SUBMISSION BY NEW SOUTH WALES BAR ASSOCIATION

FIXING *SMALLEY*

EXECUTIVE SUMMARY

1. The Motor Accidents Authority (MAA) has proposed a range of guideline changes to address a perceived difficulty in the operation of the Motor Accidents Scheme ("*the scheme*") arising from the Court of Appeal decision in *Smalley v Allianz* [2013] NSWCA 318 ("*Smalley*").

2. The New South Wales Bar Association ("the Association") supports the proposed changes in relation to:

   - Working with insurers to improve the quality and timeliness of Section 81 Notices; and

   - Amending the MAA Claims Handling Guidelines to clarify the requirements of insurers in giving a Section 81 Notice.

3. The Association suggests that the amendment to the Claims Handling Guidelines go further and that insurers alleging contributory negligence be required to supply (as distinct from refer to) evidence in support of contributory negligence allegations (on which the insurer bears the onus of proof).

4. The proposed amendments could also make it clearer that an insurer is still obliged to advise as to its attitude to breach of duty of care on the part of the insured driver where liability is being denied on other grounds (late claim, due search and inquiry, causation).

5. The Association does **not** support the proposed amendments to the Claims Assessment Guidelines. They represent a radical restructuring of the scheme that will create greater uncertainty and run up unnecessary costs.

6. The Association suggests alternative amendments to the Claims Assessment Guidelines to address the *Smalley* issues, as follows:

   8.11.7 The Principal Claims Assessor ("PCA") may defer issuing a certificate of exemption in circumstances where there has been a denial of liability or a deemed denial of liability and where the insurer is still undertaking liability investigations. The PCA may make two deferrals of no longer than three months each to allow liability investigations to be concluded.

   8.11.8 Where

   (a) a denial of liability is based upon the absence of a full and satisfactory explanation for a late claim; or

   (b) the absence of due inquiry and search in a Nominal Defendant claim;

and the insurer otherwise admits breach of duty of care;

then the PCA may defer the issuing of a certificate of exemption until after the Claims Assessment and Resolution Service ("CARS") has determined the late claim and/or due search and inquiry dispute pursuant to Section 96.

If at the conclusion of the Section 96 dispute, the insurer maintains a denial of liability, then the matter shall be exempted.

7. The above proposals solve the *Smalley* issues, whilst maintaining the current balance existing within the scheme. CARS will continue to assess cases where the only dispute is the quantum of damages or a minor degree of contributory negligence. The courts will determine the cases where there are significant disputes over liability or substantial contributory negligence allegations. Cases will not be prematurely exempted because there is a late claim dispute or delays in determining liability.

HISTORICAL BACKGROUND

8. The *Motor Accidents Compensation Act* 1999 ("the MAC Act") introduced a number of radical changes to the resolution of accident cases. Both claimants and insurers were asked to make sacrifices in the interests of increasing scheme predictability and stabilising premium.

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

10. 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.

11. There was some protection for insurers with the capacity of CARS to issue discretionary exemptions. Further, the reality was that with the punitive costs provisions that apply to re-hearings, very few claimants have exercised their re-hearing right.

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

13. Under Section 81 of the MAC Act, insurers were required to determine liability within three months of receipt of a claim form. The Section 81 Notice was important.

14. First, it triggered the payment of treatment and rehabilitation expenses.

15. Second, it allowed the parties to know whether the case would be proceeding through CARS (straightforward issues) or court (more complex issues).

16. Where there is a denial deemed (because the insurer is still investigating liability) there is still a capacity under Section 81 for the insurer to admit liability when investigations are finally completed.

17. Over the years, a number of problems have developed within this scheme arrangement as originally designed.

18. The first problem was the MAC 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:

(a) Where there has been a late claim for which there is not a full and satisfactory explanation;

(b) Where there has not been due search and inquiry in a Nominal Defendant case;

(c) Where it is disputed the accident has caused any injury at all to the claimant or where it is disputed that the accident has caused a specific injury;

(d) Where it is disputed the claimant alleging mental harm has a diagnosable psychiatric condition; and

(e) Where it is disputed that the circumstances of accident fall within the scope of the MAC Act.

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

19. A further complicating factor can be the status of a partial admission due to allegations of contributory negligence.

20. The lack of clarity within the MAC Act in terms of distinguishing between breach of duty of care/fault and the broader question of liability has ultimately proven problematic.

21. The second design problem is that Section 95 provides that an 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 provision provides an incentive for insurers to allege contributory negligence and maintain other disputes about liability.

22. An insurer who would otherwise be bound by CARS assessment creates a right of re-hearing for itself by alleging contributory negligence or keeping liability in issue.

23. It has been apparent for some years that Section 95 requires amendment to remove this lacuna. It makes no sense that an insurer would have no right of re-hearing on a $2 million CARS assessment, but would have a right of re-hearing in a $20,000 assessment where there is an allegation of 5% contributory negligence.

24. Insurers are effectively encouraged by the MAC Act to allege contributory negligence and maintain liability disputes in order to create a right of re-hearing post-CARS assessment.

25. These cracks within the scheme have, until recently, been papered over by the PCA. A practice has been adopted of keeping cases within the CARS system where breach of duty of care is admitted, but liability denied.

26. It is this practice that has given rise to the decision of the NSW Court of Appeal in *Smalley v Allianz*. The Court of Appeal have now held that in any case where there is a deemed denial of liability or a general denial of liability (because of a late claim or argument about causation of injury), the case **must** be exempted by the PCA without delay.

27. There is concern that this will lead to a significantly larger number of cases being exempted from CARS and increased costs pressures on the scheme.

ANALYSING THE PROBLEM

28. Before addressing the solution it is important to clearly understand the nature of the problem. It appears that there are three areas of problem which the MAA is trying to address:

(i) Deemed denials and longer than usual liability investigations

CTP Insurers have as one of their KPIs (as measured by the MAA) their timeliness in issuing Section 81 Notices. In order to comply with the KPI, the insurers deny liability or allow there to be a deemed denial of liability when they are still investigating.

It is accepted that in some cases, CTP insurers need more time to investigate liability. In many instances, the further investigation will lead to an admission. It would be silly in such circumstances to exempt the case simply because of delays in the liability investigation.

It is desirable that there be pressure on CTP insurers to meet the three month Section 81 deadline. Delay beyond that deadline should be the exception rather than the rule. However, the system should have the flexibility to deal with those cases where there is some delay for reasons beyond the insurer's control (such as delay by police in supply of police investigations).

(ii) Denials of liability and Section 95

The second category of problem claims (post-*Smalley*) is those where breach of duty of care is admitted, but the insurer denies liability for other reasons (a late claim, causation etc.). One unfortunate consequence of the *Smalley* decision is that the capacity for CARS to provide a quick and cheap determination of a late claim or due search and inquiry issue has been removed. All cases where the insurer admits breach but denies liability are now subject to immediate exemption.

One reason that insurers may not accept the decision of a CARS assessor in relation to a late claim dispute is because of the Section 95 lacuna – the insurer may maintain the denial of liability in order to generate a CARS re-hearing right they do not otherwise have.

The best solution is to amend Section 95 to remove the lacuna and the perverse incentive it contains. However, if legislative change is not immediately possible then the solution involves maintaining cases within the CARS system where breach of duty of care is admitted and the only issue is the late claim dispute. If the insurer does accept the CARS assessment of the late claim dispute, then the case can and should remain within the CARS system.

On the other hand, if the claimant is found by CARS not to have a full and satisfactory explanation, they should have the same right of judicial determination of that decision as they do of a CARS assessment of damages. Cases where the claimant loses a Section 96 late claim dispute should be exempted. Similarly, cases where the insurer avidly maintains the Section 96 dispute should also proceed to a court determination. Any re-drafting of the Guidelines should take account of these competing needs and interests.

(iii) Increasing allegations of contributory negligence

Independent of the *Smalley* decision, the MAA has expressed concern that insurers are increasingly alleging contributory negligence greater than 25%. This is forcing more cases out of the CARS system.

It is respectfully suggested that the solution to any demonstrated misbehaviour on the part of the insurers is not to amend the Guidelines to force all contributory negligence cases into CARS, but rather to crack down on insurers who are making excessive contributory negligence allegations. This is a regulatory issue rather than a Guidelines issue.

THE MAA PROPOSAL

29. There are three parts to the MAA proposal, the first two of which are supported by the Association.

(i) Insurer Section 81 Notices

The Association supports improvements in the amount of information being supplied by insurers in s 81 Notices. The Association also supports qualitative rather than quantitative (KPI) assessment of compliance. An insurer may "*tick a box*" by issuing a denial of liability when they are still investigating. The real issue for measurement is when the insurer makes a considered and final determination. Qualitative assessment would improve standards. So too would publication of comparable data as between insurers and the average time each takes to make an admission.

(ii) Amending the Claims Handling Guidelines

The Association supports the proposed amendments to the Claims Handling Guidelines to strengthen and clarify the requirements in relation to Section 81 Notices.

The Association would suggest that the MAA go one step further. An insurer alleging contributory negligence bears the onus of proof, whether in the CARS system or at court. However, the evidence on which an insurer relies to establish contributory negligence is rarely forthcoming. It is not until the claimant has lodged their CARS application (CARS Form 2A) that the insurer will usually provide the evidence it relies on to establish contributory negligence (in a CARS Form 2R).

It is the unfortunate experience of Association members that in some instances insurers will leave contributory negligence arguments in play as a discounting factor during the course of settlement negotiations, without providing evidence to support the contributory negligence allegation.

Insurers will be much more likely to be restrained and reasonable in their allegations of contributory negligence if required to disclose the evidence on which they relied at the time the allegation was made. This would not preclude the insurer from assembling further evidence (such as expert evidence), but would save time and costs by not requiring the claimant to go repeating identical investigations (such as interviewing lay witnesses).

In short, where the insurer alleges contributory negligence, make them hand over the factual investigation (if they have one). Queensland already has such provisions (as part of a more extensive open disclosure system).

(iii) Amendments to the Claims Assessment Guidelines

These amendments are **opposed**. The suggestion that every case where liability is denied or contributory negligence alleged should now be fully prepared for a CARS assessment, only for a certain number of them to be then exempted and then sent to court is remarkably wasteful of time and costs. There are other significant disadvantages which are addressed in more detail below. The Association does have an alternative proposal.

THE ISSUES WITH THE PROPOSED GUIDELINE CHANGES

A. Wasted time and costs

30. Whilst the preparations for a CARS assessment and court proceedings have some similarities, there are also significant differences. It will be a considerable waste of time and costs for both parties to extensively prepare CARS applications in a hotly contested liability/contributory negligence case that is going to be exempted. Currently, these cases are exempted early and the parties know that they are heading down the court track. There is no duplication in preparing for a CARS assessment (with its associated submissions, statements and schedules) and then preparing for court. Rather, the time and effort is put into preparing court pleadings and preparing for the court process. Requiring all cases to be fully prepared for CARS before obtaining an exemption on the basis of the complex liability/contributory negligence issues will drive up scheme costs.

31. If a case is fully prepared for CARS (with up-to-date costings and medical evidence) and then sent to court (where it will take nine months to get on for hearing) then there will have to be updated costings, revised statements and refresher medical examination. This all represents tremendous waste.

B. Uncertainty

32. At present, there is certainty from the time a Section 81 Notice is issued as to where the case is going and its track to resolution. Insurers can set reserve estimates based on knowing which cases will be in the CARS system and which cases won't be. With the

proposed amendment, insurers will need to set reserve estimates based on preparing a case for CARS, with a contingent estimate in the event that the case is then exempted and sent to court.

C. Suitability of forum

33. The court system is well suited to handling a particular type of claim and dispute (liability), whereas CARS is not. The court system provides:

    (a) The power to subpoena witnesses such as lay witnesses, police officers, the insured driver and experts;

    (b) An organised and easy to use method for the production of documents under subpoena;

    (c) The solemnity of providing sworn evidence; and

    (d) The capacity to readily transcribe evidence in lengthier cases.

    It is appreciated that over the years, CARS has attempted to expand its powers to replicate aspects of the court system such as compelling witnesses to attend and compelling the production of documents. However, the reality is that the court system still does these tasks much better and more efficiently than the CARS system.

    The types of cases where witnesses are required and documents need to be subpoenaed are overwhelmingly those where there are significant liability and contributory negligence issues. It makes sense that this be the category of cases that is automatically exempted and proceeds through the court system.

    It is noted that at CARS there is no right to cross-examine a witness. The Assessor must give permission. If liability is denied, then the case should be before a judge with cross-examination permitted.

    The Courts also have the capacity to sever the determination of liability and damages. This allows an early hearing of liability issues in advance of stabilisation of injury. In appropriate cases this is sensible and supported by both parties. A court can sever a hearing, CARS cannot. Indeed, under the proposed new guidelines an application to CARS for assessment (even to ask for an exemption) cannot be made until the claimant's medical condition is stabilised.

D. Re-hearing rates will dramatically spike

34. Both CARS and the court system offer a high degree of certainty to users. Currently, very few CARS assessments proceed to court re-hearing or administrative appeal. Very few court cases proceed to the Court of Appeal. There is a high degree of finality within both systems.

35. The proposed changes will alter this. By forcing cases where there is a significant conflict over liability or contributory negligence into CARS and where both parties

have an automatic right of re-hearing there will inevitably be a significant increase in the CARS re-hearing rate.

36. Currently, cases are allocated to the forum in which they are most likely to be finally resolved. Forcing more cases into CARS will lead to more wasted costs and more delays, as more cases are heard both at CARS and re-argued in court.

E. Will cases actually be exempted?

37. The MAA's proposed revisions of the Guidelines assumes that CARS assessors will in fact be prepared to exempt complex cases. There is no mention within the proposed amendments to the Guidelines of having as a criteria for exemption the low prospect of the CARS system providing final resolution of the claim.

38. Unfortunately, the CARS assessors have the shared perspective that there is no case too complex for them to handle. The PCA has said as much in evidence before the Standing Committee on Law and Justice.

39. The reality is that the CARS assessors often don't appreciate that whilst a case may be less complex to assess, it is nonetheless complex to prepare and present within the CARS structure.

40. The current system is that an assessor prepared to recommend a case for exemption for complexity requires final sign-off by the PCA. If the PCA reaches a different view from the assessor then the matter is re-allocated to a new assessor. The effect of this system is that CARS assessors may be reluctant to exempt a complex case where they anticipate that the PCA will want to keep the case within the CARS system and will refer it to another assessor.

41. There is the understandable temptation for assessors to adopt the view that they are capable of assessing everything and anything. Association members are justifiably concerned that the proposed changes will not see cases exempted where they ought to be and that this in turn will lengthen delays and increase costs.

F. The Costs Regulations

42. There is already an inbuilt injustice within the Costs Regulations that a claimant who wishes to accept a CARS assessor's award, is nonetheless obliged to litigate in court (with regulated costs) when it is the insurer who forces the re-hearing (in cases where contributory negligence is alleged or liability denied).

43. Under the MAA's proposed amendments, there will now be a much larger pool of contentious cases within the CARS system, a greater re-hearing rate and more re-hearings forced upon the claimant by the insurer.

44. The restrictive Costs Regulations should not be applied to a claimant who is in court at the insurer's behest. At the very least, part of the MAA package of amendments to the Guidelines should be an amendment to the Costs Regulations to provide that where it is the insurer requiring a court re-hearing after CARS then the case becomes exempted from the Costs Regulations.

G. Summary of Issues with the Proposed Changes

45. For all the above reasons, the proposed amendments to the Guidelines are opposed. They will increase uncertainty, cost and delay. Rather than relieving pressure on premiums, these changes will potentially add to the pressure on premiums.

46. It is noted that the proposed amendments to the Guidelines represent a significant expansion of the jurisdiction of CARS. This was not contemplated at the time the MAC Act was enacted and CARS was established. CARS was designed to assess those cases that could be dealt with simply, quickly and cheaply.

47. Limiting CARS to cases where the parties are likely to accept 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.

48. To the extent that the *Smalley* decision has upset the current balance, then there should be rectification only to the extent necessary to preserve the existing balance rather than a gross over-reaction by tipping almost every case into the CARS system.

THE ALTERNATIVE PROPOSAL

49. Having identified the primary difficulties created by the *Smalley* decision, the Association has proposals designed to meet those difficulties.

50. The first problem identified above was cases where the insurer genuinely needed more time to investigate liability. Cases should not be exempted from CARS just because the police have delayed in providing liability material to the insurer.

51. The Association proposes the following:

> 8.11.7 The PCA may defer issuing a certificate of exemption in circumstances where there has been a denial of liability or a deemed denial of liability and where the insurer is still undertaking liability investigations. The PCA may make two deferrals of no longer than three months each to allow liability investigations to be concluded.

52. The beauty of this amendment is that it allows the insurer extra time to consider liability while still keeping pressure on the insurer to reach a decision. If ultimately the insurer admits liability, then the case can stay within the CARS system. If the insurer proceeds to deny liability (having fully investigated) then the case properly belongs in the court system and should be exempted.

53. The second issue identified is in relation to those cases where breach is admitted, but liability denied. The Association proposes as follows:

> 8.11.8 Where
>
> (a) a denial of liability is based upon the absence of a full and satisfactory explanation for a late claim; or

(b) the absence of due search and inquiry in a Nominal Defendant claim;

and the insurer otherwise admits breach of duty of care;

then the PCA may defer the issuing of a certificate of exemption until after CARS has determined the late claim and/or due inquiry and search dispute pursuant to Section 96.

If at the conclusion of the Section 96 dispute, the insurer maintains a denial of liability, then the matter shall be exempted.

54. Where the insurer is otherwise admitting breach of duty of care, but taking other technical issues in relation to a late claim or due inquiry and search, then the interlocutory issue can still be determined by CARS. If the insurer accepts the result and proceeds to then admit liability, then the case stays within the CARS system. If however, the insurer maintains a denial of liability, then the case is exempted from CARS and goes to court.

55. These two modest changes to the Guidelines preserve the current balance of the scheme in the post-*Smalley* environment. Clearly legislative change to fix Section 95 would be preferable, but if that is not possible, then the alternate proposals put forward are sensible and moderate.

56. If the MAA is determined to proceed with substantial expansion of the powers of CARS and sending all cases to CARS rather than court, then that should be the subject of separate, considered proposals, backed by legislative change. A fundamental shift in the balance of the CTP scheme should not be engineered through Guideline changes in response to a single Court of Appeal decision.

57. The Association looks forward to discussing its alternate proposals with the MAA and trusts that these proposals will be given careful consideration as a sensible alternative to the MAA's more radical and potentially more costly proposals.

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