

Standing Committee on Law and Justice

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

Fifth Report

Ordered to be printed 1 April 2004

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice

Review of the exercise of the functions of the MAA and the MAC : Fifth Report / Legislative Council, Standing Committee on Law and Justice. [Sydney, N.S.W. : Parliament, N.S.W., 2004. – 137p. ; 7 cm. (Parliamentary paper ; no 380) (Report 25, April 2004)

Chair: Christine Robertson.

“Ordered to be printed 1 April 2004”.

“April 2004”.

ISBN 0646432974

1. New South Wales. Motor Accidents Authority.
2. New South Wales. Motor Accidents Council.
- I. Title.
- II. Robertson, Christine.
- III. Series: Parliamentary paper (New South Wales. Parliament) ; no. 380.
- IV. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice. Report ; no. 25.

363.125 (DDC21)

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Provisions of the *Motor Accidents Compensation Act 1999* relating to the role of the Committee

S 28 Insurers to disclose profit margins

- (1) A licensed insurer is required to disclose to the Authority the profit margin on which a premium is based and the actuarial basis for calculating that profit margin.
- (2) The Authority is to assess that profit margin, and the actuarial basis for its calculation, and to present a report on that assessment annually to the Parliamentary Committee.

S 97 Regulations

- (1) The regulations may make provision for or with respect to any aspect of procedures to be followed under this Part, including provision for or with respect to:
 - (a) the manner of referring claims or disputes for assessment, and
 - (b) the documentation that is to accompany such a reference of a claim or dispute for assessment, and
 - (c) the manner of presenting documents and information to a claims assessor by the parties, including time limits for the presentation of the documents and information, and
 - (d) the making of assessments, and
 - (e) the manner of specifying an amount of damages, and
 - (f) the extension or abridgment of any period referred to in this Part.
- (2) The Motor Accidents Council may refer to the Parliamentary Committee any inconsistency between the regulations and the MAA Claims Assessment Guidelines and the Parliamentary Committee may review and make recommendations about the resolution of any such inconsistency.

S 177 Audit of accounting records and of compliance with guidelines

- (1) The Authority may appoint an appropriately qualified person to audit or inspect, and report to the Authority on, the accounting and other records relating to the business or financial position of a licensed insurer, including accounting and other records relating to:
 - (a) the manner in which its third-party funds and other funds are invested, or
 - (b) compliance with any guideline under this Act.
- (2) A person so appointed is, for the purpose of exercising any functions under this section, entitled to inspect the accounting and other records of the licensed insurer.
- (3) A licensed insurer must provide all reasonable assistance to enable the exercise of those functions.
- (4) A person must not wilfully obstruct or delay a person exercising a function under this section.
- (5) A person exercising functions under this section has qualified privilege in proceedings for defamation in respect of any statement that the person makes orally or in writing in the course of the exercise of those functions.
- (6) A licensed insurer or another person who contravenes any requirement imposed on the insurer or other person by or under this section is guilty of an offence. Maximum penalty: 100 penalty units.
- (7) The Authority may from time to time carry out an audit to determine the profitability of a licensed insurer and for that purpose may exercise the functions of a person appointed under subsection (1). The Authority is to report on any such audit to the Parliamentary Committee, on a confidential basis.
- (8) In this section, *accounting records* has the same meaning as in section 173.

S 210 Appointment of Parliamentary Committee

- (1) As soon as practicable after the commencement of this Part and the commencement of the first session of each Parliament, a committee of the Legislative Council is to be designated by resolution of the Legislative Council as the designated committee for the purposes of this Part.
- (2) The resolution of the Legislative Council is to specify the terms of reference of the committee so designated which are to relate to the supervision of the exercise of the functions of the Authority and the Motor Accidents Council under this Act.

Terms of reference

1. That, in accordance with the provisions of section 210 of the *Motor Accidents Compensation Act 1999*, the Standing Committee on Law and Justice be designated as the Legislative Council Committee to supervise the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council under the Act.
2. That the terms of reference of the Committee in relation to these functions be:
 - (a) to monitor and review the exercise by the Authority and Council of their functions,
 - (b) to report to the House, with such comments as it thinks fit, on any matter appertaining to the Authority or Council or connected with the exercise of their functions to which, in the opinion of the Committee, the attention of the House should be directed,
 - (c) to examine each annual or other report of the Authority and Council and report to the House on any matter appearing in, or arising out of, any such report,
 - (d) to examine trends and changes in motor accidents compensation, and report to the House any changes that the Committee thinks desirable to the functions and procedures of the Authority or Council,
 - (e) to inquire into any question in connection with the Committee's functions which is referred to it by the House, and report to the House on that question.
3. That the Committee report to the House in relation to the exercise of its functions under this resolution at least once each year.
4. That nothing in this resolution authorises the Committee to investigate a particular compensation claim under the *Motor Accidents Compensation Act*.

Motion moved by the Hon Tony Kelly MLC and agreed to by the Legislative Council, Minutes of Proceedings, No 13, 25 June 2003, Item 5.

Committee membership

The Hon Christine Robertson MLC Australian Labor Party *Chair*

The Hon Greg Pearce MLC Liberal Party *Deputy Chair*

The Hon Tony Burke MLC Australian Labor Party

The Hon David Clarke MLC Liberal Party

The Hon Amanda Fazio MLC Australian Labor Party

Ms Lee Rhiannon MLC The Greens

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Chair's foreword

This report is the culmination of the Committee's Fifth Review of the exercise of the functions of the MAA and the MAC. The report collates the information gathered during the review, including evidence from the Committee's fifth public hearing with representatives of the MAA and MAC and submissions from stakeholders.

It is now five years since the Motor Accidents Scheme was significantly reformed in 1999. The MAA has reported that the Scheme is continuing to mature, with premiums lower than they have been in several years - evidence of a healthy and competitive CTP insurance market - and claims processing and access to medical treatment operating well. The Committee has identified several issues that need further consideration and this report contains 17 recommendations.

The MAA has advised the Committee that, now the new Scheme is in its fifth year, it will concentrate on examining the trends within the years of the new Scheme, rather than making a comparison between the new and old Schemes. The Committee looks forward to reviewing the emerging trends in the new Scheme in the future.

I would like to thank a number of people for their participation in the Committee's review. The contribution of senior managers of the MAA and the MAC in providing the Committee with information and oral evidence has been appreciated. The Committee has also greatly valued the input of various stakeholders including legal professional bodies and advocacy groups as the Committee is aware of the time and resources involved in preparing submissions. I would also like to thank my colleagues on the Committee for their participation during this review.

Hon Christine Robertson MLC
Committee Chair

Executive summary

Introduction (Chapter 1)

This is the Committee's Fifth Report on the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC). The Committee's Fifth Review examined issues arising from the MAA's 2002/2003 Annual Report and also explored several matters raised by stakeholders in submissions to the Committee. The review included a public hearing with the General Manager of the MAA, Mr David Bowen, the Chair of the Board of Directors and Chair of the MAC, Mr Richard Grellman, and two senior managers of the MAA. The Committee has made 16 recommendations in this report.

Performance overview (Chapter 2)

The Committee examined several issues relating to the exercise by the MAA and the MAC of their functions and overall Scheme performance. Issues examined include MAA funding and its surplus, statistical data produced by the MAA, the MAA's prudential responsibilities, and Scheme reviews and research projects. The operation of the MAC and recent legislative developments were also examined. The function of the MAA in issuing and reviewing guidelines, such as the Claims Handling Guidelines and the Treatment, Rehabilitation and Attendant Care Guidelines, was also explored.

CTP insurance and the insurers (Chapter 3)

An important aspect of the Committee's review was the examination of the exercise of the functions of the MAA and the MAC in relation to Compulsory Third Party (CTP) Green Slip insurance and the insurers. The Committee explored several issues, including the state of the CTP insurance market, premiums and insurer profits. The MAA described the market as being healthy and competitive and noted that there has been a decrease in average annual premiums over all vehicle classes in NSW and in all CTP ratings districts. The Committee made three recommendations in relation to the risk rating factors taken into account by insurers and noted the work that the MAA has already done in this area. Insurer profit was, as in previous years, a significant issue and the Committee made several recommendations in relation to the level of reporting on insurer profits by the MAA.

Claims (Chapter 4)

The Committee examined several issues relating to the making of claims against CTP insurance. The Committee explored the awareness and availability of accident notification forms (ANFs), particularly in country NSW. The Committee recommended that the MAA undertake a survey to determine the level of awareness of its forms and guidelines in country areas and consider making ANFs available in the accident and emergency departments of NSW hospitals. The Committee also examined the denial of liability for claims by insurers, exemptions from the Claims Assessment Resolution Service and difficulties faced by casual workers establishing loss of income for claims purposes.

Payment of claims (Chapter 5)

Several matters relating to the payment of claims were examined by the Committee. Compensation for non-economic loss under the new Scheme has been the focus of some attention since the 1999 reforms; in particular, the 10% whole person impairment threshold. The Committee has recommended that the Minister for Commerce consider providing wider access to non-economic loss by deeming certain injuries as being over the whole person impairment threshold. The Committee also examined a proposal to allow interim damages for personal injury arising out of motor vehicle accidents. In addition, the Committee revisited the issue of compensating parents of children killed in motor vehicle accidents and it also commented on the collection of statistics on the level of damages awarded by the courts in relation to personal injury caused by motor vehicle accidents.

Injury management and rehabilitation (Chapter 6)

The Committee's review included an examination of several issues arising from the exercise of the functions of the MAA and the MAC in relation to injury prevention and rehabilitation. Among other matters, the Committee looked at funding grants for injury prevention and rehabilitation, and sponsorships arrangements. Road safety initiatives for pedestrians and cyclists were also canvassed. In addition, the MAA provided the Committee with information regarding the audit of insurers against rehabilitation responsibilities.

Summary of recommendations

- Recommendation 1** **17**
The Committee recommends that if, as a result of the MAA's examination of the issue of claims against the Nominal Defendant for unregistered and unregistrable vehicles, the MAA determines that the operation of the legislation does have the effect described by APLA and the Bar Association (outlined in paragraph 2.23-2.26 of this report), the Minister for Commerce should seek to amend the *Motor Accidents Compensation Act 1999* accordingly.
- Recommendation 2** **35**
The Committee recommends that the MAA consider implementing an additional discount beyond the current rating factors for a safe driving record.
- Recommendation 3** **37**
The Committee recommends that the Minister for Commerce consider whether the cost of claims involving four wheel drive vehicles is higher than other sedans and whether a premium adjustment in this regard is necessary.
- Recommendation 4** **38**
The Committee recommends that the MAA examine the risk rating system, including rating based on gender, with a view to encouraging CTP insurers to implement additional risk rating factors.
- Recommendation 5** **40**
The Committee recommends that, in fulfilling its statutory obligation under section 28 of the *Motor Accidents Compensation Act 1999*, the MAA present a separate and specific report on insurer profits annually to the Committee.
- Recommendation 6** **40**
The Committee recommends that the MAA continue to include a copy of the insurer profit report it presents to the Committee, or a summary of it, in the Annual Report to enable wider public access to the information.
- Recommendation 7** **40**
The Committee recommends that the insurer profit report should contain detail including:
- the MAA's assessment of the profit margins and the actuarial basis for its calculation in relation to each of the licensed insurers, and
 - the data provided to the MAA by the insurers pursuant to section 28 that forms the basis of their assessment.
- Recommendation 8** **44**
The Committee recommends that the MAA examine the trends under the Motor Accidents Scheme since the 1999 amendments to the Scheme in relation to insurer profits and include that information in its annual insurer profit report to the Committee.
- Recommendation 9** **46**
The Committee recommends that the Minister for Commerce consider the circumstances where accidents arising out of the use or operation of a vehicle fall outside the scope of the *Motor Accidents Act Compensation 1999* and review:
- The significance and likelihood of such circumstances occurring

- Whether or not members of the public may be perceive that their CTP Green Slip insurance provides full cover in these circumstances and
- Mechanisms to cover the gap between CTP Green Slip and public liability insurance

- Recommendation 10** **50**
 The Committee recommends that the MAA undertake a survey and analysis to determine the level of awareness of, and access to, its forms and guidelines in country areas in New South Wales.
- Recommendation 11** **51**
 The Committee recommends that the MAA give consideration to making Accident Notification Forms and any other pertinent documents available to all accident and emergency departments of New South Wales hospitals, particularly in country areas.
- Recommendation 12** **57**
 The Committee recommends that the MAA work with the licensed CTP insurers to examine the experiences of casual workers in making claims, in order to identify whether they face any difficulties in establishing loss of income for claims purposes.
- Recommendation 13** **58**
 The Committee recommends that the MAA examine whether or not the Principal Claims Assessor has permitted any insurers an extension of time to make a decision on liability. The MAA should provide the Committee with relevant information, including data on when decisions on liability have been made, to substantiate its findings.
- Recommendation 14** **60**
 The Committee recommends that the Minister for Commerce seek to amend the *Motor Accidents Compensation Act 1999* to ensure that matters which will inevitably be exempt from the Claims Assessment Service pursuant to sections 91 and 92 be deemed exempted at the earliest point in time.
- Recommendation 15** **76**
 The Committee recommends that the Minister for Commerce examine the proposal to provide wider access to non-economic loss by deeming certain injuries as being over the Whole Person Impairment threshold. The Minister should evaluate in context of the injuries identified by the Australian Plaintiff Lawyers Association, as set out in paragraph 5.6 of this report.
- Recommendation 16** **79**
 The Committee recommends that the Minister for Commerce and the Attorney General consider amending the *Supreme Court Act 1970* and the *District Court Act 1973* to allow awards of interim damages in motor accident cases.
- Recommendation 17** **80**
 The Committee recommends that the MAA implement the collection of comprehensive statistics on the level of damages awarded by the New South Wales courts in relation to personal injury suffered as a result of motor vehicle accidents since the 1999 amendments to the Motor Accidents Scheme. The MAA should undertake an analysis of the damages awarded and the emerging trends. Once collected this information should be publicly accessible and updated annually.

Chapter 1 Introduction

Committee's role to review the MAA and the MAC

- 1.1 The Motor Accidents Authority (MAA) is a statutory corporation that regulates the New South Wales Motor Accidents Scheme (the Scheme). It was established by the *Motor Accidents Act 1988* on 10 March 1989 and continues to be constituted under the *Motor Accidents Compensation Act 1999* (the Act). The Motor Accidents Council (MAC) facilitates input from the various stakeholders in the Scheme.
- 1.2 Section 210 of the Act provides that a committee of the Legislative Council is to be charged with the responsibility of supervising the exercise of the functions of the MAA and MAC. The Legislative Council initially appointed the Standing Committee on Law and Justice (the Committee) to undertake this task in November 1999. The Committee was re-appointed in this current Parliament.¹
- 1.3 The Committee has exercised its responsibilities in relation to the MAA and MAC by conducting periodic public hearings with the General Manager of the MAA, Mr David Bowen and the Chair of the Board of Directors and Chair of the MAC, Mr Richard Grellman. Five public hearings have been held to date and five Committee reports, including this report, have been published subsequent to those hearings. The hearings have focused on issues arising from the MAA's annual reports regarding the Scheme and the way in which the MAA and the MAC are exercising their functions.
- 1.4 In the future the Committee will reassess its method of inquiry. The requirement for the Committee to report each year and the time frame for the release of the MAA's annual report has resulted in the Committee conducting its inquiry towards the end of the calendar year. The Committee's responsibility to review the exercise of the functions of the MAA and the MAC is too important to be conducted in such a short time frame. Stakeholders are not provided with a sufficient period in which to review the Annual Report and provide comprehensive submissions. The MAA and the MAC are not provided with adequate time to prepare constructive responses. Those factors ultimately influence the ability of the Committee to fulfil its role in monitoring the accountability of the MAA and the MAC. Ensuring accountability will gain increasing importance as the role of the MAA continues to mature.

Conduct of the Fifth Review

- 1.5 The Committee conducted its Fifth Review between September 2003 and March 2004. The review examined the 2002/2003 Annual Report of the MAA and raised several issues and questions during the hearing on the content of that report. The review also considered the issues raised by stakeholders in submissions to the Committee.

¹ Motion moved by the Hon Tony Kelly MLC and agreed to by the Legislative Council, Minutes No 13, 25 June 2003, Item 5.

Stakeholder participation

- 1.6** The Committee identified approximately 30 individuals and organisations with an interest in the functions of the MAA and the MAC. These stakeholders were invited to participate in the Committee's inquiry by identifying specific issues of concern they wished to address with the MAA and the MAC.
- 1.7** Nine responses were received, raising many issues of interest to the Committee. Most of these issues were subsequently considered by the Committee in its review. A number of stakeholders responded that they had no issues or questions to raise. Several stakeholders noted their support for various aspects of the MAA operations. The Committee is grateful to those stakeholders who participated in the review, particularly those who put a great deal of time and effort into preparing their submissions.

Hearing

- 1.8** The Committee's fifth hearing was held on Monday 16 February 2004. The hearing was originally scheduled for 5 December 2003, however, that hearing was cancelled due to an unscheduled sitting of the House that day. The Committee is precluded from conducting meeting while the House is sitting.
- 1.9** The review included a public hearing with the General Manager of the MAA, Mr David Bowen, the Chair of the Board of Directors and Chair of the MAC, Mr Richard Grellman, the Manager of the Insurance Division of the MAA, Ms Concetta Rizzo and the Manager of the Injury Prevention and Management Division, Ms Kathleen Hayes.

Report

- 1.10** The report is divided into six chapters, each dealing with an aspect of the functions of the MAA and the MAC.
- 1.11** Chapter 2 explores the overall exercise of the functions of the MAA and the MAC in terms of Scheme performance.
- 1.12** Chapter 3 explores the exercise of the functions of the MAA and the MAC in relation to Compulsory Third Party (CTP) Green Slip insurance and the insurers. It examines several issues that arose during the course of the Fifth Review, including the CTP insurance market in New South Wales, premiums and insurer profits.
- 1.13** Chapter 4 surveys the exercise of the functions of the MAA and the MAC in relation to claims made under the Motor Accidents Scheme. It examines several issues that arose during the course of the Fifth Review, including awareness and availability of accident notification forms, establishing loss of income by casual workers, denial of liability for claims and exemptions from the Claims Assessment Resolution Service.
- 1.14** Chapter 5 explores the exercise of the functions of the MAA and the MAC in relation to the payment of claims made under the Motor Accidents Scheme. It examines several issues that arose during the course of the Fifth Review, including compensation for non-economic loss,

compensating parents of children killed in motor vehicle accidents and statistics on the level of damages awarded by the courts.

- 1.15** Chapter 6 examines the exercise of the functions of the MAA and the MAC in relation to the injury prevention and rehabilitation. It examines several issues that arose during the course of the Fifth Review, including road safety and rehabilitation grants and road safety for pedestrians and cyclists.

Chapter 2 Performance overview

General comments

- 2.1 In previous years the MAA has advised that, as the new Scheme was still in its infancy, it has been difficult to draw definitive conclusions about the effectiveness of the Scheme and its management. The Committee asked the General Manager of the MAA, Mr David Bowen, whether he was now in a position to draw any definitive conclusions about the effectiveness of the Scheme. He responded as follows:

Perhaps the best indicator of that is that for year one of the new scheme more than 50 per cent of claims are finalised. That allows us to draw certain conclusions and see certain trends in relation to small claims. It is primarily small claims that will be finalised in the first 50 per cent of matters. However, the incurred cost of those claims would still be less than 20 per cent of the estimated total incurred cost. So there is still quite a bit of development to go, because as you would appreciate it is the larger claims that are finalised later, for good and legitimate reasons. They are the ones with the highest values and the ones on which we cannot draw any conclusions as yet. Obviously, after year one the percentages of both go down. It is very hard to say what is the trend of the new scheme. What we are doing, and did in our report, is compare what is happening in the new scheme for those types of matters to what was happening to a similar cohort of claims under the previous scheme.²

- 2.2 Additional evidence about the performance of the Scheme as a whole was provided by Mr Richard Grellman, Chair of the MAA Board and of the MAC, who also described the instability of the old Scheme:

... I first became Chairman of the Motor Accidents Authority in 1995. At that time the then scheme was suffering from an increasing level of instability. Various attempts were made to stabilise the then scheme. In 1995 some fairly significant amendments were made and in subsequent years less significant amendments were made. By the beginning of 1999 it looked as though the scheme was coming to the end of its life. A view is held by some that statutory schemes have a finite life, and by that stage that scheme was nearly 10 years old. Work commenced on the conception of a new scheme, which was introduced by Parliament in late 1999. That is the scheme we are living with today.

In early 2004, because of the nature of the scheme, while clearly the scheme continues to mature—it is not yet mature, by reason of the time it takes to move many of the claims through the scheme—many of the profiles and developments of the scheme are becoming clearer, but they are not yet totally clear. No doubt we will talk more on that later. When the new model was introduced the Government took the opportunity to introduce a new governance model. The board of directors now consists of six people; five non-executive and one executive director. David Bowen is the executive director, and of the five non-executive directors four would be regarded as totally independent and the fifth is independent, although he is a senior member of the public service: he is Roger Wilkins.³

² Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 2.

³ Mr Grellman, Chairman of the Board, MAA, Evidence, 16 February 2004, p 1.

- 2.3** Mr Grellman indicated that some view statutory schemes as having a limited life. The Committee was interested to learn whether this view has substance in respect of the current Motor Accidents Scheme. Mr Grellman elaborated as follows:

I said there is a view held by some that statutory schemes have a limited life. It would be fair to say if the scheme is well designed and equitably dealing with the respondents who need to be attended to pursuant to claims, if it is affordable, fair and matters are being dealt with on a timely basis, the scheme should have a longer life. The previous scheme, which was starting to become quite unstable and the premiums increasing rapidly, had a series of dynamics that were almost inevitably going to produce gross instability. Perhaps one should not confuse the views of some that I referred to that statutory schemes have a limited life with the current scheme. I think I can speak for the Motor Accidents Authority in saying that we would hope and probably be close to quietly confident that this scheme will have a considerably longer life. The fact remains that some 4½ years in the scheme is still developing and we cannot be absolutely sure about it.⁴

- 2.4** As to the stability of the current Scheme Mr Grellman added:

... I am still hoping that this scheme, the way it has been built, may have more inherent stability than some other statutory schemes that I have looked at over the years. There is a degree of cyclical dynamic. The sorts of pressures that schemes like this can be subjected to come from a number of areas. Probably the two primary areas are the underwriters—the insurers—and the legal profession. In a sense they are diametrically opposed. Insurers, who have a very high duty to their shareholders and/or owners—because some of them are owned by overseas companies—have a primary imperative to maximise their operating profit. If they can extract higher premiums and make a greater profit out of a line of business, they are very focused on that. The legal profession, both solicitors and barristers, quite appropriately, I might say, focused on how they can get a fair and appropriate result for their client. It is not necessarily the greatest amount of money. They are looking at heads of damage and ways to ensure that an injured person is appropriately and quickly compensated and treated. There is an obvious tension between those two professional groups.⁵

- 2.5** Mr Grellman provided additional comments about the effectiveness of the current Scheme:

The Motor Accidents Authority has introduced a four-arena assessment of whether the scheme is working. This is covered in our written submission and also our annual reports. We look at affordability, effectiveness, fairness and efficiency. Under those four headings we are considering, for example, under "affordability" the premiums relative to the average weekly earnings. We are seeing that the trend is heading in the right direction. Under "effectiveness", for example, we are looking at the timeliness of service delivery and whether or not people are being dealt with more quickly rather than less quickly. "Fairness" goes to issues like whether or not seriously injured people are being fairly or reasonably compensated. I might refer particularly to brain injuries and whether or not people at that end of the spectrum are being properly dealt with and compensated relative to someone who has a laceration or a couple of broken limbs. Finally, "efficiency" looks at the economics of the scheme and the transactional costs, such as legal, medical, investigation and insurance costs. Because it is statutory and compulsory it is often tempting just to look at the premiums itself. I do not think

⁴ Mr Grellman, Chairman of the Board, MAA, Evidence, 16 February 2004, p 3.

⁵ Mr Grellman, Chairman of the Board, MAA, Evidence, 16 February 2004, pp 3-4.

that is unreasonable. Over the last couple of years the average premium has either been holding or dropping.

The final point we consider and continue to work on—and it is not an easy issue—is insurer profit. There is a popular view that the insurance industry does make a lot of money out of this scheme. The Act empowers us to look at the profits they have derived and the prospective profit they may earn from premiums received while files might still be open. That is a complicated and complex arena, but we are working on that with the insurers. There is a fair degree of co-operation between the insurers and our people to try to form a common view as to how profitable this scheme is.⁶

Comparison between old and new Scheme

2.6 Since the establishment of the new Scheme in 1999, the MAA has, in relation to performance measures, compared the data from the new Scheme to the data from the old Scheme. Ms Rizzo, Manager, MAA Insurance Division, advised that now that the new Scheme is in its fifth year, the MAA will concentrate on examining trends within the years of the new Scheme rather than making a comparison between the new and old Schemes:

To date it has been most important to look at the new scheme versus the old scheme in total. But at this stage of the development of the scheme, I think that in our next annual report it would be most important that we should look at it by accident year, which is what we intend to do in our next annual report. When it comes time to prepare the next annual report that should be done...

I believe that in our next annual report we should examine the trends of claims on an accident year basis in comparison to what we are doing now, which is examining them all together. We now have enough information and enough development to take a look at it accident year by accident year.⁷

⁶ Mr Grellman, Chairman of the Board, MAA, Evidence, 16 February 2004, p 3.

⁷ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, pp 21-22.

MAA funding and surplus

2.7 The Annual Report states that the main source of funding for the MAA was a levy of 1.4 per cent on CTP insurance premiums requested by licensed insurers.⁸ Mr Bowen described the levy as follows:

The 1.4 per cent is traditionally split. Over the last five years we have attempted to split the levy into two, with 50 per cent of it going to operational costs of the MAA, which would include the surplus to cover Nominal Defendant cash flow. The other 50 per cent is attributable to the injury prevention and management side of our operations, which is funding road safety and rehabilitation programs.⁹

2.8 The Annual Report states that the MAA had a surplus of \$11.549 million in the 2002/2003 financial year compared to \$3.996 million in 2001/2002.¹⁰ The Committee asked Mr Bowen to comment on the increase and queried whether there was a distortion in the variation. Mr Bowen responded as follows:

That is correct. It has also been difficult to predict our operational costs in the area of the assessment services because of the increasing volume of matters going through medical assessment and claims assessment. The approach of the board has been to be very conservative in budgeting in allowing for the maximum possible estimated number of matters going through. It has not reached it in the last few years. Therefore, there has also been a surplus built-up in that way.¹¹

2.9 Mr Bowen also described the purpose to which the surplus is put:

It is the operational costs of the Motor Accidents Authority, including our assessment services. The surplus is generated because we set a levy each year on the insurers to fund our operations. In different years we will set that levy either to marginally create a surplus or marginally create a deficit if we wish to run the surplus down. The surplus at the moment will be significantly reduced in the current financial year. It was a little bit high because we were holding additional funds as a cash flow to fund nominal defendant payments for the HIH insolvency. The way that operates is that we have contracted Allianz to manage those claims. We verify and make the payments to Allianz and then we recoup it from Treasury. Just to enable the cash flow on a monthly basis we held additional funds. But we are running that down now.¹²

⁸ Motor Accidents Authority of NSW, *Annual Report 2002-2003*, p 59.

⁹ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 7.

¹⁰ MAA Annual Report, n 8, p 59.

¹¹ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 4.

¹² *ibid.*

Statistical data

2.10 During the Committee's First Review the MAA indicated that evaluation performance information about the Scheme would be reported in the annual report and in an annual publication called CTP Statistics. The Committee has been provided with CTP Statistics Reports from 1996 to 2000. Ms Rizzo indicated that the MAA has now discontinued the CTP Statistics publication.¹³

2.11 The Committee queried whether the information that was included in that publication could be found elsewhere. Ms Rizzo stated:

The information would not be available in a document as it was available when we produced that publication, but we have a very large database and the MAA does analysis on that database. So that if there was something that we needed to get out of that that was similar to what was in the CTP statistics publication, we would have to derive that from the database. It does not stand as a document, but we would still be able to derive it from the database itself.¹⁴

2.12 The Committee asked Ms Rizzo to describe the details that were included in the CTP Statistics publication when it was published between 1996 and 2000. Ms Rizzo responded as follows:

I suppose I could compare them with the scheme performance indicators as we have included in the annual report, except that in that period, which is what I refer to as the old scheme, we did not have scheme performance indicators. So they were quite detailed statistics that we prepared, which measured similar things to what we measure when we look at the scheme performance indicators here but in probably more detail. We also looked at trends from accident year to accident year, which we have not yet done in the annual report but which we intend to do in the next annual report.

It would follow this sort of pattern. We would have a look at the overall number of claims, we would have a look at the claims frequency and the propensity to claim. The propensity to claim is comparing our data with RTA data to see what proportion of each group of injured people is likely to make a claim: passengers, pedestrians, et cetera. We would have a look at various indicators, such as the level of legal representation, the level of litigation, et cetera, which we summarise in our scheme performance indicators anyway.

Then we would go on to have a fairly detailed analysis of the types of injuries that come with those claims. We have not done that to date here, except for looking at brain injuries in particular, but we would intend to do that in the future. In addition, we would look at the payments that have been made, and we would also include the insurers' incurred costs. That was the section on claims. We also had a section on premiums, which is very similar to what we have here under affordability, which would have a look at the trends in premiums, very much as it is here.

What we did not have in that publication was anything on efficiency, which is our final scheme performance indicator, which is possibly the most important of all scheme

¹³ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 7.

¹⁴ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 8.

performance indicators in that it shows how many of the dollars collected go back to the claimant.¹⁵

2.13 The rationale for discontinuing the CTP Statistics publication was described by Ms Rizzo:

We consider that with the introduction of the new scheme and the adoption of the scheme performance indicators that the information is, in fact, better analysed and better presented by looking at what we have looked at and, in particular, what we do with the scheme performance indicators is a comparison between the scheme and the previous scheme to see how the new scheme is going. The scheme performance indicators are much more of an evaluation than the CTP statistics were ever intended to be.¹⁶

2.14 In response to Committee questioning, Ms Rizzo stated that the performance indicators contained some statistics but less detail than the CTP Statistics publication. She also stated that the evaluation contained in the performance indicators was valuable.¹⁷ The Committee raised the issue of whether it would be beneficial to still publish the CTP statistics in detail so that people interested in the scheme be informed and make their own evaluations. Ms Rizzo commented:

...I think it has to be seen within the context of it being quite a complex scheme and the fact that it takes quite some time for the claim notification, for the claim payment and for the pattern to emerge. Also, it is very easy for people who are not used to interpreting this data to misinterpret it. It is extremely easy for that to happen.¹⁸

MAA's prudential responsibilities

2.15 During the Committee's Fourth Review, the MAA tabled an Ernst & Young review of the MAA's prudential responsibilities and practices, dated February 2002.¹⁹ The MAA described its response to that review as follows:

Since the previous hearing in December 2002, the HIH Royal Commission published its report (April 2003). The report contains a number of recommendations relevant to the MAA and prudential regulation of general insurers. In particular, the report recommended that the Australian Prudential Regulation Authority (APRA) undertake all prudential regulation. In response to the Royal Commission findings, the MAA Board Audit Committee decided that Ernst & Young, as the MAA's internal auditors, would update its review of the MAA's prudential role as part of its wider review of the MAA's corporate governance. The Ernst & Young review is scheduled to commence in April 2004 and to be completed in June 2004.²⁰

¹⁵ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, pp 9-10.

¹⁶ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 10.

¹⁷ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, pp 9-10.

¹⁸ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 10.

¹⁹ Ernst & Young, *Motor Accidents Authority of New South Wales, Review of Prudential Responsibilities and Practices*, February 2002.

²⁰ Correspondence from the Hon John Della Bosca MLC, Minister for Commerce, to Chair, 26 February 2004 forwarding MAA answers to additional questions on notice, p 18.

Collapse of HIH and the HIH Royal Commission

- 2.16** The Annual Report identifies a grant from the Treasury of \$554 million last year.²¹ Mr Bowen explained that the grant relates to the collapse of HIH:

That represents the total estimated incurred value of HIH CTP claims...it is a transfer of liability to the Nominal Defendant. It offsets the liability which is shown in our books at \$546 million.²²

- 2.17** The Committee asked the MAA to identify the total HIH liability and the current outstanding position. In response the MAA stated:

After the collapse of HIH Group the liability for NSW CTP motor vehicle claims against the CIC/FAI insurance companies was estimated by Trowbridge actuaries at \$499.8 million (net of reinsurance and discounted value). As at 1 July 2002 the estimated value of the outstanding HIH liability was calculated by Taylor Fry actuaries at \$423.8 million. The latest actuarial valuation conducted by Taylor Fry, as at 30 June 2003, calculated the outstanding HIH liability at \$262.7 million. As at January 2004 \$343.6 million has been paid to injured persons who had claims against CIC/FAI insurance. A further actuarial valuation will be conducted around June 2004 for the 2003-04 annual MAA accounts.²³

- 2.18** The Annual Report states that the report of the HIH Royal Commission contained several recommendations relevant to the MAA.²⁴ The MAA explained those recommendations and how the MAA intends to respond to them:²⁵

On 16 April 2003 the Federal Government released the report of the HIH Royal Commission. On 12 September 2003 the Federal Government announced its response to the report recommendations. The main recommendations relevant to the MAA are listed below together with the Federal Government's response and the MAA's views.

The two most relevant recommendations are recommendation 49 and recommendation 61. Recommendation 49 recommends that APRA should become the sole prudential regulator of general insurance. The Federal Government has referred this to the States and Territories. The MAA supports the recommendation and is advised that the NSW Government also supports the recommendation. The MAA considers that NSW should vacate the area of prudential regulation and that APRA should be the sole prudential regulator. However, the MAA considers that this should happen together with the introduction of a policyholder protection fund, as addressed in Recommendation 61.

²¹ MAA Annual Report, n 8, p 64.

²² Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 29.

²³ Correspondence from the Hon John Della Bosca MLC, Minister for Commerce, to Chair, 26 February 2004 forwarding MAA answers to questions on notice, p 5.

²⁴ MAA Annual Report, n 8, p 17.

²⁵ A table of the main recommendations, the Federal Government's response and the MAA's views is set out as Appendix 2.

Recommendation 61 recommends the Commonwealth Government introduce a systematic scheme to support policyholders of insurance companies in the event of a failure. The Federal Government has not decided whether any form of guarantee should be implemented and has commissioned a study to consider the merits of introducing an explicit guarantee of part or parts of the Australian financial system and the merits of possible coverage and design outcomes. The Federal Government appointed Professor Kevin Davis, Professor of Finance, University of Melbourne to undertake the study and it is understood he will provide a final report to the Commonwealth Treasurer by end of 2004. Following the completion of the study it is understood that the Commonwealth Treasury will conduct a public consultation process on possible policy options.²⁶

The Motor Accidents Council

2.19 Mr Grellman described the role of the MAC as follows:

Supporting the board is the Motor Accidents Council, and the members of that group, either in their own right or as representatives, comprise various stakeholders or service providers. We believe the council has been a very useful forum for interested parties to be kept up to date with trends and developments within the scheme. In addition to the stakeholders and service providers, the council also has myself, Mr Bowen and the deputy chair of the board as its members. We can, firstly, expose the council to scheme trends and data and, frankly, we deal with the council on an open-book basis. Almost without exception, whatever the board of directors sees the council also sees. With the scheme starting to mature, this is becoming something we can do more of. In recent times we have been able to seek input from council members if we are contemplating any changes to the scheme or, indeed, if they would like to introduce or discuss any proposed changes.

It is a forum in which very interested parties who are familiar with the workings of the scheme and with the implications, positive and negative, of the people who ultimately become claimants in the scheme, can find a voice. In conclusion, on behalf of the board of the authority, I could give my perspective of how the scheme is operating at present. Without being complacent we are reasonably content with the way the scheme maintains its stability. We see premiums holding or falling, which is important for a statutory scheme. Almost all of the trends that we measure in terms of the way the scheme is operating are heading in the right direction and/or holding. We are not complacent but we are now approaching five years into the new scheme, and we feel it is showing very positive signs of continuing to work well.²⁷

2.20 The Committee noted the role of the MAC to advise the MAA Board and asked Mr Grellman to indicate the types of issues that have been recommended to the Board. In response, Mr Grellman provided the following additional information about the role of the MAC:

That is one of two roles that it plays. The first is the channel through which we can convey scheme development data. For example, we might have insurers putting forward a proposition that the approach that is embodied in the Act for a particular right to claim should be revisited. The MAC might see that as an area that is opening up the flow of funds that were not expected or budgeted for. However, more usually

²⁶ MAA answers to additional QON, n 20, p 19.

²⁷ Mr Grellman, Chairman of the Board, MAA, Evidence, 16 February 2004, p 1.

the insurers are generally content to work with the legislation as it is. The legal profession [representatives on the MAC] is perhaps a bit more vocal in pursuing the rights of injured motorists and will often raise issues such as benefits paid to parents of children killed in motor vehicle accidents be considered.

...At the moment the most useful aspect of it has been a mechanism whereby a lot of the mystery of the way that the scheme has developed has been removed. We are giving it to a group of people who are well qualified to understand those developments and ask searching questions. That is very useful, because it is a compulsory scheme and we could get that information to the broad public, but it may struggle to understand it. That group is quite well qualified to understand it. The MAC being able to access that detailed data—and we have already talked about the statistics of it—is a very valuable mechanism. As the scheme trends start to firm, the members representing the bar and the member representing the Law Society certainly bring forward more issues for debate and discussion.

The MAC does not have any decision-making authority; that rests with the board. Frankly, the MAC as a group may be the best group to debate and discuss those issues. It has been a bit hard for the MAC to fully find its feet while we have been waiting for the scheme to mature somewhat. At least one member of the MAC is present, and we have fairly robust discussions. We do not agree on everything but I sense a fair degree of goodwill in the group. The minutes are formally undertaken and we could give the Committee copies of those minutes if members would be interested in the sorts of issues that are covered.

...If any particular member of the council, on seeing a particular issue, would like to take it to their constituents and come back to the next MAC meeting that occasionally occurs.²⁸

2.21 Mr Bowen stated that the MAC also considers the guidelines issued by the MAA and has undertaken work in relation to improving MAA processes:

In addition, all of the guidelines that we have issued since 1999 such as whiplash, anxiety, post-traumatic stress, carer competency, attendant care for spinal cord injury, and others, as well as drafts for claims handling guidelines, and stakeholder comments will go to the MAC before they are promulgated. Market practice guidelines for insurers have been tabled at the MAC. Although the chairman has indicated that it is not a determinative body, it has been the practice on anything like that, that before it is promulgated we take it through the Motor Accidents Council.

...One other matter has taken up quite a bit of time of the council. As indicated in our report, last year the assessment areas were starting to cope with workload problems. We put a fairly aggressive reduction program in place. We also set about benchmarking the processes and producing performance indicators and started on an improvement process for that assessment area. That has been publicly run through the Motor Accidents Council. In that area there are so many statistics, to get clarity we need to ask what are the key performance measures. The council has been very helpful in identifying those.²⁹

²⁸ Mr Grellman, Chairman of the Board, MAA, Evidence, 16 February 2004, p 19. A selection of minutes was subsequently provided to the Committee.

²⁹ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, pp 19-20.

Legislative developments

- 2.22** The Committee was advised by Mr Bowen that a package of legislative amendments is being prepared by the MAA for the consideration of the Minister for Commerce mid-year:

At the moment we are putting together a range of matters which go on to some substantive matters such as the nominal defendant and others which are effectively a tidying up of the new procedures. We have not formally submitted all of those to the Minister at this stage. The reason is that we are anticipating further procedural changes as a result of our current review of the motor accidents assessment services. There will be a need for changes so we are waiting for the review to be completed and we will then put a package to the Minister...it is to be completed by June. The intent is to put it to the Minister in the middle of the year.³⁰

Claims against the nominal defendant for unregistered and unregistrable vehicles

- 2.23** The Australian Plaintiff Lawyers Association (APLA) and the New South Wales Bar Association (Bar Association) have raised concerns regarding claims against the nominal defendant for injuries suffered by the negligent driving of unregistered motor vehicles. APLA described the issue as follows:

APLA is extremely concerned that claims against the Nominal Defendant for injuries suffered by the negligent driving of an unregistered motor vehicle can fail altogether if the claimant is unable to prove, on the balance of probabilities, that immediately before the motor vehicle accident the vehicle at fault was capable, after minor repairs, of being registered. This defence has been successfully raised in two recent cases where verdicts were entered for the defendant. Thus every road user in NSW (including pedestrians) is at risk of being unable to recover damages if innocently injured by the negligence of the driver of an unregistered and unregistrable vehicle. Furthermore the onus will be on the injured person to track down the vehicle at fault and have it mechanically examined to see if it was capable of being registered immediately before the accident.³¹

- 2.24** The background to this issue was described by the Bar Association in its submission:

Effective 1 January 1996 the *Motor Accidents Act 1988* was amended to restrict the circumstances under which a claim could be made against the Nominal Defendant. The initial amendment was in Section 27(5). The amendment has been carried forward into the *Motor Accidents Compensation Act 1999* in section 33(5). The legislation now effectively requires that in order to pursue a claim against the Nominal Defendant where injury has been caused by an unregistered vehicle, the vehicle in question must either be exempt from registration or, "immediately before the accident occurred, it was capable, or would, following the repairs of minor defects, have been capable of being so registered."

The Minister's Second Readings Speech introducing the 1996 amendments dealt with the above section in the following terms:

³⁰ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 20.

³¹ Submission, Australian Plaintiff Lawyers Association, p 1.

Similarly, the expression 'motor vehicle' is widely defined in the Act and covers go-karts and other vehicles, such as forklifts, not normally associated with use on the dedicated public road network. Accidents involving such vehicles have given rise to claims against the Nominal Defendant under the Motor Accidents Act. Under the Construction Safety Act the Workcover authority licences go-kart facilities and public liability insurance is compulsory. It is considered that claims for injury arising from the use of such vehicles should properly be made under such public liability policies and not against the Nominal Defendant.

It is therefore proposed to limit the type of motor vehicles that can give rise to claims against the Nominal Defendant. Claims will only be able to be made in respect of vehicles which are capable of and required to be registered for use on a public road, or are exempt from registration under the Traffic Act and Regulations. Vehicles not capable of registration only because of minor defects may still be capable of giving rise to a claim against the Nominal Defendant. By means of that provision, Nominal Defendant claims arising from accidents in the use of go-karts and other vehicles not capable of registration will not be maintainable.

The drafting of the legislation appears to go beyond the stated intention of excluding accidents involving go-karts, forklifts and the like. Public roads are still used by regular motor vehicles which are unregistered and require more than the 'repair of minor defects' to make them suitable for registration.

The purpose of the Nominal Defendant is to pick up claims for accident victims hit by unregistered motor vehicles. Under the current definition contained in Section 33(5), a pedestrian on a level crossing who is run down by the driver of an unregistered farm utility that requires more than the "repair of minor defects" to make it registrable would not be able to access the Nominal Defendant fund. A quadriplegic would be left uncompensated for catastrophic injuries.

The pedestrian has no control over the negligence of a vehicle that goes through a red light or over a pedestrian crossing. It is a bizarre outcome that where such a vehicle requires more than the repair of minor defects, the pedestrian would be better off if the vehicle did not stop to render assistance. The Nominal Defendant would have covered a claim by an unidentified vehicle but denies liability in respect of the identified but unregistrable vehicle.

It is noted that at the same time as Section 27(5) was inserted in the Motor Accidents Act, the Parliament also narrowed the scope of claims against the Nominal Defendant by replacing the old test of 'public street' with a new test of 'road or road-related area'. It is likely that go-karts and forklifts on private property would not be excluded from accessing the Nominal Defendant fund by virtue of accidents not having taken place on a road or road-related area.³²

2.25 In response the MAA stated that it will give consideration to whether an amendment is required to clarify the intended operation of the Act:

The motor accidents legislation requires that for recovery against the Nominal Defendant, the unregistered vehicle at fault in the accident must have been capable of being registered. The Motor Accidents Authority (MAA) is of the view that this

³² Submission, The New South Wales Bar Association, pp 12-13.

provision was introduced to exclude vehicles that are clearly outside of the registration scheme and not permitted to be used on the road. The MAA is examining whether the legislation may be used to reject claims involving ordinary motor vehicles that are defective and in the light of this outcome of this examination, will give consideration to whether an amendment is required to clarify the intended operation of the *Motor Accidents Compensation Act 1999* (“the MAC Act”).³³

2.26 The MAA subsequently advised that it anticipates that it will be in a position to provide policy advice to the Minister for Commerce on this issue in the near future.³⁴ The MAA undertook to consider several other issues identified by the Bar Association in its submission in the context of its examination of this issue. Those issues are as follows:

- The number of claims where the Nominal Defendant has denied liability on the basis that a motor vehicle (not a piece of industrial machinery or a go-kart) has not been capable of registration following the repair of minor defects.
- Whether there are any cases in which Courts have proceeded to give judgment where a defence has been raised that an unregistered vehicle was not capable of registration following the repair of minor defects.
- The definition of “minor defects” and whether it includes:
 - Replacing a tail light assembly
 - Fitting new brake pads
 - Removing extensive body rust
 - Installing a new headlight assembly
 - Fitting new windscreen wipers
 - Replacing damaged panels
- Whether the onus is on the injured claimant or upon the Nominal Defendant to establish that a vehicle could or could not be registered following the repair of minor defects.
- How a claimant can discharge the onus of demonstrating that a vehicle would be capable of registration following the repair of minor defects when the claimant has no right of access to the vehicle or when the vehicle has been destroyed in an accident.
- Whether claimants are aware of the need to demonstrate that the vehicle was capable of registration.
- The situation of a pedestrian who is injured on a pedestrian crossing by a vehicle that is incapable of re-registration until the repair of a minor defect.

2.27 If, as a result of its examination of this issue, the MAA determines that the operation of the legislation does have the effect described by APLA and the Bar Association, the Minister for Commerce should seek to amend the *Motor Accidents Compensation Act 1999* accordingly.

³³ Correspondence from the Hon John Della Bosca MLC, Minister for Commerce, to Chair, 3 December 2003 forwarding MAA answers to stakeholder questions on notice, Part 1, p 1.

³⁴ MAA answers to additional QON, n 20, p 9.

Recommendation 1

The Committee recommends that if, as a result of the MAA's examination of the issue of claims against the Nominal Defendant for unregistered and unregistrable vehicles, the MAA determines that the operation of the legislation does have the effect described by APLA and the Bar Association (outlined in paragraph 2.23-2.26 of this report), the Minister for Commerce should seek to amend the *Motor Accidents Compensation Act 1999* accordingly.

Motor Accidents Legislation Amendment Bill 2003

- 2.28** The Motor Accidents Legislation Amendment Bill 2003 removes what the Minister for Commerce has described as 'an anomaly' in worker's compensation entitlements that came to light through a Supreme Court case.³⁵ The Bill provides that the workers' compensation claims procedures are to apply when an employee is injured or killed as a result of a motor vehicle accident occurring in the course of employment in certain circumstances.

Motor Accidents Compensation Amendment (Terrorism) Act 2003

- 2.29** The second reading speech on the Motor Accidents Compensation Amendment (Terrorism) Act 2003 stated that "the MAA has been closely monitoring the reinsurance position and assessing the requirements for further action. Arising from discussions with re-insurers and information available from international sources, the MAA is of the view that terrorism cover for CTP reinsurance will continue to remain unavailable for the immediate future."³⁶ The MAA has advised that information available to it from reinsurers indicated that the industry did not anticipate any availability of terrorism reinsurance cover for CTP insurance within five years.³⁷
- 2.30** The MAA advised that there has been no further developments with the Commonwealth proposal to consider inclusion of state/territory statutory terrorist insurance schemes in a national reinsurance replacement scheme, since the position advised to Parliament during the passage of the *Motor Accidents Compensation Amendment (Terrorism) Act 2003*.³⁸

Guidelines

- 2.31** One of the functions of the MAA is to issue and keep under review relevant guidelines under the Act.³⁹ The Committee asked the MAA to describe the process of consultation it employed in the development of its guidelines. The MAA responded as follows:

³⁵ The Bill passed the legislative Assembly on 18 November 2003 and at the time of drafting is awaiting the Minister's second reading speech in the Legislative Council.

³⁶ Legislative Council, New South Wales, *Hansard*, 12 November 2003, p 75.

³⁷ MAA answers to additional QON, n 20, p 8.

³⁸ *ibid.*

³⁹ *Motor Accidents Compensation Act 1999*, section 206(d).

The Motor Accidents Compensation Act 1999 provides the MAA with the power to issue guidelines relating to a number of areas including claims handling (s 68), claims assessment (s 69), medical treatment, rehabilitation and impairment assessment (s 44) and market practice (s 171). In relation to each of the guideline making powers, the Act places obligations upon the MAA to consult and directions as to who will be involved in the consultation.⁴⁰

- 2.32** The MAA provided the Committee with details of the consultation and review process undertaken by the MAA in fulfilment of its statutory obligations in relation to guidelines development. The information is set out in the following paragraphs.

Claims Handling Guidelines

- 2.33** The Claims Handling Guidelines are produced by the MAA in accordance with section 68(1) of the Act. The Guidelines establish a minimum standard of claims handling to be made available by a CTP insurer to an injured person making a claim. With regard to consultation the MAA advised:

Section 68(3) of the Act provides for formal consultation in the development of the Claims Handling Guidelines, requiring the MAA to consult with the Insurance Council of Australia, the Council of the Bar Association and the Council of the Law Society. The MAA undertook extensive consultation with the nominated groups as well as all the licensed CTP insurers' claims managers, circulating drafts of the guidelines for comment and suggestion. The MAA has yet to receive any comments from the Council of the Law Society. The draft of revised guidelines will be finalised when all comments and suggestions are reviewed.⁴¹

- 2.34** With regard to review of the Claims Handling Guidelines, the MAA advised:

The Claims Handling Guidelines are presently the subject of review that has involved consultation with the Insurance Council of Australia, licensed CTP Insurers, the Council of the Bar Association and the Council of the Law Society. The guidelines are monitored for effectiveness and reviewed on a needs basis. When reviewing the guidelines, the MAA considers feedback from users and beneficiaries of the guidelines, trends in claims handling complaints and observations made during the MAA's compliance auditing.⁴²

- 2.35** The Claims Handling Guidelines are further examined in Chapter 4.

Claims Assessment Guidelines

- 2.36** The Claims Assessment Guidelines are made pursuant to section 69(1) of the Act. The Claims Assessment Guidelines explain the operation of those sections of the Act relating to the Claims Assessment and Resolution Service. The Claims Assessment Guidelines are primarily intended to guide the officers of the MAA, members of the legal profession and the insurance industry. Information more readily accessed by claimants who wish to represent themselves at

⁴⁰ MAA answers to additional QON, n 20, p 2.

⁴¹ MAA answers to additional QON, n 20, pp 2-3.

⁴² MAA answers to additional QON, n 20, p 6.

CARS is available from the MAA's Community Assistance Service. With regard to consultation on the development of the Claims Assessment Guidelines, the MAA stated:

The Claims Assessment Guidelines were developed in consultation with the Insurance Council of NSW, the Council of the Bar Association and the Council of the Law Society as required by section 69(3) of the Act.⁴³

2.37 With regard to review of the Claims Assessment Guidelines, the MAA advised:

Issues associated with the operation of the Motor Accidents Assessment Services (MAAS), including guidelines for the assessment of disputes, are addressed through the MAAS Users Group, which met throughout 2003 as a forum for feedback and discussion between MAAS, its users and stakeholders. The group was formed in 2002 as the combination of the previously separate MAS Users Group and CARS Users Group.

The group comprises:

up to 3 representatives from the Legal profession nominated by the Bar association

up to 3 representatives nominated by the Law society

up to 3 representatives from the CTP insurers as nominated by the Insurance Council of Australia

up to 3 consumer representatives, one being from the Claims Advisory Service within the MAA
The PCA

The Senior Claims Assessor

The Manager MAS/Proper Officer

The Principal Impairments assessment officer

The Principal Treatment assessment officer.⁴⁴

MAA Medical Guidelines

2.38 The MAA has developed two types of medical guidelines – clinical practice guidelines and compliance or mandatory guidelines dealing with insurer or Scheme performance.

Clinical practice guidelines

2.39 The clinical practice guidelines concern the decision making about a claimant's clinical, rehabilitation or care management. They are evidence-based and where the evidence is equivocal or unavailable are consensus-based. The working parties that developed these guidelines were comprised of representatives of relevant organisations and individuals with specific expertise, as described below:

Guidelines for the Management of Whiplash-Associated Disorders

Working Party: the Royal Australian College of General Practitioners (2 representatives); the Australian Medical Association; Australian Association of Surgeons; the Australian Physiotherapy Association (2 representatives); the Chiropractic Association of Australia; the CTP insurers (2 representatives); the Law Society of NSW; WorkCover NSW; Motor Accidents and Insurance Commission of

⁴³ MAA answers to additional QON, n 20, p 3.

⁴⁴ MAA answers to additional QON, n 20, p 6.

Queensland; the Faculty of Rehabilitation Medicine; and Associate Professor Ian Cameron, the Chair of Rehabilitation Medicine at Sydney University, at the invitation of the MAA.

Drafts of the WAD guidelines were circulated to range of medical groups including Rheumatology, Neurosurgery and Orthopaedic Medicine. The guidelines were then reviewed by a further three experts – Professor Radanov (Switzerland), Professor Peter Brooks (Qld University) and Marc White (Canada). These guidelines will be reviewed this year.⁴⁵

Managing anxiety following motor vehicle accidents

Working Party: the Alliance of NSW Divisions of General Practice; the Royal Australian College of General Practitioners; the Royal Australian and New Zealand College of Psychiatrists (2 representatives); the Australian Medical Association; the Australian Psychological Society (2 representatives); the Australasian Society of Traumatic Stress Studies; the Australian Association of Social Workers, the Insurance Council of Australia; WorkCover Authority of NSW; Transport Accident Commission (Vic); the Law Society of NSW; and Professor Richard Bryant at the invitation of the MAA.

The guidelines were then reviewed by a further 3 experts - Dr Hickling (USA), Professor McFarlane (Adelaide University) and Professor Shalev (Israel). These Guidelines will be reviewed in two to three years.⁴⁶

⁴⁵ MAA answers to additional QON, n 20, p 3.

⁴⁶ MAA answers to additional QON, n 20, p 4.

Guidelines for the level of attendant care for people who have a spinal cord injury

Working Party: The three spinal units in NSW – RNSH, Prince Of Wales/Prince Henry and Moorong Spinal Injury Units; Occupational Therapy Association; Home Care of NSW; Spastic Centre; ParaQuad; Australian Quadriplegic Association; Physical Disability Council of NSW; Northcott Society; attendant care agencies; Department of Aging Disability and Home Care; the Insurance Council of Australia and the Law Society of NSW. It is proposed to reconvene the working party in 2005 to review these guidelines.⁴⁷

Compliance or mandatory guidelinesAssessment of Permanent Impairment

A working party was formed to advise the project management team that developed the guidelines and the MAA. The role of the advisory committee was to advise the MAA of their respective stakeholder perspectives and issues on the development and implementation of the impairment guidelines. The draft guidelines were circulated to a wide range of medical associations including neurosurgeons, rehabilitation specialists, ophthalmologists, orthopaedic surgeons, forensic psychiatrists, psychologists and physiotherapists.

Project Management Team: Dr Jim Stewart, A/Prof Ian Cameron (Rehabilitation Medicine, Sydney University); Dr Dwight Dowda, (Occupational Physician); Prof Peter Disler (Rehabilitation Medicine, Melbourne University); and A/Prof Malcolm Sims (Dept of Epidemiology and Preventative Medicine, Monash University).

Advisory Committee: Geraldine Daley (Law Society); Dr John Firth (College of GPs); Tom Goudkamp (APLA); Mary Hawkins (WorkCover); Ross Letherbarrow (Bar Association); Robyn Norman (QBE); Dr Kathy McCarthy (Rehabilitation Physician); Shayne O'Reilly (NRMA); Brendon Sydes (APLA); Dr Conrad Winer (AMA).

These guidelines are currently undergoing a minor review to remove any ambiguity in the assessment process. Two working groups are being formed to clarify issues that have occurred in the spinal chapter and in chapter dealing with brain injury. Once this has been completed the guidelines will be circulated to the Medical Assessment Service's impairment assessors, medical associations, the Insurance Council of Australia and the Law Society for comment.⁴⁸

Treatment, Rehabilitation and Attendant Care Guidelines

These guidelines were initially issued in 1998 and underwent a substantial review in 2000 to incorporate the changes resulting from the *Motor Accidents Compensation Act 1999*. The 2000 revision was distributed to health associations for comment. The reviews since then have been minor, and have taken into account feedback from the Medical Assessment Service concerning disputes about reasonable and necessary treatment, from the Compliance Branch of the MAA on common areas of complaints about insurers and feedback from the auditors.

⁴⁷ *ibid.*

⁴⁸ MAA answers to additional QON, n 20, p 3.

The guidelines relate to the claims management practices of insurers and are about insurers' decision making processes and how they make decisions, but not the decision itself. These guidelines will next be reviewed following the 2005 audit program.⁴⁹

- 2.40** In a submission to the Committee the Australian Psychological Society expressed the view that it was not sufficiently consulted in the development of several guidelines, including those that relate to the long term care of the seriously injured and the Treatment, Rehabilitation and Attendant Care Guidelines. The Committee queried whether the MAA consulted with any organisations in the field of psychology when developing those and other guidelines. In response the MAA stated:

The Australian Psychological Society (APS) was asked to nominate 2 representatives for the working party that developed the guidelines "Managing anxiety following motor vehicle accidents". Professor Richard Bryant, a psychologist, was asked by the MAA to be a member of that working party. The working parties currently developing documents on the assessment of adults and children with a brain injury have representatives from and receive feedback from all the Brain Injury Units which include psychologists and neuropsychologists. One of the recommendations of the working parties – the development of a tool to assess and classify the care needs of a claimant with a brain injury – is being undertaken by a neuropsychologist.⁵⁰

Market Practice Guidelines

- 2.41** The Market Practice Guidelines are produced by the MAA in accordance with section 171(3) of the Act. The Guidelines establish a minimum standard of fair and proper practice by the CTP insurers in their method of providing quotes for CTP policies prices, renewal and payment. With regard to consultation the MAA informed the Committee that:

Section 171(3) of the Act provides for formal consultation in the development of the Market Practice Guidelines, requiring the MAA to consult with the licensed CTP insurers. The MAA undertook extensive consultation with all the licensed CTP insurers circulating drafts of the guidelines for comment and suggestion and holding meetings with representatives of the insurers to discuss in greater detail the comments and suggestions received. The MAA is currently waiting for final comments prior to finalising the latest draft guidelines.⁵¹

- 2.42** With regard to the review of the Market Practice Guidelines, the MAA stated:

The Market Practice Guidelines are presently the subject of review that has involved consultation with the licensed CTP insurers' product managers. The guidelines are monitored for effectiveness and reviewed on a needs basis. When reviewing the guidelines, the MAA considers any recommendations by the ACCC, feedback from users and beneficiaries of the guidelines, complaints and findings of "mystery shopper" spot checks.⁵²

⁴⁹ MAA answers to additional QON, n 20, p 5.

⁵⁰ MAA answers to additional QON, n 20, pp 4-5.

⁵¹ MAA answers to additional QON, n 20, p 5.

⁵² MAA answers to additional QON, n 20, pp 6-7.

2.43 The review of the Market Practice Guidelines is examined in more detail in Chapter 3.

Role of the MAC

2.44 The MAC is required to advise and make recommendations to the MAA on, and keep under review, the MAA Medical Guidelines and MAA Claims Assessment Guidelines.⁵³ The Committee asked how the MAC has been exercising its statutory function to ‘advise and make recommendations to the MAA on, and keep under review, the MAA Medical Guidelines and MAA Claims Assessment Guidelines’. The following response was received:

Proposed changes to existing guidelines and drafts of proposed new guidelines are referred to the MAC for consideration and feedback. The MAA also notes that individual members of the MAC have also been involved in the development of guidelines. The health representatives on the MAC, Dr John Frith and Dr Stephen Buckley, have participated on clinical practice guidelines’ working parties (WAD and anxiety guidelines).⁵⁴

Fraud

2.45 During the Committee’s Second Review, the MAA advised that the instance of fraud within the Scheme is not an issue of major concern. At the hearing Mr Bowen advised that this was still the case:

Because the insurers thoroughly investigate claims. They are able to look at claims by related parties, where they are coming from, where the accident occurred and the vehicles that were involved. If they were encountering problems there they would let us know.

... When fraud was last a significant issue in the scheme—this was about 1995—there were some fraudulent claims identified. They were done through that sort of matching: where they came from, who was involved, what vehicles were involved. We do not believe that now there is very much, if any claimant fraud. I suspect what fraud there is probably more by way of exaggeration of injury.

...The circumstances now are that it is extremely difficult and probably not worthwhile for someone to manufacture an accident in which an injury is sustained for the purpose of bringing a CTP claim. Because of the scheme changes you have to be reasonably seriously injured now to be able to maximise out your benefits, other than your actual loss. To get access to non-economic loss, which might have been considered to be the reward for the injury, you have to be fairly seriously injured. The propensity to generate a claim there is pretty limited.⁵⁵

⁵³ *Motor Accidents Compensation Act 1999*, section 209(1)(a).

⁵⁴ MAA answers to additional QON, n 20, p 7.

⁵⁵ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 23.

Minister's review of the *Motor Accidents Compensation Act 1999*

- 2.46** Under section 233 of the Act the Minister for Commerce is obliged to review the Act to determine whether its policy objectives remain valid and if its terms remain appropriate for securing these objectives. The Minister's Review, conducted by the Minister for Commerce, the Hon John Della Bosca MLC, commenced in March 2002 and the report was tabled in October 2002.⁵⁶
- 2.47** During the Committee's Fifth Review the MAA noted that the Minister's Review did not contain any recommendations for Scheme changes and that it demonstrated that the reforms had been successful in reducing premiums:

The Minister's report on the review of the MAC Act tabled in the Legislative Council on 24 October 2002, was a status report on the first two years operation of the reformed motor accidents scheme and did not contain recommendations on scheme changes.

The review demonstrated that the legislation has been successful in reducing Green Slip premium costs in NSW. The average premium for a Sydney metropolitan passenger vehicle had dropped from \$441 in June 1999 to \$348 (excluding GST) in June 2002. As a proportion of average weekly earnings, weighted best price has dropped from 50% AWE before the reforms to 34% AWE in June 2002.

Scheme performance during the first two years operation of the new legislation indicates that the reforms significantly improved scheme effectiveness and service accessibility and delivery. Performance trends indicated that injured people lodge notifications more quickly, access funds for the treatment of their injuries more quickly, and settle their claims more quickly. Consistent with the intentions of the legislative reforms, there have been reductions in payments in the areas of non-economic loss payments, investigation costs and legal costs.⁵⁷

Justice Policy Research Centre research projects

- 2.48** The MAA has engaged the Justice Policy Research Centre at the University of Newcastle to undertake a range of research projects relating to various aspects of the Scheme, as described by Mr Bowen:

There has been a range of projects. We engaged the Justice Policy Research Centre, under a slightly different name, in 1999 when it had been in existence for a few years and funded through the legal profession that funds the Law Foundation. After we had entered into the engagement with the centre, the director of that unit, Ted Wright, became the dean at Newcastle University and to some extent we had engaged that centre because of Professor Wright's background as probably the best-known civil justice researcher in the country. There was a detailed program of activities for the

⁵⁶ *Review: Motor Accidents Compensation Act 1999*, tabled in the Legislative Council, 24 October 2002, by the Hon John Della Bosca MLC, Special Minister for State.

⁵⁷ MAA answers to stakeholder QON, Part 2, n 33, pp 1-2. See also MAA Annual Report, n 8, p 28.

centre to undertake, and it produced stage one and stage two reports, which have been provided to this Committee previously.

... We can provide you with a schedule of all the reviews the centre is undertaking, together with the reviews that are completed. There are a couple that are outstanding and are now quite significantly overdue. This had to do with Professor Wright being quite ill over the last 12 months. While he has researchers to assist him, he likes to sign his name off on these matters, and frankly I would prefer that it came under his name in any event. We are awaiting one from him at the moment, which is to do with a follow-up report on legal costs. He did a preliminary report stage one in 1999-2000.⁵⁸

2.49 The MAA provided the Committee with a Schedule of the Justice Policy Research Centres program, as set out below.

<u>Schedule – MAA Evaluation Programme – Justice Police Research Centre</u>				
		Start date	Anticipated completion date	
Study 1	Claims handling practices	Dec-00	Mar-01	Completed
Study 1A	Solicitors' perceptions of the new Act	June-01	Nov-00	Completed
Study 2	Claims resolution profile	Dec-01	Feb-04	
Study 3	Legal costs	Mar-02	Mar-04	Interim report completed
Study 4 and 5	Perceptions of MAS and CARS	Dec-03	Feb-05	

⁵⁸ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 27.

Chapter 3 CTP insurance and the insurers

This chapter explores the exercise of the functions of the MAA and the MAC in relation to CTP Green Slip insurance and the insurers.⁵⁹ It examines several issues that arose during the course of the Fifth Review, including the CTP insurance market in New South Wales, premiums and insurer profits.

CTP insurance market

State of the market

- 3.1 Mr Bowen describe the current state of the New South Wales CTP insurance market as being 'healthy and competitive':

At this stage the market is as competitive as it has been in a decade. The position is that while the number of insurers has reduced, they are all substantial insurers, either domestic or international, and the current jockeying on price is an indication that they are starting to chase increased market share for CTP. From their point of view it is a good product. It is a healthy and competitive market at this stage with insurers in it who are substantial and viable. So we have both capacity and competition, which are the MAA's two concerns to be maintained...

There has been a reduction in general insurers within Australia overall. HIH took out two of our registered insurers. Otherwise, there have been a lot of mergers and acquisitions by the larger companies of the medium and small firms. For example, the NRMA owns SGIO and CGU. Allianz picked up CIC and FIA and Suncorp purchased GIO. That is affecting CTP. It is certainly not being driven by CTP...⁶⁰

- 3.2 The percentage of the market held by each of the licensed insurers was described by Mr Bowen as follows:

... To give indicative numbers, the NRMA has round about 39 to 40 per cent of the market. That is by premium dollar. It will have slightly more than that in terms of policies because it focuses on the domestic end. QBE and AAMI each has around 11 per cent, GIO 7 per cent, and Zurich 6 per cent. There are two Allianz companies—Allianz itself and Allianz CIC. They have a combined total of around about 26 per cent.⁶¹

- 3.3 Mr Bowen informed the Committee that he did not foresee any movement in the number of insurers in the New South Wales market over the next 12 months:

I do not believe that any of our insurers will leave the market in the next 12 months. We have that possibility in our minds at all times from the point of view of looking to ensure that there are enough insurers participating so there will be capacity to write 100 per cent of the CTP market. I do not think there will be any new entrants. From

⁵⁹ The compliance of insurers with the Claims Handling Guidelines is examined in Chapter 4.

⁶⁰ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 24.

⁶¹ *ibid.*

the point of view of the MAA it would be desirable to look for additional entrants, but that is not looking likely at this stage.⁶²

3.4 In relation to the role of the MAA to encourage extra entrants into the market, Mr Bowen stated:

We have had discussions with those who expressed interest to let them know what the regulatory environment is should they be willing to operate. The reality is that there are a really no other Australian insurers companies of sufficient size to enter the market at the moment. If there were to be an additional entrant it would be an international company coming in and setting up an Australian subsidiary.⁶³

3.5 The Committee noted that the MAA has conducted research into maintaining market capacity and competitiveness and asked the witnesses to outline the major findings of that research.⁶⁴ Ms Rizzo described the research as focusing on identifying potential risk factors:

What we are looking at there is to try to identify if there are any potential rating factors that we can introduce to encourage insurers to identify segments of the marketplace and price differently. Initially we will have a very thorough look at how they are pricing currently. As David addressed briefly beforehand, setting a premium is a three-stage process. The MAA declares relativities in certain geographic areas and vehicle types—there are about 20 vehicle types and five geographic areas—and the insurers file a premium. Then they can apply a discount or add a loading depending on characteristics they choose. That is open to them... providing it is a valid risk rating and it is not discriminatory in that sense. What we want to do is identify where some other risk factors are. We are looking at the overseas experience to see if we can come up with anything that is valid in the New South Wales context.⁶⁵

3.6 The Minister has subsequently advised the Committee that the research report into the ways that CTP market capacity and competitiveness could be maintained will be available in June 2004.⁶⁶ Risk rating factors are examined in further detail in paragraphs 3.18-3.29.

Review of the Market Practice Guidelines

3.7 The MAA's Market Practice Guidelines are issued under section 171 of the Act and apply to licensed CTP insurers. The Annual Report states that the MAA has drafted *revised* Market Practice Guidelines to address disclosure issues, as recommended by the ACCC.⁶⁷ The Committee asked the MAA to explain the context of the ACCC's recommendations. In particular, the MAA was asked to describe the main recommendations and how the guidelines have been changed to reflect them. The MAA responded as follows:

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ MAA Annual Report, n 8, p 14.

⁶⁵ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 24.

⁶⁶ Correspondence from the Hon John Della Bosca, Minister for Commerce, to Chair, 26 February 2004.

⁶⁷ MAA Annual Report, n 8, p 15.

The ACCC published a market pricing review of the General Insurance industry in Australia in 2002. The main recommendations of the ACCC for the General Insurance industry were that increases to the previous policy's premium should be clearly explained when policies are offered for renewal, and that insurers should improve their premium complaints and query handling systems.

New conditions have been added to the draft revised Market Practice Guidelines requiring CTP insurers to clearly explain to the customer, in general terms, reasons for any changes in the prices of third party premiums, and to provide the MAA with regular summary reports of complaints regarding the issuing of third party policies.⁶⁸

- 3.8** The Minister's Review also foreshadowed changes to the Market Practice Guidelines to ensure insurers provided sufficient information to consumers to explain premium variations.⁶⁹ The MAA advised that the changes to the Guidelines are still in progress and that the revised Guidelines will be in place for policies issued from 1 October 2004.⁷⁰

Licensing arrangements

- 3.9** The Minister's Review, which was tabled in October 2002, states that the MAA believes the current licensing arrangements for insurers to write CTP insurance in New South Wales are satisfactory and no change is recommended.⁷¹ The MAA advised the Committee that it still considers that the current licensing arrangements are satisfactory.⁷²
- 3.10** The Committee queried whether there were any aspects of the licensing arrangements currently being reviewed. The MAA responded:

The licensing arrangements require insurers to comply with Guidelines as a condition of their license. This includes the Claims Handling Guidelines, Market Practice Guidelines and Premium Determination Guidelines, which are reviewed and updated on a regular basis.⁷³

⁶⁸ MAA answers to additional QON, n 20, pp 14-15.

⁶⁹ Minister's Review, n 56, p 18.

⁷⁰ MAA answers to additional QON, n 20, p 14.

⁷¹ Minister's Review, n 56, p 10.

⁷² MAA answers to additional QON, n 20, p 1.

⁷³ *ibid.*

Premiums

Level of premiums

- 3.11** The Annual Report identified a decrease in average premiums for Sydney metropolitan passenger vehicles from \$441 in June 1999 to \$339 in June 2002. In addition, the average annual premium over all vehicle classes in New South Wales dropped from \$419 in June 1999 to \$328 in June 2003.⁷⁴
- 3.12** The MAA advised the Committee that there has been a decrease in *all* CTP ratings districts and identified several factors contributing to this decrease:
- Decrease in filed insurer profit;
 - Decrease in claims handling expenses;
 - Decrease in acquisition costs;
 - Decrease in risk premium resulting from reduction in cost of claims following the 1999 legislative reforms;
 - Lower claims frequency;
 - Lower levels of litigation; and
 - Decrease in other transaction costs such as legal and investigation costs.⁷⁵
- 3.13** The MAA also advised that premiums have decreased in almost all other *vehicle categories* and identified two categories - buses in the Central Coast area and heavy trucks – that have experienced a rise in premiums:

Buses in the Central Coast area have experienced an increase in premiums due to the deterioration in their claims experience over the years. Since October 2000 the claims experience for buses in this area has been found to be similar to Newcastle necessitating the re-classification of Central Coast area as Newcastle instead of Country. The increase in premiums for buses would have been even greater if the 1999 legislation had not been passed.

Premiums for heavy trucks increased to reflect the cost of injuries in accidents caused by heavy trucks and a change in categorisation for national registration. Prior to October 2000 goods carrying vehicles were grouped into only two categories namely under 2 tonnes tare (unladen) weight and over 2 tonnes. In October 2000 there was a change in the insurance classes for goods vehicles to reflect changes in the national registration system in place since July 1997, from Tare Weight to Gross Vehicle Mass (GVM). GVM is the fully laden weight. This resulted in the split of the over 2 tonne tare weight category into two GVM categories. In calculating premiums for trucks

⁷⁴ MAA Annual Report, n 8, p 33.

⁷⁵ MAA answers to additional QON, n 20, p 12.

three classes now apply. They are light trucks up to 4.5 tonnes GVM, medium trucks between 4.5 and 16 tonnes GVM, and heavy trucks over 16 GVM.⁷⁶

3.14 The issue of premiums for buses is examined in further detail in paragraphs 3.30-3.31.

3.15 The Committee asked the MAA what its predictions were for premium levels over the next 12 months. The MAA explained the difficulty in predicting premium levels but speculated that insurers may lower premiums:

The MAA obtains a risk premium from its actuaries from time to time. Without such a report, it is not possible for the MAA to be conclusive about future expectations. However, insurers are due to file in May for a 1 July premium to incorporate MAA changes to relativities, which will be completed by Trowbridge Deloitte actuaries in April 2004. It should be noted that insurers filed premiums from 1 July 2003 and since that time, three insurers have lowered their premiums, and the MAA expects that other insurers will follow suit and lower premiums.

- Factors that have a bearing on premiums continuing to decrease are
- Continued lower claims frequency.
- Substantially lower superimposed inflation.
- Improved investment return.
- The 10% WPI level continuing to hold NEL payments to only the most seriously injured claimants.
- CARS general assessments according with the intentions of the legislation.⁷⁷

3.16 In its submission to the Committee, the Bar Association noted that, while premium levels have been effectively stable since mid-2000, there have been increased cost pressures on the Scheme over the same period, including increased costs for medical services, indexation of the cap on non-economic loss payments and some increase in wages.⁷⁸ The Committee asked the MAA to comment on the stability of the Scheme in relation to the increased cost pressures. In response the MAA stated:

According to the MAC Act, insurers must submit a premium filing with the Motor Accidents Authority (MAA) at least once a year. The filing outlines the insurer's proposed premium having regard to estimated future claims experience, expenses and reasonable profit. The amount identified by insurers must fully fund the cost of claims in the underwriting period addressed in the filing, and must be signed off by a qualified actuary and by the insurer's CEO.

There have been cost pressures on the insurers in the most recent filing period which have resulted in an increase in the premium charged. Recent pressures are due to increases in reinsurance costs and to increases in the discount rate for future investment earnings. The increase in reinsurance costs reflects increases in the international reinsurance market and the continuing hardening of reinsurance rates.

⁷⁶ MAA answers to additional QON, n 20, p 11.

⁷⁷ *ibid.*

⁷⁸ Bar Association, n 32, p 3.

Increases in the discount rate are due to the global phenomenon of lower investment returns.

In other words, the reasons for the increase lay outside the motor accidents scheme, which continues to produce the outcomes intended by the legislative reforms. Continued scheme stability has resulted in a higher level of confidence amongst insurers. The MAA expects stability in premiums over the next 12 months with the upward pressure of reinsurance being offset by better investment returns and continued scheme stability.

The number of vehicles in NSW has increased over the last few years and is now about 4 million. The size of the fleet is an additional factor in maintaining an affordable premium as the claims costs can be shared over a greater number of vehicle owners.⁷⁹

- 3.17** In responding to the Bar Association, the MAA also stated that “...it is necessary to distinguish between scheme changes and changes to vehicle categories, changes to zones, the deterioration in claims experience in particular vehicle classes, and the discount/loading structures adopted by insurers which have taken place since the legislative reforms”:

Setting Green Slip premiums

Setting Green Slip premiums is a three stage process.

1. Stage 1: Insurers are required to classify vehicles according to vehicle categories and geographic zones as set by the MAA. There are five geographic zones: Metropolitan Sydney, Outer Metropolitan, Newcastle/Central Coast, Wollongong and the remainder of NSW referred to as Country. There are approximately 30 separate vehicle categories for example, motor car, motor bike based on engine size, and goods vehicles based on gross vehicle mass.

The MAA regularly reviews the claims experience of each of the vehicle classes and geographic zones. The outcome of this review is a table of relativities reflecting the risk of each vehicle/region category relative to the ordinary motor car in metropolitan Sydney.

2. Stage 2: Insurers file with the MAA the base premium that they intend to charge for an ordinary motor car in metropolitan Sydney. The base premiums for all other classes of vehicles and regions are calculated by applying the relativities set by the MAA.

3. Stage 3: Once the base premiums are filed with the MAA, the insurers may offer discounts or impose loadings according to the risk being insured. Insurers may apply discounts and loadings within the range allowed by the MAA's Premiums Determination Guidelines. The maximum discount is 15% for policyholders/drivers under 55 and 25% for policyholders/drivers over 55. The current maximum loading is approximately 40%.

In deciding to offer a discount or impose a loading insurers may take into account any objective risk-rating factor, other than race and intra zone localities. Insurers apply rating factors differently. A vehicle that attracts a loading from one insurer may attract

⁷⁹ MAA answers to stakeholder QON, Part 2, n 33, pp 235

a discount from another insurer. For example, some insurers use the age of the owner/driver as a primary rating factor, while other insurers use comprehensive insurance history, no claim bonus or the age of the vehicle.

The age of the driver/owner, comprehensive insurance and no claim bonus are factors that insurers have incorporated in their discount/loading structures since well before the legislative reforms.

Young drivers, as a group, do not have a very good road safety record. The Green Slip premiums that they pay are significantly subsidised by older and safer drivers, as a community rating subsidy. Before the legislative reforms, young drivers paid as much as \$549. The highest amount paid by young drivers has in fact reduced and the current maximum is \$525.

When the new scheme was introduced, the benefit of the reduction in premiums was provided to better risks as a way of unwinding the subsidy to a limited extent.

Changes to vehicle categories

Changes to vehicle categories can affect the premium. An example of such a change is the categorisation of trucks which the MAA reviewed in 1998 to reflect changes in national registration. National registration, previously based on tare or unladen weight, was changed to gross vehicle mass (GVM), that is, fully laden weight. The MAA reviewed the system for determining premiums for goods vehicles to accommodate this change and a new system was introduced in October 1999, at the same time as the legislative reforms took effect.

In changing from tare weight to GVM, the two original truck categories were extended to three categories to better reflect different levels of risk and to be consistent with national registration laws.

Because of this change in categorisation, owners of the heaviest trucks (over 16 tonnes GVM) incurred a substantial increase in premium even after the premium reduction resulting from the scheme changes were taken into account. This cost reflected the cost of injuries in accidents caused by such large trucks.

The increased premium for large trucks was offset by a decrease in the premiums of small trucks, under 4.5 tonnes GVM, as the subsidy they were providing to large trucks was unwound.

Classes with deteriorating claims experience

Because the MAA undertakes regular reviews of claims experience in all vehicle classes, it is possible to identify those classes where claims experience is either improving or deteriorating. Where there are significant and ongoing trends in claims experience, this will be reflected in the relativity and hence in the Green Slip premium. For example, there is a category for large buses carrying more than 16 passengers. This category excludes the State Transit Authority (STA) buses. The claims experience of this category has deteriorated over time and this is reflected in an increased premium. Conversely, the experience of STA buses has improved and this is reflected in a reduction in their premium.

Changes to geographical rating zones

Prior to the creation of two new rating districts in October 2000, there were four rating districts, Metropolitan, Newcastle, Wollongong and Country. Due to significant demographic changes in NSW over the past twenty years, the MAA reviewed the claims experience of the following areas: Gosford/Central Coast; Areas surrounding Newcastle; Western area of metropolitan Sydney including the Blue Mountains and the area around Camden.

The review indicated that the claims experience in these areas, primarily rated as Country, was deteriorating. That is, these areas had been subsidised by Country vehicle owners for many years. As a result of the review, the MAA created two new rating districts to allow more equitable rating of Green Slips. They were Outer Metropolitan (including the Blue Mountains) and Newcastle/Central Coast.

The change in rating districts, on its own, had negligible impact on Green Slip prices. However, some insurers applied discount/loading structures in the new regions which were different to the structures applied in the Country zone. Discount/loading structures have been addressed above under *Stage 3*.⁸⁰

Risk rating

- 3.18** The Minister's Review identified various risk rating factors currently used by insurers. They include age and gender of drivers, the level of motor vehicle insurance and the no-claims bonus.⁸¹ The Review also indicates that the MAA is considering the introduction of further risk rating factors. The MAA has expressed the view that new risk factors can contribute to a decrease in premiums for lower risk groups:

Yes, because the higher risk groups will be paying a premium more appropriate to their risk. However, there is still an element of community rating which creates cross subsidies from low risk groups to high risk groups such as young male drivers.⁸²

- 3.19** The Committee asked the MAA to identify the other factors that are being examined as potential risk rating factors. In response, the MAA identified drivers with good safety records and different types of vehicles such as four wheel drives:

The MAA considers that drivers with good safety records should be rewarded with eligibility for registration and CTP insurance discounts. The MAA has raised with the RTA the option of a safe driver certificate that demonstrates that there have been no traffic infringements over a number of years. A tri-partite working group has been set up comprising CTP insurers, MAA and RTA to look at electronic access to customer driving records. An important consideration is the issue of privacy.

Insurers have already taken the MAA's lead on this issue and have adopted related risk factors such as:

⁸⁰ MAA answers to stakeholder QON, Part 2, n 33, pp 2-5.

⁸¹ Minister's Review, n 56, p 15.

⁸² MAA answers to additional QON, n 20, p 12.

- The number of collision claims made against the motorist's vehicle insurance in the last five years.
- The number of moving traffic offences committed in the last three years.

Insurers have also responded to the MAA's interest in differentiating between different types of vehicles in class 1 (ordinary motor car) such as four wheel drive vehicles and special performance vehicles like the Subaru WRX. One insurer now considers these factors in offering premiums.⁸³

Drivers with good safety records

- 3.20** The Minister's Review stated that that MAA was working with the RTA to identify ways to reward drivers with good safety records, with eligibility for registration and CTP insurance discounts.⁸⁴ In this regard, Mr Bowen advised that:

The RTA has through its Internet site the capacity to issue a person with a copy of his or her driving record and we are encouraging insurers to use that as a positive indicator. It has not happened yet and the MAA needs to consider next whether we allow an additional discount beyond the current rating factors for a safe driving record—either no demerit points or no traffic offences, as distinct from parking offences, for five years.⁸⁵

- 3.21** The Committee encourages the MAA to consider allowing an additional discount beyond the current rating factors for a safe driving record including either no demerit points or no traffic offences, as distinct from parking offences, for five years.

Recommendation 2

The Committee recommends that the MAA consider implementing an additional discount beyond the current rating factors for a safe driving record.

'Dangerous' vehicles

- 3.22** During the hearing, the Committee noted that Bicycle NSW has proposed that a higher premium should be set for more 'dangerous' cars, such as large cars and cars with bullbars. Mr Bowen explained the intricacies of this issue, as follows:

To some extent that is a question that would need to be put to the Minister because at the moment the premiums are set within a relativity range produced by the MAA. For example, we will make comparisons between sedans, trucks and a whole range of other vehicles. On the basis of the MAA figures, the insurers then have a discretion—quite a wide discretion—either to provide a discount or to add a loading to it. We have undertaken some work looking at four-wheel drives, which is not quite finalised.

⁸³ MAA answers to additional QON, n 20, p 12.

⁸⁴ Minister's Review, n 56, p 16.

⁸⁵ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 25.

To explain our problem, we pick up from our database information on the type of vehicle based on Roads and Traffic Authority [RTA] determinants. We cannot obtain through the RTA directly a separation of four-wheel drives from other types of sedan vehicles apart from the very large ones, such as land cruisers, which fall into the small trucks category. We have been endeavouring to do a data match based on the vehicle identification number [VIN]. Ms Rizzo might be able to explain the process—it starts to become a quite complicated data exercise. The feeling has been—and the research will either verify this or prove it wrong—that with a four-wheel drive the cost of claims to third parties will be higher but to some extent that will be offset by lower claims for vehicle occupants...

Therefore, you are left in a situation where if you look just at the issue of cost in the scheme it may well neutralise itself. I cannot give you the timing because we are still waiting for the RTA to assist us with the data-matching exercise...

Other than from the insurance side we have an interest in this issue wearing our road safety hat. We are very strong advocates of better enforcement to prevent the use of bullbars that do not meet proper design standards or that have protrusions because of the particular danger that they pose to child pedestrians—a child will no longer go up and over but will often be hit at head height and knocked to the ground. That is a very serious injury concern. The other issue that we have identified with four-wheel drives is the danger that they pose when reversing. In fact, they are in this category with a number of other vehicles that are disproportionately at fault in child deaths in driveway accidents because of the poor rear visibility and the inability to see a child out the back. That is a road safety issue that we try to address. For example, we have been working with local councils and Kidsafe on a whole range of educational strategies aimed at driveway accidents in particular.⁸⁶

3.23 Ms Rizzo explained the difficulty with obtaining the data necessary to fully examine this issue:

... To each vehicle is attached a vehicle identification number, which is something like 14 digits long. Unfortunately, each manufacturer attaches its own sort of code so there is no consistency between manufacturers. It is out of that information that you can get a descriptor of which vehicle is a four-wheel drive and other characteristics. But because there is no consistency in VIN numbers you have to set up a very detailed program. The RTA is doing that but the timing is theirs rather than ours. So we are reliant on the RTA looking at the VIN and coming up with some identifier for four-wheel drives in particular because we have had an interest in this for a very long time.⁸⁷

3.24 Mr Bowen reiterated that to introduce a reduction in premiums in relation to 'dangerous' cars would require a decision of the Government:

To introduce premiums based on other than a risk factor would require the Government to make a decision to do so. At the moment the insurer will only adjust the premiums on a risk factor. As I said, from the insurance point of view it may balance out that the risk factor is negligible or indeed negative.⁸⁸

⁸⁶ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 5.

⁸⁷ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 5.

⁸⁸ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 5.

- 3.25** The Minister subsequently advised that the MAA is endeavouring to work with the RTA to obtain data on four wheel drives to enable the MAA to complete a review of the experiences of four-wheel drive vehicles in the first quarter of 2005.⁸⁹
- 3.26** The Committee encourages the MAA in its examination of this issue. The Committee is of the view that, once the data is available and the analysis undertaken, the Minister should consider whether the cost of claims involving four-wheel drive vehicles is higher than other sedans and whether a premium adjustment in this regard is necessary.

Recommendation 3

The Committee recommends that the Minister for Commerce consider whether the cost of claims involving four wheel drive vehicles is higher than other sedans and whether a premium adjustment in this regard is necessary.

Gender

- 3.27** The Minister's Review noted that, despite the significantly lower risk for female drivers of all age groups, there is only limited gender rating by insurers. The Review also noted that the MAA was to pursue this matter further.⁹⁰
- 3.28** The Committee asked the witnesses to provide an update on this issue. Mr Bowen advised that there is at least one example of an insurer providing a premium discount based on gender and that there is scope for other insurers to do more in this area:
- ...As I have indicated, we can identify different risk variables and encourage insurers to rate on that basis but we cannot mandate it. The response from the insurers when we have raised issues of gender is that they believe there would be a response to minimise the amount of the premium by registering vehicles in a woman's name but that the risk would still be the same and you would, over a short period, do away with the gender variants. We have the one example—which I think has now been followed—of AAMI providing a discount for women in the 23 to 25 age bracket given that normally people up to 25 are put on the maximum. I think the NRMA also provides something similar for their customers who have been with them for five years and have no accident claims on their comprehensive for that period. We certainly think there is scope for the insurers to do more in that area.⁹¹
- 3.29** The MAA should further examine the issue of risk rating based on gender, with a view to encouraging CTP insurers in the Scheme to introduce additional risk rating factors.

⁸⁹ Correspondence from the Hon John Della Bosca MLC, Minister for Commerce, to Chair, 26 February 2004.

⁹⁰ Minister's Review, n 56, p 15.

⁹¹ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 25.

Recommendation 4

The Committee recommends that the MAA examine the risk rating system, including rating based on gender, with a view to encouraging CTP insurers to implement additional risk rating factors.

Premiums for buses and coaches

- 3.30** The Committee was advised by the Bus and Coach Industrial Association (NSW) that the high cost of premiums is having a detrimental effect on its members.⁹² The Committee is aware that the MAA has been involved in negotiations in the past with insurers to secure reduced premiums for bus operators. The Committee asked the witnesses to inform the Committee as to the background to this issue and the role that the MAA has played in trying to resolve it. Ms Rizzo explained the situation as follows:

My understanding is that the main issues for the Bus and Coach Association are in the Central Coast area. I previously spoke about the five geographic regions. A couple of years ago we amalgamated the Newcastle region, which was a fairly small region centred around Newcastle, with the Central Coast area. Quite a few buses that previously would have paid a country relativity in that area now have to pay a Newcastle premium, and there is quite a big difference. We have introduced a transition relativity—a transition premium—to allow those buses to pay in between what they would have paid previously and what they must pay now.

Unfortunately, as you would expect, not very many buses are garaged in that area and the claims experience differs significantly between operators. It is my understanding that all companies buy their premiums from the association, which gives them a flat premium. So there would be dissatisfaction among the people who have a better claims experience. In order to try to help them out in a temporary way we have decided to transit those relativities because we appreciate that they are large increases.⁹³

- 3.31** The MAA also stated:

Buses in the Central Coast area have experienced an increase in premiums due to the deterioration in their claims experience over the years. Since October 2000 the claims experience for buses in this area has been found to be similar to Newcastle necessitating the re-classification of Central Coast area as Newcastle instead of Country. The increase in premiums for buses would have been even greater if the 1999 legislation had not been passed.⁹⁴

⁹² Submission, Bus and Coach Industrial Association (NSW), p 1.

⁹³ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 26.

⁹⁴ MAA answers to additional QON, n 20, p 11.

Insurer profits

Statutory obligation to report to the Committee on insurer profits

- 3.32** Section 28 of the Act provides that licensed insurers are required to disclose to the MAA the profit margin on which its premiums are based and the actuarial basis for calculating that profit margin. The MAA is then required to assess that profit margin and the actuarial basis for its calculation and present a report on that assessment annually to the Committee.
- 3.33** As part of the Committee's Fourth Review, the MAA provided its report on insurer profit at the Committee's hearing. Consequently, the Committee was not provided with sufficient time to review the report and constructively question the witnesses on it. The Committee therefore recommended in its Fourth Report that the MAA provide its report on insurer profits to the Committee at least one week in advance of the scheduled hearing.⁹⁵
- 3.34** In correspondence to the Chair in July 2003, Mr Bowen advised that from 2003 the MAA will report on insurer profit as part of its Annual Report.⁹⁶ As foreshadowed, the MAA's Annual Report for 2002/2003 contained a one and a half page report on insurer profit. The MAA has indicated that it has not undertaken any further analysis of insurer profit beyond that included in the Annual Report.⁹⁷
- 3.35** The Committee commends the MAA for introducing this public accountability information in annual reports. The Committee is also of the view however that the inclusion of the report on insurer profit in the MAA's Annual Report does not satisfy the statutory obligation set out in section 28. It is the Committee's interpretation of section 28 that the MAA is required to make a separate and specific report to the Committee each year assessing the profit margins on which premiums are based by each of the licensed insurers and the actuarial basis for their calculation.
- 3.36** The Committee is of the view that the insurer profit report to be provided to it should contain as much detail as possible to enable the Committee form a comprehensive understanding of insurer profits within the Scheme. The Committee considers that the report should contain not only the MAA's assessment of the profit margins and the actuarial basis for its calculation in relation to each of the licensed insurers, but also the data provided to it by the insurers pursuant to section 28(1) that forms the basis of their assessment.

⁹⁵ NSW Legislative Council, Standing Committee on Law and Justice, Report 24, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council*, Fourth Report, December 2002, Recommendation 1.

⁹⁶ Correspondence from Mr David Bowen, General Manager, MAA, to Chair, 30 July 2003. See also the government response to the Committee's Fourth Report which can be viewed on the Parliament's website: www.parliament.nsw.gov.au.

⁹⁷ MAA answers to stakeholder QON, Part 2, n 33, p 6.

Recommendation 5

The Committee recommends that, in fulfilling its statutory obligation under section 28 of the *Motor Accidents Compensation Act 1999*, the MAA present a separate and specific report on insurer profits annually to the Committee.

Recommendation 6

The Committee recommends that the MAA continue to include a copy of the insurer profit report it presents to the Committee, or a summary of it, in the Annual Report to enable wider public access to the information.

Recommendation 7

The Committee recommends that the insurer profit report should contain detail including:

- the MAA's assessment of the profit margins and the actuarial basis for its calculation in relation to each of the licensed insurers, and
 - the data provided to the MAA by the insurers pursuant to section 28 that forms the basis of their assessment.
-

2002/2003 insurer profits and methodology

3.37 The Annual Report states that estimates of profit are taken from the most recent filings submitted to the MAA in April/May 2003 for 1 July 2003 commencement and that profit margins ranged from 7.5% to 9.7% for individual insurers, with a weighted average of 8.5%.⁹⁸

3.38 The Committee asked Mr Bowen to compare the 2002/2003 estimate of insurer profits with previous years. He indicated that there has been a decrease in the amount estimated to go to profit:

There has been a decrease in the amount estimated to go to profit in the insurer premium filings. Each year when the insurer files a premium, they make an estimation of how much of that premium will be required to go to claim payments, how much to expenses and how much is left in profit. The big variable in that is the amount that goes to meet claims expenses because it is making assumptions about how the scheme will continue to develop, so the reduction I talked about is in the insurers' estimates in their filing each year. To determine what actually will go to profit will be after claim payments are made.

⁹⁸ MAA Annual Report, n 8, p 41.

If the insurers have an excess, they will start to release capital and that release of capital becomes their profit on this business. They would not be in a position at this stage to have released any capital from year one other than the claim payments made because of the difficulty—well, not difficulty because you can make an assessment of what the incurred value of the outstanding claim is, but still on year one you are making an assessment as to what the entire amount that may finally be paid out will be and there is still quite a way to go. As I said, whilst it is 50 per cent of claims, it is less than 20 per cent of claim payments, so you still have a big chunk of large claims to pay and until that amount is determined and paid out, you will not know what is left.

I certainly can give you the MAA's estimate of what would be the total incurred value of claims for year one, but it does not translate to actual profit until that comes to fruition, and it will never come to that point; it will either be lower or higher because there will be developments one way or another. However, we can give you that particular figure; that is, premiums less total incurred value, adjusted for investment returns and the like, will give you an indication of what the profit may be. That is the best I can do.⁹⁹

3.39 During the hearing, Mr Grellman noted that determining insurer profits is a complex task:

There is a popular view that the insurance industry does make a lot of money out of this scheme. The Act empowers us to look at the profits they have derived and the prospective profit they may earn from premiums received while files might still be open. That is a complicated and complex arena, but we are working on that with the insurers. There is a fair degree of co-operation between the insurers and our people to try to form a common view as to how profitable this scheme is.¹⁰⁰

3.40 The methodology for determining the prospective profit margin is explained in the MAA's Annual Report, as follows:

Taylor Fry Consulting Actuaries developed the methodology for determining a prospective profit margin that can be used to evaluate premium filings. The methodology is based on a 'representative' insurer and involves three components:

- determining a suitable quantum of total capital (net assets) for a representative insurer
- determining a suitable allocation of insurer capital to NSW CTP
- calculating a profit loading that would service the allocated capital at a fair rate of return.

The representative insurer is based on the average of insurers writing CTP business in NSW. For Taylor Fry calculations, the representative insurer holds capital equal to 58% of CTP technical provisions, which is approximately 66% of outstanding claims provision (OCP). The insurer also holds additional (implicit) capital as a prudential margin within the provision for outstanding claims. The Taylor Fry methodology for allocating capital to the CTP line of business is consistent with APRA's prudential regime.

⁹⁹ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, pp 12-13.

¹⁰⁰ Mr Grellman, Chairman of the Board, MAA, Evidence, 16 February 2004, p 3.

Levels of capitalisation vary widely between individual insurers. The allocation of capital by the representative insurer used in the derivation of the profit margin is around the top end of the range of capital allocations reported by individual CTP insurers.

The indicative range resulting from Taylor Fry's calculations is 4.5%-6% of gross premium for the representative insurer. This range accounts for two levels of correlation between claims costs and stock market returns, being 0% and 10%. A value of 0% reflects the situation where there is no such correlation. In this case the range of profit margins is 5%-5.6%.

As the range of profit margins relates to a representative insurer, they are illustrative only. It is fully expected that profit margins filed by individual insurers may vary, reflecting the insurers' own business structures.

The MAA regards the indicative range of 5%-5.6% of gross premium as the minimum necessary to support CTP in NSW, especially in the current climate in which insurers report a contraction in available capital, increased reinsurance rates and lower investment returns. Therefore the MAA considers that an industry average prospective return of 8.5% is not inappropriate.¹⁰¹

3.41 The Annual Report notes that the insurance industry has challenged the MAA's methodology:

The CTP insurance industry has challenged the MAA's methodology. However, the MAA has not yet been provided with alternative approaches to capital allocation and reasonable profit. The MAA will pursue further discussions with the Industry and APRA to ensure a consistent approach to determining allocation of capital to a line of business an assessment of reasonable return on capital.¹⁰²

3.42 Mr Bowen made the following comments about insurer profits under the old Scheme and the MAA's goal and methodology in relation to insurer profits under the new Scheme:

Under the previous scheme the level of insurer profit as the percentage of gross premium was between 9 and 11—an average of about 10. One of the objectives of the new scheme was to reduce the amount of premium going to insurer profit and, therefore, the Motor Accidents Authority, when reviewing the premium filings, looked at it in the context of what had previously been charged and in the context of what was required to give insurers a reasonable return on capital. Up until the new scheme that had been done really by reference to the insurer indicating to the authority what their shareholder hoped-for return of capital was and translating that to a percentage of the premium.

In 1999 we took the view that this had to be done much more rigorously and not relying upon an insurer indication of what was reasonable and we published a couple of papers that were tabled in earlier Committee reports as to how it went about the assessment of profit and the determination of what was reasonable. We have picked up a methodology that is not without some complexity but does have the advantage that it is used by some United States State regulators as a measure over there. That came up with the result that the minimum level of profit required for this business,

¹⁰¹ MAA Annual Report, n 8, pp 41-42.

¹⁰² MAA Annual Report, n 8, p 41.

when you translate into a percentage of the premium, is about 5.5 per cent of the gross premium.

We have taken the view that in 1999 when the insurers started to write the business under the new scheme there was a considerable degree of uncertainty as to what could be the outcome of the scheme, whether it would reduce the level of claim costs and other costs in the way that was anticipated or, indeed, whether it would be ineffective. So there was an element to which we have allowed the insurers to include a component for that uncertainty but we have been pressing it down ever since. When one starts to look at the trend of this over time, you will see that the percentage of premium going to profit is decreasing.

It is also fair to say that that is now becoming apparent in the marketplace, in that we have increasing competition with the insurers. They are finding the new scheme to be stable and reasonably predictable. Therefore, there is increasing competition and even since our annual report we have had insurers refiling—they are only required to refile once a year mandatorily but they are now voluntarily refiling in between to reduce the amount of premium and that is an indication of their willingness to write, so we would expect that to continue to go down.¹⁰³

3.43 Mr Bowen expanded on the methodology used:

There is a minimum level which generates a return on capital for the insurers. There are a number of variables that go into that but there is essentially a minimum level and there is probably then a maximum level and that is what the policyholder will pay to get coverage. We put ourselves into the position of collective policyholder and have to make a judgment on that. We would like to see those two get closer and closer together but we are having some interesting discussions with the insurance industry, who take the view that our minimum level is too low for them to meet shareholder returns and at this stage we are awaiting a more detailed proposal from the insurers as to an alternative methodology for calculating premium in this class of business.

We are entering reasonably new territory here and I am content to do that, but we are trying to do that in conjunction with some of our other regulatory colleagues, such as APRA. For example, it has not been the practice of the insurance industry to look at returns or the allocation of a return on capital by way of different lines of business. Under the new Commonwealth regulatory regime they are starting to be required to do that. Most of them have plans in place for better analysis of their own business so that we can look at capital allocation by line of business and then make determinations of what is a reasonable return on that.

The delay with the insurers in responding to the MAA methodology has been the knowledge that what they are doing in conjunction with the New South Wales MAA may well act as a precedent for Commonwealth and other regulators to look at returns in other lines of business. I think that is a good thing. It is becoming much more transparent and we are much more able to say, "Yes, this is reasonable" rather than just guessing at it.¹⁰⁴

3.44 The Committee asked the MAA about the methodology used by insurers to record expenses when calculating a profit. Mr Bowen responded as follows:

¹⁰³ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, pp 11-12.

¹⁰⁴ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 12.

The premium filing is constructed from a whole range of different expenses and costs, including acquisition expenses, which are expenses the insurer has to get the product out there, advertised and marketed. We look at that in two ways. One, we look at their trend over time to see whether there have been any changes in that which would require them to justify an increase. We have also in the past looked at it by reference to the amount of their acquisition expenses disclosed in the insurer returns to the Australian Prudential Regulatory Authority, and where they have not been able to directly compare it or where the comparisons show up significant differences we have questioned the insurers on that. It is not a large variation in acquisition expenses between insurers but there are some to do with the different types of strategies they have. For example, the NRMA and GIO sell primarily through shopfront or through existing customers, and AAMI sells mainly through the telephone, whereas some others like QBE and Allianz sell mainly through agents and brokers. That will have a bearing on their acquisition expenses profile and therefore the amount allowed for it in the premium filings.¹⁰⁵

- 3.45** As discussed in paragraph 2.6, Mr Bowen has indicated that from this year the MAA will concentrate on comparing the trends in the new Scheme rather than comparing the new Scheme to the old Scheme. Mr Bowen indicated that this would be done in relation to insurer profits as well:

For us, from the annual report ending this financial year, what we believe is more important is to look at trends under the new scheme, and that will include a trend in what is happening with profit levels.¹⁰⁶

Recommendation 8

The Committee recommends that the MAA examine the trends under the Motor Accidents Scheme since the 1999 amendments to the Scheme in relation to insurer profits and include that information in its annual insurer profit report to the Committee.

¹⁰⁵ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 15.

¹⁰⁶ *ibid.*

Consumer attitudes to CTP Green Slip requirements

- 3.46 During the Committee's Fourth Review, the Committee was advised that the survey of consumer attitudes to CTP insurance found there was low awareness of the Green Slip Helpline and the website services to assist vehicle owners to "shop around" for the best prices.¹⁰⁷ At that time, the MAA indicated that it was examining strategies to address this issue.
- 3.47 During this Fifth Review, the Committee asked the MAA what strategies were identified and, if they have been implemented, whether they have been effective: The MAA responded as follows:

The MAA is continuing to monitor use of the Green Slip Helpline and the website services. The MAA Annual Report 2002-2003 indicates that there was a 56% increase in the overall usage of MAA Green Slip premium information services during 2002-03 compared with the previous year.

The MAA in conjunction with the Roads and Traffic Authority (RTA), is currently reviewing the manner in which information about the MAA's Green Slip 'shop around' services is provided to motorists with registration renewals.

CTP insurers have also introduced e-Green Slips, with the last insurer to offer this service rolling out e-Green Slips in March 2004. At the present time approximately 200,000 e-Green Slips are sold each month and the MAA is working with insurers to increase this volume. The RTA is also promoting electronic registration and the RTA web site provides a link to the MAA web site for Green Slip price comparisons. The MAA web site provides links to CTP insurer web sites to facilitate the purchase of e-Green Slips.¹⁰⁸

Insurance gap between CTP insurance and public liability insurance

- 3.48 The Bar Association raised with the Committee the issue of the insurance gap between CTP and public liability insurance, as follows:

In short, until 1 January 1996, all accidents that arose out of the use or operation of a motor vehicle were covered by the CTP policy. However, with amendments to the definition of injury contained in the *Motor Accidents Act 1988*, the coverage provided by the CTP policy effectively shrank so that it only answered claims for injury that arose out of the use or operation of the vehicle and which involved either the driving of the vehicle, a collision with the vehicle, the vehicle running out of control or a defect in the vehicle. It has thus become possible for there to be accidents arising out of the use or operation of a vehicle which do not fall within the scope of the *Motor Accidents Act 1988* or its successor, the *Motor Accidents Compensation Act 1999*. Most public liability insurance policies still maintain an exclusion clause for accidents that arise out of the use or operation of a motor vehicle. Thus there is a gap...

¹⁰⁷ Fourth Report, n 95, p 7.

¹⁰⁸ MAA answers to additional QON, n 20, pp 1-2.

The MAA provides literature to the public on trailers to the effect that trailers are covered under the CTP scheme. Is it not the case that there is no CTP coverage over a trailer that is being lifted preparatory to being attached to a motor vehicle? If the jockey wheel on a trailer collapses causing injury while a trailer is being pushed towards a vehicle, would there be any CTP coverage? Does the trailer owner risk being without insurance cover, even with a public liability policy?¹⁰⁹

3.49 This issue was also examined during the Committee's Fourth Review, at which time the MAA advised that the matter was raised at the May 2002 meeting of the Motor Accidents Council. The MAA also advised that, through the Motor Accidents Insurers Standing Committee, it referred the matter to the Insurance Council of Australia (ICA) and was being examined by the ICA's Liability Working Party.¹¹⁰

3.50 The Committee drew the MAA's attention to the Bar Association's ongoing concerns during this Fifth Review. The MAA commented as follows:

The MAA has drawn to the attention of the Insurance Council of Australia, the gap in public liability cover raised by the Bar Association. The MAA has been advised that the ICA issued a General Circular to insurers on 28 November 2002, inviting companies to review their motor or personal liability cover under home contents to provide gap insurance. The regulation of public liability insurance is not a responsibility of the MAA.¹¹¹

3.51 While the Committee is aware that the regulation of public liability insurance is not the responsibility of the MAA, it is of the view that this issue is relevant to the exercise of the functions of the MAA and within the portfolio responsibility of the Minister for Commerce. In this respect, the Committee encourages the Minister to examine this issue in further detail and, in particular, to consider whether members of the public may be under the impression that their CTP Green Slip insurance provides full cover in these circumstances.

Recommendation 9

The Committee recommends that the Minister for Commerce consider the circumstances where accidents arising out of the use or operation of a vehicle fall outside the scope of the *Motor Accidents Act Compensation 1999* and review:

- The significance and likelihood of such circumstances occurring
 - Whether or not members of the public may be perceive that their CTP Green Slip insurance provides full cover in these circumstances and
 - Mechanisms to cover the gap between CTP Green Slip and public liability insurance
-

¹⁰⁹ MAA answers to stakeholder QON, Part 2, n 33, p 16.

¹¹⁰ Fourth Report, n 95, p 41.

¹¹¹ MAA answers to stakeholder QON, Part 2, n 33, p 16.

GST – transitional arrangements

3.52 In the Committee's Third Report, tabled in February 2002, the extension of the transitional arrangements under the GST legislation for CTP insurers beyond the initial three years was discussed.¹¹² At that stage a decision on whether to extend the period had not been made by the Federal Government. The MAA provided the Committee with an update of that issue:

The Federal Government did not extend the GST transitional arrangements. From 1 July 2003, Compulsory Third Party insurers issue a Tax Invoice Green Slip for business vehicles. The Tax Invoice Green Slip costs about 7 percent more than the equivalent ordinary Green Slip. The main reason for this increase is that insurers will no longer receive a tax credit on those claims against business vehicles where the business has claimed an Input Tax Credit. Also included in the increased price are the administration costs incurred by insurers in implementing the final stage of the GST legislation. NSW introduced differential pricing so that only those who can claim an Input Tax Credit are required to pay the higher premium. Private individuals continue to receive the standard Green Slip.¹¹³

¹¹² NSW Legislative Council, Standing Committee on Law and Justice, Report 19, *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council*, Third Report, February 2002, pp 80-82.

¹¹³ MAA answers to additional QON, n 20, p 13.

Chapter 4 Claims

This chapter examines the exercise of the functions of the MAA and the MAC in relation to claims made under the Motor Accidents Scheme.¹¹⁴ It examines several issues that arose during the course of the Fifth Review, including awareness and availability of accident notification forms, establishing loss of income by casual workers, denial of liability for claims and exemptions from the Claims Assessment Resolution Service.

Accident notification forms

Awareness and availability of accident notification forms

- 4.1 During the hearing the Committee raised the issue of the level of awareness of the accident notification forms (ANFs) among medical practitioners and queried whether the MAA has conducted a recent analysis of the level of awareness. Mr Bowen advised that a survey of medical practitioners would be undertaken this year:

No, we have not done a further survey of medical practitioners. It is our intent to do a follow up one this year. With the level at which accident notification forms are being lodged it gives us some contentment that they are out there and they are being used by medical practitioners and we know we have issued over 500,000 of them through GP offices.¹¹⁵

- 4.2 The Committee also queried whether ANFs were available in hospital accident and emergency departments. Mr Bowen advised that this is not currently the practice:

No. A person who has been admitted to hospital and in acute care is likely to make a full claim and is likely to have a serious enough claim that they may go straight past the accident notification form and submit a full claim.¹¹⁶

- 4.3 The Committee asked the witnesses whether it would be valuable to have ANFs and prescribed medical certificates available in accident and emergency departments. Mr Bowen stated that:

The certificates cannot be signed by practitioners in accident and emergency, it requires an examination to be conducted. So they are not going to be signed by accident and emergency doctors, it would require someone to visit a GP.¹¹⁷

- 4.4 The Committee asked Mr Bowen whether there was a need to improve awareness of ANFs and whether there was continuity of information between emergency departments and GPs. An example was given of a situation where somebody was taken to hospital in an ambulance

¹¹⁴ The exercise of the functions of the MAA in relation to the payment of claims is examined in Chapter 5.

¹¹⁵ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 16.

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

following a motor vehicle accident and they are then referred to their GP. Mr Bowen responded that:

The visit to hospital will be recorded and that information can then be included in the claim form. In terms of awareness—and this is really picking up from what our last survey indicated—with people who attend upon individual GPs, some individual practitioners usually do not have any problem at all because the GP is aware of the existence of the accident notification form and will make use of it. Our primary concern is with people who attend medical clinics where the form may be kept in a drawer in the front desk and there is a large number of GPs working through the clinic and it may be under-utilised in those circumstances.¹¹⁸

4.5 The Committee enquired whether people in country areas, who may not have access to a GP but who may present to hospital for treatment, had no access to ANFs. In response, Mr Bowen explained that over 500,000 ANFs have been distributed in pads to cover “...every practice and every individual doctor in the State.”¹¹⁹

4.6 The Committee also asked Mr Bowen, whether the MAA would be prepared to include staff in accident and emergency departments, even as a sample study, when doing future analysis of the levels of awareness. Mr Bowen responded that:

We would certainly be prepared to talk to them about whether they want to have another form or not to hand out in what is often quite a hectic place. That is a matter that would be theirs to determine. I am saying we will be happy to make the offer for it to be available. For people who are admitted and have serious injuries we have very good liaison, for example with the social workers, in all of the spinal cord units and the brain injury units to make sure that injured people are aware of what the provisions of the scheme are and how they can access it.¹²⁰

4.7 The Committee is concerned that people in country areas who have difficulty accessing a GP may also have difficulty obtaining ANFs if they are not readily available in other medical services such as hospital accidents and emergency departments. The Committee considers that it is important for the MAA to conduct a survey and analysis to determine the level of awareness of and access to its forms and guidelines in country areas in New South Wales.

Recommendation 10

The Committee recommends that the MAA undertake a survey and analysis to determine the level of awareness of, and access to, its forms and guidelines in country areas in New South Wales.

4.8 The Committee also considers that the MAA should give consideration to making ANFs and any other pertinent documents available in accident and emergency departments of New South Wales hospitals.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

Recommendation 11

The Committee recommends that the MAA give consideration to making Accident Notification Forms and any other pertinent documents available to all accident and emergency departments of New South Wales hospitals, particularly in country areas.

Maximum payment for accident notification forms

4.9 Section 51 of the Act requires the MAA to review each year the maximum amount of treatment expenses for injured persons that insurers are required to pay on an ANF. The maximum amount of \$500 has been the same since 1999.

4.10 The Committee notes that the Minister's Review identified a potential increase in this maximum amount because insurers often pay more than the maximum:

Given insurers have voluntarily made ANF payments in excess of \$500 in over 1,000 matters, there may be a case for increasing the maximum amount payable on an ANF, and the MAA will review this in consultation with the insurers and the legal profession.¹²¹

4.11 The Committee asked the witnesses about the conclusions drawn from the last review of the maximum amount undertaken by the MAA and, in particular, whether the current figure was considered to be adequate. Mr Bowen responded that the \$500 figure was viewed as adequate citing as one of the reasons that the insurers do often pay more than the maximum as noted by the Minister's Review:

We consider it is adequate for two reasons: one is that the actual amount paid out on accident notification forms on average is less than that and so it is not pushing towards that threshold; and secondly, the insurers have, as a matter of practice, paid above the \$500 amount if it will complete the matter on the accident notification form without requiring a full claim to be lodged. So if a matter may be finalised for say \$800 it is the practice of the insurers to make the payments up to that amount simply on the accident notification form, even though they are not required to do so, without requiring a full claim to be lodged. So the two points in conjunction satisfy us that at the moment it is okay.¹²²

Claims Register

4.12 The Annual Report refers to the in-house management of the Claims Register noting that the register's management had previously been outsourced.¹²³ The Committee asked the MAA why the decision to move from outsourcing the management of the claims register to in-house management was made. In response the MAA stated:

¹²¹ Minister's Review, n 56, p 28.

¹²² Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 17.

¹²³ MAA Annual Report, n 8, p 14.

In 1989/1990, when the Claims Register system was developed, the MAA was a very small organisation with no internal IT resources. There was, at the time, no alternative other than to outsource the development and ongoing management of the system. By July 2001, it was becoming clear that the operating environment upon which the system was built required review. In particular there was increasing difficulty retaining expertise in the older technologies.

With the outsourcing contract up for renewal in June 2002, the feasibility of managing the system in-house was examined as a part of the application review process. At this point in time, the MAA had an effective internal IT team, capable of supporting the new technologies and managing the application. When it became apparent that the management of the system could be absorbed by the Business Systems and Statistics areas of the MAA without any need for additional staff resources, the decision was made to terminate the outsourcing contract, saving the MAA over \$200,000 per year.¹²⁴

4.13 The MAA advised that the in-house management of the Claims Register has achieved cost savings, maintenance of a high level of service and improved response times for queries:

The redevelopment of the system and its handover to the MAA has been subject to a post-implementation audit by Ernst & Young. In the 18 months that the system has been managed in-house there have been no hidden additional or unexpected costs, so the estimated savings have been realised in full.

An important feature of the former outsourcing contract was the very high level of service provided by the contractor to the MAA and other users of the system (e.g insurers). This level of service has been maintained, or in many cases improved, since the system was brought in-house.

A key advantage of running the system in-house is that MAA staff have a much more detailed understanding and control of the system. This allows for improved response times for any queries relating to the information on the system, and provides more flexibility in the way the system can be integrated with other key MAA information systems.¹²⁵

¹²⁴ MAA answers to additional QON, n 20, pp 21-22.

¹²⁵ *ibid.*

Review of the Claims Handling Guidelines

4.14 The Claims Handling Guidelines are described in paragraphs 2.33-2.34. The Committee asked the witnesses whether the review of the Claims Handling Guidelines has occurred. Mr Bowen responded that the review was currently being undertaken:

Yes, the review is current. As I indicated in response to one of the earlier questions, we have completed a further audit of the guidelines and we can now table the report. We cannot table it today, I am sorry, but we will provide it to the committee. As a result of that further audit we propose some amendments to the claims handling guidelines. We sent those out to various stakeholders for comment in December. We have received responses from the Insurance Council and the Bar Association, and we are still awaiting a response from the Law Society at this stage.¹²⁶

4.15 The Annual Report states that, as a result of the Claims Handling Guidelines audit conducted this year, the MAA will make a number of changes to the guidelines.¹²⁷ The MAA provided a summary of changes proposed by the MAA which have been included in the consultation draft Claims Handling Guidelines:

New requirements proposed to be added to the Guidelines are as follows:

- inclusion of a 'General Principles' section for insurers' consideration in their management of claims.
- the inclusion of additional requirements for the handling of paediatric catastrophic claims when insurer denies liability or is awaiting further information for liability determination.
- inclusion of a specified time frame for the payment of approved accounts associated with an ANF.
- inclusion of a specified time frame for the insurer to provide a copy of the police report to the claimant.
- insurer to provide reasons for the allegation of contributory negligence as well as the percentage.
- insurer to advise the claimant when the claimant has satisfied due inquiry and search for unidentified Nominal Defendant claims.
- insurer can communicate directly with a legally represented claimant when advising about the details of a medical appointment or in respect of a complaint or dispute notified to the insurer.
- Insurer to advise the claimant of their decision not to pay expenses within specific time frames including reasons for their decision.

¹²⁶ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 17.

¹²⁷ MAA Annual Report, n 8, p 15.

Modifications to existing requirements proposed:

- insurer to request (if necessary) medical evidence following receipt of a claim form within 10 days.
- clarification when an insurer may directly contact legally represented claimants.
- insurer to pay all reasonable and necessary expenses within 20 days following receipt of accounts (consistent with TRAC Guidelines).
- insurer to provide treatment provider reports to claimants, not just treating doctor reports.
- increased promotion of the insurer's internal dispute resolution procedure for treatment disputes.

The following requirement is proposed to be **deleted**:

Reference to the Insurance Enquiries and Complaints Commission as an external body available to deal with CTP complaints. The MAA has been advised that the IEC's terms of reference were amended and no longer applied to CTP insurance.

Inconsistency between Regulations and Claims Assessment Guidelines

- 4.16** The Claims Assessment Guidelines are explained in Chapter 2 (paragraphs 2.36-2.37). Section 97 of the Act states that the MAC may refer any inconsistency between the Regulations and the Claims Assessment Guidelines to the Committee and the Committee may review and make recommendations about the resolution of any such inconsistency.
- 4.17** The MAA has advised that to date, the regulation making power has not been exercised. Claims Assessment and Resolution Service assessment procedures have been addressed solely in the Claims Assessment Guidelines. Consequently, the question of any inconsistency between the Regulations and the Guidelines has not arisen.¹²⁸

Claims made by cyclists

- 4.18** The Committee informed the witnesses that Bicycle NSW is concerned that not all Green Slip insurers would pay a cyclist injured by a compulsory third-party insured driver. In response Mr Bowen commented on the issue of liability and the number of claimants under the scheme who were injured as cyclists:

I am not sure whether we have it with us but we can certainly provide you with details on the number of claimants who are bicyclists and the circumstances and numbers in which liability is not found. I do not see any reason why that would vary that much from the rest of the scheme. Liability is not found completely in a very small number of cases. Be it either a pedestrian or a cyclist and not have the driver at fault really means it is literally a case where the pedestrian has run out onto the road in front of a

¹²⁸ MAA answers to additional QON, n 20, p 24.

car and the driver could not do anything. The same with a cyclist. There would be a number of matters where there is a reduction in the amount of compensation paid because of contributory negligence. But we can find the actual figures for that for whatever period you like. I cannot see that there would be any change in the trends for that at all.¹²⁹

4.19 Following the hearing the MAA provided further details of claims made by cyclists:

Insurers have rejected liability in 18% of claims made by cyclists and have alleged contributory negligence in 10% of claims. Insurers allege contributory negligence in those cases where the claimant is partially at fault in the accident or did not take other road safety precautions e.g. not wearing a helmet. The rates are higher than for vehicle passengers but lower than for pedestrians (27% rejected and 17% contributory negligence).¹³⁰

4.20 In its submission to the Committee, Bicycle NSW noted that section 50(3) of the Act requires insurers to accept provisional liability in cases where the injured person is a pedestrian or a passenger of a motor vehicle and that *in practice* this is extended to include cyclists by at least some insurers in New South Wales.¹³¹ Bicycle NSW queried whether inclusion of cyclists by insurers is standard practice or required practice. Mr Bowen shed some light on this issue at the hearing in response to a question asking whether all insurers are in the practice of extending provisional liability to cyclists:

They certainly should. We have not had any complaints that I am aware of. Complaints about the insurer failing to accept that provisional liability are usually brought to our attention either directly by the claimants or by their solicitor. I cannot recall that we have had any—if we have had some, it is not very many...They are obliged to accept provisional liability on the accident notification form for the early payment of treatment and, as I have indicated, I am not aware that that is not occurring at all.¹³²

4.21 Mr Bowen also explained the rationale for insurers accepting provisional liability in these circumstances:

The rationale is that you can significantly improve the health outcome by early treatment and that it is preferable that the insurer pay up to the first \$500 while they further investigate the claim so that the person can get that treatment even though at a later point they may deny liability once they have investigated the circumstances of the accident.¹³³

Establishing loss of income by casual workers

4.22 The Committee raised the issue of difficulties faced by casual workers establishing loss of income for claims purposes, particularly those working for personnel placement agencies who

¹²⁹ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 4.

¹³⁰ MAA answers to QON, n 23, p 1.

¹³¹ Submission, Bicycle New South Wales Inc, p 2.

¹³² Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 6.

¹³³ *ibid.*

are sent on a range of short term employment engagements. The Committee queried whether this issue had been brought to the attention of the MAA. In response Mr Bowen stated:

It will not be directly addressed through the claims handling guidelines which are focused primarily upon the insurers' procedures and communications and the like but we can have a look to what extent it has been raised as an issue with us. I cannot answer substantively as to whether or not it is a problem at this stage.¹³⁴

4.23 The MAA later advised that it does not have any information that would indicate claimants who are casual workers are precluded from lodging claims for economic loss:

The MAA does not have any information that would indicate claimants who happen to be casual workers are not entitled to lodge claims for economic loss. The MAA's Compliance Unit conducted Claims Handling Compliance Audits between June 2003 and October 2003. The audits consisted of on-site inspections of the CTP insurers: GIO, Zurich, AAMI, QBE, NRMA, CIC Allianz and Allianz. A total of 383 claim files were audited, made up of 90 Accident Notification Forms (ANFs) and 293 full claims. The 2003 audit results indicated that insurers were complying with their obligations in making reasonable offers of settlement (Sections 7.2 & 7.3 of the Claims Handling Guidelines).

The MAA auditors did not find any evidence that insurers attempted to avoid or reduce any heads of damages in offers of settlement, including past and future economic loss, if the claimant was entitled to these components. Furthermore, of the 80 complaints received by the MAA in 2002-2003, which related to the way insurers managed claims, none of these complaints related to inappropriate or unjust offers of settlement made by insurers to claimants.¹³⁵

4.24 The MAA indicated that it would be prepared to investigate any complaint from a complainant in relation to this issue:

Nevertheless, the MAA would be prepared to investigate any information from claimants wanting to make such complaints, on the basis that they consider insurers have unfairly treated them in this area.¹³⁶

4.25 The Committee remains concerned about the potential difficulties faced by casual workers establishing loss of income in relation to claims with CTP insurers. The Committee is of the view that some investigation into this issue is required. The MAA should work with the licensed CTP insurers to examine the experiences of casual workers in making claims and identify whether they face any difficulties in establishing loss of income for claims purposes.

¹³⁴ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 17.

¹³⁵ MAA answers to QON, n 23, pp 3-4.

¹³⁶ MAA answers to QON, n 23, p 4.

Recommendation 12

The Committee recommends that the MAA work with the licensed CTP insurers to examine the experiences of casual workers in making claims, in order to identify whether they face any difficulties in establishing loss of income for claims purposes.

Denial of liability for claims by insurers

Deemed denial of liability

- 4.26** Section 81(3) of the Act provides that if an insurer fails to admit or deny liability for a claim within three months of being given notice of the claim, the insurer is taken to have denied the claim. Once the claim is deemed to have been denied, the claimant can apply for the matter to be exempted from the CARS (exemptions from CARS are examined in paragraphs 4.35-4.38).¹³⁷
- 4.27** In its submission to the Committee APLA claimed that the Principal Claims Assessor (PCA) arbitrarily allows insurers an extension of time in which to make decisions on liability. APLA submitted that once the three months have expired liability ought to be deemed as having been denied thus allowing the matter to be exempted from CARS and that the insurer should not be given an extension of time.¹³⁸
- 4.28** In response to a question whether the MAA has a written policy or directive allowing the PCA to arbitrarily extend the period in which an insurer is supposed to make a decision in relation to liability, the MAA stated:
- In the assessment of matters, the Principal Claims Assessor is undertaking a statutory function. Accordingly, the MAA does not issue directives regarding how the assessment of matters is dealt with. The Principal Claims Assessor decides each case on its merits.¹³⁹
- 4.29** The Committee took up this issue with the MAA, querying whether the legislation authorises an extension of this three month period in any circumstances. The Committee also asked the MAA whether it was aware of any claims in which the PCA has allowed an extension of time. In response, the MAA stated:

Section 81(1) of the *Motor Accidents Compensation Act 1999* places a duty upon insurers, to give written notice to the claimant as expeditiously as possible whether the insurer admits or denies liability for the claim, but in any event within 3 months after the claimant gave notice of claim under section 72.

¹³⁷ Pursuant to sections 91 and 92 of the *Motor Accidents Authority Act 1999*.

¹³⁸ APLA, n 31, p 8.

¹³⁹ MAA answers to stakeholder QON, Part 1, n 33, p 9.

Section 81(3) of the Act deems an insurer to have denied liability upon the expiration of a period of 3 months from the claimant's notice of claim. Section 81(4) provides that nothing prevents an insurer from admitting liability after having given notice denying liability or after having failed to comply with this section.

This means that whilst an insurer who has failed to provide the claimant with written notice within the 3 month period is taken to have denied liability, the insurer is however permitted at any subsequent time, to admit liability for the claim.

The Principal Claims Assessor (PCA) in undertaking an exemption assessment must consider both the application and reply provided by parties to the claim, when deciding whether the prerequisite circumstances exist to grant the exemption. In undertaking an assessment for the purposes of an exemption on the basis of stipulated circumstances, it is the parties' demonstration of the existence of those circumstances at the time of the conduct of the assessment that is relevant.

The practical effect of the operation of s81(4) is that no impediment exists to an insurer, during the course of the preparation of documentation for an exemption assessment, exercising its right to now admit liability, having previously either denied liability or failed to comply with the section (i.e having been deemed to have denied liability for the claim). The PCA has no power to extend time under s81(1).¹⁴⁰

- 4.30** The Committee is concerned about the claims made by APLA and is interested to establish whether there is any merit to the claim. The MAA should further examine this issue and advise whether or not there have been any claims in relation to which the PCA has allowed an extension of time in which to make a decision on liability. The MAA should provide the Committee with relevant data or other information to substantiate its findings.

Recommendation 13

The Committee recommends that the MAA examine whether or not the Principal Claims Assessor has permitted any insurers an extension of time to make a decision on liability. The MAA should provide the Committee with relevant information, including data on when decisions on liability have been made, to substantiate its findings.

Assessment of whole person impairment where liability is denied by an insurer

- 4.31** In cases where liability has been denied an application can only be made to the Medical Assessment Service for the assessment of whole person impairment (WPI) with the consent of an insurer. In its submission to the Committee APLA expressed concern that insurers, as a matter of course, refuse to provide this consent and that this leads to unnecessary delay.
- 4.32** In response to this issue the MAA stated that it will encourage insurers to consent to a Medical Assessment Service assessment of WPI in a timely manner:

In cases where liability has been denied and there is a dispute as to whether the extent of permanent impairment exceeds the threshold, the MAA will approach licensed insurers in the NSW motor accidents scheme with a view to encouraging them to

¹⁴⁰ MAA answers to additional QON, n 20, p 25.

consent to a MAS assessment of permanent impairment no later than when the matter is brought to Court.¹⁴¹

Claims Assessment Resolution Service

- 4.33** The Claims Assessment Resolution Service (CARS) is an independent claims assessment and dispute resolution service. All disputed claims must go to CARS before they can go to court. CARS will assess the claim or find the matter not suitable for assessment, in which case an exemption certificate is issued, which allows the matter to proceed to a court hearing.
- 4.34** A claim may be referred for assessment by CARS by either the claimant or the insurer. Generally, claims can only be referred after 2 months have elapsed since the insurer made an offer or settlement to the claimant.¹⁴² Claims may, however, be referred for assessment at any time if the insurer has wholly denied the claims or the claim is in respect of the death of a person or it is a claim in respect of an injury which has not stabilised within 3 years of the accident.

Exemptions

- 4.35** Section 92 of the Act allows for a claim to be exempt from CARS assessment if it is a claim identified as exempt under the Claims Assessment Guidelines, or the claims assessor determines that it is not suitable for assessment. Applications for exemption can be made at any time subject to section 91, the requirements of which are explained in paragraph 4.34. The Claims Assessment Guidelines permit exemptions where the insurer denies liability for the claim (see paragraph 4.26 for more detail on this issue), where the insurer makes an allegation that a claim is a false or misleading claim or the claimant lacks capacity.¹⁴³
- 4.36** The MAA advised that as at 12 November 2003, 2,165 matters were deemed exempt based on 2,618 grounds. Of these, 1,744 were mandatory grounds and 874 were discretionary grounds.¹⁴⁴
- 4.37** APLA's submission raised an issue regarding the time limit for an exemption from CARS:

Cases cannot be resolved expeditiously if a decision by the Principal Claims Assessor (PCA) in relation to an application for an exemption from CARS is unreasonably delayed due to the operation of Section 91 of the MACA. Section 91 provides, in effect, that an application for an exemption from CARS cannot be made:

(a) Unless 2 months have elapsed since the insurer made an offer of settlement to the claimant under Section 82, or

(b) Unless the period within which the insurer was required to make such an offer of settlement has expired and the insurer has failed to make an offer.

¹⁴¹ MAA answers to stakeholder QON, Part 1, n 33, p 10.

¹⁴² *Motor Accidents Compensation Act 1999*, section 91.

¹⁴³ Motor Accidents Authority NSW, *Claims Handling Guidelines*, para 4.1.

¹⁴⁴ MAA answers to stakeholder QON, Part 2, n 33, p 12.

It is inevitable that a matter will be exempted from CARS where the claimant is an infant, where the claimant has suffered severe brain injury and is of unsound mind or where the claimant resides overseas. However a decision in relation to whether or not the matter ought to be exempted from CARS cannot be made until the time set out in the above Section 91 has elapsed. This appears nonsensical. It is APLA's submission that where it is inevitable that a matter will be exempted from CARS an application for an exemption ought to be capable of being made at any time, so as to avoid unnecessary delay.¹⁴⁵

- 4.38** The Committee raised this issue with the MAA and asked whether matters which will inevitably be exempt from CARS ought to be deemed exempt at the earliest possible time. The MAA agreed that this should be the case and also advised that it "considers it appropriate to make such a recommendation to the Minister for Commerce when proposals for legislative reform are next considered."¹⁴⁶ The Committee considers that this situation should be rectified promptly and the Act should be amended to ensure that matters which will inevitably be exempt from CARS pursuant to sections 91 and 92 of the Act be made exempt as soon as possible.

Recommendation 14

The Committee recommends that the Minister for Commerce seek to amend the *Motor Accidents Compensation Act 1999* to ensure that matters which will inevitably be exempt from the Claims Assessment Service pursuant to sections 91 and 92 be deemed exempted at the earliest point in time.

Late claim disputes

- 4.39** The MAA advised that as at 12 November 2003, CARS has finalised 206 Late Claim Disputes of which 88 (43%) were settled or withdrawn and 118 (57%) were assessed. Of the 118 assessments, 92 matters (78%) that were rejected by the insurer for late lodgement were accepted by an assessor. Insurers therefore have been successful in 22% of these matters.¹⁴⁷

General assessments

- 4.40** In its submission to the Committee, the Bar Association sought information about the number of awards made by CARS assessors in matters involving general assessments and the damages awarded in relation to those assessments. In response the MAA stated:

The MAA can provide global data regarding general assessment determinations. Data to 31 October 2003 indicates that 249 determinations involving general assessments have been made with \$ 14.6 million awarded in damages.¹⁴⁸

¹⁴⁵ APLA, n 31, pp 5-6.

¹⁴⁶ MAA answers to stakeholder QON, Part 1, n 33, p 5.

¹⁴⁷ MAA answers to stakeholder QON, Part 2, n 33, p 13.

¹⁴⁸ *ibid.*

4.41 The Bar Association also sought information about the number of CARS assessments that are currently lodged but not allocated to an assessor and the number of those that are delayed pending receipt of a MAS determination. In response the MAA advised as follows:

1,615 CARS general assessment matters have been lodged but not yet allocated for determination. Of these, 535 are not yet due for allocation. The remainder have been reviewed and the allocation has been deferred as the matters are not yet ready to proceed to assessment. The Claims Assessment Guidelines provide several grounds upon which deferrals can be made, including where there is a pending MAS assessment. A breakdown of this data cannot currently be provided.¹⁴⁹

4.42 The MAA also noted that the limited number of matters subject to CARS or court determination was insufficient to enable a suitable survey of contested claims involving contributory negligence:

...the limited number of matters which had been subject to CARS/court determination was insufficient to enable a suitable survey of contested claims involving contributory negligence. Given the number of matters now progressing through CARS, the MAA proposes to include the survey in its 2004 activities.¹⁵⁰

Medical Assessment Service

Review applications

4.43 The Bar Association sought data on the percentage of review applications lodged by claimants and insurers, the number of applications granted review by the MAS Proper Officer and the outcome of those reviews. In response the MAA provided the following information:

Review Applications	Lodged by insurer	Lodged by claimant's legal representative	Lodged by unrepresented claimant	TOTAL
Total lodged as at 14 Nov 2003	129 (15%)	741 (81%)	40 (4%)	910
Total considered as at 14 Nov 2003	73	447	27	547
Accepted for review	21 (32%)	42 (65%)	2	65
Acceptance rate	29%	9%	7%	12%
Outcome changed by review panel?	Yes – 10 No – 6 Pending - 5	Yes – 15 No – 13 Pending – 14	Yes – 0 No – 2 Pending - 0	Yes – 25 No – 21 Pending – 19

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

Consistency of medical assessors

4.44 In its submission to the Committee, APLA advised that a survey of its members indicated a concern that some members of the MAS panel may be biased or inconsistent in their approach to the assessment of WPI.¹⁵¹ The MAA advised the Committee that it is unaware of the perceived bias and inconsistency and provided the Committee with the following information about the appointment and training of its assessors:

MAS assessors are independent and subject to guidelines detailing the practice and procedure to be employed whilst undertaking assessments. The guidelines have been developed in consultation with the relevant medical colleges including the Royal Australasian College of Surgeons, Royal Australian College of General Practitioners, and Australian Orthopaedic Association.

Regarding the process for appointment of assessors for permanent impairment, the Northern Clinical School of Sydney University provides the Motor Accidents Authority with a list of names of medical practitioners who attend the training for the American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition (“the Guides”). MAS then calls for expressions of interest from these participants.

Regarding the process for appointment of assessors for treatment disputes, MAS approaches specific medical and allied health practitioners who are identified by their professional standing and expertise in a specific area of clinical practice.

All practitioners who express interest in becoming a MAS assessor are required to fill in an application form providing details of:

1. Their post graduate qualifications, and for permanent impairment, evidence of approved training
2. Their speciality,
3. Number of years of clinical practice,
4. Details of the number of medico-legal reports provided in the past 2 years in relation to patients under their care, referred for opinion by insurer, referred for opinion by solicitor;
5. Specific details of the insurer, organisation or legal firm if the any of these account for more than 20% of their current medico-legal referrals,
6. Evidence of continuing professional education,
7. Details of current Registration and eligibility to practice in NSW,
8. Readiness to conduct assessments for MAS and provide reports within set time frames, and

¹⁵¹ APLA, n 31, p 6.

9. Agreement to attend training sessions as requested by MAS.

In addition:

1. All potential Permanent Impairment assessors are required to sit and pass an examination set for MAS by the course trainers in the specific modules that they have attended at the Northern Clinical School
2. All potential assessors must agree to abide by the Code of Conduct (See Attachment 1) and Terms and Conditions of Engagement (See Attachment 2) under section 59 of the Act. The relevant medical colleges and professional associations are contacted to screen for professional competency and any complaints or misdemeanours.
3. All applications are screened according to set criteria and then presented to the MAS Users Group who must agree to their appointment. The users group includes representatives of the NSW Bar Association, the Law Society of NSW, CTP Insurers, and community representatives.
4. Upon appointment all new assessors must attend a compulsory induction session covering the MAS Code of Conduct, procedural fairness, report and formats, and general MAS procedures.¹⁵²

4.45 The Code of Conduct for Medical Assessors and the Terms and Conditions of Engagement for medical assessors, referred to in the above quote, are set out as Appendix 3. The MAA also described the way the appointment of assessors is reviewed:

Regarding review of the panel of MAS assessors, in 2003 MAS reviewed the appointment of all assessors and offered appointment for a further three year term to all those who still met the required criteria. In reappointing medical assessors, MAS used an assessor performance management system which comprises key performance indicators on which all assessors are measured:

1. Timeliness –
 - a. Timeliness of submission of draft reports
 - b. Timeliness of submission of amendments to reports.
2. Accuracy
 - a. Number of reports on which amendments are requested
 - b. Average number of amendments requested per report
 - c. Types of errors
3. Reviews
 - a. The proportion of applications for a review of a medical assessment which were accepted (the Proper Officer determined that there was reasonable cause to suspect that the assessment was incorrect in a material respect)
 - b. The number of accepted review applications resulting in one or more certificates being revoked by a review panel.

MAS also took into account any complaints made in writing about an assessors performance of their assessment duties.

¹⁵² MAA answers to stakeholder QON, Part 1, n 33, pp 6-7.

MAS has further advised assessors that they will be provided with their individual performance data twice per year.¹⁵³

- 4.46** In its submission to the Committee, the Bar Association similarly expressed the view that there is inconsistency between medical assessors in their approach to determinations:

The MAA Medical Guidelines are put forward as representing an independent and objective method for the determination of impairment. However, the lay experience of legal practitioners is that there can be widespread variation between MAS assessor determinations of similar injuries. There are even examples of two MAS assessors reaching distinctly different conclusions on examination twelve months apart when there has been no material change in the claimant's medical condition.¹⁵⁴

- 4.47** In response the MAA again indicated that it was not aware of any inconsistencies:

The MAA is not aware of areas of significant inconsistency. Determination of whole person impairment is very case-specific and depends upon the findings of a clinical examination of the claimant. The evaluation of permanent impairment is based on presentation at the time of the assessment. Cases that appear to involve similar injuries (such as soft tissue injury of the neck and back) may validly have different impairment results because of different clinical signs on examination. Similarly, examinations of the same person conducted 12 months apart may also validly have different outcomes.¹⁵⁵

- 4.48** The Bar Association speculated that how 'warmed up' the claimant was at the time of examination might reflect upon the assessment of the range of movement. The MAA responded as follows:

Where "range of movement" is used to assess impairment, the assessor is required to conduct several repetitions to ensure accurate measurement. The "range of movement" model is not used for assessment of spinal injuries.¹⁵⁶

- 4.49** The Bar Association also suggested that differences of perception by assessors as to the application of the American Medical Association IV Guides and in particular, the application of DRE I, II and III for assessment of neck and back injuries may lead to inconsistencies. The MAA provided the following response to this suggestion:

The application of DRE III may only be assigned to a claimant when they fulfill the differentiators for that category, that is structural inclusions as defined in the MAA Medical Guidelines - vertebral body fracture of 25-50%, or postural element fracture, other than of transverse or spinous process with displacement disrupting the spinal canal, or radiculopathy. Because of the large number of cases referred to MAS involving soft-tissue injuries of the spine, this issue was discussed at the August 2003 workshop for medical assessors and reported on in the November 2003 MAS Assessors' newsletter. The MAA plans to include further clarification of the

¹⁵³ MAA answers to stakeholder QON, Part 1, n 33, p 7.

¹⁵⁴ Bar Association, n 32, pp 8-9.

¹⁵⁵ MAA answers to stakeholder QON, Part 2, n 33, p 11.

¹⁵⁶ *ibid.*

differentiators between DRE categories in the next revision of the MAA Impairment Guides.¹⁵⁷

- 4.50** In addition, the Bar Association queried whether different perceptions of assessors as to the nature and effect of what are loosely described as soft tissue whiplash injuries by some and are regarded as zygapophysial joint injuries by others may lead to inconsistencies. The MAA responded as follows:

Both soft tissue whiplash injuries and zygapophysial injuries are assessed under the DRE model for the spine. Assessment is based on findings upon clinical examination, regardless of whether 'zg joint' injury is diagnosed or not.¹⁵⁸

- 4.51** The Bar Association also suggested that differing approaches to the assessment of the nature and extent of degenerative conditions and pre-existing injuries and disabilities may contribute to inconsistencies. The MAA responded that:

The method of assessment of pre-existing impairment is clearly prescribed in the MAA Impairment Guides and only this approach can be used. Medical assessors are not required to assess pre-existing disability. Medical assessors may be required to comment on the causation of an injury, and there is guidance on this issue in the AMA Guides. Additional guidance has been provided in the November 2003 newsletter and future workshops are also planned on this issue.¹⁵⁹

Delays in claims handling

- 4.52** Several stakeholders raised the issue of delays in the handling of claims in their submissions to the Committee. Delays were described by the Insurance Australia Group (IAG) as having significant cost implications in terms of the level of conservatism required for claim reserves and in the capital required to support the Scheme.¹⁶⁰

- 4.53** In their submissions, the Bar Association and APLA identified concerns with delays in the processing of claims by the MAS. The MAA provided the following information about the MAS, acknowledging that an efficient service for the assessment of medical disputes is critical to the success of the Scheme:

The MAC Act established the Medical Assessment Service (MAS) as an alternative dispute resolution service for medical disputes arising between insurers and injured people. This is a major improvement on the previous Compulsory Third Party scheme where if an insurer disputed payment of a medical expense, a determination as to payment could be delayed until the end of the claim. This potentially left injured people and medical providers uncertain as to whether disputed treatment costs would be reimbursed, as well as leading to litigation and increased medico-legal costs where parties could not successfully negotiate resolution of the dispute.

¹⁵⁷ MAA answers to stakeholder QON, Part 2, n 33, pp 11-12.

¹⁵⁸ MAA answers to stakeholder QON, Part 2, n 33, p 12.

¹⁵⁹ MAA answers to stakeholder QON, Part 2, n 33, p 12.

¹⁶⁰ Submission, Insurance Australia Group Limited, p 2.

On receipt at MAS, applications regarding treatment disputes are triaged into five types of cases from Category 1 to 5 in descending priority. For example, Category 1 involves the most urgent cases, including disputes as to proposed surgery or investigations, whereas Category 5 involves disputes regarding future therapy/treatment with no clear recommendation or planned treatment.

The MAA recognises that an efficient service for the assessment of medical disputes is critical to the success of the dispute resolution procedures under the Motor Accidents Scheme. In response to the sharp increase in applications to MAS, in the short term, the MAA has directed additional resources to MAS. The MAA has initiated a major programme of improvements across all areas of MAS. This project is progressively implementing new processes and structures which better suit the new high volume environment.¹⁶¹

4.54 The MAA conceded that the MAS had experienced delays in 2003:

The Medical Assessment Service (MAS) has experienced delays in processing matters in 2003. In response to these delays, the MAA initiated the Continuous Improvement Project to review the operations of the Motor Accidents Assessment Service. As a result of the first stage which focused on internal initiatives that reduced delay and backlogs, as at 14 November MAS is up to date in all areas except in determining applications for reviews.

MAS has experienced a significant increase in the number of applications for review: 65 applications were received in 1999-2001, compared with 252 in 2002 and 550 to date in 2003. There are currently 215 Review Determinations due which should be finalised by February 2004. Additional resources have been allocated to expedite review determinations, however, if MAS continues to receive the same volume of applications in December, January and February, there may be ongoing delays.¹⁶²

4.55 APLA's submission highlighted that delays were caused by insurers refusing to concede that certain injuries will exceed 10% WPI:

APLA is concerned that cases are being unnecessarily delayed because insurers routinely refuse to concede that serious injuries will exceed the greater than 10% whole person impairment (WPI) threshold thus requiring the injured person to undergo a formal MAS assessment. Unnecessary MAS assessments of serious injuries for WPI purposes is causing considerable delay in the MAS process, not only in assessing WPI but also in assessing treatment disputes. It is submitted that treatment delayed is recovery delayed.¹⁶³

4.56 In response to APLA, the MAA agreed that injuries which will clearly exceed 10% should not be brought to MAS for independent medical assessment:

The MAA agrees that the disputes which should be brought to MAS for independent medical assessment regarding the degree of permanent impairment should be in areas of genuine dispute, rather than in situations where the injury will clearly result in a finding of 0% or clearly exceeds 10%. MAS is producing a case book on decisions to

¹⁶¹ MAA answers to stakeholder QON, Part 1, n 33, p 2.

¹⁶² MAA answers to stakeholder QON, Part 2, n 33, p 10.

¹⁶³ APLA, n 31, p 3.

assist insurers and solicitors identify situations where the injury will clearly result in a finding of 0% or clearly exceed 10%.¹⁶⁴

4.57 Similarly, IAG submitted that while many of the unresolved claims are *unlikely* to establish an entitlement for non-economic loss, impairment is nonetheless being tested through the MAS, causing additional costs and delays. The Committee asked whether the MAA had any comments on this assertion and, in particular, whether it considered that any claims were being assessed in terms of impairment unnecessarily. The MAA provided the following response:

In the first years of the operation of the motor accidents scheme, the Motor Accidents Authority took the view that it was important to provide assistance to and educate users in regard to the use of the MAA Medical Guidelines on the assessment of the degree of permanent impairment of an injured person. Initiatives undertaken include:

- production of an impairment case studies booklet in October 2000,
- education forums for both the legal profession and insurers,
- continuing education through provision of case studies in the quarterly MAAS Bulletin.

As part of this educative process, parties were also encouraged to bring disputed matters to the Medical Assessment Service (MAS).

After the educational phase, it has always been recognised by the MAA that parties should utilise MAS to resolve disputes around the margins of the whole person impairment (WPI) threshold. The MAA considers that it is inappropriate for MAS to receive disputes on matters where there is clearly 0% permanent impairment. Likewise, the MAA considers that insurers should have sufficient knowledge to determine situations where the injuries are likely to result in permanent impairment which is clearly above the threshold, thus avoiding unnecessary referral of matters to MAS.

In October 2003, the General Manager initiated a series of user consultations on the Motor Accident Assessment Services (MAAS) processes and procedures. Arising from these consultations, a MAAS/users project group will meet during the second quarter of 2004 and consider further WPI awareness initiatives.¹⁶⁵

4.58 IAG also suggested that because there are no time limits on applications to the Claims Assessment and Resolution Service this leaves open the possibility to further action almost indefinitely. The Committee asked the MAA about its views on the absence of a time limit on applications and whether it is contributing to delays. In response the MAA stated:

The MAA notes that it is open to either party to lodge an Application for General Assessment at the Claims Assessment and Resolution Service (CARS). Accordingly, an insurer can initiate a CARS application to bring a matter to assessment.¹⁶⁶

¹⁶⁴ MAA answers to stakeholder QON, Part 1, n 33, p 3.

¹⁶⁵ MAA answers to additional QON, n 20, pp 22-23.

¹⁶⁶ MAA answers to additional QON, n 20, p 23.

- 4.59** Finally, IAG suggested that adding to the uncertainty is a large number of ‘inactive claims’ that have no outstanding issues but which have not been resolved. The Committee asked the MAA to advise it of the number of ‘inactive’ claims and the nature of these claims. The MAA responded that it was unaware of a problem with ‘inactive’ claims:

The MAA is unaware of inactivity being a widespread problem. The MAA auditors observed during the 2002 Claims Handling Compliance Audit that some insurers could have been more proactive in their endeavours to resolve claims, whilst the same was noted for some claimant solicitors who had not responded to insurer requests for further and better particulars or offers of settlement. Insurer inactivity usually occurred when an insurer did not follow up an unanswered request to the claimant’s solicitor for particulars or an offer of settlement.

The revised Claims Handling Guidelines propose a condition that insurers review claim files at intervals of less than 3 months after requesting particulars or offers of settlement.

During the 2003 Claims Handling Compliance Audit the MAA auditors also reviewed a sample of approximately 50 claims from year 1 of the new scheme that had not been finalised. It was generally found across the industry that these claims were active.¹⁶⁷

Consumer attitudes to forms and MAAS processes

- 4.60** The Committee asked the MAA about its internal monitoring of consumer acceptance of MAA forms and guidelines and the independent researchers it has engaged to undertake external monitoring of consumer acceptance. The MAA provided the following information on this matter:

In October 2003, the General Manager initiated a series of user consultations on the Motor Accident Assessment Services (MAAS) processes and procedures. Arising from these consultations, a number of joint MAAS/user project groups have been established to further develop a number of issues including a user project group to review MAAS forms. This project group will be meeting during the first quarter of 2004 and making recommendations on areas for improvement of MAAS forms.

The General Manager has also commissioned a comprehensive MAAS user satisfaction survey to be undertaken by the Justice Policy Research Centre at the University of Newcastle. The survey will be conducted in four stages and will progressively cover medical and claims assessors, insurance industry, legal profession and claimants. The assessor survey module will commence shortly and a report to the MAA is anticipated by the end of April 2004. The other modules will be conducted during 2004 with a view to all modules being completed and reported on by November 2004.¹⁶⁸

¹⁶⁷ MAA answers to additional QON, n 20, p 24.

¹⁶⁸ MAA answers to QON, n 23, p 5.

Complaints about claims handling

Consumer awareness of complaints procedure

- 4.61** The Committee questioned the witnesses about consumer awareness of the MAA's complaints procedure. In response, Mr Bowen outlined the requirement for insurers to advise claimants about complaints procedures and the role of the Claims Advisory Service:

Firstly, it is a requirement of our claims handling guidelines that the insurers advise each claimant of the right to take a matter to the Motor Accidents Authority by way of a complaint, and we audit compliance with those guidelines. Our claims handling guidelines audit was not included in the annual report, because it was not completed until November. We now have that available, so we can certainly provide it to the Committee to be tabled. It will show you each of the guidelines and the result of the audit.

The answer is twofold. First, there is an obligation on the insurer to advise the claimant of their right to come to the Motor Accidents Authority. Second, we provide within the MAA a claims advisory service that has a focus to primarily assist unrepresented claimants work their way through the system, but it is also a source of general information. We do publicise that in a variety of different arenas, including a green pamphlet that goes out with all registration papers. It has in it a push-out section that reads, "If you are injured in a motor vehicle accident, called the Claims Advisory Service." I suspect that most people do not push out the portion and put it on their fridge or in their wallet, because most people do not contemplate that they are going to be the victim of an accident. But we do as much as we can to promote the service.¹⁶⁹

Complaints regarding the way insurers handle claims

- 4.62** The Annual Report provides statistics on complaints for this reporting period. It states that the MAA received 86 complaints, 80 of which related to the way New South Wales CTP insurers managed claims.¹⁷⁰ This compares with 60 complaints relating to the management of claims by insurers last year. In particular, allegations of wrongful actions increased from 18 to 49 complaints.
- 4.63** The Committee queried the rise in complaints about the way CTP insurers handle claims asking the witnesses to identify the factors contributing to this increase in the number of complaints. Mr Bowen responded as follows:

...I will take the question on notice and provide you with a more detailed breakdown of the basis of the complaints. Most of those will be alleging breach of statutory duty or one established under our claims handling guidelines, probably primarily to do with insurers meeting time frames.¹⁷¹

¹⁶⁹ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 8.

¹⁷⁰ MAA Annual Report, n 8, p 16.

¹⁷¹ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 8.

4.64 The Committee then asked what types of wrongful actions have been alleged. Mr Bowen stated:

We will give you the detailed breakdown. As I indicated, I suggest that the majority of those will be that the insurers failed to meet the statutory requirement, such as a requirement to make a decision on liability within three months, or one of the obligations established under the MAA's claims handling guidelines. Those guidelines primarily go to putting obligations on the insurer to both meet time frames, and provide a range of information to the claimant and responses to the claimant. I think they will all fall into that area. We can certainly get for you the breakdown between the different ones.¹⁷²

4.65 The MAA subsequently provided the Committee with the following information:

The reason(s) for the increase in the number of complaints may largely be attributed to an increased awareness by claimants' legal representatives of the MAA's Compliance Unit which was established during the 2001/02 reporting period. Of the 49 complaints reported in the 2003 Annual Report alleging wrongful action by the insurer, 39 were lodged by a claimant's solicitor. Only 13 of the 49 complaints alleging wrongful action by the insurer in the 2003 Annual Report were resolved in favour of the complainant. These matters were resolved by way of remedial action by the CTP insurers.¹⁷³

Investigation and legal costs

Investigation costs

4.66 The Committee asked the witnesses to comment on the significant reduction in investigation costs identified in the MAA Annual Report, from \$54.6 million to \$28.2 million. Ms Rizzo described the impact of the introduction of the ANFs on investigation costs:

The sorts of investigation costs would include factual investigations by both the claimant's solicitors and by the insurers. That would include people investigating the situation of the accident. With the introduction of the accident notification form [ANF], where liability is accepted it has to be decided by the insurer within 10 days of the receipt of that form. Because the insurer must pay a maximum of \$500 the insurer is less likely to include as onerous investigations as they would otherwise have done. The ANF explains part of that process. As we have just discussed, liability is deemed accepted for certain individuals such as passengers, pedestrians and cyclists. That would explain part of it.¹⁷⁴

4.67 Mr Bowen also noted that the MAA has discouraged insurers from overuse of surveillance and that this may impact on investigation costs:

The other aspect of investigative costs is surveillance and we informally try to discourage the insurers from over-reliance on surveillance. I think it is fair to say that

¹⁷² *ibid.*

¹⁷³ MAA answers to QON, n 23, p 2.

¹⁷⁴ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 6.

insurers overestimate the number of matters in which there is real fraud and they tend to overuse video surveillance—or they certainly did in the past. We have tried to encourage them to reduce the amount of surveillance they do on injured people.¹⁷⁵

4.68 The Committee queried whether there is simply less duplication of investigatory procedures or whether claims are not investigated as thoroughly as before. Ms Rizzo responded:

I would suggest that it is probably a bit of both. But it is not that claims are not investigated as thoroughly but that we have a totally new way of making certain claims—that is, the accident notification form. It was introduced so that it would not be necessary to do the sort of investigation for smaller claims that might be done when you get a 14-page claim form. So I would say that it is a bit of both.¹⁷⁶

Legal Costs Regulation

4.69 During the Fourth Review the MAA advised that a study into the effects of the Legal Costs Regulation was being undertaken by Professor Ted Wright from the Justice Policy Research Centre. The study was due to be completed by April 2003, however, the MAA indicated that the report was not finalised on time due to illness.

4.70 The MAA has since advised the Committee that the Justice Policy Research Centre has provided the MAA with a draft of the report on the legal costs regulation and that it is anticipated that a final report will be available in the very near future.¹⁷⁷ The MAA also advised that it proposes to undertake a work value review of legal costs for CTP personal injury claims and is currently in discussion with legal costs experts. It is anticipated that the work value review will be completed by the end of 2004.¹⁷⁸

Legal costs

4.71 The Annual Report states that legal costs in the first 45 months of the new Scheme have been reduced significantly compared to the old Scheme, from \$87.2 million to \$35.3 million.¹⁷⁹ Ms Rizzo identified one aspect of this reduction as being a reduction in medico-legal costs

The other part of investigation costs is the medico-legal aspects. Under the old scheme, which was a much more adversarial scheme, both sides—the claimant's legal representatives and the insurers—would obtain their own medico-legal opinions before they came together to try to negotiate a settlement. With the introduction of the assessment services, it is not necessary to get those medico-legal reports. Just those two—the factual investigations and the medico-legal reports—are part of what has happened. In addition, under the new scheme insurers have probably become a bit tighter in the way they have been managing their investigation costs because part of the scheme involves them reducing their transaction costs.¹⁸⁰

¹⁷⁵ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 7.

¹⁷⁶ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 7.

¹⁷⁷ MAA answers to additional QON, n 20, p 26.

¹⁷⁸ *ibid.*

¹⁷⁹ MAA Annual Report, n 8, p 40.

¹⁸⁰ Ms Rizzo, Manager, Insurance Division, MAA, Evidence, 16 February 2004, p 7.

- 4.72 The report also states that, at this stage of the new Scheme, claims for more serious injuries have not been finalised and that those claims can be expected to involve significant legal costs. The Committee asked the MAA to estimate the legal costs of these claims. The MAA provided the following response:

The MAA estimates that these legal costs may be in the vicinity of \$50 million. Legal costs in serious injury claims are expected to be at similar levels to the old scheme, with the savings in legal costs coming from less serious claims.¹⁸¹

Payment of legal fees where cases are not exempted from CARS

- 4.73 In submissions to the Committee, the Bar Association and APLA expressed concern that there has been no increase in the allowance for costs and disbursements for matters not exempted from CARS since the introduction of the scheme:

The Act regulates the recoverable party/party legal costs in cases that are not otherwise exempt from CARS. Recoverable costs are based partly on a fee for service and partly linked to the total sum recovered. The regulated fees have not been indexed or increased since the introduction of the Act over four years ago. For example, the fee payable to a solicitor or barrister for attending an assessment conference under Section 104 of the Act which may last for up to two hours has remained fixed at \$400.¹⁸²

- 4.74 Commenting on this issue during the Fourth Review, the MAA indicated that it considers it appropriate that the cost scales be reviewed and that it will consult with the industry, legal and medical profession in undertaking that review. When asked about this issue during this Fifth Review the MAA provided the following update:

The MAA has previously indicated that it proposed to review the level of fixed fees in conjunction with consideration of the report of the review of the impact of the legal costs regulation undertaken by Professor Ted Wright of Newcastle University. At the time of the last Standing Committee hearing the MAA anticipated that the Wright review report would be finalised by April 2003, however owing to Professor Wright's prolonged illness it was not possible for the report to be finalised within this timeframe.

In preliminary advice to the MAA, Professor Wright has indicated that in undertaking the review, the research team experienced considerable difficulty in gaining access to solicitors' files, however, on the basis of information provided by CTP insurers there appears to be a very high level of contracting out of the regulated costs. The MAA will also consider the issue of contracting out during the review of regulated costs.¹⁸³

¹⁸¹ MAA answers to additional QON, n 20, p 26.

¹⁸² Bar Association, n 32, p 10.

¹⁸³ MAA answers to stakeholder QON, Part 1, n 33, pp 8-9.

Chapter 5 Payment of claims

This chapter explores the exercise of the functions of the MAA and the MAC in relation to the payment of claims made under the Motor Accidents Scheme.¹⁸⁴ It examines several issues that arose during the course of the Committee's Fifth Review, including compensation for non-economic loss, compensating parents of children killed in motor vehicle accidents and statistics on the level of damages awarded by the courts.

Claims data

5.1 The Annual Report notes that claim payments have fallen from \$657 million to \$407 million.¹⁸⁵ Mr Bowen advised that the main reduction was made in the area of non-economic loss:

If you look at the graph on page 37 of our annual report, the main reduction is in non-economic loss. That is to be expected. Under the old scheme, about 40 to 45 per cent of claimants were receiving non-economic loss. The introduction of the impairment threshold was expected to reduce that to only 10 per cent of the claimants most seriously injured, so there has been a big reduction in non-economic loss payments for small to medium-size claims. The rest of those reductions are also as expected: reductions in legal costs and reductions in investigation costs. There are slight increases in non-economic loss in percentage terms, but probably not that much of a variation in actual dollar terms.¹⁸⁶

5.2 The MAA provided the following breakdown of claim payments:¹⁸⁷

	Old scheme	New scheme	Average/claim Old scheme	Average/full claim New scheme
Total	656.6m	407.0m	\$12,450	\$10,280
NEL	175.8m	48.0m	\$3,330	\$1,200
Economic loss	157.8m	106.3m	\$3,000	\$2,700
Treatment and other care	181.2m	189.3m	\$3,440	\$4,800
Investigation costs	54.6m	28.2m	\$1,000	\$700
Legal costs	87.2m	35.3m	\$1,650	\$900

5.3 The MAA provided additional information about claim payments, as set out over the page. In relation to these tables the MAA noted that care must be taken in comparing underwriting year data with accident year data.

¹⁸⁴ The exercise of the functions of the MAA and the MAC in relation to making claims and the claims process is examined in Chapter 4.

¹⁸⁵ MAA Annual Report, n 8, p 37.

¹⁸⁶ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 9.

¹⁸⁷ MAA answers to QON, n 23, p 3.

	Accident year	
	Year 1	Year 2
Year 1 payments	\$13.5m	
Year 2 payments	\$41.5m	\$12.4m
Year 3 payments	\$74.3m	\$44.9m
Year 4 payments	\$105.1m	\$59.0m
Total payments to 30/6/03	\$234.5m	\$116.3m
Incurred cost *	\$815.4m	\$719.9m
% paid	29%	16%
Bulk bill for ambulance & public hospitals	\$36m	\$37m
Total paid incl bulk bill	\$270.5m	\$153.3m

* The incurred cost is from the MAA's claims database, as reported by insurers and does not include incurred but not reported (IBNR) adjustments which will see the incurred cost increase. In addition, incurred cost will continue to develop throughout the life of a claim. Development in incurred cost will depend not only on the stabilisation of a claimant's injuries but also on factors such as superimposed inflation and legal precedent. Incurred cost for accident year 1 for example may increase to more than \$1billion on an undiscounted basis.

	Underwriting year	
	Year 1 \$M	Year 2 \$M
Premiums written	1325	1321
Acquisition expenses	201	199
Claims handling expenses	53	53

5.4 The Committee noted the comparisons of claim payments in the scheme performance information in the Annual Report, where the last 45 months of the old scheme are compared to the first 45 months of the new scheme. The Committee asked the witnesses to comment on whether there were any anomalies in the previous Scheme or the current Scheme which make those figures difficult to compare. Mr Bowen responded as follows:

I suppose like all statistics, it is the best we can do to pick a point of time in development and make comparisons. There will be a range of variables that could affect the outcome of this. For example, it is certainly the case that under the new scheme while the smaller payments have gone quickly we have now reached a point in time where the finalisation rate under the new scheme is equivalent to the old scheme for the second lot of payments. That may be partly attributable to the fact that there was a notable reluctance on the part of both parties to be the first through the new Claims Assessment Resolution Service.

Interestingly, when we hit October last year, which was the three-year point of limitation period, it started to generate a whole lot of activity and the number of matters coming through CARS increased quite significantly from October. That holding back will have affected the profile of the payments a little bit, but what you attribute to direct scheme changes in benefits and how much you can attribute to indirect scheme changes, such as having different assessment services, is very hard to make a call on.¹⁸⁸

¹⁸⁸ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 9.

Compensation payments for non-economic loss

5.5 The 1999 reforms limited access to compensation for non-economic loss (NEL) to claimants with WPI of greater than 10%. The MAA provided the Committee with the following information regarding claims for non-economic loss:

NEL payments cannot be quantified until an injury stabilises. In most cases where a claimant has a serious injury the extent of NEL will not be quantified until some considerable time after the accident, when claims finalise. Consequently at this stage of development, NEL payments cannot be expected to fully reflect the ultimate pattern of NEL awards.

In the first four years of the new scheme governed by the MAC Act, NEL payments were recorded in 2.4% of finalised claims. The average NEL award was \$64,000.

In the last four years of the previous scheme, governed by the *Motor Accidents Act 1988* ("the MA Act"), NEL was included in 41% of finalised claims and the average NEL award was \$16,000.

However, the experience under the MAC Act, is very similar to the MA Act when the most seriously injured claimants are considered, as intended in the legislation. Only 3.7% of finalised claims under the MA Act received more than \$40,000. In addition to the experience of finalised claims, the MAA has also undertaken an audit of insurer files to determine the percentage of claims for which insurers have made reserve estimates for NEL and to assess whether this is consistent with the objectives of the reforms.

On average insurers reserved for NEL in 12% of claims. This compared favourably with an actuarial forecast made prior to the commencement of the MAC Act that the 10% most severely injured claimants would be eligible for NEL, consistent with the overall reduction of payment of NEL required to provide the Government's promised premium reduction. The audit report is contained in Appendix 3 of the Committee's Report 19 February 2002.¹⁸⁹

Deeming certain injuries above the 10% threshold

5.6 In its submission to the Committee, APLA noted that the 10% WPI threshold results in at least 90% of injured claimants not being entitled to damages for non-economic loss and that this includes claimants who have suffered fractured legs, arms, hands, feet, pelvis, brain injury and severe depression.¹⁹⁰ APLA therefore submitted that certain injuries should be deemed to exceed the greater than 10% threshold, namely:

- Quadriplegia,
- Partial quadriplegia
- Paraplegia
- Partial paraplegia

¹⁸⁹ MAA answers to stakeholder QON, Part 2, n 33, pp 7-8.

¹⁹⁰ APLA, n 31, pp 3-4.

- Organic brain injury
- Traumatic organic brain injury
- Fractures of lower extremity requiring hospitalisation and/or surgery
- Fractures of upper extremity requiring hospitalisation and/or surgery
- Disc protrusions requiring spinal surgery
- Amputations of feet, legs, hands, arms, thumbs
- Loss of sense of taste
- Loss of sense of smell
- Total loss of hearing
- Significant visual impairment
- Unsightly facial scarring
- Displaced fracture of the hip
- Displaced fracture of the pelvis

5.7 In response to APLA's suggestion the MAA indicated that it will consider providing wider access to non-economic loss without increasing the overall costs of non-economic loss:

Whilst the MAA is not amenable to increasing the overall cost of the Scheme on non-economic loss (NEL) payments, it will consider providing wider access to NEL. Wider access would however mean reducing the amount of NEL available to seriously injured people.¹⁹¹

5.8 The Committee believes that this issue should be examined further to determine whether wider access should be provided to compensation for non-economic loss by deeming certain injuries as being over the WPI threshold.

Recommendation 15

The Committee recommends that the Minister for Commerce examine the proposal to provide wider access to non-economic loss by deeming certain injuries as being over the Whole Person Impairment threshold. The Minister should evaluate in context of the injuries identified by the Australian Plaintiff Lawyers Association, as set out in paragraph 5.6 of this report.

Non-Economic Loss Performance Audit Report

5.9 During the Committee's Fourth Review, the MAA provided information about the actions of insurers to implement the recommendations of the Non-Economic Loss Performance Audit Report. During this Fifth Review the Committee asked the MAA whether it has continued to

¹⁹¹ MAA answers to stakeholder QON, Part 1, n 33, p 4.

monitor the insurers in relation to implementing those recommendations. In response, the MAA stated that it had, and elaborated as follows:

...The MAA has continued to monitor the performance of insurers in making %Whole Person Impairment (WPI) determinations during its claims handling compliance audits, and by quantitative analysis of WPI disputes assessed at MAS. Approximately 90% of MAS %WPI disputes are found in favour of the insurer (ie assessed as not greater than 10% WPI). The MAA has also required insurers to provide additional information to the MAA's database to identify claims with reserve estimates for NEL. According to the information supplied, insurers have attached an NEL estimate on 8%-11% of new Act full claims.¹⁹²

Compensating parents who lose children in motor vehicle accidents

- 5.10** The proposal to compensate parents who lose children in motor vehicle accidents has been examined by the Committee in previous years and has been the subject of two Committee recommendations. In its Third Report, the Committee recommended that the MAA should further consider how parents who lose children in motor accidents might be compensated, particularly parents who would not qualify for non-economic loss according to current medical and psychological guidelines. In its Fourth Report, the Committee recommended that the Minister consider legislative amendment to provide for a statutory monetary benefit of up to \$100,000 to parents whose children are killed in a motor vehicle accident.
- 5.11** This issue was also raised by APLA and the Bar Association in their submissions to the Committee during this Fifth Review. APLA and the Bar Association expressed concern that parents who lose children in motor vehicle accidents are often not compensated because the thresholds in relation to psychiatric/psychological injuries are too high. At present, a parent is only entitled to recover for the death of their child where there is a diagnosable psychiatric injury, where the psychiatric injury arose as a consequence of the shock of the death of the child and the extent of the psychiatric injury is assessed as exceeding 10% whole person impairment.
- 5.12** The Government's response to the recommendation in the Fourth Report noted that the Minister for Commerce requested the MAA to prepare an issues paper on the Committee's suggestion of a monetary benefit to parents whose children are killed in a motor vehicle accident. The MAA's Issues Paper was provided to the Committee on 3 December 2003 and is set out as Appendix 4. The Issues Paper sets out further background to the proposal to compensate parents of children killed in motor vehicle accidents, including costing for the proposal, details of claims made by parents for a psychological reaction to the accident in which their child died and other options for assisting parents in this situation.
- 5.13** The MAA Issues Paper notes that since 1989, 172 parents have claimed for psychological reaction to the accident in which their child died.¹⁹³ The MAA has advised that since the 1999 amendments to 30 June 2003, 50 claims have been lodged and half of those claims had been

¹⁹² MAA answers to additional QON, n 20, p 28.

¹⁹³ Motor Accidents Authority NSW, *Child motor vehicle fatalities: bereavement benefit for parents*, Issues Paper, p 3 (see Appendix 4).

finalised at that date. There were NEL payments made in 6 of the 25 final claims. The average amount paid in those claims was \$48,000.¹⁹⁴

5.14 In its Issues Paper the MAA has recommended *against* including such a benefit in the Motor Accidents Scheme:

In coming to this conclusion the Board took account not only of the cost of the proposal, but more importantly, the issues that would be raised in implementing such a proposal in a fair and equitable manner. In particular, the Board considered how the proposal would operate in the context of the existing fault based compensation scheme for motor vehicle accidents. The Board was particularly cognisant of the report published by the NSW Law Reform Commission in 1984. The NSWLRC examined bereavement benefits as part of its proposal for a transport accident compensation scheme in NSW. The Commission recommended against the inclusion of bereavement benefits in the scheme.

The MAA Board also considered the provision of counselling but recommended against the introduction of a special counselling scheme for motor vehicle accident fatalities. The motor accidents scheme legislation requires the insurer, once liability is accepted for a claim, to pay all medical expenses that are reasonable and necessary in the circumstances, properly verifiable, and causally related to the injury arising from the accident. This would include reasonable and necessary counselling expenses relating to a parent's claim for psychological trauma experienced because of the death of their child.¹⁹⁵

5.15 The Committee concurs with the reasoning of the MAA's recommendation. The Committee is of the view, however, that the MAA should endeavour to provide other forms of bereavement support to parents of children killed in motor vehicle accidents.

5.16 In this regard, the Committee supports the commitment of the Minister for Commerce to ask the MAA to consider organisations that provide assistance to bereaved parents when the board looks at the 2004 grants program. Mr Bowen advised that the Board will set its funding priorities in May or June:

We set a global budget in February for the program from 1 July and then we provide the board with some recommendations as to areas for priority funding that program and then we call for applicants later in the year. That recommendation, through the Minister, will go to the board at its May or June meeting when it sets the funding priorities.¹⁹⁶

5.17 The Committee also notes that the Minister for Commerce has asked the MAA to further consider and report on the continuing suitability of a fault-based scheme where children are involved and that such a report should also consider what definition of 'child' is appropriate. The MAA advised that it is presently undertaking a cost analysis and examining policy options in relation to this issue, for report to the Minister.¹⁹⁷

¹⁹⁴ MAA answers to additional QON, n 20, p 28.

¹⁹⁵ MAA Issues Paper, n 182, p 3.

¹⁹⁶ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 30.

¹⁹⁷ MAA answers to additional QON, n 20, p 28.

Proposal to allow interim damages

5.18 The Bar Association noted in its submission that it has proposed an amendment to the *Supreme Court Act 1970* and the *District Court Act 1973* to allow awards of interim damages in motor accident cases. The purpose of interim damages is to provide for a plaintiff by means of interim payments pending trial and final assessment of damages. The Bar Association stated that it made a submission to this effect to the Attorney General in June last year and provided the MAA with a copy of its submission. In support of its proposal the Bar Association noted:

Although the Motor Accidents Scheme makes provision for payment of medical and hospital expenses, there will be cases where such payments are of little substantial relief to an accident victim. Take a family where the principal wage earner is killed in a motor accident. Resolution of the Compensation to Relatives claim may take two or three years. Even though liability may be admitted, the family of the deceased has no recourse to any compensation until the claim is finalised. In such circumstances an award of interim damages would be justified, but is currently unavailable.¹⁹⁸

5.19 The Committee is concerned that the difficulties this situation may place on the victims of motor vehicle accidents and their families. The Committee therefore recommends that the Minister for Commerce and the Attorney General consider the proposal to allow interim damages to be awarded in motor vehicle accidents cases.

Recommendation 16

The Committee recommends that the Minister for Commerce and the Attorney General consider amending the *Supreme Court Act 1970* and the *District Court Act 1973* to allow awards of interim damages in motor accident cases.

Statistics on level of damages awarded by the courts

5.20 One of the specific statutory functions of the MAA is to conduct research and collect statistics or other information on the level of damages awarded by the courts.¹⁹⁹ The Committee asked the MAA how it has fulfilled this obligation in the past and how it intends to do so in the coming year. The Committee also asked whether the MAA has any available statistics on the level of damages awarded by the courts. The following response was received from the MAA:

The Motor Accidents Assessments Services (MAAS) monitors significant cases in motor accidents and personal injury law and provides regular updates to stakeholders and assessors on relevant developments. The MAAS Bulletin, issued quarterly to stakeholders and assessors, includes regular sections “CARS and Court Cases of Interest” and “Non Economic Loss” which include discussion on damages assessments. The CARS E-News is an electronic newsletter to CARS assessors which includes articles on relevant court decisions, including damages assessments at both CARS and the Court. The introduction of the alternative to court medical and claims assessment procedures as part of the 1999 reforms to the motor accidents scheme has

¹⁹⁸ Bar Association, n 32, p 11.

¹⁹⁹ *Motor Accidents Compensation Act 1999*, section 209.

significantly reduced the level of court litigation in motor accident claims. Whilst complex matters will continue to be dealt with by the courts, the MAA considers that the potential for court decisions to impact on the scheme has lessened. The MAA will continue its monitoring of court decisions and general developments in personal injury law.²⁰⁰

- 5.21** The Committee is of the view that the collection of statistics on the level of damages awarded by the courts is an important endeavour. Not only is it specifically required by the Act, but the collection of such statistics would enable the Committee and various stakeholders and interest groups to gain a better understanding of awards of damages. The Committee is of the view that the publication in the MAAS Bulletin of discussions of damages assessments does not satisfy the statutory requirement to collect statistics.
- 5.22** The MAA should collect comprehensive statistics on the level of damages awarded by the courts for personal injuries caused by motor vehicle accidents since the 1999 amendments. This information should be publicly accessible and updated annually. The MAA should also undertake an analysis of the damages awarded and the emerging trends in order to provide the Committee and other interested parties with an understanding of the approach taken by the courts in awarding damages for motor vehicle accidents.

Recommendation 17

The Committee recommends that the MAA implement the collection of comprehensive statistics on the level of damages awarded by the New South Wales courts in relation to personal injury suffered as a result of motor vehicle accidents since the 1999 amendments to the Motor Accidents Scheme. The MAA should undertake an analysis of the damages awarded and the emerging trends. Once collected this information should be publicly accessible and updated annually.

²⁰⁰ MAA answers to additional QON, n 20, pp 26-27.

Chapter 6 Injury prevention and rehabilitation

This chapter explores the exercise of the functions of the MAA and the MAC in relation to injury prevention and rehabilitation. It examines several issues that arose during the course of the Fifth Review, including road safety and rehabilitation grants, road safety for pedestrians and cyclists and CTP insurers' rehabilitation responsibilities.

Injury prevention

- 6.1 A significant aspect of the MAA's role is to encourage and support injury prevention. One of the specific functions of the MAA under the Act is to provide funding for measures for preventing or minimising injuries from motor vehicle accidents and for safety education.²⁰¹ The Annual Report states that through its Road Safety Strategy, the MAA has focused on reducing serious injuries in areas with greatest cost impact to the CTP scheme.²⁰² The Strategy's priority target groups include children, young people, pedestrians and motorcyclists.

Road safety grants and sponsorship

- 6.2 The Annual Report identified an increase in spending on road safety grants and sponsorships from \$2.897 million in 2001/2002 to \$6.486 million in 2002/2003.²⁰³ The MAA explained that the expenditure in 2001/2002 was under budget and the increase in the following year was mainly in the area of public education:

The MAA typically budgets up to \$5 million each year for road safety activities. The expenditure for 2001/2002 was therefore less than the usual road safety budget. In 2002/2003, the increased expenditure was mostly in the area of public education/advertising. Approximately \$3 million was expended on education campaigns in the areas of motorcycle, pedestrians, education and enforcement, and learner drivers. In relation to sponsorships during 2002/2003, the MAA undertook a major new initiative with sponsorship of the Big Day Out.²⁰⁴

Sponsorship of the South Sydney Rugby League Club

- 6.3 The Committee questioned the witnesses about the rationale for sponsoring the South Sydney Rugby League Club and the evaluation of the sponsorship. Mr Bowen provided the Committee with the following response:

... The background is that the MAA identifies from our claims database risk areas for the purpose of devising our road safety program, and the high-risk area is young drivers, particularly young male drivers. Quite a few years ago—probably 2000—we

²⁰¹ *Motor Accidents Compensation Act 1999*, section 206(f).

²⁰² MAA Annual Report, n 8, p 18.

²⁰³ MAA Annual Report, n 8, p 64.

²⁰⁴ MAA answers to additional QON, n 20, p 29.

undertook some fairly detailed market research into attitudes of young men, the media that caught their attention and the mechanisms by which messages may be delivered to them. It was quite apparent that an interest in sport was high on their list and that was a means of getting their attention that we should consider utilising. The other piece of background information is that previously we had a program with the Australian Paralympic Committee whereby we provided traineeships to our Paralympic athletes and in response to that traineeships payment athletes spoke about their personal experiences as victims of motor vehicle accidents. The feedback we received was that that was a very powerful way of talking to young people and that they retained the message.

The sponsorship of the South Sydney team served two purposes. One was to promote a new brand, which was the Arrive Alive brand, and to bring people in through our Internet site and into contact with a whole range of information about road safety issues that were relevant to them. But the main purpose was to make use of the South Sydney players as spokespersons for road safety in a very tailored road safety program whereby they would undertake a training run with primarily older school-age students who were about to get their licence or who had just done so and talk to them about their personal experience. We brought in all the players—we have done this in each subsequent year—for training in presentation skills. But we did not want to polish them up. We did not want them to be MAA advocates; we wanted them to talk about their own experiences. We found that all of them—I do not know whether this reflects rugby league or primarily the age of the players—had a personal experience of their or their friends being involved in an accident, which sometimes had ended tragically or could have been quite tragic bar happenstance.

The first year we ran the program Bunnies in the Bush in the country in conjunction with country rugby league. Last year we ran the Bunnies in the Burbs program in Sydney primarily through the schools, with the Department of Education and the police. I am not sure what we have planned for this year: probably a little more of the same. We have evolved into other areas of sponsorship. We now sponsor music festivals and art and film as different communication tools. In looking at the amount of money expended on this we should bear in mind that while it is substantial in terms of our budget it is only quite modest when compared with what you might spend if you ran a two- or three-week advertising campaign on some generic road safety issue where you can burn \$1 million or \$2 million extremely quickly. We think that sort of campaign has a role in influencing people to maintain good standards but this is a tougher audience and they are not going to listen or tune in to that sort of generic road safety advertising. We need something that is more individually focused. I cannot remember the figures for year two but in year one, for example, they spoke to more than 12,000 students, which is a pretty impressive number and hopefully had some impact...²⁰⁵

6.4 Additional comments were made by Mr Grellman:

The frightening thing is that a rugby league player, some of whom may not be well educated, will have more credibility with an 18-year-old kid in Brewarrina than the local policeman or that kid's parents. That is simply a reflection of our society. This is an initiative that we think has worked pretty well. It comes up for review in a month or two because we entered into the relationship for three years. I think at the next board meeting the board will be given a full brief on how our people think it has gone and what impact it has had. Of course, it is one of those initiatives that you can never

²⁰⁵ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, pp 26-27.

really measure. For example, if one young man's behaviour has been modified and subsequently he does not end up in a wheelchair, whatever it costs us is inexpensive, but you can never tell.²⁰⁶

Focus on youth

- 6.5** In a submission to the Committee Youthsafe commended the MAA for its work in the area of injury prevention and young road users:

Youthsafe commends the MAA on its grants program, including the support it provides for road safety initiatives targeting and involving young people such as the 'Arrive Alive' program. Youthsafe commends the MAA on its involvement with advertising campaigns to date targeting young people, such as those addressing learner drivers, drink driving and fatigue. Also to be commended is the partnership arrangements with others to deliver the campaigns in a way that complements other road safety initiatives.²⁰⁷

- 6.6** Arrive Alive is the generic term used by the MAA for all activities in its Youth Program. Activities include:

- grants of up to \$10,000 to groups of young people for local road safety activities;
- research grants to improve road safety knowledge; and
- sponsorship of a range of activities including sports (rugby league, Eastern University Games, soccer and netball) and music festivals (Arrive Alive was a major sponsor of the Big Day Out in January 2003).

- 6.7** The Committee asked the MAA to comment on the evaluation of the Arrive Alive project:

At this stage there is not an overall program evaluation report available because each activity is evaluated individually. There will, however, be reports on the youth participation grants and the music festivals by mid 2004. In addition, the MAA has commissioned an independent review of the MAA Grants Program that funds all MAA road safety and rehabilitation programs. The final report from this review will be completed by mid May 2004 and will include some assessment of Arrive Alive activities. The Program has remained within budget.²⁰⁸

Road safety initiatives for pedestrians and cyclists

- 6.8** The Committee asked the MAA whether it is planning to undertake any research and road safety initiatives that relate to pedestrians and cyclists. In response, the MAA outlined its current initiatives relating to pedestrians:

In 2002-2003 the MAA worked with the Roads and Traffic Authority on a major pedestrian safety public education campaign with the aim of highlighting pedestrian

²⁰⁶ Mr Grellman, Chairman of the Board, MAA, Evidence, 16 February 2004, p 27.

²⁰⁷ Submission, Youthsafe, p 1.

²⁰⁸ MAA answers to additional QON, n 20, p 32.

safety issues to both drivers and particularly older pedestrians. A further run of this campaign is planned for late 2004.

In relation to children, the MAA is currently working with Kidsafe NSW to present the third run of the *'kids need a hand in traffic'* campaign across a number of local government areas in Sydney, Newcastle and Woollongong from late February to mid March 2004. This initiative was developed out of MAA funded research undertaken by Kidsafe NSW into parents' behaviours, attitudes and knowledge of child pedestrian and bicycle safety issues.

In addition the fourth annual *Walk Safely to School Day* is planned for 2 April 2004. This activity is coordinated by the Pedestrian Council of Australia and involves the major road safety stakeholders.

A number of child pedestrian accidents happen in off road locations such as driveways and yards. The MAA is the lead agency coordinating a range of countermeasures to reduce the incidence of such casualties. This project is currently sponsoring research through the Children's Hospital at Westmead and completing an evaluation of a driveway safety commercial piloted in northern NSW. This evaluation will guide decision regarding a further run of this campaign across a broader area.

The MAA is currently funding two research projects in relation to pedestrians. The first examines the circumstances of fatalities in elderly drivers and pedestrians that are due for completion in mid 2004. The second examines different perceptions of intersection priority rules by drivers and pedestrians.

The MAA is currently sponsoring research into "out of school travel times" child pedestrian and pedal cyclist accidents as well as a separate study on spinal injury outcomes of such accidents. Once completed these research projects will assist the MAA develop road safety initiatives. Through the MAA funded Kidsafe Child Road Safety Initiatives Project a range of fact sheet /resources are being developed to support pedestrian safety and promotion of helmet wearing.²⁰⁹

- 6.9** In its submission, Bicycle NSW recommended that the MAA support and help to provide funding for a state-wide BikeEd program as exists in other states in order to help children develop road craft and hazard perception skills. The Committee asked the MAA to describe the programs it has undertaken or funded that relate to cyclists as safe and effective road users and also to driver awareness of cyclists. In response, the MAA noted the low percentage of claims that involve cyclists and identified its current initiatives that relate to cyclists:

The MAA places priority on funding road safety programs for children as passengers and pedestrians rather than as pedal cyclists. MAA Claims data indicates that claimants under the age of 5 were mainly injured as passengers (73%) and a further 17% were injured as pedestrians and 1% were injured as pedal cyclists. Of claimants in the 5-16 year age group, 20% were injured as pedestrians and 4.9% as cyclists.

In relation to cyclists, the MAA has focused on child pedal cyclists. This included preliminary work on the development of a consumer evaluation program for child pedal cycle helmets, research into the extent and nature of child pedestrian and pedal cycle casualties in 'out of school travel times', and a review of spinal injuries occurring to children as a result of road accidents.

²⁰⁹ MAA answers to additional QON, n 20, p 30.

The MAA provides annual funding, approximately \$250,000, to enable councils to conduct road safety initiatives in their local communities through the MAA Local Government Road Safety Initiatives Program.

In the 2003/04 round three grants were funded in the pedal cycle category. These included research into local pedal cycling to assist development of an integrated transport plan, preparation of a safe cycling brochure to assist parents with issues of cycling with their child, and production of a safe cycling booklet in support of a Bicycle Courier Accord. Each year the MAA calls for research and general community grants in MAA priority areas. The 2004/5 round will be called for in March 2004. Priority areas include pedestrian and bicycle safety.²¹⁰

Injury treatment and rehabilitation

6.10 The specific functions of the MAA under the Act in relation to the provision of acute care, treatment, rehabilitation, long term support and other services for persons injured in motor vehicle accidents is to:

- monitor those services;
- provide support and funding for programs that will assist effective injury management;
- provide support and funding for research and education in connection with those services that will assist effective injury management; and
- develop and support education programs in connection with effective injury management.²¹¹

Grants for rehabilitation projects

6.11 The Committee asked the witnesses for details about the MAA's rehabilitation grants program. The witnesses advised the Committee of the following:

- Of the 64 applications for funding under the rehabilitation grants program, 25 were approved.
- \$7.5 million in grants was provided in 2002-2003, this being a little higher than previous years. Typically, the budget for rehabilitation projects is about \$2.5 million. Last year capital funding provided approximately \$6 million, so that year was perhaps bigger than other years.
- Grants are usually one-off initiatives as the MAA does not provide recurrent funding for the projects.²¹²

6.12 Ms K Hayes, Manager, Injury Prevention and Management Division, outlined one particular project, the Rural and Regional Spinal Networks Project, for the Committee:

²¹⁰ MAA answers to additional QON, n 20, pp 30-31.

²¹¹ *Motor Accidents Compensation Act 1999*, section 206(3).

²¹² Ms Hayes, Manager, Injury Prevention and Management Division, Evidence, 16 February 2004, p 28.

That is the second round of funding for that particular project. Essentially, the purpose of the project is to improve the delivery of spinal cord injury services in rural New South Wales. At the moment people with spinal cord injury tend to depend on the units that are in Sydney, both for acute medical care and then for support for their medical issues once they return to their communities. We have been trying to address that by improving the knowledge of people in rural areas, particularly general practitioners and allied health people who have been working with a group of people to try to manage their medical problems closer to their homes rather than having to come back to Sydney.

The first part of the project involved providing funding for education programs in a number of areas in New South Wales. The project that has been approved this year will be looking at trying to provide those services right across New South Wales. Moving on from an education model to actually having people in each area, who will establish some sort of network of allied health professionals and provide ongoing education to those groups.²¹³

Auditing and evaluating grants projects

6.13 The witnesses provided the Committee with the following information about how the grants projects are evaluated or audited:

In the assessment phase, the applications we get for funding are generally reviewed by external experts. Depending on the type of projects, we would identify usually two or three people who would have expertise in that area to provide advice to the MAA on whether the project is valid, whether it is feasible and whether it would be useful. Having done that, recommendations are being made to management about whether they would be approved or not. Once they are approved, we have people within the MAA staff who would monitor those projects on a quarterly basis to make sure they are actually doing what they say they were doing to start with. In relation to our funding, we also pay that on a quarterly basis, so that people do not actually get paid unless they can demonstrate that they are making satisfactory progress.²¹⁴

A lot of these requests ultimately end up with the board. We have a hierarchy of delegated authorities. For example, David has authority to approve grants up to a certain level, and then David plus one of the independent directors up to another level, and beyond that they come to the board. It is to reduce the amount of time needed to debate them.²¹⁵

Guidelines for the Management of Whiplash-Associated Disorders

6.14 Information about the development of the Guidelines for the Management of Whiplash-Associated Disorders is set out in paragraph 2.39. At the hearing the Committee enquired as to the work of the MAA in evaluating those guidelines. Ms Hayes responded:

²¹³ Ms Hayes, Manager, Injury Prevention and Management Division, Evidence, 16 February 2004, p 28.

²¹⁴ Ms Hayes, Manager, Injury Prevention and Management Division, Evidence, 16 February 2004, p 28.

²¹⁵ Mr Grellman, Chairman of the Board, MAA, Evidence, 16 February 2004, p 28.

That is a project that started a couple of years ago, and information is just starting to come through about the usefulness of those guidelines, and we would probably be in a position to forward reports to you within the next few months.

6.15 Ms Hayes then illustrated various ways in which the guidelines were evaluated:

A large study is being done looking at health outcomes of people who sustained whiplash injuries. PricewaterhouseCoopers are taking quite a rigorous scientific approach to looking at what people's health outcomes are and comparing them across the years since the guidelines have been introduced. We are also looking at their use by, in particular, physiotherapists and general practitioners because they are the group that use them most, and surveying those groups about their effectiveness. We have also looked at costs in our claims register to see whether the costs have changed since the guidelines were introduced. The other group that we would evaluate them with would be the insurers themselves, asking them how they have used them since they have been introduced.²¹⁶

6.16 The Minister for Commerce advised the Committee of an additional study being undertaken in relation to the Whiplash Guidelines. The MAA commissioned PricewaterhouseCoopers and Sydney University to conduct a Health Outcomes Study to determine if the claimants' health outcomes are at least the same as before the Whiplash Associated Disorders Guidelines or better. The project was explained as follows:

The project is looking at three different cohorts:

- 1999 cohort – WAD claimants injured in 1999 and assessed 2 years after injury. This cohort will provide the pre-reform comparison.
- 2001 cohort – WAD claimants injured in 2001 and assessed 3 and 6 months and 2 years after injury.
- 2003 cohort – WAD claimants injured in 2003 and assessed 3 and 6 months and 2 years after injury.

Interviews of the 1999 cohort are complete, as well as the 3 and 6 month interviews for the 23001 cohort. The interviews for the 2001 cohort at 2 years and the 2003 cohort at 3 months are underway. A preliminary report on the 1999 cohort is currently the subject of peer review and will be made available to the Committee when that review is completed.

The MAA notes that a determination of whether the claimants' health outcomes are at least the same as before the Whiplash Association Disorders Guidelines or better, will not be answered until all three cohorts are compared. It is anticipated that a final report will be available in the latter half of 2005.²¹⁷

Audit of insurers against insurer rehabilitation responsibilities

6.17 The Committee had previously been advised by the MAA that all insurers, including both current underwriters and run-off insurers, would be audited against the *Treatment, Rehabilitation and Attendant Care Guidelines* this year. The MAA provided the Committee with the following information about those audits:

²¹⁶ Ms Hayes, Manager, Injury Prevention and Management Division, Evidence, 16 February 2004, pp 28-29.

²¹⁷ Correspondence from the Hon John Della Bosca MLC, Minister for Commerce, to Chair, 26 February 2004.

The Motor Accidents Authority contracted auditors Schofield-Anderson to undertake two-day onsite audits of Compulsory Third Party (CTP) insurers against the TRAC Guidelines in April and May 2003.

All claims previously managed by insurers who have handed in their licenses are now being managed directly by currently licensed insurers. These claims are managed within the licensed insurers' claims management systems and are not being managed separately. Therefore there was not a need to separately audit claims from the unlicensed insurers.

Rating of performance was based on the combined processes of self assessment (a responsibility of the insurer prior to audit) and on site auditing of performance to verify the self assessment.

The TRAC audits provide an objective measure of the ongoing achievement of the TRAC Guidelines and ensure that CTP insurers are actively assisting claimants to obtain early and appropriate access to treatment, rehabilitation and attendant care. The audits also verify insurers have achieved the goals identified in Quality Action Plans following their previous audits. Below is a summary of overall achievement of TRAC guidelines at 2003 audit.

CTP insurer	Overall	Standard 1	Standard 2	Standard 3	Standard 4
1	Commendable	Excellent	Excellent	Commendable	Excellent
2	Commendable	Excellent	Satisfactory	Commendable	Excellent
3	Commendable	Satisfactory	Commendable	Commendable	Satisfactory
4	Satisfactory	Satisfactory	Satisfactory	Satisfactory	Satisfactory
5	Satisfactory	Satisfactory	Satisfactory	Satisfactory	Satisfactory

Three insurers exceeded the required standards and achieved an overall commendable result. One insurer's audit was postponed in 2003 due to extenuating circumstances. Consequently, since April 2003 they have been required to provide monthly progress reports and will have a two-day onsite audit in April 2004.

While all the insurers audited passed, two insurers were required to provide further documentation on their internal audit processes related to specific criteria. As a result one insurer is required to provide further evidence of compliance with the compulsory criteria in February 2004.

The following statements summarise some of the comments made by the auditors:

- the majority of CTP insurers acted on the recommendations contained in their 2001 TRAC audit report.
- for some insurers, the internal auditing system enabled honest identification of problem areas and opportunities for continuous improvement. This provided them with tangible evidence of systems improvement since the last audit.
- most insurers are now using feedback from the MAA's Medical Assessment Service process to inform future decisions related to claims management and the concept of reasonable and necessary.
- most insurer's demonstrated comprehensive training of rehabilitation and claims staff about the TRAC guidelines, in particular the concept of reasonable and necessary.

- several insurers were reminded of the need for their rehabilitation staff to keep abreast of developments in evidence-based practice to inform decisions on reasonable and necessary.²¹⁸

National catastrophic care scheme

6.18 The Minister's Review noted that the MAA has been working closely with other State agencies and has had discussions with the Commonwealth Government and other States in relation to a proposal for a national catastrophic care scheme.²¹⁹ The New South Wales Government has advocated that such a scheme be introduced. Mr Bowen advised the Committee as to progress of this matter:

...The matter is on the agenda of the heads of Treasury group, which is the Commonwealth and all the State Treasurers, and it will be dealt with by the group at its meeting in a week or 10 days time.²²⁰

6.19 The Minister's Review identified the model being proposed as follows:

- Remove future care as a head of damage from common law and provide it through a statutory benefit scheme;
- Pool funds for future care to remove some of the uncertainties around estimating cost of care for each individual;
- Criteria for eligibility to enter the scheme, for example, require more than one hour of care a day from two year post accident;
- Provide services rather than funds;
- Case management model and purchaser/provider split for service delivery;
- Establish standards for the delivery of services and guidelines for assessment of need for services;
- Encourage development of appropriate services to meet claimants' needs.²²¹

²¹⁸ MAA answers to additional QON, n 20, pp 15-16.

²¹⁹ Minister's Review, n 56, p 44. The background to this issue was examined in the Committee's Fourth Report, n 95, p 9.

²²⁰ Mr Bowen, General Manager, MAA, Evidence, 16 February 2004, p 27.

²²¹ Minister's Review, n 56, p 44.

Appendix 1 Minutes

Meeting No 1

1.00pm, Thursday 26 June 2003

Room 1153, Parliament House, Macquarie Street, Sydney

MINUTES

1. Present

Ms Robertson (in the Chair)
Mr Pearce
Mr Bourke
Mr Clarke
Ms Rhiannon

2. Apologies

Mr Obeid

6. Review of the exercise of the functions of the MAA and the MAC

The Chair tabled the resolution of the Legislative Council of 25 June 2003 designating the Committee as the Legislative Council Committee to supervise the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council in accordance with section 210 of the *Motor Accidents Compensation Act 1999*.

The Committee deliberated.

Resolved, on the motion of Mr Pearce, that the Committee seek a briefing from officers the Motor Accidents Authority and the Motor Accidents Council during the October sittings of the Legislative Council.

Resolved, on the motion of Mr Pearce, that a public hearing to review the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council be held in November 2003 on a date to be determined by the Chair in consultation with Committee members.

Tony Davies
Committee Director

Meeting No 2

1.30 pm, Wednesday 3 September 2003
Room 1153, Parliament House, Macquarie Street, Sydney

MINUTES

1. Present

Ms Robertson (in the Chair)
Ms Fazio
Mr Clarke
Ms Rhiannon

2. Apologies

Mr Burke
Mr Pearce

3. Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 1 be adopted.

6. Review of the exercise of the functions of the MAA and the MAC

The Committee deliberated.

Resolved, on the motion of Ms Fazio, that the Committee Secretariat contact Committee members to ascertain availability and, in consultation with the Chair, schedule a date in November for the public hearing to review the exercise of the functions of the MAA and the MAC.

Rachel Callinan
A/Committee Director

Meeting No 3
1.00pm, Thursday 30 October 2003
Room 1136, Parliament House, Macquarie St, Sydney

MINUTES

1. Present

Ms Robertson (in the Chair)
Mr Pearce
Mr Burke
Ms Fazio
Ms Rhiannon

2. Apologies

Mr Clarke

3. Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 2 be adopted.

5. Review of the exercise of the functions of the MAA and the MAC

A/Director provided an update of the progress of the inquiry.

The Committee deliberated.

Resolved, on the motion of Mr Burke, that a public hearing to review the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council be held on 5 December 2003.

6. Government responses to third and fourth MAA reports

The Committee deliberated.

Resolved, on the motion of Ms Fazio, to consider the Government's response to the Committee's Third and Fourth MAA Reports in the context of the fifth MAA hearing.

Rachel Callinan
A/Director

Meeting No 4
5.30pm, 20 November 2003
Room 1153, Parliament House, Macquarie St, Sydney

MINUTES

1. Present

Ms Robertson (in the Chair)
Mr Burke
Ms Fazio
Mr Pearce

2. Apologies

Mr Clarke
Ms Rhiannon

3. Minutes

Resolved, on the motion of Mr Burke, that the Minutes of Meeting No 3 be adopted.

4. Review of the exercise of the functions of the MAA and the MAC

The Secretariat provided members with draft possible questions for the hearing.

The Committee deliberated.

Rachel Callinan
A/Director

Meeting No 5

10.30am, Friday 5 December 2003
Room 814/815, Parliament House, Macquarie St, Sydney

MINUTES

1. Present

Ms Robertson (in the Chair)
Mr Pearce
Mr Burke
Mr Clarke
Ms Fazio
Ms Rhiannon

2. Apologies

No apologies

3. Minutes

Resolved, on the motion of Mr Burke, that the Minutes of Meeting No 4 be adopted.

5. Public hearing into the exercise of the functions of the MAA and the MAC

Postponement and rescheduling of the hearing

The Committee deliberated.

Resolved, on the motion of Mr Burke, that the MAA hearing scheduled for 5 December 2003 be postponed due to the unscheduled sitting of the Legislative Council on that day and that the hearing be rescheduled to a date to be confirmed in February 2004.

Tabling documents relevant to the MAA Review

The Chair tabled the following documents:

1. MAA response to stakeholder questions, received from the Hon John Della Bosca MLC, 3 December 2003.
2. Correspondence from the Hon John Della Bosca MLC to the Hon Bob Carr MP dated 4 December 2003 and attached MAA issues paper: *Child motor vehicle fatalities: bereavement benefit for parents*.

The Committee deliberated.

Resolved, on the motion of Mr Pearce, that the Committee write to the Minister to advise of its view that the MAA's answers to stakeholder questions are not satisfactory and to request that the MAA supply a further, more detailed response, to each of the specific issues and questions raised by the stakeholders.

Making certain documents public

Resolved, on the motion of Mr Pearce, that, in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and, under the authority of Standing Order 243, to make public the following documents:

- (i) Chair's letter to stakeholders, 29 September 2003, inviting them to nominate issues or questions they would like the Committee to raise at this hearing;
- (ii) Responses received from:
 - Bar Association of NSW;
 - Australian Plaintiff Lawyers Association;
 - ICA;
 - Bus and Coach Association (NSW);
 - Paraquad;
 - Australian Psychological Society;
 - Bicycle NSW;
 - Royal Australasian College of Surgeons; and
 - Youthsafe.
- (iii) Chair's letter to the Hon John Della Bosca MLC, 6 November 2003, seeking a written response from the MAA to stakeholder questions.
- (iv) MAA response to the stakeholder questions, received from the Hon John Della Bosca MLC, on 3 December 2003.
- (v) MAA issues paper: *Child motor vehicle fatalities: bereavement benefit for parents*.

Rachel Callinan
A/Director

Meeting No 7

9.45am Monday 16 February 2004
Jubilee Room, Parliament House, Macquarie St, Sydney

MINUTES

1. Present

Ms Robertson (in the Chair)
Mr Burke
Mr Clarke
Ms Fazio
Mr Pearce
Ms Rhiannon

2. Minutes

Resolved, on the motion of Mr Burke, that the Minutes of Meeting No 6 be adopted.

4. Public hearing for the Review of the Exercise of the Functions of the MAA and the MAC

The Committee began its fifth hearing for the Review of the Exercise of the Functions of the MAA and the MAC.

The public was admitted.

Mr David Bowen, Ms Concetta Rizzo and Ms Cathy Hayes were affirmed and examined.

Mr Richard Grellman was sworn and examined.

Evidence concluded and the witnesses withdrew.

The public withdrew.

The Committee resolved, on the motion of Ms Fazio, that in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under paragraph 21 of the resolution establishing the Standing Committees, and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, to publish the transcript of the public hearing held on 16 February 2004.

Rachel Callinan
Senior Project Officer

Meeting No 8

1.00pm Monday 29 March 2004

Rm 1153 Parliament House, Macquarie St, Sydney

MINUTES

1. Present

Ms Robertson (in the Chair)

Mr Burke

Mr Clarke

Ms Fazio

Mr Pearce

2. Apologies

Ms Rhiannon

5. Review of the MAA and MAC

The Chair submitted her draft report on the *Review of the Exercise of the Functions of the MAA and the MAC, Fifth Report* which, having been previously circulated to Members of the Committee, was accepted as being read.

The Committee considered the draft report.

Executive Summary read.

Resolved, on the motion of Ms Fazio, that the Executive Summary be agreed to.

Chapter 1 read.

Resolved, on the motion of Mr Burke, that Chapter 1 be agreed to.

Chapter 2 read.

Resolved, on the motion Ms Fazio, to insert after paragraph 2.26 the following paragraph and recommendation.

If, as a result of its examination of this issue, the MAA determines that the operation of the legislation does have the effect described by APLA and the Bar Association, the Minister for Commerce should seek to amend the Motor Accidents Compensation Act 1999 accordingly.

Recommendation 1

The Committee recommends that if, as a result of the MAA's examination of the issue of claims against the Nominal Defendant for unregistered and unregistrable vehicles, the MAA determines that the operation of the legislation does have the effect described by APLA and the Bar Association (outlined in paragraph 2.23-2.25 of this report), the Minister for Commerce should seek to amend the Motor Accidents Compensation Act 1999 accordingly.

Resolved, on the motion of Ms Fazio, that Chapter 2 as amended be agreed to.

Chapter 3 read

Resolved, on the motion of Mr Pearce, that Chapter 3 be agreed to.

Chapter 4 read.

Resolved, on the motion of Mr Burke that paragraph 5.18-5.26 be moved and inserted after paragraph 4.65.

Resolved, on the motion of Ms Fazio, that Chapter 4 as amended be agreed to.

Chapter 5 read.

Resolved, on the motion of Mr Burke, that Chapter 5 as amended be agreed to.

Chapter 6 read.

Resolved, on the motion of Mr Burke, that Chapter 6 be agreed to.

Resolved, on the motion of Ms Fazio, that the draft report as amended be the report of the Committee and be signed by the Chair and presented to the House, together with the transcript of evidence, submissions, documents and correspondence in relation to the inquiry, in accordance with the Resolution of the House dated 21 May 2003 establishing the Committee.

Resolved, on the motion of Ms Fazio, that the Committee Secretariat be permitted to correct stylistic, typographical and grammatical errors in the report prior to tabling.

The Committee thanked the Secretariat staff for their assistance during this review and in the preparation of the Committee's Report.

Rachel Callinan
Senior Project Officer

Appendix 2 Main recommendations of HIH Royal Commission relevant to the MAA, Federal Government response and MAA views

Recommendation 49 proposes that APRA should become the sole prudential regulator of general insurance.	The Commonwealth will refer this recommendation to the States and Territories for their consideration.	Supported by the MAA.
Recommendation 50 is that if the States and Territories remain involved with prudential regulation, that there be effective information exchange with APRA.	The Commonwealth will refer this recommendation to the States and Territories for their consideration.	Supported by the MAA. The MAA already has an MOU with APRA and will update the MOU to reflect changes as they are implemented by APRA.
Recommendations 51-52 propose that the States and Territories reduce inconsistencies in their statutory schemes, and that they apply relevant prudential requirements.	The Commonwealth will refer this recommendation to the States and Territories for their consideration.	Civil law reform is being addressed through Heads of Treasuries chaired by the Commonwealth Treasurer.
Recommendation 53 proposes that the States and Territories consider allowing greater price flexibility in their statutory schemes. This is a matter that would be appropriate for consideration by the proposed ministerial council.	The Commonwealth will refer this recommendation to the States and Territories for their consideration.	This is already addressed by the MAA in contrast to other states and territories where there is limited differentiation on price.
Recommendation 54 recommends that the Commonwealth use a ministerial council to discuss and resolve general insurance and perhaps other financial services matters with the States.	Accept. Since March 2002 the Commonwealth has convened a meeting of Commonwealth and State and Territories Insurance Ministers to discuss insurance matters generally. The forum will continue to consider insurance matters as they arise.	
Recommendation 58 is that governments avoid imposing on insurers levies and other taxes that	The Commonwealth will refer this recommendation to the States and Territories for their	There are no duties or taxes applicable to CTP policies.

cannot be passed on to policyholders.	consideration.	
Recommendation 61 recommends the Commonwealth Government introduce a systematic scheme to support policy holders of insurance companies in the event of a failure.	This matter was last considered under the Financial System Inquiry (the Wallis Inquiry) which recommended against establishing such a scheme. The Government will commission a study by an eminent person into the merits of financial system guarantees. The study will include how any guarantee might be funded and how it might impact on consumers and incentives in financial markets. Details of the study including the terms of reference and how the study will be conducted will be available on the Treasury website.	Supported by the MAA.
Recommendation 29 proposes that APRA develop an internal system for tracking all relevant information concerning regulated entities.	The Government will refer this recommendation to APRA for its action.	Supported by the MAA.
Recommendations 34 deals with the disclosure of information by authorised general insurers.	The Government will refer this recommendation to APRA for its action.	Supported by the MAA. The MAA/APRA MOU allows for the exchange of information.

Appendix 3 Code of Conduct & Terms and Conditions of Employment



Motor Accidents Authority of NSW (MAA) Medical Assessment Service (MAS)

Code of Conduct for Medical Assessors

1. RESPECT FOR THE LAW

- 1.1. A Medical Assessor should demonstrate a respect for the law in the performance of their assessment responsibilities by maintaining and upholding the integrity of the MACA scheme, the Medical Assessment Service and the medical assessment process.
- 1.2. A Medical Assessor should also demonstrate a respect for the law in private life.

2. FAIRNESS

- 2.1. A Medical Assessor should take into account all of the information provided to them by MAS.
- 2.2. A Medical Assessor should act without bias and in a way that does not give rise to an apprehension of bias in the performance of their assessment responsibilities.
- 2.3. A Medical Assessor should be pro-active and comprehensive in disclosing to all interested parties any interests that could conflict (or appear to conflict) with the medical assessment of a claim.
- 2.4. A Medical Assessor should have regard to the potential impact of activities, interests and associations in private life on the impartial and efficient performance of their assessment responsibilities.
- 2.5. A Medical Assessor should not accept gifts of any kind where this could reasonably be perceived to compromise the impartiality of the assessor or MAS.

3. INDEPENDENCE

- 3.1. A Medical Assessor should perform their assessment responsibilities independently and free from influence external to assessment proceedings.

4. RESPECT FOR PERSONS

- 4.1. A Medical Assessor should be patient, dignified and courteous to injured persons referred to them, CARS, MAS and MAA staff and others with whom the Assessor deals, and should require similar behaviour of those subject to their direction and control.

- 4.2. A Medical Assessor should endeavour to understand and be sensitive to the needs of persons involved in proceedings before MAS.

5. DILIGENCE AND EFFICIENCY

- 5.1. A Medical Assessor should be diligent and timely in the performance of their assessment responsibilities.
- 5.2. A Medical Assessor should take reasonable steps to maintain and to enhance the knowledge, skills and personal qualities necessary to the performance of their assessment responsibilities.

6. INTEGRITY

- 6.1. A Medical Assessor should act honestly and truthfully in the performance of their assessment responsibilities.
- 6.2. A Medical Assessor should not knowingly disclose, take advantage of, or benefit from, information not generally available to the public obtained in the course of the performance of their assessment responsibilities.
- 6.3. A Medical Assessor should not use their position as an assessor to improperly obtain, or seek to obtain, benefits, preferential treatment or advantage for the assessor or for any other person or body.
- 6.4. A Medical Assessor should be scrupulous in the use of MAS resources.
- 6.5. In private life, a Medical Assessor should behave in a way that upholds the integrity and good reputation of MAS.

7. ACCOUNTABILITY AND TRANSPARENCY

- 7.1. A Medical Assessor is accountable for decisions and actions taken as a Medical Assessor and should fully participate in all applicable scrutiny regimes (including legislative and administrative scrutiny).
- 7.2. A Medical Assessor should be as open as possible about all decisions and action (including lack of action) taken in the performance of their assessment responsibilities.

8. RESPONSIBILITY OF MEDICAL ASSESSMENTS MANAGER

- 8.1. The Medical Assessments Manager should ensure that medical assessors have access to assistance to help them comply with the standards of conduct and to perform their assessment responsibilities, through the provision of appropriate leadership, training and support.



**Motor Accidents Authority of NSW (MAA)
Medical Assessment Service (MAS)**

**Terms and Conditions of Engagement
For Medical Assessors appointed under section 59 of the
Motor Accidents Compensation Act 1999 ('the Act')**

All appointments as Medical Assessor with the Motor Accidents Authority are subject to the following terms and conditions.

1. APPOINTMENT

- 1.1. The term of appointment covers the period detailed in the Letter Of Offer issued by the MAA, subject to compliance with these terms and conditions, or unless the appointment is otherwise terminated or the Medical Assessor resigns.
- 1.2. The appointment is restricted to specific types of disputes as advised by the MAA in its Letter of Offer and no guarantee is made of the number of disputes that will be referred to a Medical Assessor.

2. MEDICAL ASSESSMENT

- 2.1. The Medical Assessor is to conduct an assessment and make a determination of the disputes outlined in the MAA's Letter of Referral and accompanying documentation. The Medical Assessor will provide a Certificate stating the decision and provide reasons for the decision in the required formats.
- 2.2. Assessments will be conducted in accordance with these Terms and Conditions, the MAA Medical Assessment Guidelines, Code of Conduct for Medical Assessors and the Information for Conducting a Medical Assessment under Section 61 of the Act.
- 2.3. The Medical Assessor will maintain appropriate premises for conducting medical assessments referred by the MAA. All equipment and facilities used in providing services will be maintained in an operable and effective condition.

- 2.4. The work to be performed as a Medical Assessor is personal to the Medical Assessor and cannot be assigned and/or sub contracted in whole or in any part.
- 2.5. Medical Assessors and their employees cannot:
 - a. be or become officers, employees and or agents of the MAA
 - b. represent that they are officers, employees and or agents of the MAA.

3. TIMELY PROVISION OF ASSESSMENTS

- 3.1. Assessments must be conducted and a Certificate provided in accordance with the time limits specified in the Medical Assessment Guidelines.
- 3.2. A draft copy of the Medical Assessor's Certificate is to be provided to the Registry of the MAA within 15 business days of the conclusion of assessment.
- 3.3. In the case of a review of a medical assessment, a report of the review panel (providing brief reasons for the decision) and any new certificate must be provided by the Chairperson of the review panel within 20 business days of the conclusion of the review.

4. PERFORMANCE REVIEW

- 4.1. The performance of the Medical Assessor will be monitored by the MAA for compliance with MAA requirements and feedback on performance will be provided to the Medical Assessor as required and at least twice per year.

5. CONFLICT OF INTEREST

- 5.1. Engagement as a Medical Assessor does not preclude the Medical Assessor from employment elsewhere. However, each Medical Assessor must ensure that no conflict of interest exists or is likely to arise in undertaking medical assessments.
- 5.2. The Medical Assessor must notify the MAA immediately on becoming aware of the existence or possibility of a conflict of interest.
- 5.3. The Medical Assessor must advise the MAA in writing of any Compulsory Third Party insurer or legal firm whose referrals account for more than 20% of the Medical Assessor's total private workload.

6. PROFESSIONAL REGISTRATION STATUS

- 6.1. The Medical Assessor must notify the MAA immediately if there is any change to the Medical Assessor's professional registration status. The MAA may subsequently exercise its right of termination of the appointment.

7. TRAINING

- 7.1. Training and advice will be provided by the MAA on the requirements of the medical assessment role. The Medical Assessor must attend, or otherwise undertake, all training required by the MAA. This training will be provided free of charge and reasonable attendance costs met for country and interstate assessors.
- 7.2. The provision of information and advice by the MAA is by way of assistance only and the Medical Assessor must rely on his or her own professional expertise in providing the services.
- 7.3. The Medical Assessor is required to undertake on-going professional development and in particular keep up to date with the developments in medical assessment issues and requirements.

8. FEES AND PAYMENT

- 8.1. The MAA will pay the Medical Assessor the fee specified in the fee letter accompanying the MAA's Letter of Referral to Assessors, which is calculated in accordance with the Medical Assessors Fee Schedule attached as Attachment 1 and as varied from time to time.
- 8.2. The Medical Assessor must render an account for the work done for the MAA on the completion of each matter. Completion of a matter occurs at the time of the submission of the draft copy of the Medical Assessor's Certificate or, in the case of reviews, at the time of submission of the Report and/or Certificate of the Review Panel.
- 8.3. The account must be rendered in the format specified by the MAA. Accounts will be paid within 30 days of the date of the receipt of the invoice.
- 8.4. The MAA reserves the right to submit payment of accounts by electronic deposit to the Medical Assessor's bank account in future. At such time as this facility becomes available to the MAA, the MAA will require the Medical Assessor to provide details of an Australian bank account (including account name, account number and BSB number) into which payment may be made.

9. SUPERANNUATION

- 9.1. The MAA will make superannuation payments to approved Medical Assessors as required under the Commonwealth *Superannuation Guarantee (Administration) Act 1992*.
- 9.2. The Medical Assessor will provide the MAA with any details necessary for the payment of superannuation.

10. CONFIDENTIALITY

- 10.1. All information relating to a medical assessment, including information provided by the MAA and Reports and Certificates prepared by Medical Assessors is confidential.
- 10.2. The Medical Assessor must not disclose any confidential information to any person other than the MAA. The Medical Assessor must take reasonable steps to ensure that confidential information is protected against unauthorised use and access. Confidential information must be used solely for the purposes of the service being provided to the MAA and for no other purpose.
- 10.3. In a case where a Medical Assessor becomes aware of a serious risk to the injured person's health or safety, or an urgent need, the Medical Assessor should first advise an officer of MAS before taking any action, except where failing to take immediate action will endanger the life or health of the injured person. The MAA may authorise the Medical Assessor to disclose confidential information to the injured person's treating doctors and/or legal representatives following request by letter to the Proper Officer if this is considered reasonable in the circumstances.
- 10.4. Confidential information can only be disclosed to the Medical Assessor's employees where such disclosure is essential to the employee carrying out his or her duties. In these cases the Medical Assessor must ensure that the employee is aware of the confidentiality requirements and is advised that he or she is strictly forbidden from disclosing or using any aspect of the confidential information.
- 10.5. The Medical Assessor must not copy, reproduce or supply to any other person any confidential information without the prior written approval of the Motor Accidents Authority

11. ASSESSMENT OF CHILDREN

- 11.1. Where a Medical Assessor agrees to assess a dispute in relation to a child ("Child Related Employment") it will be necessary for the MAA to conduct a "Working with Children Check". The check takes

into account relevant criminal records, apprehended violence orders and completed disciplinary proceedings.

- 11.2. The Medical Assessor must fully co-operate with the conduct of such a check which is required under the NSW Child Protection (Prohibited Employment) Act 1998.

12. INDEMNITY

- 12.1. Where the Medical Assessor has conducted the assessment fully in accordance with all MAA requirements and has acted in good faith, the MAA will fully indemnify and keep indemnified the Medical Assessor and his or her employees from and against:
- a. All damages and legal costs arising out of allegations of an injury arising from the Medical Assessor's negligence during the conduct of a medical assessment or loss resulting from the Medical Assessor's decision, and
 - b. Injury or loss to the Medical Assessor or the Medical Assessor's employees as a result of an act or omission by the person being assessed and/or any person accompanying the person being assessed.
- 12.2. This indemnity does not extend to any injury or loss arising to any person in relation to activities outside the scope of the work undertaken by the Medical Assessor pursuant to these Terms and Conditions of Engagement and the MAA's Letter of Referral.

13. INSURANCE

- 13.1. The Medical Assessor will, throughout the term of his or her appointment, take out and maintain with a general insurance company licensed by the Australian Prudential Regulatory Authority the following insurance policies:
- a. A broad form public liability policy of insurance in respect of all premises used by the Medical Assessor to conduct medical assessments; and
 - b. Workers' compensation insurance in accordance with applicable legislation in the state in which the assessor practices in respect of all the Medical Assessor's employees
 - c. A professional indemnity policy of insurance in respect of each and every occurrence and unlimited in the number of such occurrences over any one period of cover
- 13.2. The Medical Assessor will, on request, produce to the MAA satisfactory evidence that the Medical Assessor has effected and renewed the necessary insurance policies.

14. RECORD KEEPING

- 14.1. Medical Assessors must keep proper accounts and records of services provided in his or her dealings with the MAA and must adopt adequate and accurate accounting practices relating to fees or other costs paid by the MAA.

15. ELECTRONIC OPERATING ENVIRONMENT

- 15.1. Medical Assessors are encouraged to maintain access to a PC system equipped with a modem and connected to the Internet and to ensure they can be contacted by email.
- 15.2. Medical Assessors are also encouraged to provide documentation (including medical assessment Reports and Certificates and invoices) electronically to the MAA

16. DISPUTES

- 16.1. In the event of a dispute between the MAA and the Medical Assessor, the Medical Assessor must contact the MAAS Manager and endeavour in good faith to resolve the dispute.

17. TERMINATION

- 17.1. A Medical Assessor's appointment may be terminated by the MAA or the Medical Assessor by giving one month's notice.
- 17.2. A Medical Assessor's appointment may be terminated by the MAA in the event of a breach by the Medical Assessor of these Terms and Conditions or a change in the Medical Assessor's professional registration status or failure to comply with the performance criteria specified from time to time by the MAA.

Attachment 1**Medical Assessment Service****MEDICAL ASSESSOR FEES, EFFECTIVE 11/08/03
Exclusive of GST and superannuation.**

	On papers	Average	Complex	Average Psychiatric	Complex Psychiatric
Single application	\$470	\$705	\$940	\$940	\$1175
Plus additional application	+\$120	+\$120	+\$120	+\$120	+\$120
Total for 2 applications	\$590	\$825	\$1060	\$1060	\$1295
Plus additional application	+\$120	+\$120	+\$120	+\$120	+\$120
Total for 3 applications	\$710	\$945	\$1180	\$1180	\$1415
<u>Flat rates to be applied</u>					
Additional interpreter loading			Additional \$50		
Video review up to one hour			Additional \$120		
Video review more than one hour			Additional \$235		
Supplementary report where an additional dispute is added			\$235		
Cancellation 1 or 2 days prior			\$235		
Non-attendance or less than 24 hours notice of non-attendance			\$470		

Important Notes

- These fees are payable to all medical specialties and are based on an hourly rate of \$235 plus GST.
- Fees include the assessor's review of the file and documents, examination and preparation of a report and certificate in accordance with MAS requirements.
- No additional fee is payable if amendments are requested as a result of an error, omission or defect of form on the part of the assessor.
- Invoices are payable upon receipt by MAS of the report of the assessment.
- The fee schedule is to be adjusted 1 October 2004 and 1 October every year thereafter. The adjustment is to be in accordance with the percentage change in the amounts estimated by the Australian Statistician of the average weekly total earnings of full-time adults in New South Wales in the 4 quarters preceding the date of adjustment, where those estimates are available.

Additional Explanatory Notes

What is a single application?

- This is an application for assessment of permanent impairment and stabilisation OR earning capacity OR treatment OR stabilisation only.

What is an additional application?

- Each additional application will be accompanied by a separate MAS Application for Assessment of a Dispute. For example, where there is an application for assessment of a treatment dispute AND an application for assessment of a permanent impairment dispute.

What is an average case?

Permanent Impairment:

- **1 or 2 body systems** to be assessed – **not injuries**. For example, a soft tissue injury to the cervical, thoracic, lumbar spine and shoulders is average because it involves 2 body systems – Spine and Upper Limb.
- Documents can be realistically reviewed within an hour.

Treatment:

- Assessment of several treatment disputes which relate to the same injury
- e.g.1: Physiotherapy and arthroscopy disputed in a knee injury – single analysis of the current status and need for further intervention in relation to a knee injury only.
- E.g 2. Massage therapy, CT scan and need for ongoing review by an orthopaedic specialist in relation to a soft tissue injury of the spine. All decisions in this case flow from a single analysis of the status and need for further intervention in relation to the spinal injury.
- Documentation which can realistically be reviewed within one hour.

What is a complex case?

Permanent Impairment

- More than 2 body systems requiring examination
- OR
- Complex multiple injuries within one body system (e.g. separate finger, wrist and shoulder injuries). Bilateral injuries do not constitute a complex case.
 - Examination of the claimant is likely to take longer than one hour
 - Large quantity of documentation is provided, which is likely to require more than one hour to review.

Treatment

- Assessment of several treatment disputes requiring separate analysis of different factors, such as diagnosis, prognosis, benefit from further intervention and extent and impact of functional limitations.

- E.g.1: Physiotherapy, surgery and need for domestic assistance.
 - E.g. 2: Orthopaedic consultations, physiotherapy and various pharmaceuticals.
 - E.g. 3: Facet joint injections, domestic assistance, CT scans, specialist review.
- Examination of the claimant is likely to take longer than one hour
 - Large quantity of documentation is provided, which is likely to require more than one hour to review.
 - NB: An additional loading of \$120 may be given where 3 or more disputes require a decision regrading causation and R&N.

How do I calculate the fee payable for combined or multiple assessments ?

Where **treatment and permanent impairment and/ or EC** are in dispute, the MAS officer must first determine the appropriate base fee by considering:

1. Do the treatment issues justify a complex fee and if not,
2. Does the PI dispute justify a complex fee and if not,
3. Does the volume of documents justify a complex fee?

Once the base fee has been determined, an additional fee of \$120 is added to the base fee for **each additional application** (not the number of disputes).

- Where an assessor is asked to assess **multiple** applications, for example permanent impairment and earning capacity and a treatment dispute, the applicable fee will be:
 $\$705 + \$120 + \$120 = \$945 + \text{GST}$ in an "average" case, or
 $\$940 + \$120 + \$120 = \$1180 + \text{GST}$ in a "complex" case.

Additional loading

- If an assessor is required to travel at the request of MAS for the purposes of conducting an assessment, the rate payable is negotiable, at an agreed hourly rate or in accordance with public sector rates per kilometre.
- An additional loading based on the hourly rate of \$235 will apply only in exceptional cases where it is agreed that the assessment will be more time consuming than the above.
- All additional loadings must be approved by a Principal Assessment Officer or Proper Officer.

Appendix 4 MAA Issues Paper

Child motor vehicle fatalities: bereavement benefit for parents

The report of the Legislative Council Standing Committee on Law and Justice: 'Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council' - Fourth Report (Report 24 - December 2002) recommends that:

The Special Minister of State consider an amendment to the Motor Accidents Compensation Act 1999 to provide a statutory monetary benefit to parents whose children are killed in a motor vehicle accident as a means of providing them with some form of direct and untied financial assistance. The amount paid should not exceed \$100,000.

1. Background

NSW Law Reform Commission Report

In its report on A Transport Accidents Scheme for NSW (1984) the New South Wales Law Reform Commission recommended that the scheme should provide compensation on the death of a person killed in a transport accident.

The Commission reported that benefits should take the form of a lump sum for the benefit of dependent family members, and periodic compensation for the spouse and children of the deceased. The availability of death benefits in all existing compensation schemes in Australia at the time reinforced the Commission in its view that the proposed scheme should also cover death benefits.

To be eligible for death benefits, a person would have to demonstrate both material dependence and family membership. Material dependence comprised dependence for material support, whether in the form of contribution from earnings where the deceased was an earner, or household services where the deceased was a non earner. The main recipients of the compensation recommended by the Commission were the surviving dependent spouse and children of a deceased parent.

The Commission also recommended that the scheme cover reasonable funeral expenses of people killed in transport accidents.

In the current fault based motor accidents scheme in NSW, these benefits are available where a person makes a claims under the Compensation to Relatives Act.

Further, the Commission considered whether there was a need for bereavement benefits where the deceased was a child, such as a small payment for grief and suffering. The Commission noted that it was not possible to justify a large payment as bereavement benefit but also expressed concern that a small payment might be seen as a form of tokenism and therefore insensitive in the circumstances.

The Commission's report drew attention to the fact that no provision for bereavement benefit existed in any other scheme in NSW providing death benefits. It was noted that compensation might be payable for the death of a child in consequence of a tort action for nervous shock, or as criminal injuries compensation. A bereavement benefit

for the death of a child was not available under the Compensation to Relatives Act or under any of the existing no fault schemes in Australia or New Zealand.

For these reasons, in its final report, the Commission recommended that no compensation should be paid as consolation for grief and bereavement.

NSW Victims of Crime Compensation

The Victims Support and Rehabilitation Act provides statutory compensation for the family members of a crime victim killed by an act of violence. The total amount of compensation which all the family members are eligible to share, is \$50,000. Family members are identified as:

- The victim's spouse
- The victim's de facto spouse, or partner of the same sex, who has cohabited with the victim for at least two years
- A parent, guardian or step-parent of the victim
- A child or step-child of the victim or some other child of whom the victim is the guardian
- A brother, sister, step-brother or step-sister of the victim.

Whilst the compensation paid to family members may be considered to be a form of bereavement benefit it is noted that the legislation does provide that any dependent family members have priority (to the exclusion of other family members) in the payment of the benefit.

The victims of crime support scheme also provides counselling for the family members of a homicide victim. Recent changes to the legislation has extended access to this counselling to the family of a victim of crime killed in circumstances where a motor vehicle has been used as a weapon.

Benefits available from the Victorian no fault scheme

Under the Victorian no fault Transport Accident Compensation(TAC) scheme the provisions for a grief reaction are very limited. Although there is a provision for the payment of nervous shock claims, it is limited to people who were directly involved in the accident or witnessed the accident or its immediate aftermath.

The TAC does pay the cost of family counselling services to family members of a person who dies or is severely injured as a result of a transport accident. Severe injury means a severe closed head injury, paraplegia, quadriplegia, amputation of a limb, or burns to more than 50% of the body, or any other injury prescribed. Family member means a partner, parent, sibling or child of the person who dies or is severely injured as a result of a transport accident. The maximum amount available for family counselling is \$1,880.

The TAC also partly funds the Road Trauma Support Team, which was established in Melbourne in 1994 to provide support, information and counselling to people whose lives have been impacted by road trauma. The Team has expanded to 40 volunteers who have been trained in handling bereavement, loss and grief counselling. Their clients include family, friends, crash witnesses, work colleagues and neighbours of the deceased.

2. Costing the proposal

Number of child fatalities

Over the last ten years, the RTA has recorded about 50 child fatalities (aged 16 and under) each year in NSW, although the number has decreased more recently. As the RTA definition includes only accidents that have occurred on a public road, this number does not include driveway accidents and other deaths resulting from a motor vehicle accident not on a public street.

However, the most recent report of the NSW Child Death Review Team, using information from the NSW Registry of Births, Deaths and Marriages, identified that there were 50 child fatalities aged 17 and under due to transport accidents in 2001-2002. This number has been used to cost the proposal.

Compensation for the death of a child under the Motor Accidents Scheme

When a child is injured or killed in a motor vehicle accident, a CTP claim can be made for compensation related to the child's injuries if there is fault on the part of an owner or driver of a vehicle. In cases where the child dies as a result of the accident, compensation includes funeral expenses.

In addition to claims directly related to the deceased child, a parent may lodge a separate claim for compensation on their own behalf, for any injuries sustained in the same accident and/or psychological trauma experienced because of the injury or death of their child. A parent can make a psychological trauma claim whether they were at the scene of the accident or not. However, a parent who was the at fault driver in the accident is not eligible to make a claim.

Since the start of the motor accidents scheme in July 1989, 378 claims related to child fatalities have arisen from 345 accidents. This represents an average of just under 30 child fatality claims per year (on average 60% of all child fatalities). If the child died in the accident or soon afterwards, the only payment likely to be made would be for funeral expenses. If the child died some time after the accident, the insurer may have made other payments as well.

Related to these child fatalities, 172 parents claimed for a psychological reaction to the accident in which their child died. Most of those parents claimed for psychiatric injuries only. Sixteen parents claimed for both psychiatric and physical injuries. On average 13 parents per annum claimed for a psychological reaction to a child fatality.

In addition 57 parents claimed for physical injuries only. Including these claims, brings the total to 229, or 18 parents per annum making a claim.

Costing analysis

In costing the proposed benefit, it has been assumed that the benefit would replace the claims made by parents for psychiatric injuries alone, but that parents could still make claims for any physical injuries they sustained in the accident.

If the benefit is \$100,000 for each child fatality, the total cost would be \$5 million per annum. This would be reduced by about \$940,000, which is currently paid on claims by parents for psychiatric injuries. The resulting net cost is \$4.1 million per annum.

Type of claim	Claims per annum	Average cost	Total cost	Average cost excl L&I*	Total cost excl L&I
Not at scene	9.5	\$61,782	\$586,929	\$52,188	\$495,786
At scene – psyche only	3.5	\$74,156	\$259,546	\$66,593	\$233,076
Total – psyche only claims	12		\$846,475		\$728,862
At scene – psyche & physical (psyche component only)	1.2	\$74,156	\$88,987	\$66,593	\$79,912
Total – psyche component			\$935,462		\$808,774
At scene – physical only	4.4	\$205,879	\$905,868	\$194,937	\$857,723
At scene – psyche & physical	1.2	\$236,374	\$283,649	\$192,353	\$230,824
Total – physical injuries	5.6		\$1,189,517		\$1,088,547

* excluding legal & investigation costs

The MAA Board notes that some parents would receive more under the current Motor Accidents Compensation Scheme than under the proposed benefit scheme. Parent claimants in the current compensation scheme may for example receive both counselling, economic loss and non economic loss damages.

In addition to the cost of the proposal a number of other issues must be considered. These are identified below.

3. Options and issues

In examining the Standing Committee's proposal, the MAA Board identified a number of issues that would need to be resolved if a bereavement benefit is to be provided in a fair and equitable manner. In particular, the Board considered how the proposal would operate in the context of the existing fault based motor accidents compensation scheme.

No fault accidents

There are circumstances where no driver may be considered to be at fault in a motor vehicle accident, for example:

- there was no fault found on the part of the driver of the vehicle (e.g. a young child runs out onto the road but the driver is not negligent as was the case in the landmark High Court decision of *Derrick v Cheung (2001)* or
- the child was injured in a 'no blame' accident. No blame accidents occur for example when
 - a vehicle hits an animal
 - a driver has a heart attack
 - the vehicle has a mechanical fault.

If a statutory benefit is to be available to all parents whose children are killed in a motor vehicle accident, regardless of whether any driver is at fault in the accident, it creates the anomaly in the context of an otherwise fault based compensation scheme that a benefit would be available where the child is killed, but where a child suffers a

catastrophic injury in similar circumstances but survives, the child (and their parents) may not receive any monetary benefit or compensation.

Where the child is at fault in the accident

According to the NSW Child Death Review Team, males aged 15 to 17 accounted for 22 of the 50 fatalities in 2001-2002. The report comments that risk-taking behaviour that may commonly be associated with 'adolescent' behaviour can have fatal outcomes. The report also notes that pedestrian fatalities aged 15 to 17 were characterised by risk-taking behaviours on the part of the victims.

Under the current scheme, children who are at fault drivers in an accident are not eligible for compensation. However, if a bereavement benefit is introduced in all cases of child motor accident fatalities, the parents of those children will be eligible to claim.

Where the parent is at fault in the accident

Over half (57%) of the children who died in accidents recorded by the MAA were passengers. In 43% of cases they were passengers in the vehicle most at fault in the accident. Clearly, there are significant numbers of cases where the deceased child was a passenger in a vehicle driven by a parent and the parent was at fault. Under the fault based Motor Accidents Scheme, these parents are not eligible to make a claim.

There are other situations where a parent may be considered to have contributed to the death of the child, for example by,

- not ensuring that the child had a seat belt on
- not ensuring the child was in a child safety seat
- being under the influence of alcohol and/or other drugs.

Should the proposed statutory benefit be available in these circumstances? As the parents' grief at the death of their child may be exacerbated by their feelings of guilt and failure in protecting their child from harm, it could be argued that these parents are more in need of support services than monetary benefits.

Where the child was at risk, there was a history of child abuse and neglect

The NSW Child Death Review Team notes that 11 (22%) of the 50 children who died in transport accidents had been the subject of an 'at risk of harm report' to the Department of Community Services. Six of the 11 fatalities occurred in the context of risk-taking behaviours on the part of the victim, and all were aged between 15 and 17. Five of these children had previously been reported for behaviours that contributed to their death, four within months of the fatality. Behaviours included acting violently, being 'out of control' and risk-taking, depression, alcohol and substance use.

The negative outcomes for some children who are victims of long term child abuse and neglect are well documented. These negative outcomes include behavioural problems (such as aggression, violence and crime) and risk taking behaviours (such as substance and alcohol abuse). While the deaths of these children are directly related to specific risk behaviours that exposed them to hazardous and ultimately fatal situations, these risk behaviours may in part be related to their past experience of child abuse and neglect.

It may be considered as inappropriate that a parent who abused or neglected their child could benefit financially from their child's death.

Divorced/separated parents; step parents, grand parents, guardians; siblings

While the majority (75%) of Australian children under 18 live with both natural parents, 18% are in one parent families and 8% in step or blended families. In NSW, a higher proportion of children live in a one parent family: 20% of children under 15 live in one parent families. In those cases where a child lives with one natural parent, it may be appropriate for only that parent to receive a benefit. Or is it appropriate for the other natural parent to also receive a benefit of the same value, or share the benefit?

In the case of step-parents, the death of a step-child might be as catastrophic as the death of a natural child. Should the benefit be limited to natural parents only? In a small number of cases, the child will be living with other relatives such as grand parents or other guardians. Should the proposed benefit be extended to guardians who are not the natural parents?

It is noted that the Victims Support and Rehabilitation Act recognises a parent, guardian or step-parent of a deceased child victim, as well as including siblings and step siblings. The legislation also specifies that a total amount of \$50,000 is available for distribution to all eligible family members. If there are two or more family members, the \$50,000 is to be divided equally between them.

Where more than one child dies

From the MAA's claims database it was found that there were 378 child death claims from 345 accidents. Clearly there will be cases where more than one child in a family is fatally injured in an accident. Should the proposed bereavement benefit be available per fatality or as a benefit per family.

Definition of a child

In this paper a cut-off of 16 years of age at the time of the accident has been used to cost the proposal. This is indicative only. However if a death benefit for child fatalities were to be introduced, a decision would need to be taken as to the maximum age at which the parent's entitlement to the benefit would cut out. A related issue is deciding the point at which the cut-off age is calculated - should it be at the time of the accident or at the time of death? Although death usually occurs at the time of the accident or shortly thereafter, a cut off point will need to be specified. For statistical purposes, deaths are reported if they occur within thirty days of injury. For the purposes of eligibility for the benefit, the time between the accident and the date of death would need to be clearly defined. A further issue that would need to be resolved is whether the loss of an unborn child would be included in the benefit.

Child fatalities resulting from other accidents or conditions

The introduction of a bereavement benefit only for parents of children who die as the result of motor vehicle accidents will highlight the lack of such a benefit for parents of children who have died from another cause e.g. a train accident, a boat accident, sports accident, sudden infant death syndrome or meningococcal infection.

4. Counselling

In response to a previous recommendation on this matter from the Law and Justice Committee the MAA commissioned a preliminary investigation of grief support services currently available to families of children killed in a motor vehicle accident.

The report, prepared by The Workwise Group, noted that grieving families are extremely vulnerable and in need of crisis intervention initially followed by counselling and emotional and practical support.

According to the report, there is both anecdotal and research evidence to support the notion that married couples have serious problems following the death of a child. The estimated number of couples experiencing serious problems in their relationship ranges from 75% to 90%. The report identified that the group of people most often forgotten where the death of a child occurs are the siblings of that child.

According to the report, there is no systematic provision of counselling and support services for this group of people. There was, however, consistently positive comment from grieving families for Compassionate Friends, an organisation in which parents who have lost a child provide support for one other.

5. Conclusion

The MAA Board addressed the Standing Committee's proposal that a statutory monetary benefit be provided to parents whose children are killed in a motor vehicle accident its meeting in August 2003 and has recommended against providing such a benefit.

In coming to this conclusion the Board took account not only of the cost of the proposal, but more importantly, the issues that would be raised in implementing such a proposal in a fair and equitable manner. In particular, the Board considered how the proposal would operate in the context of the existing fault based compensation scheme for motor vehicle accidents. The Board was particularly cognisant of the report published by the NSW Law Reform Commission in 1984. The NSWLRC examined bereavement benefits as part of its proposal for a transport accident compensation scheme in NSW. The Commission recommended against the inclusion of bereavement benefits in the scheme.

The MAA Board also considered the provision of counselling but recommended against the introduction of a special counselling scheme for motor vehicle accident fatalities. The motor accidents scheme legislation requires the insurer, once liability is accepted for a claim, to pay all medical expenses that are reasonable and necessary in the circumstances, properly verifiable, and causally related to the injury arising from the accident. This would include reasonable and necessary counselling expenses relating to a parent's claim for psychological trauma experienced because of the death of their child.