

Our Ref: JM:RSL:1230971
(Please quote our reference on all correspondence)
Direct Line: 9926 0200

11 February 2005

The Hon. Christine Robertson MLC
Committee Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

By facsimile (10 pages): 9230 3416

Dear Ms Robertson,

Re: Legislative Council Standing Committee on Law and Justice Inquiry - Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Sixth Review

I refer to your letter to the Law Society of 13 December 2004, in which you asked the Society to supply suggested issues and/or questions relating to the Sixth Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council (the "Review") being conducted by the Legislative Council Standing Committee on Law and Justice (the "Standing Committee"). A copy of the Society's proposed questions, to be considered by the Standing Committee for possible inclusion in the group of questions to be presented to the Motor Accidents Authority, are enclosed for your consideration.

Part 1 of the Society's questions in regards to the review relates to the Government's response (tabled by the Hon Henry Tsang MLC on 16 November 2004: *Minutes of Proceedings No 83, 16 November 2004, Item 4, page 1134*) to Report 25 (the Fifth Report of the Legislative Council Standing Committee on Law and Justice on the Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council). Part 2 deals with the MAA 2003-2004 Annual Report. However, some references to the Annual Report have been made in Part 1 in order to avoid duplication.

Please do not hesitate to call me on (02) 9926 0200, if you wish to discuss this matter further.

Yours sincerely

John McIntyre
President

Encl.

Law Society of New South Wales

Proposed Questions for the Legislative Council Standing Committee on Law and Justice Inquiry - Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Sixth Review

Part 1: Government response to the Fifth Report of the Legislative Council Standing Committee on Law and Justice on the exercise of the functions of the Motor Accidents Authority

Nominal Defendant Scheme

Recommendation 1 of the Final Report of the Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council - Fifth Report (the “*Fifth Report*”) states that:

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.

- Considering this recommendation, and the potential injustices resulting from the present nominal defendant arrangements that were identified within the Fifth Report itself, can the MAA indicate to the Standing Committee whether it will be recommending legislative changes to rectify this difficulty, and, if so, when such a recommendation is likely to be made.

Insurer Profit

Recommendation 7 of the Fifth Report states that:

- 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.

The Government’s response to Report 25 (tabled by the Hon Henry Tsang MLC on 16 November 2004: *Minutes of Proceedings No 83, 16 November 2004, Item 4, page 1134*) (the “*Government response*”) to this recommendation states that the MAA may reject an insurer’s suggested premium if it is determined that “the premium will not fully fund the insurer’s likely liabilities or if it is **excessive**” (emphasis added). The Government response further states that:

Over the last five years profit margins have ranged from 6% to 10%, with a weighted average of 8%. The MAA considers this range of profit margins to be **reasonable**. (emphasis added.)

Furthermore, page 101 of the MAA 2003-2004 Annual Report also states that:

The indicative range [of desirable insurer CTP profit] resulting from Taylor Fry's calculations is a profit of 4.5-6% of gross premium for the representative insurer. 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 from them, reflecting the insurers' own business structures. The MAA accepts that the level derived by the Taylor Fry methodology sets the minimum level of profit to ensure an adequate return on capital and that actual profit levels will be within a range above this as long as the level is justified by the insurer and not considered by the MAA as **excessive**. (emphasis added)

- While it is acknowledged that the MAA has developed a methodology for assessing profit levels via the MAA Premium Determination Guidelines, on what basis would the MAA determine that the profit that a CTP insurer is generating, or is likely to generate, is "*excessive*", or alternatively that the profit that the insurer is generating is "*reasonable*"?
- How is the figure for what is a "*reasonable return on capital*" in relation to profit determinations calculated?
- In approximate terms, what sort of percentage profit on premium would the MAA consider to be "*excessive*"?

Furthermore, page 101 of the 2003-2004 Annual Report also states that:

The MAA believes the risk of writing business in the NSW CTP scheme is less than for other long tail business because of the legislative changes to promote scheme stability and the existence of a regulator to closely monitor scheme performance. The MAA believes APRA should develop [a] line of business standards that, in the MAA's view, would reduce capital allocation for CTP and thus permit a reduced profit margin as a percentage of premium while still providing a reasonable return on reasonable capital allocation.

- What is the current status of these discussions with APRA?
- Is there an indication as to the extent to which the indicative level of profit for the "*representative insurer*" is likely to be reduced as a result of these discussions?

Nominal Defendant Provisions

Recommendation 9 of the Fifth Report states that:

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 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

The Government response to this recommendation states that the MAA is obtaining legal advice as to the kinds of motor vehicle accidents that do not give rise to a claim against a CTP insurer or the Nominal Defendant.

- Can the MAA advise as to when this advice was sought, and provide an indication of when the final advice on the matter will be received, and when the Standing Committee will be informed of the outcome of this advice?

Interim Damages

Recommendation 16 of the Fifth Report states that:

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.

Furthermore, practitioners have raised with the Law Society of NSW the issue of the payment of interim damages in motor accidents matters, and the injustices that can be caused to motor accidents victims as a result of the operation of the current provisions of the *Supreme Court Act 1970* and the *District Court Act 1973*. For example, the Society has stated that it is aware of a firm of solicitors that is acting on behalf of a client who was injured in a motor vehicle accident which occurred on 14 March 2000. Proceedings in this matter were issued in the District Court Albury in mid 2003, but, according to the firm, as at early February 2005 there had been no further progression towards a hearing on the basis that the claimant's entitlement to non-economic loss remained undetermined by the MAA's Medical Assessment Service.

The claimant had been assessed by the Medical Assessment Service. However, due to differing reports as to his psychiatric position, his situation had been described as unstable, even four years after the incident. A summary of the progression of the matter, which indicates the causes for this delay, is as follows:

An Application for Assessment of a Stabilisation or Permanent Impairment Dispute was lodged by the Insurer dated 7 March 2002. The Application did not refer to psychiatric injury. The solicitor lodged a Reply dated 2 May 2002 specifying at Part 7 that the injuries specified in the Application were not correct and including Depression/Post traumatic stress and anxiety as injuries sustained. The MAA referred the firm's client to [a neurologist] for assessment and no assessment was made of his psychiatric injuries.

The solicitor's client was examined by an MAS assessor (a psychiatrist) who provided a report dated 7 May 2003 assessing the client as having a whole person impairment greater than 10%.

On 13 May 2003, the firm forwarded by mail an Application for Assessment of a Stabilisation for Permanent Impairment Dispute. By letter dated 22 May 2003, receipt of the Application was acknowledged and by letter dated 19 June 2003 a Reply was received. On 25 July 2003, a telephone call was made to the MAA, and advice was received that the officer handling the matter was on leave and would be dealing with the matter on his/her return. By letter dated 31 October 2003, the MAA determined the matter would be referred for further assessment. The solicitor's client was referred to [a second doctor] for assessment on 28 January 2004. At the request of the assessor, the appointment was rescheduled to 11 February 2004. After several telephone calls, a letter was received from the MAA, dated 6 May 2004, which stated that although the certificate and report had been received, they were not in the form approved by the Authority. Under a letter dated 3 June 2004, the firm received the assessment by [the second doctor] which assessed the client as having a whole person impairment of 30%, but which also assessed the client's condition as not being stable.

By letter to the Medical Assessment Service, the firm set out its concerns in relation to the differences between the assessments of [the first doctor] and [the second doctor], both of whom are MAS assessors. Under letter dated 8 July 2004, the firm's letter was returned with advice that the firm should file an Application for Review. Such an Application was forwarded on 22 July 2004. On 10 August 2004 the Proper Officer of MAS by letter apologised for the previous advice provided, and indicated that the Application for Review may be inappropriate. That Application was subsequently withdrawn. Under letter dated 2 September 2004, and marked 'URGENT', an

Application for Further Assessment was forwarded to MAS. A Reply was forwarded by MAS under letter dated 7 October 2004. Enquiries were made of MAS as to progress and a telephone conversation on 12 January 2005 revealed that the file had been misplaced but had now been located. An appointment was subsequently arranged for the firm's client to be assessed by [a third doctor] on 3 February 2005. As at early February 2005, the firm was awaiting the report and certificate.

Injured persons may be severely disadvantaged in the light of such delays combined with the difficulties that such claimants may experience in obtaining interim payments under current legislative arrangements. It has been suggested that such delays could in part be redressed by an amendment to section.61 of the District Court Act to enable issues other than non economic loss to be determined pending a final assessment of the Plaintiff's impairment. As such, claims where injuries stabilise could then be assessed in part, pending the finalisation of the Plaintiff's impairment.

- In its response to Recommendation 16, the Government indicated that this issue was still under consideration. Considering the very real injustices that appear to be arising from the operation of the current provisions, could the MAA indicate, based on its discussions with the Government on this issue, its expected timetable for the rectification of this legislative difficulty?

Analysis of Damages Awarded and Emerging Trends

Recommendation 17 of the Fifth Report states that:

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.

- In its response to Recommendation 17, the Government indicated that the Honourable Justice RO Blanch AM, Chief Judge of the District Court, had advised that it is not possible for the Court to provide information about the damages awarded under the Act as the Court does not separately record Motor Accident cases and, further, that few of the judgments of the Court are electronically recorded or available in hard copy. However, are these difficulties in recording award amounts able to be overcome by adjustment to the data collection procedures and software used by the District Court Registry?
- If so, has the MAA, as regulator of the Motor accidents compensation scheme which has been established pursuant to the *Motor Accidents Compensation Act* 1999 (the "Scheme") worked with the Court to examine the feasibility of such an option?
- If not, can the MAA indicate what steps it envisages undertaking in this regard?

Part 2: Questions regarding the MAA's 2003-2004 Annual Report

Premium Levels

The 2003-2004 Annual Report states at page 5 that:

Many of the State's motorists have also benefited from two premium price reductions during the year, which is further proof that the scheme is going from strength to strength. Premium prices have fallen to pre-1996 levels, making them more affordable than ever for NSW motorists.

- In assessing the Scheme's success in terms of the community benefit it generates, does the MAA have any data available to it as to the importance that the public places on the level of greenslip premiums as opposed to the level of compensation available under the Scheme'?

The 2003-2004 Annual Report further states at page 16 that:

Insurers filed premiums to commence 1 July 2003, which showed a general increase from the previous prices resulting from factors outside the control of the motor accidents scheme. The major factors were an increase in the cost of reinsurance in the international reinsurance market and reductions in anticipated returns on investment.

Furthermore, page 107 of the 2003-2004 Annual Report states that:

Claim frequency has dropped from an estimate of 46 for the first accident year to 32 for the most recent accident years. This is at least partly due to the increase in the number of registered vehicles over the period and the drop in the rate of casualties/registered vehicle. It is noteworthy that all Australian CTP jurisdictions report a decrease in claim frequency, which suggests that the decrease may be due to factors outside the CTP schemes, such as effective road safety campaigns and the prolonged drought, for example.

Page 105 of the 2003-2004 Annual Report states that:

The actual claim frequency has been lower than the projected claim frequency. Furthermore, the claim frequency has continued to decrease from one underwriting year to the next. This is partly due to an increase in the number of registered vehicles and a drop in the rate of casualties/registered vehicle. It should also be noted that all Australian CTP jurisdictions report a decrease in claim frequency.

- To what extent has the recent general decrease in CTP premiums under the Scheme resulted from factors outside the MAA's control (e.g. reductions in the cost of reinsurance in the international reinsurance market, improvements in anticipated returns on investment and in automotive safety, and the drought)?
- As such, to what extent can such premium changes be seen as evidence of *"further proof that the scheme is going from strength to strength"*?

Furthermore, page 94 of the 2003-2004 Annual Report states that:

The average premium (excluding GST) for a Sydney metropolitan passenger vehicle in the June 2004 quarter was \$343 compared to \$339 in the June 2003 quarter. The average premium over all NSW vehicles was \$332 in the June 2004 quarter compared to \$328 in the June 2003 quarter.

- How does this statement cohere with the assertion that CTP premiums have actually fallen over the most recent reporting period? That is, is it appropriate to look at the best CTP price as a scheme performance indicator, as opposed to average price?

Educational Programmes

The 2003-2004 Annual Report also lists, at pages 5 and 6, the various road safety awareness and education programmes that the MAA is currently funding. These include:

- the Arrive alive youth program, (including 20 Arrive alive grants of up to \$10,000)
- its sports sponsorship this year to include NSW women's netball and soccer, and
- its commitment to the South Sydney Rabbitohs

Furthermore, page 37 of the 2003-2004 Annual Report refers to the Kids Need a Hand in Traffic pedestrian campaign and the MAA Local Government Grants Program (under which 42 grants totaling \$279,950 were provided to councils).

The 2003-2004 Annual Report states, at page 25, that the independent review of the performance of the MAA programme recommended *“improving overall strategic direction and evaluation as well as the processes of selecting and managing individual grants.”*

- In the light of this recommendation, could the MAA provide more details as to what evaluation procedures are in place regarding the above programmes to ensure that they are the most effective educational tools for promoting road safety to young people and an appropriate use of the MAA's resources?
- What changes to the existing programme structure/new programmes is the MAA considering funding/administering over the next 12 months?
- Furthermore, at page 35, the 2003-2004 Annual Report states that *“The second grant round received 40 applications. Funding of \$171,240 was approved for 20 projects.”* Considering the large amounts of grant money involved and the relatively small number of applications made as a proportion of awards given, is the MAA considering any measures to boost the public's awareness of the existence of these projects and grant opportunities?

Prudential Monitoring

Page 19 of the 2003-2004 Annual Report states that:

Ernst & Young - the MAA's internal auditors – would include a review of the prudential role as part of its wider review of corporate governance. Ernst & Young began the review in June 2004 and will report to the MAA Board in 2004-2005.

- Can the MAA indicate to the Standing Committee when in the 2004-2005 financial year this report is expected to be completed?

Medical Treatment Disputes

Page 28 of the 2003-2004 Annual Report states:

[there has been] a decrease in the number of applications [for resolution of medical treatment disputes], a decrease in the number of disputes per application and the requirement for parties to provide evidence that the treatment was in fact in dispute.

- Can the MAA provide any information as to why the number of medical treatment disputes may be decreasing, and information as to whether such decreases are occurring as a proportion of the number of claims made?

Reviews and reassessments of MAS Decisions, and CARS Assessments

The 2003-2004 Annual Report indicates that there has been an increase in the rates with which applicants are applying for a number of types of assessment under the Scheme:

Pages 29 and 30 of the 2003-2004 Annual Report state that:

The main feature of this reporting period is the significant increase in the number of applications for review received. The number of applications for a review of a medical assessment has increased by 112 per cent over the previous year. This increase is broadly in line with the increased number of assessments conducted. [see also p. 117 of the 2003-2004 Annual Report]

Further down on page 30, the 2003-2004 Annual Report states that: the number of applications for “*further medical assessment*” has also significantly increased when compared with the previous reporting period.

On page 31, the Annual Report states that “*in this reporting year CARS received 4,801 applications, which is a 14 per cent increase compared to the previous reporting period.*”

Furthermore, at page 46 the Annual Report states that:

a large item of expenditure for 2003-04 was \$5.253 million incurred in medical assessor fees and a further \$1.035 million was incurred in CARS assessor fees, reflecting the increased number of matters assessed and finalised in 2003-04.

And at pages 119 and 120, it states that:

The number of CARS applications continued to increase in the reporting period after a dramatic increase the previous year....
... As set out in the following table, the number of CARS matters assessed has increased substantially from year to year. In the reporting period, a total of 2,449 matters were assessed, almost 80% more than the previous year. In particular, the number of 2A matters (general assessments) assessed increased from 162 to 662, an increase of more than 300%.

- Has this extra number of applications led to increased processing delays, and hence increased the delays in compensating motor accident victims?
- What steps, including the allocation of extra assessment resources, is the MAA taking to ensure that delays do not result from the increasing number of

applications?

Legislative Reform of the Motor Accidents Compensation Act 1999

At page 32, the 2003-2004 Annual Report states that a policy and legislative reform agenda was developed on the basis of the consultation forums held with stakeholders to identify improvements to MAAS policies and processes between October 2003 and June 2004. It is further stated that this reform agenda will be pursued in 2004-2005.

- Can the MAA provide further details as to when a draft version of the legislative changes associated with this reform agenda are likely to be made available to key Scheme stakeholders, and when these proposed changes are likely to be introduced into Parliament?

Scheme Efficiency

Page 99 of the 2003-2004 Annual Report defines the "*efficiency*" of the Scheme as follows:

An efficient CTP scheme is one where as much as possible of the premium dollar is returned to injured people as compensation.

Page 110 also states that:

The reforms also aimed to increase the scheme's efficiency, which means that as much as possible of the premium dollar is available to claimants for compensation.

- Does the MAA consider that Scheme efficiency should also include a consideration of allocative efficiency. That is, should it include a consideration of whether the most appropriate amounts of compensation are being awarded to claimants according to their compensation needs, or is this not a relevant consideration?

The following statements also appear in the Annual Report:

In the current filing period, the projected return to claimants is 60% of total premiums representing a slight reduction from the previous year. Generally, the return to the claimant has been greater under the new scheme averaging 61.3% compared to 58% under the old scheme. (p. 99)

Furthermore, of the actual payments made on finalised Year 1 claims, 86% was paid to claimants compared to 80% in the old scheme. (p. 109)

- Considering the importance that the 2003-2004 Annual Report attributes to Scheme "*efficiency*", does the MAA consider that the current Scheme is substantially more "*efficient*" than the "*old scheme*" (which existed under the *Motor Accidents Act 1988*) in the light of the above statement?

Page 111 of the 2003-2004 Annual Report states that:

The introduction of ANFs has shortened the time that it takes for an injured person to seek compensation from an insurer and for compensation payments to be made. For the first accident year of the new scheme, the average time to lodge an ANF was 29 days. Over total notifications (including full claims), the notification period reduced by 16%. The average time to the first claim payment dropped by 29%. The average time to finalisation also dropped by 7%.

Considering full claims alone, there were improvements in the average time to notification, and time to determine liability, which improved by 29%. These trends indicate that injured people now lodge claims more quickly, access funds for the treatment of their injuries more quickly, and settle their claims more quickly.

- Considering that the amount payable for an ANF is statutorily limited to \$500, does the MAA consider that payments under the ANF scheme equate with full payment to injured persons of the *“funds for the treatment of their injuries”*?
- If not, how does the MAA consider that it is appropriate to use the time periods for the payment of ANFs as an indicator of the time taken for injured motor accidents victims to *“access funds for the treatment of their injuries”*, and to compare this with the time taken for such victims to *“access funds for the treatment of their injuries”* under the *“old scheme”*?

Furthermore, the enactment of the Motor Accidents Compensation Act 1999 simplified motor accident compensation claims by reducing the extent to which injured motor accident victims could be compensated for their injuries.

- As such, would it not be appropriate for the MAA’s consideration of the differences between *“old scheme”* and *“new scheme”* claim processing times to mention the fact that the decrease in overall processing times is at least partly due to the fact that there is less that motor accident victims are now able to claim for?