NEW SOUTH WALES BAR ASSOCIATION SUBMISSIONS

STANDING COMMITTEE ON LAW AND JUSTICE: TWELFTH REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS AUTHORITY AND FIFTH REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE LIFETIME CARE AND SUPPORT AUTHORITY

1. The New South Wales Bar Association ("the Association") is again pleased to provide submissions to the Standing Committee on Law and Justice for the purposes of its statutory review of the operation of the New South Wales motor accidents scheme.

2. It is noted that the Standing Committee has previously resolved to conduct this inquiry every two years on the basis of the more stabilised nature of the scheme, and that the last report reviewing the operations of the Motor Accidents Authority ("MAA") (the 11th) was published in December 2011.

3. The Association ready to provide whatever assistance it can to the Standing Committee in the course of its deliberations.

4. Although the motor vehicle represents one of the wonders of modern technology, its use comes at a tragic social cost. An unfortunately inevitable by-product of the interaction of humans and high speed machines is injury and death. The sole purpose that the motor accidents scheme exists is to allow those injured in motor vehicle accidents to be properly looked after. The collection of compulsory third party premiums (green slip fees) is not an end in itself, but rather a means to facilitate society taking care of those who have been injured, mostly through no fault of their own.

5. More will be said below about the attempts to restructure the motor accidents scheme earlier in 2013. However, it is worth noting at the outset that the collection of premiums to cover the expenses of the motor accidents scheme and the Lifetime Care and Support ("LTCS") Scheme involve a degree of rationing. We do not collect sufficient premiums to pay full benefits to all those injured in motor vehicle accidents.

6. The rationing mechanism has always been based on fault. We prioritise looking after the innocent victims of motor vehicle accidents at the expense of those who cause accidents. This is a perfectly legitimate and well-established mechanism for the allocation of limited benefits.

7. The scheme reforms proposed in 2013 led to the *Motor Accident Injuries Amendment Bill 2013* ("the Bill"). The Bill proposed the substantial abandonment of the fault principle in favour of very limited no fault benefits. Whilst there was much talk of the extension of benefits (to those who cause accidents), one of the primary failings of the reform proposal was to clearly identify those whose benefits were being cut (and in many instances, severely cut) to fund the extension of benefits to careless drivers.

8. The Association is conscious that there is a limit on the amount of money that can be collected from motorists to fund compensation schemes. Any expansion of benefits must (of necessity) involve savings or cuts elsewhere.

9. The Association is committed to working with the government to create certainty within the scheme and thus ensure stability of premium. The Association believes this can be done without the need to engage in the radical reforms proposed earlier this year and without significantly slashing the benefits paid to innocent accident victims.

10. Unfortunately, the material produced by the Government in support of the reform proposal was heavily slanted. The Association is keen to ensure that the Standing Committee investigation into the operation of the scheme is fully informed. Thus, the starting point for this submission is to address ongoing scheme operations in a neutral and objective fashion. To that end, brief submissions are made on the following topics.

The 2013 Reform Proposals

A. NSW CTP scheme performance – the reality;

B. What does no fault really mean?;

C. Premium pressures;

D. The 10% WPI fallacy;

E. The role of legal representation in the motor accidents scheme.

11. Having addressed those more general matters of scheme performance, this submission will then address:

The 2013 Standing Committee on Law and Justice Review

(i) The Motor Accidents Council and advisory committees;

(ii) The Standing Committee on Law and Justice review process;

(iii) The Medical Assessment Service ("MAS");

(iv) The *Smalley* decision;

(v) Outstanding actions to "*fix*" the NSW CTP scheme;

(vi) Improve insurer operation; and

(vii) Expanding the Accident Notification Form ("ANF") system.

12. Finally, the submissions briefly address the operation of the LTCS scheme and the LTCS Authority.

THE 2013 REFORM PROPOSALS

A. The Reality Of NSW Compulsory Third Party Scheme ("CTP") Performance

13. It is acknowledged that the NSW CTP premium is generally more expensive than those applicable in Victoria and Queensland. There are a number of reasons why. They include:

    (i) NSW offers significantly better benefits than those available to accident victims in Victoria and Queensland.

    (ii) The NSW Government and the MAA have permitted insurers to increase CTP premiums well above increases permitted by other States.

    (iii) The Victorian scheme is government underwritten, can absorb a loss and does not have to provide the same dividends as a privately underwritten scheme.

Comparing benefits between schemes

14. When comparing the cost of a CTP premium in NSW with the cost of a CTP premium in Queensland, the starting point is to recognise that Queensland does not have a Lifetime Care and Support Scheme. In NSW, we look after those catastrophically injured in motor vehicle accidents, irrespective of fault. In Queensland, they do not. As and when Queensland is obliged to implement the National Disability Insurance Scheme ("NDIS") and National Injury Insurance Scheme ("NIIS") by creating their own version of the LTCS scheme, then Queensland premiums will significantly increase to cover the costs of catastrophic injury for at-fault drivers. It is anticipated this will add up to $100 to Queensland premiums, making them far more comparable in price to NSW.

15. However, this is not the only difference in benefits between the two States. The full difference is that NSW has the following:

    (i) NSW motorists reimburse the public hospital system for all treatment costs of all drivers irrespective of fault. In effect NSW motorists subsidise the NSW health system by paying for at fault drivers in a way that does not occur in Queensland.

    (ii) NSW provides a no fault benefit to all those injured in an motor vehicle accident up to a value of $5,000 on submission of an Accident Notification Form (ANF) and upon proof of treatment expenses and wage loss. This limited no fault payment at the bottom end of the scheme helps keep many potential claims out of the full CTP system.

    (iii) NSW covers blameless accidents, such as tyre blowouts and unexpected medical conditions (a provision introduced after the Fairlight accident that caused catastrophic injuries to Sophie Delezio).

(iv) NSW covers all children for their treatment and care needs on a no fault basis. Any child under 16 who is injured in an motor vehicle accident is covered for treatment and care needs, irrespective of fault.

(v) NSW has the LTCS scheme with its coverage of catastrophic injuries (albeit at a significant cost to premiums).

16. All of these benefits are modifications to the general fault-based principle. They have (over the years) added to the cost of the NSW CTP premium. The Association supports these additions to cover the particularly vulnerable – children and the catastrophically injured. However, we cannot provide these socially progressive benefits and expect to have the same low premium as Queensland.

Comparing efficiency of schemes

17. The Issues Paper put out by the MAA in February 2013 (entitled "Reforms to the NSW Compulsory Third Party Insurance Scheme") made unfavourable comparisons between the efficiency of the NSW scheme and other interstate schemes. The efficiency of a scheme is categorised as the amount of premium dollar that is spent on the claimant (both by direct payments and in meeting medical and care expenses).

18. The comparisons showed the NSW scheme efficiency rate at a little over 50%, with interstate schemes having a much better efficiency – a little above 60%.

19. The comparison was unfair and potentially misleading.

20. First, calculation of the efficiency of NSW scheme performance was made over the full ten years of its operation between 1999 and 2009. The first few years of this period saw insurers keeping up to 30% of the premium dollar in profits, due to unduly generous allowances for "*prudential margins*" that were being permitted by the MAA. The grossly excessive profits made by insurers in those early years meant that the scheme was operating very inefficiently.

21. However, in recent years the scheme has operated more efficiently. As insurer profits have come down under 20% of the premium written then the scheme has become more efficient with a greater percentage of the premium collected being returned to the injured. If insurer profits could be restricted to the 10% level they should be at, then the scheme would operate more efficiently yet.

22. What is consistently missing from the MAA analysis of NSW scheme efficiency is the MAA's inability to restrain insurer profits. Nonetheless, the scheme is operating far more efficiently now than it was when first introduced. The 10 year historical average simply does not reflect the scheme as it operates now. The scheme is currently operating at greater than 50% efficiency.

23. The second part of the analysis that is misleading is that the NSW scheme data excludes cases within the LTCS scheme. The Victorian and Queensland figures do include their catastrophic claims. In short, apples are not being compared with apples.

24. Catastrophic injuries are amongst the most efficient claims in terms of legal costs incurred in the delivery of lump sum benefits. The legal fees associated with a $10 million case are unlikely to be significantly more than the legal fees associated with a $500,000 or $1 million case. Excluding all the multi-million dollar cases when measuring NSW scheme efficiency will drag down the efficiency rate and result in an unflattering and unfair comparison with scheme efficiency in Queensland and Victoria.

25. Once the early years of NSW scheme performance are excluded and the major claims added back in, the NSW scheme operates at a comparatively efficient level when measured against interstate schemes.

Speed of benefit delivery

26. One area in which NSW can seriously improve compared to interstate schemes is the speed of delivery of benefits. As part of its submissions to the NSW Government during the course of this year's scheme reform debate, the legal profession put forward various concrete suggestions to improve the efficiency of benefit delivery within the operation of the current scheme. These include:

    (a) Simplifying and streamlining the late claims process;

    (b) Streamlining processes at MAS and ending repeated referrals of matters to MAS for further assessment;

    (c) Simplifying and expediting hardship payments to those who have lost wages claims;

    (d) Expanding the ANF scheme so that more claims can be dealt with quickly and at less cost; and

    (e) Penalising insurers who delay in making admissions of liability, take excessive technical points and make unrealistic allegations of contributory negligence.

27. The Bar Association maintains that there are steps that can be taken to improve the efficiency of the current scheme and to ensure quicker delivery of benefits to claimants. Later in these submissions, these various measures are further addressed.

Scheme performance – a summary

28. In conclusion, when comparing the performance of the NSW scheme with those interstate, it is important to present the data in a fair and honest fashion. It is important to compare the level of benefits available. When this is done, the NSW scheme compares favourably with those interstate in terms of the range of benefits available and the return of premium dollar to the injured.

29. There are still improved efficiencies that can be made within the NSW scheme and the Association seeks to work with the government and the MAA to pursue those efficiencies.

B. Fault v No Fault

30. Each year the NSW CTP insurers collect around $1.8 billion in premium. This is not enough to properly or fully compensate all those injured in a motor vehicle accident for their full wage loss, their pain and suffering and their full past and future treatment expenses. As mentioned above, payments have to be rationed.

31. Until now, the primary rationing mechanism has been to make payments to innocent accident victims and exclude from coverage those who cause accidents (in short, a fault based scheme).

32. The proposals put forward this year by the government abandoned this rationing mechanism in favour of a no fault system. NSW would have changed from looking after innocent accident victims moderately well to paying very restricted benefits for almost everyone.

33. The rational for the change was that many at fault drivers did not really intend to have motor accidents. As the Issues Paper stated, motor vehicle accidents occur and drivers are injured in circumstances where no one is breaking the road rules. The Issues Paper identified adverse weather, unfamiliar road conditions and poor lighting as being factors that contributed to accidents (although the Issues Paper failed to recognise the fact that a failure to drive having regard to the weather and prevailing road and traffic conditions is a breach of the Road Rules.)

34. The Issues Paper identified four examples of drivers who could cause accidents, but should be treated as "*innocent*" victims and entitled to compensation when injured in the accident they caused:

    (i) The distracted mother with squabbling children who runs off the road;

    (ii) The experienced driver who misjudges a corner on an unfamiliar road;

    (iii) A farmer who swerves to avoid an animal and hits a tree; and

    (iv) A motorcyclist who comes off his bike when cornering in the wet.

35. It should be noted that these are all drivers who could and should have been more careful and driven more appropriately to the circumstances. Whilst in a perfect world, social welfare safety nets would see all of these drivers compensated in full, in a world where we have to ration the CTP payments, it seems unjust to reduce the benefits of innocent accident victims in order to pay this category of at fault drivers.

36. It is worth noting that the position set out in the Issues Paper and the Bill was conceptually inconsistent. Contained within the Bill was a provision that excluded drivers from recovering where they had committed a serious criminal offence. The definition of what constituted a serious criminal offence extended down to "*negligent driving causing injury*".

37. The net effect of this was that if the mother with squabbling children caused injury to one of her children (and was charged by police) then she was excluded from recovering

any statutory benefits. Similarly, if the same mother with squabbling children had hit another car or injured a pedestrian then she would have (and ought to have been) charged and thus excluded from benefits. The driver of a motor vehicle is expected not to kill or injure other road users, even when there are squabbling children in the car.

38. If the government had genuinely wanted a no fault scheme, then it should have been prepared to pay benefits to the injured mother of squabbling children, irrespective of whether any other person was injured (in addition to the mother) or not. It is worth bearing in mind that this momentary inadvertence by the driver as she leaves the road due to squabbling children poses a grave risk to everyone around her. The criminal law sends a clear message in such circumstances – the mother could be jailed if her inattentive driving saw a pedestrian killed as she ran off the road. The parents of the dead pedestrian would be demanding jail, rather than compensation for the careless driver.

39. What was completely missing from the debate about changing to a no fault benefit scheme was just how many innocent accident victims had to have their benefits cut (and to what extent) to pay benefits to careless drivers.

40. The CTP Roundtable saw scheme users (motorcycle groups, taxi groups, bus industry representatives) expressing concern about the proposed changes and wanting to know the extent to which benefits were being cut and the number of claimants who would have benefits cut in order to extend no fault benefits to others. The concerns were exacerbated when it became clear that there was no guarantee that the proposed change to a no fault scheme would reduce premiums.

C. Premium Pressures

41. There is no doubt the NSW green slip premium is under pressure. However, it is important to look closely at why.

42. By far the single largest factor placing pressure on NSW premiums over the last three years has been the international decline in bond yield rates.

43. In simple terms, if CTP insurers can invest the premium income collected and earn a healthy return on it (at government bond rates) then they don't need to collect as much money in premiums to eventually pay out on benefits.

44. On the other hand, if international bond rates are close to zero, then the CTP insurers need to collect every single dollar to be paid out as benefits in premium, as they are not making any investment returns on the funds collected.

45. As international bond rates have declined over the past several years, insurers have increased premiums to make up for the shortfall in investment income. Nothing produced by the MAA has clearly quantified the extent to which this has occurred (in order that it can be objectively analysed). The starting point to understanding the pressure on premiums is a clear analysis of the change in bond rates and the extent to which this has impacted directly on premium.

46. It is worth noting that bond rates cannot go much lower so there should not be much further premium pressure from this source. Moreover, in the long run, the US government cannot keep interest rates close to zero – it just isn't economically sustainable. As world economies revive and as interest rates increase, the pressure on the NSW CTP premium will be eased. Premiums will stabilise and should ultimately be capable of being cut.

47. Within the scheme itself, any inflationary pressures are much more modest. Only two can really be identified.

48. First, the MAA points out that rates of legal representation are increasing. With that comes an increase in claims costs. It should be noted that the increase in claims costs is only in small part due to legal fees. A far more significant contributor is that those with legal advice recover closer to their full and proper entitlement to damages. Those without legal advice tend to recover less than their legal entitlement from insurers. In effect, the unrepresented subsidise the NSW scheme by forsaking their proper entitlement to damages. There really should not be any complaint about increasing recovery of damages by those legally represented – it means that more people are receiving the compensation which the Parliament has determined they are entitled to.

49. However, to the extent that there is concern about the increasing cost of smaller claims, this can be partially addressed by suggestions made by the legal profession to expand the ANF scheme and simplify the dispute resolution process. The Motor Accidents Compensation Act 1999(NSW) ("1999 Act") was supposed to set up a scheme that could be accessed by the injured without the need to resort to legal representation. The reality is that the scheme is so complex that many feel compelled to resort to a lawyer in order to understand how to pursue their claim.

50. There is an obligation under the Act that insurers make a reasonable offer of settlement to a claimant. The MAA effectively refuses to enforce the statutory obligation for insurers to make a "*reasonable*" offer by defining "*reasonable*" as meaning any offer that can be justified on any of the available evidence, (i.e. a small element of evidence favourable to the insurer rather than the weight of the evidence and the most likely value of the claim).

51. It is often a low opening offer from an insurer that drives a claimant to seek legal advice. Either that or an excessive allegation of contributory negligence. These are areas where the MAA could be a better regulator and reduce the frequency with which claimants feel compelled to obtain legal advice.

52. The second area of suggested inflationary pressure within the scheme is in relation to damages awarded for voluntary care and assistance. For many elderly claimants who fall under the 10% WPI threshold and have retired, there is no entitlement to damages beyond treatment expenses and any need for care. It is unsurprising that in these cases where there is no other entitlement to damages, the care claim is pursued more vigorously.

53. The Association is interested in discussing with the MAA and the Government the approach to care claims and easing any inflationary pressure in this area of the scheme.

54. In summary, claims costs are not escalating out of control. There is minimal superimposed inflation currently within the NSW CTP scheme. The real reason that NSW premiums have had such a large increase is due to low bond rates. In Victoria premiums were not substantially increased because of this pressure and instead the scheme ran a billion dollar deficit. In Queensland, the government refused to allow significant premium increases.

55. It is worth noting that, during 2012, NSW CTP insurers were allowed an average premium increase of $50. Some insurers increased premium by $70 while others increased it by as little as $12. It would be appropriate for the Standing Committee to ask the MAA why there was such a wide range of premium increases.

56. Just as importantly, the Standing Committee may care to ask the MAA why the Queensland government permitted less than $15 in premium increases over the same twelve month period (2012) whilst in NSW, the premium went up by an average of $50. Is it that Queensland has better regulatory procedures and better capacity to control excessive premium increases sought by insurers in a private CTP market?

D. The 10% WPI Fallacy

57. At the heart of the proposed no fault scheme was the use of WPI ("Whole Person Impairment") to determine ongoing access to benefits.

58. At present, a measurement of WPI only determines access to non-economic loss (compensation for pain and suffering). The proposal was to use WPI to determine ongoing access to all benefits (loss of earnings, treatment expenses). This would have perpetuated and expanded injustices that already exist within the current scheme.

59. The Government's Issues Paper made this claim:

> ["Those"] *whose whole person impairment is not greater than 10% are generally able to return to a normal and productive life, although some may have to make adjustments as a result of ongoing difficulties."*

60. However, the reality is that 90% of those injured in motor vehicle accidents do not get over the 10% WPI threshold. This includes some with very serious injuries that change their lives forever.

61. In NSW the percentage WPI is measured using the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition). The Guides' themselves state that the guidelines are not reliable when it comes to determining fair entitlement to compensation:

> *"It must be emphasised and clearly understood that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities."*

62. Despite this advice, the government wished to extend the critical role of WPI (following a MAS assessment) to treatment, care and lost earnings.

63. Just consider some of the following injuries which come in under 10% WPI:

- A lumbar disc prolapse causing radiculopathy. In lay terms, a collapsed disc in the low back presses on the spinal cord, causing shooting pains into the legs. Manual work may be impossible. The condition is painful and disabling. It is assessed at 10% WPI (not over 10%).However, exactly the same condition (a disc prolapse with radiculopathy) in the cervical spine (the neck) is assessed at 15%. The Guides are crude and haphazard.

- An ankle fusion is effectively the surgical welding of the joint to stop the movement that causes pain. Although pain may be reduced, the ankle will no longer flex and the claimant will no longer run, jog or be able to work all day on their feet. Some pain will persist. This is assessed at 4% WPI. An ankle fusion does not constitute living a "*normal*" life.

- Loss of teeth is only assessed by reference to the loss of ability to chew. The Bar Association has previously brought to the attention of the Standing Committee the case of a 17 year old girl who had lost 7 teeth, only to be assessed at 0% WPI on the basis that she could still chew from the other side of her mouth. The fact that she would require a lifetime of painful and expensive dental treatment was not taken into account.

- Mr. H had a two-level cervical fusion in 2000. The operation was a success and he returned to work as a plumber. Following a 2011 motor vehicle accident, he required a much more significant four-level fusion. This operation was less of a success and Mr. H now cannot return to working with tools. Due to an anomaly in the Guides, he is assessed at 0% WPI (25% for the four-level fusion minus 25% for the pre-existing two-level fusion). Mr. H may lose his trade and his home – hardly a "*normal and productive life*".

64. The Guides are crude. They take no account of pain. They take no account of the fact that there may have been three or four surgical procedures to bring a claimant to their current level of impairment. They take no account of future needs for surgical treatment or future deterioration such as the onset of arthritis.

65. The Association has previously urged - and the Standing Committee has recommended - that the MAA review the application of the Guides and the injustices they inflict. No such systematic review has ever taken place. Rather, there is the opposite – a plan to make all damages contingent upon thresholds set by guidelines that are inherently unsuitable for the purposes for which they are being deployed. The talismanic faith of the MAA that those under 10% WPI are not seriously injured is in no way justified or justifiable.

E. The Role Of Legal Representation And The Motor Accidents Scheme

66. One of the critical elements in the government's proposed reform was to prevent lawyers from assisting claimants within the statutory claims regime. Even those who wanted to choose to pay for legal advice out of their own pocket would not have been able to do so.

67. It has been the consistent experience of the NSW scheme that legal representation helps ensure that claimants recover their proper entitlements. Without representation, insurance companies can and do take advantage of claimants.

68. Each CTP insurer is a commercial entity with an obligation to maximise return to shareholders. The job of any claims officer is to minimise the insurer's expenditure on each and every claim. This means insurers can and do:

- Argue technical points including in relation to late claims;
- Challenge whether treatment is reasonable and necessary;
- Vigorously contest whether injuries exceed the 10% WPI threshold; and
- Make low opening offers in settlement negotiations.

69. Without legal representation, claimants are left on their own to fight experienced claims officers, many of whom have legal qualifications.

70. Critical to asserting rights to compensation for treatment, lost wages and WPI is having relevant medical evidence. The insurers maintain lists or panels of doctors who they know will give them particular opinions.

71. For the purposes of MAS assessments, insurers frequently provide lengthy submissions to the MAS assessor, drafted by in-house rehabilitation specialists. If the claimant does not have the ability to provide submissions in reply, then they are placed at a distinct disadvantage in the MAS process. Without a lawyer to draft a responding submission, some claimants will miss out on being assessed as over the 10% WPI threshold, because they will not be able to properly challenge the insurer's submission.

72. It should be noted that lawyers play other important roles within the system. Given the MAA's shortcomings as an industry regulator, fairness within the scheme is often only maintained by lawyers prepared to hold insurers accountable for breaches of the Claims Handling Guidelines and other obligations.

73. The legal profession retains a key role within the motor accidents scheme in terms of ensuring fairness, equity and proper recovery of benefits. Moves to exclude lawyers will only result in leaving unrepresented claimants vulnerable to insurers.

74. Removing lawyers from the system will penalise claimants and benefit insurers. A right to compensation is no right at all if a claimant is denied the experienced advice needed to properly exercise that right.

THE 2013 STANDING COMMITTEE ON LAW AND JUSTICE REVIEW

A. The Motor Accidents Council Abolished – No Advisory Committees Appointed

75. Previously the Standing Committee on Law and Justice has reviewed not only the operation of the MAA, but also the operation of the independent Motor Accidents Council. The reason the operation of the Motor Accidents Council is no longer being reviewed is that it has been abolished. The *Safety, Return to Work and Support Board Act* 2012 abolished both the MAC and the Motor Accidents Authority Board. The motor accidents scheme is now administered by the Safety, Return to Work and Support Board.

76. Section 10 of the *Safety, Return to Work and Support Board Act* made provision for the establishment of advisory committees to provide advice to the Minister about aspects of scheme operation. Unfortunately, the two Ministers who have so far been responsible for the operation of the new Board and the various compensation schemes have not established any advisory committees.

77. The Bar Association has written to both the former Minister, the Hon Greg Pearce MLC, and the current Minister, the Hon Andrew Constance MP, urging that these advisory committees be established. These committees serve an important function.

78. First, they provide the opportunity for stakeholders to have a formal means of providing feedback to government on the scheme performance.

79. Second, they provide the opportunity for scheme stakeholders to be informed, educated and consulted about aspects of scheme operation.

80. Third, the officers administering the schemes have the opportunity to hear directly from scheme stakeholders as to issues and to take advice from those with practical experience in terms of resolving developing issues.

81. The Standing Committee on Law and Justice was previously critical of the former government when it left the Motor Accidents Council positions vacant for a period of over twelve months. (See the third recommendation of the 10th Review). It is hoped that the Standing Committee will focus upon the Government's failure to establish any advisory committees more than twelve months after the legislative power to do so was enacted.

82. It is disappointing that the Association has had no communication with government about the operation of the CTP or WorkCover schemes in the second half of 2013. Whilst there are occasional lower level consultations with the MAA, these meetings are not minuted and have no statutory recognition. If advisory committees had been established then an ongoing dialogue would be formalised.

B. Non-Implementation of the Standing Committee's Recommendations

83. The past two submissions from the Bar Association to the Standing Committee on Law and Justice made the following comment:

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

84. Unfortunately that comment still bears true. The Association views the Standing Committee review of the operation of the motor accidents scheme as extremely important. It is a unique opportunity for the Association to directly address the parliamentarians responsible for the operation and oversight of a scheme that exists to provide for motor accident victims.

85. In the past, submissions from the Association have been adopted by and become recommendations from the Standing Committee. This in turn has seen changes and improvements in the scheme. Unfortunately, in more recent years, the Standing Committee's recommendations have been increasingly neglected and ignored by government.

86. The Association again recommends that, as part of the Standing Committee review process, there be a mechanism for the Standing Committee to have the MAA comment upon implementation of recommendations from previous Standing Committee reviews. If there is no follow through on recommendations from the Standing Committee then the time and effort put by the Committee into its deliberations and reporting have little practical effect.

87. Examples of previous unimplemented recommendations from the Standing Committee that remain relevant to scheme operation include the following:

(a) A review of the threshold for non-economic loss (the 10% WPI barrier) to *"achieve a better balance between scheme efficiency and compensation*". The tenth recommendation from the Eleventh Review was that the MAA publish a discussion paper considering:

- Changing the threshold to access non-economic damages to that of s.16 of the *Civil Liability Act 2002*;
- Lowering the 10% whole person impairment threshold;
- Allowing both physical and psychological injuries to be aggregated to determine the whole person impairment threshold;

It was said the Authority should make this review a priority, publish the discussion paper and invite comment and pursue any subsequent legislative amendments during 2012. (See also the second recommendation of the Ninth Review echoing a recommendation from the Eighth Review.)

No such review took place. To the contrary, the Government proposed a Bill seeking to extend the importance of WPI beyond the assessment of compensation for pain and suffering to cover the ongoing eligibility for compensation to treatment expenses and lost earnings.

The WPI threshold remains as unjustly capricious as it has ever been.

(b) Recommendation fourteen of the Tenth Review (2010) was that the MAA examine the late claims process "*in consultation with the MAC and key stakeholders*". This never occurred.

The proposed Bill did address the late claim situation, but with the Bill having lapsed, there seems to be no further action from the MAA to address the excessive disputation and cost associated with late claims.

(c) Causation. Recommendation eleven of the Eleventh Review (2011) was that the Motor Accidents Council form a subcommittee to review, analyse and recommend a course of action to the Motor Accidents Authority on the issue of legal causation. With the abolition of the Motor Accidents Council, nothing further has happened on this issue. There remain considerable difficulties with MAS assessors determining causation. Reviews and further assessments regarding causation delay claims resolution.

(d) It has been repeatedly recommended that the Motor Accidents Compensation Regulations 2005 be revised to properly reflect the amount of work required of lawyers by MAS and the Claims Assessment and Resolution Service ("CARS") in pursuit of a claim. Recommendation three of the Tenth Review (2010) and recommendation six of the Eleventh Review (2011) urged the expediting of the remaking of the Costs Regulations, rather than waiting until their expiry on 1 September 2012. However, in September 2012, the Regulations were simply extended for a further two years.

88. The Association is unable to determine whether the absence of any drive or determination to implement the recommendations made by the Standing Committee lies within the Motor Accidents Authority or Government or both. However it is clear that we are little closer to addressing important aspects of scheme performance than when the Standing Committee began reviewing the operation of the scheme over a decade ago. Repeated recommendations by the Standing Committee to review the 10% WPI threshold, aspects of scheme operation and the Costs Regulations have not been addressed.

C. The MAS System

89. This submission has already addressed various injustices arising out of the application of the 10% WPI threshold and inconsistencies in the MAS system. In submissions to the Tenth Review, the Bar Association provided extensive case studies of unjust results. Nothing has changed since or as a consequence.

90. The Standing Committee has made numerous recommendations for investigation and further consideration of the inequities of the 10% WPI threshold. The Association is unaware of any such investigations taking place. The MAA apparently continues to regard the 10% WPI threshold as a cornerstone of the scheme.

91. The Association repeats its objections to the MAS system and its capricious and unfair results. We highlight the time and delays involved in taking cases through MAS. Part of the reason that scheme inefficiency blows out to lengthy periods is that some cases go

to MAS over and over again, as either the claimant or insurer keep fighting to reverse an initial MAS assessment.

92. Reform is needed and the government's Bill earlier this year did offer some suggestions to streamline the MAS process. Most of these suggestions were adopted from submissions made by the legal profession. This remains an area of the scheme that needs reform at both a philosophical and a structural level. Whilst there may be some will to address the structural level of efficiency of operation, there is absolutely no sign of any interest in following the recommendation of the Standing Committee that the issue be reviewed at a philosophical level – the fundamentally arbitrary and unfair nature of the threshold.

D. The *Smalley* Decision

93. The 1999 Act introduced a number of radical changes to the scheme. There was a balance or trade-off in the restrictions imposed on both claimants and insurers. These restrictions were imposed in the interests of stabilising premium.

94. Claimants were penalised with the introduction of the 10% WPI threshold (eliminating 90% of claimants from recovering non-economic loss) and by the introduction of extensive restrictions on the recovery of legal costs (within the CARS system). These changes represented a radical reduction in claimants' rights and entitlements.

95. On the other side, in exchange for these caps on payments, insurers were denied the right to challenge a CARS assessor's award. Only the claimant would have the option of taking a case beyond CARS to the courts.

96. The 1999 Act introduced CARS as an alternate dispute resolution stream. The original intent was that simple and straightforward cases would go to CARS for quick and easy determination. More complex cases would continue (as they traditionally had) into the court system.

97. Under Section 81 of the 1999 Act, insurers are required to determine liability within three months of receipt of a claim form. An insurer can admit or deny liability for the claim. Where the insurer has not made a decision then they are deemed to have denied liability for the claim. This is an important step in the operation of the scheme. The admission of liability triggers early payment of treatment expenses and the early commencement of rehabilitation. Where there is a deemed denial (because the insurer is still investigating liability), there is still the capacity for the insurer to admit liability when investigations are finally completed.

98. Generally cases are exempted from the CARS scheme where breach of duty of care on the part of the insured driver is denied or where there is a substantial allegation of contributory negligence (greater than 25%). These cases go to court. More straightforward cases remain within the CARS system, subject to a discretion for the CARS assessor to exempt them if they are unduly complex. (It should be noted that very few cases are exempted on the grounds of complexity.)

99. Over the years a number of problems have developed with this scheme arrangement.

100. The first problem was that the 1999 Act was (and remains) poorly drafted in terms of distinguishing between admissions of breach of duty of care or fault (an insured driver caused an accident) and liability (the insurer is obliged to pay damages as a consequence). There are a variety of circumstances in which an insurer will admit fault or breach of duty of care on the part of its insured driver, but still maintain it has no liability to make any payments to the accident victim. These circumstances include:

    - Where there has been a late claim for which there is not a full and satisfactory explanation;
    - Where there has not been due search and inquiry in a Nominal Defendant case;
    - Where it is disputed that the accident has caused any injury at all to the claimant;
    - Where it is disputed the circumstances of accident fall within the scope of the 1999 Act; and
    - Where it is disputed that the claimant has a diagnosable psychiatric condition causing impairment.

    In all of these cases, an insurer may admit breach of duty of care or fault, but not admit liability.

101. A further complicating factor is where there is a partial admission due to an allegation of contributory negligence.

102. Where these distinctions become relevant is in relation to the operation of Section 95 of the 1999 Act. As previously mentioned, CARS was meant to be a binding assessment on the insurer. This was part of the trade-off in the design of the scheme.

103. However, Section 95 provides that the assessment at CARS is not binding on the insurer where there is a dispute about liability for the claim (in whole or in part). This effectively means that there is an incentive for insurers to allege contributory negligence and maintain other disputes about liability. The reason insurers do it is that it creates a right of re-hearing after a CARS assessment that the insurer is not otherwise entitled to.

104. It has been apparent for some years that Section 95 requires amendment (perhaps in conjunction with Section 81 and Section 92).

105. Until recently, it has been the practice of the Principal Claims Assessor to keep within the CARS system cases where the insurer admits breach of duty of care by their insured driver, but otherwise denies liability (for any of the variety of reasons above).

106. The current balance between the determination of cases within the CARS system and the courts has recently been undone by a decision of the NSW Court of Appeal in *Smalley v Allianz* [2013] NSWCA 318. In that decision, the Court of Appeal held that any case where there was a deemed denial of liability or a general denial of liability, (because of a late claim or argument about causation of injury) must be exempted by the Principal Claims Assessor ("PCA"). The PCA's previous practice of permitting

cases where liability was denied to remain within the CARS system provided there was an admission as to breach of duty of care by the driver has been quashed by the Court of Appeal.

107. The response from the MAA to the *Smalley* decision has been to circulate a proposed amendment to the MAA Claims Assessment Guidelines. It is now proposed that all cases where liability is denied, where breach of duty is denied and where contributory negligence is alleged, should still go into the CARS system. There is then to be a discretionary determination by the CARS assessor as to whether the case is too complex to remain at CARS and should be sent to court.

108. The Association is fundamentally opposed to this proposal for the following reasons:

(i) There will be increased uncertainty rather than certainty. Both claimants and insurers won't know whether the case is going to stay at CARS or go to court until two to three years into the life of the claim. The parties would much prefer to know early in the life of the claim whether they are preparing a case for CARS or preparing a case for court. The preparations required for each involve some material differences;

(ii) There will be wasted time and costs in preparing a case for CARS that ultimately gets exempted and sent to court;

(iii) There will be natural temptation for CARS assessors to refuse to exempt complex cases. Bar Association members have seen this happen already. CARS assessors may not to appreciate that a claim may be complex to investigate or complex to prepare in addition to being complex to present.

(iv) A CARS assessor who decides that a claim should be exempted for complexity refers that decision back to the PCA for approval. Assessors are understandably reluctant to recommend exemptions in order to avoid any perception that they are unable to deal with complex claims.

(v) The CARS process was never intended for the hearing of liability issues. There are inherent limitations in the CARS process which will seriously inhibit the ability of both parties to adequately prepare and present a liability case:

- The presentation of a liability case usually requires the calling of witnesses to give evidence of the circumstances of accident. These are bystanders who are otherwise disinterested in a claim. The court process can subpoena such witnesses to attend. The CARS process (which requires witness statements to be served in advance) has no means of compelling these witnesses to co-operate in providing the necessary statements or indeed easily procuring their attendance at an assessment conference;

- Police witnesses are often required to be called in respect of physical evidence collected at the scene and their own investigations;

- Contested liability hearings frequently involve the calling of expert evidence. Either the insurer, the claimant or both will retain an accident

reconstruction expert. Such expert evidence is usually the subject of challenge through cross-examination. The CARS system is ill-suited to permit this.

(vi) Section 95 of the 1999 Act provides that an assessment by CARS where liability is in issue is not binding on any party to the assessment. The most controversial cases are those where liability is hotly contested or there is a significant allegation of contributory negligence.

There is a high probability that if these cases are kept within the CARS system then one or the other side will seek a re-hearing before a court. Where liability is in issue, both parties have that right. There will be an extraordinary waste of time and costs every time a case goes to a court re-hearing beyond a CARS assessment. There is a very low re-hearing rate at present. The re-hearing rate will substantially increase if liability contested cases are kept within the CARS system.

(vii) There is a massive unfairness to a claimant in permitting this change to the system without amending the Costs Regulations. Currently cases within the CARS system have costs caps. There are additional caps that apply if a claimant chooses to exercise their right to have the CARS assessment re-heard. It is the existence of these caps that mean that very few claimants do choose to go beyond the CARS system and on to court.

The proposed amendments will now create many more CARS assessments where the insurer has a right to force the claimant to litigate past the CARS stage. The restrictive costs regulations apply to the claimant in court, even where it is the insurer who has compelled the litigation. At the very least, the Costs Regulations should be amended concurrently with the Guideline amendments to provide that where it is an insurer requiring a court re-hearing, the restrictive Costs Regulations will not apply.

109. The proposed amendments to the Guidelines represent a significant expansion of the jurisdiction of CARS. This was never contemplated at the time the 1999 Act was enacted and CARS was established. Limiting CARS to cases where the parties are likely to live with the result was a sensible feature of scheme design. The sending to court of controversial cases involving denials of breach of duty of care, denials of liability and substantial allegations of contributory negligence was sensible. That balance ought to be preserved.

110. To the extent that the *Smalley* decision has upset the current balance, then there should be rectification to preserve the existing balance rather than tipping every case into the CARS system. The proposed change will increase costs and delays.

111. The Association will be presenting an alternative proposal to the Motor Accidents Authority for reform to address the *Smalley* issue and will provide a copy of that submission to the Standing Committee on Law and Justice.

(ii) Outstanding actions to fix the NSW CTP scheme

112. There are still plenty of improvements that can be made to the CTP scheme with minor legislative change. Many of the following submissions have been put to the Standing Committee on Law and Justice before. Most were contained in the joint submission from the legal profession to the Government earlier this year in relation to proposals to reform the CTP scheme. Some of the suggestions were even adopted in the Bill that was eventually produced. Streamlining measures put forward by the legal profession included:

(a) Fixing the late claims system.

(b) Making Section 81 work by compelling insurers to give a determination on liability within three months. Clear up the mess that has arisen over confusion between admissions of "*liability*", "*fault*" and "*breach of duty of care*".

(c) Amend Guidelines or the Act to require insurers to share liability information. An insurer is currently required to hand over a copy of the police report, but no other material in relation to liability or contributory negligence. If an insurer wants to dispute liability or allege contributory negligence, then they should hand over all relevant material including the driver's statement, witness statements and accident investigations. If this information was provided to the claimant then disputes would be reduced. The same obligation to disclose liability information should be placed on claimants.

(d) Make the current hardship payments system work. Currently the 1999 Act provides for insurers to make advance payments pending final resolution of the claim. On some occasions, insurers do so willingly. In other instances, there are extensive and expensive disputes over a modest ($5,000-$10,000) advance payment.

Provided the amount being sought by way of hardship payment does not exceed the total value of the claim, insurers should not object to making an interim payment. The only real reason for the insurer to oppose an interim payment would be in the unlikely event that the total value of the claim might be exceeded or to keep an accident victim in limited financial circumstances in the hope that they will then settle their claim more cheaply.

The current hardship system does not work because the process is bureaucratic and insurers are allowed to generate needless disputes over what should be straightforward interim payments.

Efficiency can be improved by:

- Reversing the onus so as the insurer has to show why an interim payment should not be made; and

- Legislating for a presumption in favour of quarterly interim payments for those with a loss of earnings as a consequence of an accident (quarterly payments avoiding the tax complications that a weekly payment regime involves).

(e) Repealing Sections 89A-E. Insurers and claimants want to settle cases without overly elaborate preparation for what should be a straightforward settlement conference. These legislative provisions require extensive preparations, adding to costs and creating delays. It was proposed to abolish these sections in the government's Bill. It should still be done.

(f) Improve the efficiency of the MAS. Suggestions previously made by the legal profession included:

- Requiring claimants to apply to MAS for assessment of WPI within two years of the accident;
- Not permitting insurers to dispute the 10% WPI threshold where they hold evidence that injuries are over the threshold;
- Allowing insurers and claimants to agree the nature and extent of injuries that are not in dispute and their percentage WPI so that only injuries where there is a dispute are assessed at MAS. Currently, MAS assesses all injuries, even those about which the parties agree; and
- Restrict reviews and further assessments by only looking at injuries that are in dispute. MAS currently re-assesses all injuries, even those about which the parties are in agreement.

The Association also considers that the MAS is an inappropriate body to make binding determinations on causation.

113. There are more suggestions as to mechanisms to improve the current efficiency of operation of the scheme. The Association is looking for the opportunity to be involved with Government in discussing such improvements.

(iii) Improve insurer accountability

114. An improvement in scheme efficiency also involves an improvement in insurer performance. The Association had put forward a variety of suggestions to improve the regulation of insurer conduct and deliver savings to the scheme. These included:

(a) Reduced acquisition costs. Currently about 15% of the premium goes to cover insurer claims handling and acquisition costs. This is the case even though there is minimal price-based advertising in CTP and the insurers only use generic advertising that barely mentions the CTP product. It is generally conceded that the advertising is really targeted at the comprehensive insurance market. The legal profession submitted that as the green slip is a compulsory insurance for vehicle owners, those vehicle owners should not be subsidising the costs of generic advertising and corporate sponsorship. The only allowance that should be permitted in the premium for CTP insurer advertising is where such advertising makes specific reference to CTP price.

(b) Set resolution targets and publish results. The MAA sets no targets for the resolution of claims and publishes no comparative data on the relative

performance of insurers in speed of resolution of claims. Setting targets and publishing the results (identifying individual insurers) would create a positive incentive for insurers to push the rapid resolution of claims.

(iv) Expanding the ANF

115. Currently there is a $5,000 limit to the ANF scheme which pays for treatment expenses and lost wages on a no fault basis. As part of its submissions earlier this year, the Association had professional actuaries (Deloittes) cost the expansion of the ANF up to $20,000. The actuaries came back reporting that there would be a minimal increase in premium to cover an expansion of no fault benefit at the lower end. This is because the offset in savings from investigative costs, claims handling and legal fees would cover the additional costs incurred.

116. Lawyers don't want to be acting in small claims – it isn't cost effective for them. Claimants don't necessarily want lawyers for small claims where they are not being met with liability issues and allegations of contributory negligence. Small claims should see the ready payment of treatment expenses and lost wages to get people back to work.

117. The Association encourages the Standing Committee to look at this issue and to ask the MAA to report on whether a modest expansion of the ANF scheme would improve scheme efficiency without increasing costs.

THE LTCS SCHEME

118. The Association has little involvement in the day to day operations of the LTCS scheme. Bar Association members see the scheme operating for clients who have compensable rights. The general experience is that in many cases, family continue to provide the vast majority of care services, with an under-utilisation of the paid care that should be on offer from the LTCS scheme.

119. There is also anecdotal evidence of shortcomings such as:

- Poor quality services with repeated changes of staff. The Authority insists on using the lowest tender by price and makes little judgment about the quality of service being provided: and

- Delays in the provision of services in regional areas where no authorised provider is available.

120. The LTCS consumes a very sizable portion of the CTP premium. It is costing over $100 per premium per year to care for less than 200 of the most seriously injured motor accidents scheme participants. The operation of the LTCS scheme requires comprehensive, external audit to determine just where all this money is going. The experience of Association members is that an inadequate proportion of the amount seems to be going to provide treatment and care for the catastrophically injured.

121. As a matter of general policy, the Association is of the view that individuals should be able to opt out of the LTCS scheme if they so wish.

22 November 2013