolitan passenger vehicle in the June 2006 quarter was $314 compared with $322 in the June 2005 quarter. The average premium as a percentage of average weekly earnings was below 25 per cent of average weekly earnings in June 2006 as opposed to 50 per cent of average weekly earnings in 1999. A key performance indicator for the MAA is to have average premiums that are less than 35 per cent of average weekly earnings. The current level is well below this target. This is at the same time as the scheme has been expanded to include lifetime care for the catastrophically injured.

CTP insurance is long-tail insurance—that is, premiums collected today have to be kept in reserve for future claims. Almost all claims cannot be paid out in full immediately. For example, the percentage of claims finalised as of 2004 was 49 per cent. In addition, only 12 per cent of the estimated proportion of claims costs was paid in 2004. The MAA ensures that the CTP scheme is fully funded from year to year and that CTP insurers are in a financial position to meet all claims costs as they arise and for the full duration of the claim. The number of complaints is extremely low—116. The level of complaints is less than 0.54 per cent based on the number of total current claims. In conclusion, the Insurance Council believes the Motor Accidents Scheme in New South Wales is meeting public expectations to ensure that more of the compensation dollar is going to meet the needs of injured people whilst providing a high degree of affordability. Green slips are at the lowest they have been since the 1999 reforms. The Insurance Council submits that the scheme is working well. Thank you.

CHAIR: Thank you. Do you have any concerns about any areas of the legislation or the process that you would like to see reformed or you would like to be considered for change?

Mr COOPER: I can answer that to some extent by saying that we, with the MAA and other stakeholders within the injury compensation area, are continually looking at ways to improve the scheme. I think you will have noticed that over the years there have been a number of incremental changes to the legislation designed to achieve that. I am sure that there are a few more we could do. In fact, insurance companies are slightly concerned at the moment that there may be a little degree of inconsistency creeping into some of the cars awards. That is one of the matters that we are taking up with the MAA now.

CHAIR: Do you have any idea what is causing the discrepancies?

Mr COOPER: My personal opinion is that perhaps we should be looking at trying to be a little more specific in the guidance we give to assessors when they are awarding assessments.

CHAIR: Is that sending you to court more often?

Mr COOPER: Absolutely not. That is not what we are trying to achieve.

The Hon. JOHN AJAKA: Mr Driscoll, you indicate in your submission that legal costs under the CTP scheme are regulated in order to encourage early resolution and decrease litigation and unproductive disputes. Since the introduction of the legal costs regulation a greater proportion of the settlement is going to the injured person. One of the concerns I have with a comment of that nature is that we are hearing that the insurance companies do not have the same limitations as far as costs are concerned and that they continually seek reassessment or move the matter on. However, the applicant is still limited as to the amount of costs that they may be awarded. I find it strange that the parties are not on the same level playing field in that regard. There seems to be almost an incentive for the insurance companies not to settle because they are not prejudiced by the same costs aspect that an applicant is.

Mr DRISCOLL: One of my colleagues may be able to give you a little more detail, but the rules are set by the Government and the MAA and insurers are merely following the rules set by the Government and the MAA.

The Hon. JOHN AJAKA: Do you personally consider it to be a fair playing field in that regard? That is a question that you can answer.

Mr DRISCOLL: I believe that government sets the rules and I do not believe it is my position to comment on whether or not the rules are correct, incorrect or otherwise. I believe it is the role of the insurance industry to act, as I believe it does, in a proper, efficient and effective way in administering rules set by the Government.

The Hon. DAVID CLARKE: You can make recommendations on the Motor Accidents Council. That is what the council is there for. If you felt applicants are at a disadvantage because they have a restriction put on them in regard to costs—a disadvantage that insurers do not have—if you felt that there was an injustice to injured parties, you would have the right on the Motor Accidents Council to join with the Law Society and the Bar Association in putting forward a recommendation to remedy that injustice to injured parties.

Mr DRISCOLL: I might defer to Mr Cooper to answer that question.

Mr COOPER: Yes, we do. I might add one further comment, which I think would go towards correcting an impression that may have been created in the hearing that I have heard today, that is, I do reject the proposition that insurance companies continually seek re-examinations or reassessments. We are under very strict guidelines as to when we can and the circumstances under which we are able to do so. It is much more an unusual case rather than what normally happens. That is certainly not the impression I have heard here today.

Ms MAINI: That is right. The cases where we would apply for reassessment are if there is a deterioration, material evidence or there was an incorrect assessment made. In the majority of cases, I think from the motor accidents statistics that we will have to take it on notice and see if we can provide more information. We are not the ones that are actually applying for reassessments.

The Hon. JOHN AJAKA: We heard earlier—correct me if this is wrong—that a large number of the appeals to the Supreme Court are via the insurance companies as opposed to the applicant, I think I heard almost 90 to 95 per cent, and that a large number of them are unsuccessful. Is that not a demonstration of the insurance companies not accepting the umpire's decision and putting the applicant in an unfair situation?

Mr COOPER: I do not know the exact number. We will certainly look that up. You asked the same question of the MAA and they are seeking to get that information. However, my observation is that the insurance companies appeal, when they do appeal, on administrative reasons where they feel that the hearing has not been held in the correct manner or the decision was based on incorrect information. Once again I would like to try to correct the impression that it is large numbers. The vast majority of assessments go through without appeal from my party.

CHAIR: Recognising that our cut-off date for receiving information is 14 September, the Committee would be grateful if you took on notice getting that information by then.

Mr COOPER: Certainly.

The Hon. DAVID CLARKE: Without passing judgment on whether appeals are justified or not, would you not agree that there should be a level playing field and applicants should not be, in effect, restricted from bringing appeals because of legal restraints? Do you think a level playing field would be in the interests of the consumer? Would you take on board joining with the Bar Association and the Law Society in a joint submission on the Motor Accidents Council to remedy this problem?

Mr COOPER: In fact, it is not a level playing field, I do agree. Claimants are able to appeal either CARS [claims assessment and resolution service] or MAA decisions if they feel they are incorrect or not to their satisfaction. Insurance companies are not able to appeal at all CARS decisions. We can only appeal if we think the hearing was incorrectly held and there is an administrative problem. We are not able to appeal the outcome at all. So, in fact, it is not a level playing field.

CHAIR: For clarification, if you appeal it is about process?

Ms MAINI: Yes.

CHAIR: Therefore you have to go to the Supreme Court because it is about process.

Ms MAINI: That is correct.

CHAIR: If the litigant wishes to appeal they go to the District Court because it is not about the process, is that correct?

Ms MAINI: Their avenues for appeal are two-fold. If it is about process they can go to the Supreme Court, but they do not need to because if they are unhappy or unsatisfied with the assessment made at CARS they have the right to go to the District Court and commence legal proceedings.

The Hon. DAVID CLARKE: Both courts are expensive, the District Court as well as the Supreme Court. So they are still at a disadvantage regardless of which court hears the appeal.

Ms MAINI: Can I correct something that was said earlier? The MAA is going to provide submissions on the cases that have been taken to the Supreme Court, the Administrative Appeals Tribunal. I think from memory there are less than seven decisions that have actually been taken by insurers on administrative appeals processes only.

The Hon. DAVID CLARKE: We are talking about the cap placed on legal costs of injured parties. That is what we are addressing our comments to. You will take that on board and give

consideration to an application being made by the Motor Accidents Council for this cap to be lifted to the benefit of applicants under the scheme?

The Hon. AMANDA FAZIO: Do you mean the regular CPI increase?

The Hon. DAVID CLARKE: I am talking about the cap on legal costs at the moment.

CHAIR: The issue was addressed this morning.

Ms SYLVIA HALE: We heard this morning about the unfortunate outcome of the HIH-FIA-CIC debacle and how it left the State having to pick up the tab. We also heard there was a period of almost unprecedented stability and prosperity within the industry and, therefore, the outlook was rosy. Given we are experiencing an extraordinary number of natural calamities—this week in Queensland, the Central Coast in June and so on—what is the attitude of the industry to quarantining the premiums it receives so that regardless of whether companies are affected by natural disasters elsewhere there will still be a pot of money available to compensate victims of accidents?

Mr COOPER: I would like to agree with the comments the General Manager of the MAA made this morning. A couple of points he made were that APRA [Australian Prudential Regulation Authority] has a vastly superior process for now regulating insurers, particularly the prudential regulation, and they take a much closer view of the way in which they set claims reserves. I am quite satisfied that there are sufficient reserves and will continue to be to pay for whatever claims that do come along. The second point on quarantining funds, in the way that insurance works the idea is that you can offset calamity in one area versus another. If we make mono-line insurance companies, which is virtually what that means if you are going to separate them into product lines, then it would not be possible to offset those various losses from one type of loss to another. It necessarily therefore would make it more expensive because you would have to up the reserves to allow for the greater volatility. So whilst it is quite possible to do it, it is economically not sensible because that defies the whole idea of what insurance is for.

Ms SYLVIA HALE: Do you think it would be unreasonable to require a certain percentage of premiums to be invested in State bonds, for example? The rate of return might be less than you receive on the stock market but it might provide ultimately for the benefit of the purchasers of the insurance.

Mr COOPER: Once again that is an economic decision. As you said yourself, if insurance companies, and they do already, are obliged to keep funds in very high security bonds—a lot of insurance funds are kept in bonds—the higher you make that percentage the less the return will be to insurance companies and necessarily therefore the premiums will have to increase.

Ms SYLVIA HALE: You say at the moment a high percentage is kept in bonds. What is the difficulty with earmarking some of those bonds for CTP purposes?

Mr COOPER: As I said, if you are not able to offset claims reserves for wherever the loss is, therefore you have to keep a higher claims reserve in each particular product.

Ms SYLVIA HALE: Was not the process of offsetting the nub of the HIH problem? It offset its losses in other areas against the profits it was making from third party insurance and the State's organisation has to step in and pick up the tab.

Mr COOPER: I do not wish to put myself forward as an expert on why HIH had a calamity, but I think there were a few more problems there than just that one.

Ms SYLVIA HALE: The Bar Association, in its comments and in its submission, noted that the 2004-05 and 2005-06 reports showed a 9 per cent profitability, whereas for the period prior to that profitability had been about 18.9 per cent, and said there was a lack of transparency or an inability to understand what caused that decline in profitability. Could you enlighten the Committee on that?

Mr COOPER: Probably not a lot, but I will try. First of all, I will not comment on various insurers' profitability because, first, I do not know those figures and, second, it would be inappropriate

to do so. The MAA has an independent actuary that looks at the insurers' returns, and it is they who come up with the figures, I presume because they considered there had been a deterioration in claims cost, or frequency, or a combination thereof. But for the exact reason, you would have to ask them.

Ms SYLVIA HALE: So if one wanted to understand it, one would need to go to the actuaries who prepared the assessments and ask them to make their reasons public?

Mr COOPER: Precisely.

Ms SYLVIA HALE: There is concern that claims are often dismissed without adequate and clear reasons being given for dismissal of those claims. I understand the authority has been in discussion with the insurance industry about greater transparency or understanding. How far has that progressed, and why has the industry been reluctant to give reasons?

Mr COOPER: I think I should clarify the question. I think the discussion previously was on the decision on whole person impairment.

Ms SYLVIA HALE: Yes.

Ms MAINI: I sit on a representative body with the Motor Accidents Authority, the MAS reference group, and through the MAS reference group there is representation from the Plaintiff Lawyers Associations, the Bar Association, insurances and MAS assessors. Through consultation, I understand that there will be amendments in the next set of legislative reforms to cover that. But, before those amendments come into effect, most insurers, if not all of them—and I will have to confirm that with other members—are now providing reasons when they provide whole person impairment certificates as to why the insurance company believes someone was under or over 10 per cent impairment.

Ms SYLVIA HALE: The guidelines used are apparently based on AMA4, which came with a proviso that they are not to be used for the assessment of damages. Do you consider the guidelines currently in use, or about to be modified, to be an adequate tool for the assessment of compensation?

Mr COOPER: I will answer briefly. My understanding is that those guides are meant to assess the level of impairment, not damages. I think that point has been slightly missed today. I am not aware of the exact guidance, but as for ways in which we can improve them, I will defer to my colleague.

Ms MAINI: We made submissions when the guideless were last being reviewed, and we also made submissions on the TEMSI scale. We agreed that some clarity was required regarding scarring, and we supported the recommendations and the revision of the MAS guidelines to ensure a greater level of consistency in their application.

The Hon. AMANDA FAZIO: We have received a quite interesting submission from the New South Wales Motor Cycle Council, which presented anecdotal evidence that CTP quotes for motor cycles from the same company can vary wildly from year to year, and the council believes it appears that insurers take turns at providing the lowest green slip price each year. Have you any comment to make on that observation?

Mr COOPER: I would have trouble justifying that with a reasonable comment. I take great umbrage at the suggestion that insurers collude. It is fairly obvious, if you look at prices at the moment, that there is no collusion whatsoever. I totally reject that observation.

The Hon. GREG DONNELLY: In the ICA submission, at page 4, the council says that the council itself and members are pleased to contribute to government and community programs particularly those concerning road safety. Could you give the Committee some detail of examples of the contributions you refer to in that comment?

Mr DRISCOLL: Perhaps I can help a little. There is a lot of work done on road safety issues by individual member companies of the Insurance Council. I also participate in road safety fora in a number of jurisdictions to work with government and other stakeholders top try to achieve positive

outcomes. In fact, as recently as last Wednesday I attended a meeting of the Queensland Motor Cycle Road Safety Forum, where we and all stakeholders looked at a number of initiatives, advertising campaigns, et cetera, which could be used to increase the level of awareness by drivers of vehicles other than motor cycles of the issue of road safety when it comes to motor cycles on the road. We achieved consensus with a variety of stakeholders sitting round the room—insurers, smash repairers, suppliers of vehicles, regulators, government and other stakeholders. That is an example that comes to mind because it is quite recent, but there are a number of initiatives that a number of insurers are themselves undertaking, and some of them are very well publicised. The Insurance Council itself is keeping abreast of developments in road safety right across Australia.

The Hon. AMANDA FAZIO: Could I ask you about a proposal that you put in your submission? On page 5 you state that you thought the scheme's efficiency could be further improved by the ability to have online access to police data which would allow insurers to determine liability more rapidly. Can you explain what you mean by this proposal? And have you had discussions with the MAA about it? And what about privacy concerns?

Ms MAINI: One of the obligations on insurers is to determine liability as expeditiously as possible. Within the current scheme we have approximately three months to determine liability. One of the things that members have noticed is that we could greatly reduce the time it takes to make that determination if we had online access to police records, similarly to the access that Queensland insurers have in that State. They are able to access the police system. I do not think they have access to all the details—just accident description. Queensland insurers have limited access to the police system, but they are then able to determine liability faster than can New South Wales CTP insurers. We are looking for ways to improve the scheme and we have referred to those in the submission.

CHAIR: How long do you have to wait for police reports?

Ms MAINI: Often, it is weeks. But I will take the question on notice and provide to the Committee a summary of how long it is taking us.

The Hon. AMANDA FAZIO: Can you provide information about the reduction time in Queensland?

Ms MAINI: Yes.

The Hon. DAVID CLARKE: Mr Driscoll, in your opening statement you pointed out that premium levels are at historically low levels under the new scheme. However, the truth is that the amount injured parties receive in compensation is also at historically low levels.

Mr DRISCOLL: Premiums are at record lows and the 1999 reforms are being reflected in the fact that more of the compensation dollar is going to those most in need; that is, the catastrophically injured.

The Hon. DAVID CLARKE: In addition, up to 80 or 90 per cent of parties injured in motor vehicle accidents are receiving no compensation, whereas under the previous scheme they were entitled to receive compensation.

Mr DRISCOLL: Are you referring to non-economic loss?

The Hon. DAVID CLARKE: Yes.

Mr DRISCOLL: I believe that the current scheme is delivering in terms of the reforms that were enacted in 1999.

CHAIR: Is this the only part of the insurance industry that is subject to monitoring of profit levels?

Mr COOPER: That is in the State legislation and it is the only legislation of that kind that I am aware of. APRA does observe it, but it does not have a role to say whether it is too high or too low.

CHAIR: But it is observing whether the industry is still able to function.

Mr COOPER: Yes.

CHAIR: If an application is made to increase a premium and the MAA questions it, how does the industry as a whole cope with the process?

Mr COOPER: We know the rules with regard to filing and the general levels of profitability. Therefore, when we submit a filing we keep within those guidelines.

CHAIR: There have been a couple of knock-backs over the years.

Mr COOPER: Yes, but very few. We have made a submission to the MAA—and I think we have made it here—that we do not think the allowable profit is sufficient in terms of international competitors or insurance companies.

The Hon. AMANDA FAZIO: One issue we have not talked about today is any benefits to claimants as a result of having their claims dealt with more quickly, which happens under this system, rather than being a perpetual compensation claimant/victim. Are you aware of any decent research dealing with this issue? If one is looking simply at hard numbers, it is left out of the equation.

Mr COOPER: It is very hard. I agree that the more expeditiously we can settle a claim the better it is from a psychological point of view for the claimant. I have seen that myself, and anecdotal evidence would suggest that is true. I also sit on the Motor Accident Council. I do not recall the details, but a member of the council brought forward an American study along those lines.

CHAIR: Thank you very much for appearing before the committee today. I thank everyone for this day's public hearing of the eighth inquiry into the MAA and the MAC. I thank Ms Rachel Callinan of the secretariat and the other people who have worked with us to make it happen. If there are further questions, the secretariat will forward them to you for response by 14 September. You were also given some questions on notice. I hope you look forward to the committee's recommendations.

(The witnesses withdrew)

(The Committee adjourned at 3.45 p.m.)