CARS Assessors

1,000 years of CTP experience

This document contains the submissions from the Assessors of the Claims Assessment and Resolution Service in answer to the Government's options paper, *'On the road to a better CTP scheme, options for reforming Green Slip insurance in NSW'*.

22 April 2016

Introduction

Claims Assessors are appointed under s 98 of the *Motor Accidents Compensation Act* to assess claims for compensation and determine certain disputes that may arise in connection with claims.

Since October 1999 when CARS was established, Claims Assessors have:

1. Participated in the determination of over 3,000 disputes that have arisen in connection with a motor accident claim including disputes about whether a late claim can be made, whether an accident was reported to the police in accordance with the Act or whether a claimant is in financial hardship and requires an interim payment of damages;

2. Assessed, determined or facilitated the settlement of over 27,000 claims during the course of which Assessors have:

    a. Conducted over 57,000 teleconferences endeavouring to resolve disputes or assess claims

    b. Presided over close to 10,000 assessment conference hearings

There are currently 31 Assessors who between them have over 1,000 years of personal injury motor accident compensation claims experience as lawyers acting for Claimants or Insurers (and sometimes both). In providing these submissions all Claims Assessors are addressing the options paper from their position as independent decision-makers within the scheme without reference to their constituent group's position.

These submissions are in four parts:

Part A	Short answers to the 10 questions posed in the paper about the four proposed options
Part B	Short answers to the five questions posed in the paper about other policy considerations
Part C	Assessors observations on the current scheme
Part D	Detailed submissions about the four proposed options

Part A - Questions on possible options

1. What should be the most important features in any scheme reform?

Claims Assessors believe that the most important features in any scheme reform are:

1. Adherence to the compensatory principle – that the injured person should be paid no more and no less than the injured person's actual loss (both past and anticipated future losses) so that the injured person can be put back in the position (as best money can) they would have been in had the accident not happened.
2. Fairness to the injured person - there should be no blunt tests for entitlements and that an individual claimant's circumstances should be taken into account when determining entitlement to compensation.
3. Injured person focus – there should be high quality, consistent, service focussed and well regulated claims management by the Insurer responding to the claim.
4. Minimisation of disputes – address the drivers of disputation and maintain an independent expert forum for the resolution of any disputes (CARS/Court).
5. Timeliness - Assessors also consider that the time taken to resolve a claim should be addressed and steps taken to ensure claims are determined as quickly as is fair for the circumstances of the claim and the claimant.
6. Efficiency - more of the premium dollar to injured persons and less to insurers – according to the table on page 6 of the options paper 43% of the Green Slip premium currently goes to insurers (assuming half the legal and investigation expenses are incurred by insurers).

2. On balance which option or combination of options do you believe best addresses the priorities for improving the scheme and why?

Claims Assessors are of the view that the government has not yet obtained maximum efficiency from the current scheme and that the current scheme is not so broken that it needs to be abolished.

Claims Assessors consider there are significant gains to be made in terms of efficiency and timeliness by adopting a number of the changes proposed in option 1 and if combined with fair and appropriate modification of benefits in option 2, substantial savings could be made improving Green Slip affordability.

3. Does fault in an accident remain the most acceptable way of determining eligibility for benefits, or is it more important that anyone injured on the road is covered even if it means fewer savings in any reform?

The current scheme is a hybrid scheme because there have been significant departures from the common law fault based scheme introduced in 1988 as follows:

1. Blameless accident provisions have widened the scope of the scheme considerably to persons injured in circumstances where they cannot prove fault and to all pedestrians;

2. No-fault treatment and loss of earning benefits are available to everyone injured in a motor accident (up to $5,000);

3. No-fault funeral benefits, past and future treatment and care needs are available for almost persons under the age of 16;

4. No fault life time treatment and care needs for those catastrophically injured in motor accidents;

No compensation scheme can cover everyone and there will always need to be boundaries and as a result not everyone injured near a motor vehicle or on a NSW road can or should recover damages.

4. Is it more important to reduce CTP prices or to extend benefits to more people?

There is an inherent tension between the two main stakeholders in the CTP scheme, the motorists who want to pay the lowest price for a Green Slip and the injured person who wants to enforce his or her rights and obtain the best most comprehensive benefits.

Claims Assessors believe more should be done to make the motorist aware of the nature of the product they are purchasing (compared with the product offered in other states or other products such as comprehensive insurance). Comparing a Green Slip purchased in NSW with a Green Slip purchased in Tasmania on price alone is not helpful when one is a fault based scheme with better benefits if you can establish liability while the other is restricted benefits for all.

Claims Assessors also believe the public should be made more aware of the benefits of the scheme, how to claim and to ensure that people are aware that not all accidents result in an injury that needs to be made the subject of a claim and is compensable.

While some people will always purchase based on price (e.g. the cheaper home brand vs the named brand) many purchase based on quality of the product.

5. Are people better looked after if receiving a negotiated lump sum often years after the accident or receiving prescribed weekly benefits shortly after making their claim

Assessors believe people are better looked after receiving a timely lump sum that reflects their actual and future losses as opposed to receiving prescribed weekly benefits which may be capped or limited.

Claims Assessors note there are mechanisms in the current scheme that permit the earlier recovery from injury and earlier resolution of claims:

1. the current scheme provides for early treatment and rehabilitation on a no-fault basis up to $5,000 and then beyond that after a claim is made and liability is admitted;

2. the scheme as it stands provides for the interim payment of damages for economic loss for persons who face financial hardship e.g. employed persons unable to work;

3. under the Act, both parties (claimants and insurers) can refer claims to CARS or MAS. However only **13%** of referrals to MAS and **9%** of 1,550 referrals to CARS last year were

made by insurers (see appendix A). If the regulator had sufficient resources, it could encourage insurers to refer more claims to MAS and CARS rather than waiting for the Claimant to do so.

Whether there is a statutory benefits scheme or a common law compensation scheme, Claims Assessors are of the view that injured people are better looked after with more timely payments, accurate, pro-active and high quality, consistent case management of claims.

6. Should a greater proportion of funds go to the more severely injured even if this means capping benefits or introducing an excess for low severity injuries?

No, as this fails to recognise the difference between the seriousness of the injury to the person making the claim compared to the severity of injury according to a defined and rigid table which makes no allowance for the individual circumstances of the injured person.

7. If government retains common law should there be tighter restrictions and caps on various benefits as is the case in other states or if the government adopted defined benefits, should the caps and threshold reflect what is paid in other state?

NSW caps and restrictions are not too different from other states with a fault based scheme. For example Queensland has a common law privately underwritten scheme (with some of the same insurers) with a third party insurance premium $300 lower than NSW. Queensland has a loss of earnings cap set at three times average weekly earnings (ours is at five), a similar gratuitous care threshold but a different non-economic loss threshold and tighter restrictions on legal costs.

The Claims Assessors consider that comparisons with other states may not be helpful as a NSW motorist can only buy a Green Slip in NSW. It may be more helpful to compare the NSW CTP scheme with other common law fault based compensation schemes in NSW so that people injured in NSW can compare the benefits received for a motor accident compared to the benefits received for a say a medical misadventure in a NSW public hospital or a fall in a NSW public place. The *Civil Liability Act* maximum amount for NEL is $594,000, the *MAC Act* maximum is $511,000. The *Civil Liability Act* maximum amount for loss of earnings and earning capacity is $3,464 gross ($2,344.78 net per week after superannuation, tax and Medicare) whereas the current *MAC Act* maximum is $4,688 per week net per week.

8. If the government retains common law what is the best method and threshold to determine eligibility?

Claims Assessors consider that the liability of a private insurer is best determined by considering whether a motor accident is caused by fault on the part of the owner/driver of the insured vehicle.

Claims Assessors consider a whole person impairment threshold often operates too harshly and accepts that having a 'narrative' test such as the Victorian scheme may cause disputation.

Some Assessors suggested that for state-wide uniformity, adopting the *Civil Liability Act* threshold of a percentage if a most extreme case could be considered.

9. If government retains common law what mechanisms should be adopted to resolve claims more quickly and avoid lengthy negotiations and disputes?

The Claims Assessors have recommended at paragraph 10 a number of steps including:

1. Better resourcing the Regulator;
2. Early decisions about liability by insurers (including fault and causation) with early determination of liability disputes by CARS;
3. Adopting an open disclosure model where all relevant information is shared between the parties early and throughout the life of the claim;
4. Referral to CARS for claims review, triage and, if ready, assessment at a point 2 years after the date of accident;
5. Reform of pre-CARS procedures and introduction of a limitation period for CARS referrals;
6. Amendment to s 62 preventing further MAS assessments except with leave of a CARS assessor or court officer; and
7. More effective costs incentives for both parties after compulsory settlement conferences or exchange of offers.

10. Should there be limits to legal expenses, especially for small claims and should legal expenses be linked to the work performed or the value of the claim?

Yes. Claims Assessors consider that legal expenses should always be linked to the work performed and should not be linked to the value of the claim although the principle of proportionality should see limits set on legal expenses in small claims (with protections in place for the most vulnerable).

The current regulations need to recognise the front end loading of work done in a claim. Most work is undertaken at the early stage investigating and preparing of the claim so the parties know what the claim is worth rather than the assessment stage.

Claims Assessors feel there should be some form of compulsory final offers made by both parties with costs penalties.

Part B - Questions on other policy considerations

1. Should there be support or a safety net for anyone injured on the roads by vehicles that are not part of the insurance system (like bicycles) even if that increases the overall cost of CTP?

While the Claims Assessors acknowledge that there is some usefulness in having a scheme which might compensate an injured pedestrian knocked over by a bicyclist, skateboarder or Segway rider what if the bicyclist, skateboarder or Segway rider are injured in that collision with the pedestrian? Should there be a difference if the accident happened on the road surface or the footpath adjacent to the roadway?

Assessors are of the view that there must be some boundaries to a scheme and that not all incidents or accidents in or near a motor vehicle should be compensated within a compulsory scheme and poses the following examples of claims not currently covered by the scheme:

1. If a person is walking past a workman's utility vehicle with a dog tied up in the tray and is bitten by that dog, should the safety net be extended to them?
2. If a person injures their back while lifting a heavy suitcase out of the boot of their car, should the safety net be extended to them?
3. Should a motor cycle gang member be compensated for injuries sustained outside his home when shot by a passenger in a motor vehicle owned and driven by a rival gang member?
4. Should a driver recover benefits when he or she self-harms by crossing on to the incorrect side of the road and deliberately driving into an oncoming car? (any person injured by their action would be covered)
5. Should pedestrians tripping on footpaths, slipping on oil on the road surface or stumbling in potholes be compensated by the third party scheme?
6. Should a skateboard, bicycle or Segway rider be compensated if injured when colliding with a lawfully parked car?
7. Should a bus passenger be compensated for missing the step of the bus when boarding or alighting from the bus?

2. Is it better to make a claim against your own insurer as opposed to the insurer of the at-fault driver? If so, why?

Claims Assessors are of the view it is better to make a claim against the insurer of the owner (or driver) of the other vehicle. Making a claim against your own insurer might affect your premium even though the accident may not have been your fault and should not affect your premium.

Making a claim against the other person's insurer might assist the insurer of that vehicle in obtaining co-operation from that owner or driver. Your own insurer might have difficulty getting co-operation from the other owners or drivers to determine issues of liability.

3. Should the Government retain competitive private underwriting or give consideration to a return to public underwriting delivery?

Claims Assessors are of the view that there could be significant benefits to the Government and community in a return to public underwriting because currently 19% of the Green Slip price is allocated to insurer profit. If there was public underwriting there would be no need to provide a profit margin which would could reduce the Green Slip price by close to $100.

There are many great initiatives undertaken by insurance companies aimed at improving the claimant experience, or reducing claims timeliness however in a competitive market insurers do not share their ideas claiming 'commercial in confidence'. As a result claims are managed and handled inconsistently between insurers. A return to public underwriting could promote more consistent claims management and ensure all NSW injured persons benefit from scheme wide initiatives.

Some Claims Assessors expressed the view that most claimants start off being dealt with as a client or customer but that in many cases at some stage the claimant becomes 'the enemy' and the management of the claim deteriorates. If there was a return to public underwriting claims managers would be public servants committed to providing high quality customer focused service to members of the public injured in NSW.

4. How should Government best deal with fault (including injuries without another party to sue) illegal acts and contributory negligence in any reform?

Claims Assessors are of the view that there is no scheme reform needed to deal with issues of liability including fault or contributory negligence. Fault or contributory negligence is determined by Claims Assessors and the Courts by considering the evidence obtained by both parties in relation to a claim. Insurers might be assisted by education in better understanding what evidence is and how it is to be applied. Claims Assessors note there is current published guidance material demonstrates that CARS and the Courts regularly assess contributory negligence for failing to wear a seatbelt at between 15% and 20% yet Claims Assessors regularly see Insurers making submissions that a 50% reduction should be applied in a claim where a claimant was not wearing a seatbelt.

Motor accidents occurring during the course of an illegal acts are dealt with by the legislation and the common law – for example the driver of a bank robber's getaway car does not owe a duty of care to his bank robber passenger and therefore is not entitled to recover *MAC Act* damages however an innocent person injured by the getaway car is compensated by the third party insurer of the getaway car. Persons involved in street racing cannot be compensated under the Act.

Currently a person injured by an unidentified vehicle can claim against and sue the Nominal Defendant.

People injured in a motor vehicle accident by a person not at fault (a blameless accident) can recover benefits and compensation. For example a driver has a heart attack at the wheel, loses control of his

vehicle and collides with another car injuring the occupants of that car. The occupants of the other car (and any occupants of the heart attack victim's car) can claim against and sue the third party insurer of the heart attack victim's car. The blameless accident provisions however do not currently permit the heart attack victim to recover *MAC Act* damages but could be easily amended to provide coverage for the blameless driver.

Persons injured by what some people consider 'acts of god' such as motor cyclists whose vehicle hits ice on the road or driver of cars injured when they swerve to avoid wild or domestic animals may be unable to recover under the blameless accident provisions and may have no one to claim against or sue. Extending the blameless accident provisions to enable them to pursue claims could be considered.

5. What changes to the CTP scheme could increase competition?

Claims Assessors consider that competition would be increased if insurers could reduce the time taken to resolve a claim.

Claims Assessors also consider that if the Regulator was better resourced it could develop more measures than just price to assist motorists in choosing their Green Slip insurer and to promote competition between insurers. For example key performance indicators that could be developed and published on the Authority's website could include:

1. Timeliness from claim to first payment
2. Timeliness from claim to finalisation
3. % of claims where an interim award of damages is made in cases of financial hardship
4. Disputation rate - % of claims referred to MAS / CARS / Court
5. Success in disputed claims
6. % of claims where liability admitted vs denied vs partly admitted

Part C – Observations about the current scheme

1. Dispute Resolution in the scheme

Proposed new scheme with no-fault benefits

1. In any scheme, be it the current scheme or anything that is planned, one of the aims should be to minimise disputes between Claimants and Insurers. Disputation costs the scheme including the costs associated with running the forum for resolution of disputes e.g. CARS or the Court; the legal costs of the parties associated with preparing and defending those disputes and of course disputation delays the resolution of claims.

Liability disputes

2. The options paper suggests that a no-fault scheme might reduce disputation because the parties are no longer arguing over fault. Claims Assessors note that fault is just one of the many types of disputes about liability however it is not the most prevalent dispute in the current scheme. Assessors who act for Claimants say that 50% of their claims have disputes about causation (the nature and extent of the injuries sustained in the accident) and these disputes will of course continue to arise in a no-fault scheme.

3. Attached to these submissions is a table (annexure 2) showing the types of liability disputes that currently arise in the scheme with an indication of whether they are likely to occur in a new, no-fault scheme because in a no-fault scheme there will be disputes about the insurer's liability to pay for statutory benefits.

4. There is the possibility of new disputes about liability arising should a no-fault or hybrid scheme be embarked upon and based upon the type of disputes that arise in other jurisdictions and these have been added to the foot of the table.

Disputes over benefits

5. In a no-fault system there will be disputes over the entitlement to and the quantum of statutory benefits. For example there could be disputes over current weekly wage rates, disputes about the application of any new threshold tests and disputes about whether treatment is reasonable and necessary or related to the injuries caused by the accident.

6. The NSW workers compensation scheme is a no-fault scheme and there are disputes within that scheme currently determined by the Workers Compensation Commission (9,344 compensation disputes and 1,189 workplace injuries damages disputes were determined in 2014), the State Insurance Regulatory Authority's Merits Review Service (data about dispute numbers not publicly available), the WorkCover Independent Review Office (which dealt with over 2,500 complaints last year) and the Courts (data not available).

7. In the current scheme, disputes about the quantum of compensation are dealt with once, at the end of the claim when the claim is assessed. In a no-fault scheme you are likely to have multiple disputes over thresholds/entitlement to statutory benefits, variations in benefits over time and so on.

Drivers of disputes

8. The Assessors are of the view that there are a number of drivers leading to disputation in the current scheme as follows:

    a. Private vs Public underwriting – it is possible one of the drivers in disputes is the Insurer's profit motive and a desire to maximise profits by having a more aggressive approach to claims management; in addition with six private insurers there is a lack of consistency in Insurer approaches and attitudes which could be rectified with a single / monopoly insurer;

    b. Poor decision making and claims management by inexperienced and / or overworked insurer claims staff leads to early antagonism that infects the whole claim for the life of the claim;

        i. Unrealistic denials of liability, denials of fault or allegations of contributory negligence and a lack of familiarity by insurers with the provisions of the legislation;

        ii. Unrealistic (too low) initial offers leave Claimants with the impression they have no option other than to pursue the claim without further negotiation;

        iii. Denying to pay for treatment or denying paying the full cost of treatment;

        iv. In more complicated matters, retaining lawyers too late usually just before referral to CARS or assessment when matter needs further preparation; and

        v. Poor preparation of the claim.

    c. Poor conduct of claims by inexperienced lawyers or unsupervised paralegals acting for Claimants:

        i. Ethical issues including claims harvesting, choice of expert witnesses; and

        ii. Poor preparation of the claim.

    d. The ability to pick and choose what information to rely on in the conduct of a claim and therefore fail to disclose information relevant to ensure the correct and preferable assessment of the value of the claim;

    e. Limited regulated legal costs can distort the ability to settle claims early as costs regulations do not front end load the work and Claimants seek the costs for later stages or events in the life of the claim;

    f. Legislative complexity providing friction points;

    g. MAS and impairment – managing injured person's expectations over entitlement to NEL, impairment threshold difficult to predict in many cases, having to go to MAS adds 6 – 12 months to the life of a claim;

h. Division 1A – the pre-CARS procedures are complex and give rise to significant areas of disputation; and

i. There is a concern that insurers raise and maintain late claim and other procedural issues as this keeps alive the Insurer's rights to reject a claims assessment and require Claimants to commence legal proceedings.

9. In any new scheme what drives disputes must be considered and addressed with an acknowledgment that it is not just disputes about fault that cause disputation but disputes about liability generally and more particularly disputes about the nature and extent of the injuries sustained in the motor accident (causation).

2. What works well in the current scheme

10. Assessors expressed the view that CARS is well regarded in the legal community and insurance industry and that having expert personal injury decision makers is one of the keys to its success.

11. Assessors think that the current scheme works well, but could work better and that NSW has not yet achieved the maximum benefit from the existing scheme.

12. Assessors consider there are some easily identified and agreed stumbling blocks which, if addressed, could significantly improve scheme efficiency, timeliness and affordability before embarking on a new and untested model.

3. Improvements to the current scheme

13. Assessors agree that the following would enhance the efficiency of the current scheme:

   a. Educate the public:

      i. on the value for money of the Green Slip product (compared for example with comprehensive insurance or income protection insurance)

      ii. about the current level of benefits and how to access the scheme;

      iii. that not all motor accidents are compensable (that is not everyone in an accident sustains personal injury);

   b. Improve insurer decision making with more education for insurers and give more powers, and increased resources for the regulation of insurer performance;

   c. Adopting an open disclosure model of claims and case management by insurers and claimants to ensure all relevant information is shared between them early and throughout the life of the claim;

   d. Rewrite the costs regulations to:

      i. front end load costs and

      ii. add incentives to promote early settlement and improve Claimant lawyer

conduct;

e. Continue access to common law acknowledging:

    i. statutory benefits usually provides compensation for wage loss not compensation for lost earning capacity. Only 40% of claimants are employed at the time of the accident and may sustain wage loss, the other 60% may not have a wage loss because they are not currently employed but may have an impairment to their ability to go to work and earn wages in the future and may, under the current scheme receive interim payments to avoid financial hardship. Further children may suffer injury that will impact their future earning capacity but cannot at the time of injury demonstrate a wage loss;

    ii. acknowledge that 'seriousness of injury' to the injured person does not often equate to categorisation of 'injury severity'. A fractured right arm to a 9 year old will not have the same seriousness as the same injury to a 90 year old, who needs that right arm to use a walking stick and therefore mobilise. While they may have the same injury severity, their treatment, care and assistance needs will be vastly different.

f. Maintain early decisions on liability (some assessors considered a deemed admission of liability might assist rather than a deemed denial as currently provided for in the legislation) but amend the legislation to provide for:

    i. the early resolution of liability disputes and

    ii. the ability for Insurers to retreat from an admission of liability should further information come to light (currently insurers at CARS are bound by any admissions about liability)

g. Expand the ANF process to allow for increased amounts (e.g. to $10,000) and consider lengthening the time to transition to a full claim to 12 months after date of accident.

h. Improve timeliness by:

    i. Abolishing the pre-CARS requirements in Division 1A and provide a simple pre-CARS step including compulsory settlement conference with costs incentives/penalties;

    ii. Introducing a limitation period for the making of a CARS application (currently there is no time limit which means that a claim can be referred to CARS 5, 10 , even 15 years after the date of the accident). Currently there is a 3 year limitation on bringing court proceedings

    iii. Providing for the mandatory referral of claims to SIRA /CARS for triage and case management (but not necessarily assessment) at say 2 years or 3 years post-accident. This would provide an early and neutral evaluation of the claim and a pathway for future management.

iv. Involving Claims Assessors in causation disputes currently determined solely by MAS. This may assist in reducing disputation (in particular applications to the Supreme Court challenging MAS determinations of liability).

v. Removing the ability to come back again and again for further assessments at MAS and limit the ability to seek a further MAS assessment to where it is directed by a Claims Assessor or Court.

i. Benefit reform:

   i. Provide more guidance in the legislation around the entitlement to gratuitous care and / or amend thresholds;

   ii. limit costs for OT reports on care

j. Limit exemptions from CARS and provide additional powers to Claims Assessors needed if they are to determine claims involving infants or claims where fault is denied.

k. Resourcing the Regulator to provide better education to insurers; regulating insurers to promote better decision making earlier; and oversight of consistent high quality claims management throughout the life of the claim;

Part D The Four Options

Option 1 – retain common law with process improvements

Mandatory assessment processes after a certain period of time

14. This is likely to save costs to the scheme by allowing a road to resolution of the claim in a shorter period thereby resolving some of the uncertainty for insurers. However rather than mandatory 'assessment' of a claim at a certain period of time Claims Assessors suggest a mandatory 'review' of the claim as not all claims can be assessed at 3 or 5 years post-accident (some complicated joint injuries may still be having treatment at that point).

15. Assessors are aware that s 90 of the Act currently empowers both a Claimant and the Insurer to refer a claim to CARS but the Assessor's experience is that over 90% of all claims are referred by Claimants and few by Insurers and that many are referred more than three years after the accident. The Claims Assessors are of the view that having a mandatory referral of claims to CARS for review at some point in time before the three year anniversary of the accident would significantly improve timeliness as Claims assessors could conference these matter, identify issues in dispute, facilitate the resolution of some or all of those disputes, and direct the claims down appropriate pathways for the determination of those disputes.

16. Some Assessors consider there needs to be a simple mechanism in the Act (with appropriate safeguards) for finalising claims where the claim is not being pursued.

Internal review process and compulsory mediation in claims prior to legal assessment

17. A robust review process within an Insurance company could address concerns of sub-optimal or inaccurate decision-making by inexperienced claims staff. Many assessors report that experienced (and well regarded) claimant lawyers have had success resolving disputes where they are escalated internally to more senior and more knowledgeable claims staff. But many inexperienced lawyers are unaware that this informal escalation is available and / or they do not have the connections to ensure any such escalation occurs.

18. Compulsory mediation is unlikely to assist in reducing timeliness or cost as mediation incurs mediation fees and could be seen as simply adding on another 'layer' of costs and some legal practitioners may not embrace the concept or genuinely participate in the mediation.

19. The Assessors consider that having open disclosure and simplifying the pre-CARS procedures is more likely to improve timeliness. This could be achieved by abolishing Division 1A and requiring the service of the CARS document with all evidence two months before filing the document at CARS and that the parties be required to use their 'best endeavours' to settle in the meantime with the filing of final offers and costs consequences (including genuine costs consequences for insurers by the accounting for costs penalties out of profit and not scheme expenses).

Lost earnings be available periodically rather than waiting for settlement

20. There was general support from Assessors for the idea of lost earnings being paid periodically. A general feeling among the cohort of Assessors is that there are many claims requiring the

payment of income for a short period of time (less than 6 – 12 months) which if paid as part of an expanded ANF program may resolve many of the smaller claims for people employed at the time of accident. Assessors recognised that only 40% of claimants are in employment at the time of a motor vehicle accident and that small claims involving unemployed, children or the retired would not be assisted by such changes.

21. Claims Assessors are of the view that if ANF payments were increased and the time period for lodging a full claim form was extended to 12 months this might reduce the number of smaller full claims. It would also be beneficial to ensure ANF coverage doesn't simply cease when a full claim is made.

22. One of the risks of adopting changes to allow for periodic payments is that small claims can and do need management and may require more management (ongoing payments rather than a lump sum) which may save costs on settlement but incur more administration costs and insurer overheads.

New powers for the regulator to address over-servicing and fraud

23. Assessors are of the view that something needs to be done to reduce the costs associated with "small claims" but there was no agreement as to what the definition of a small claim is. A $20,000 claim payment for a 75 year old pensioner might be considered a 'large' claim to him or her.

24. Claims harvesting needs to be addressed by the Law Society working with the Legal Services Commission and the regulator although assessors acknowledge that genuine and serious claims can also be 'harvested' due to general ignorance in the public of the right to claim. Claims Assessors are of the view that an education campaign for the general public about the right to claim should be conducted balanced with a reminder that not all accidents generate a need to claim.

25. Claims Assessors support the amendment of the Act and Guidelines to permit the publication of their decisions as Claims Assessors are seeing more and more small claims being assessed. If decisions were made available this might assist the public in understanding what claims are being upheld and what types of claims are not.

Greater support for claimants provided by SIRA and better information

26. The Assessors acknowledge the difficulty for SIRA in providing process information but avoiding providing legal information. Assessors acknowledged the good work of SIRA in providing information on the website but note that more could be done to embrace newer technologies such as You-tube, apps etc.

27. Assessors wondered whether SIRA could partner with the Law Society and the Bar Association to provide a pro-bono service.

Tighter caps on legal expenses

28. The Claims Assessors consider that costs restrictions on smaller claims could encourage the

earlier resolution of smaller claims particularly if the ANF scheme is expanded but there should be a safety net for the vulnerable.

29. Claims Assessors are concerned about unregulated costs of some health care practitioner reports (e.g. occupational therapists reports in care claims) and the real cost of medical practitioner reports are often much greater than the regulated fee. If there are to be any restrictions on disbursements the SIRA might want to consider working with the Health Practitioner Boards and bodies to encourage and identify those medico-legal practitioners who would be prepared to write reports for the regulated fee.

30. More could also be done to make the regulated fees 'compulsory' as in the NSW workers compensation scheme.

Clearer rules around the acceptance of liability and regulated rules around contributory negligence

31. Rules around liability and contributory negligence are set in the *Civil Liability Act*, provisions of the *MAC Act* and the common law. There has been very little change in this area over the last 20 years. Claims Assessors acknowledge that the terminology used in the legislation could benefit from simplification and clearer expression. This is of course a matter for legislative drafters and the parliament but if there is to be legislative change, Claims Assessors would support and encourage the adoption of plain English language and simplicity of legislative drafting.

32. Claims Assessors are concerned that having prescribed set amounts of contributory negligence reductions may operate perversely depending on the factual circumstances of the claim.

33. The *MAC Act* currently provides for mandatory findings of contributory negligence in certain cases (e.g. alcohol and absence of seat belts) but it is difficult to further regulate this. For example the failure to wear a seat belt may have no effect on damages if, for example, the accident / injury occurred when a load from a passing truck dislodged and fell onto the occupant of the car. Similarly a pedestrian with a blood alcohol reading of 0.15 sitting on a bench waiting for a bus should have no contributory negligence deducted if the accident was caused when a runaway vehicle mounted the footpath without warning pinning the Claimant to the bus stop.

Clearer rules around late claims

34. The Act provides for clear rules around late claims. The Courts have interpreted the provisions consistently with little change over the last 20 years. Applying the law to the facts and circumstances of the case requires common sense and experience. Every late claim is different to every other late claim and it is hard to imagine how to provider greater clarity.

35. Claims Assessors do support the lifting of the claim period to 12 months after date of death or accident along with an education campaign to alert the public to the requirements of making a claim.

36. Some Claims Assessors suggested that a Claims Assessor's decision to allow a late claim to be made should be binding on an Insurer.

New regulatory powers to address insurer premiums and profit

37. According to the table at page 6 of the options paper 15% of the premium dollar pays 'insurer expenses' this is apparently expenses associated with claims management, acquisition of business and so on. Part of the 18% attributed to legal and investigation expenses is insurer incurred legal and investigation expenses and of course $98 or 19% is insurer profit.

38. Claims Assessors note that there are many penalty provisions in the *MAC Act* and elsewhere that penalise Claimants with reference to costs. For example if a Claimant rejects a CARS assessment and commences Court proceedings and does not do more than 20% better on re-hearing in the Court, the Claimant gets no costs (which means their settlement or verdict monies are used to pay the costs). If a Claimant challenges a MAS assessment in the Supreme Court and is unsuccessful the Claimant will usually be ordered to pay the costs of the Insurer as well as his or her own costs.

39. The Claims Assessors note there are fewer 'penalties' in the Act in respect of insurer behaviour and any costs penalties imposed against insurers become a 'legal or investigation expense' or an 'insurer expense' that might then be used to justify increasing the premium. Consideration could be given to quarantining costs penalties imposed on insurers and having them deducted from insurer profits rather than being identified as a scheme expense. For example if an Insurer challenges a CARS assessment in the Supreme Court and is unsuccessful the Insurer will usually be ordered to pay the costs of the Claimant as well as its own costs. These costs could be taken out of profit rather than scheme expenses. Similarly if an Insurer does not participate in Division 1A activities the Insurer may be liable to pay a costs penalty which is to pay an additional sum up to 25% of the costs allowed to a Claimant however that costs penalty is currently included as an insurer expense paid for by the motorist/ Green Slip rather than a true penalty paid out of the insurer's profit.

40. Consideration could also be given to imposing penalties on Insurers who reject CARS assessments forcing the Claimant to commence legal proceedings and who, when judgment is entered do not do better than the outcome of the CARS assessment. Again any costs penalties imposed should be deducted from insurer profit rather than being added to the cost of the expenses associated with claims management or other scheme expenses.

How does option 1 address the objectives?

41. The Assessors are of the view that if Insurers were encouraged (required) to refer more claims to MAS/CARS earlier, timeliness would significantly improve and thus the efficiency of the scheme would be positively impacted.

Option 2 – retain the current common law with adjustments to benefits levels

Adjustment to payments for non-economic loss

42. Assessors do not consider that non-economic loss is a driver for change to the scheme. There is no evidence to suggest that excessive amounts are being paid out for this head of damage, paid inappropriately, or that this head of damage is costly to the scheme.

43. If any changes were to be made to NEL, any changes should be to harmonise NEL payments with payments available under the New South Wales *Civil Liability Act*.

44. Some assessors considered whether NEL payments could be scaled to some degree? One suggestion was of a $350,000 limit for injuries with a greater than 10% WPI but a maximum of $594,000 (current *Civil Liability Act* maximum) for certain catastrophic injuries / LTCS participants. However most Assessors like the flexibility of the limit and think that is applied appropriately with few people being allowed the maximum.

45. The Assessors also discussed having a scale or table of maims type of more regulated benefits but acknowledged this does not allow for individual circumstances (the amputated hand for the piano player v the amputated hand of a factory worker) or give the Assessor the flexibility to consider the merits of each individual case. A scale or table of payments for certain injuries was considered "not fair" by all of the Assessors.

46. The Assessors are aware of the Queensland 100 point provisions for entitlement to non-economic loss and while the Assessors are aware it provides a range and therefore allows for some discretion to take into account the individual injuries sustained, they believe that it can operate unfairly by not taking into account how the injuries affect the individual injured person.

Adjustments to loss of earnings or earning capacity

47. The opening statement under this heading was felt by Assessors to misrepresent the current scheme. The current scheme allows for the compensation for the loss of the ability to earn income rather than lost income per se. The *MAC Act* compensates for the loss of an injured person's earning capacity rather than their lost wages. This valuable common law right enables a person not currently working to be compensated for their inability to work in the future.

48. The current maximum cap on lost earning capacity is not considered to be a significant driver of expenses in the scheme and is largely considered to be fair. The Assessors note that the maximum amount of loss of earnings that can be compensated ($4,688 net) is currently 5 times average net weekly earnings. While reducing this to a figure at say 3 times average weekly earnings is unlikely to make a huge impact on Green Slip premium prices it should, along with other measures achieve some savings.

49. Assessors are of the view that currently the vast majority of disputation about loss of earnings and earning capacity concerns:

    a. persons unemployed or under employed at the time of the accident;

b. younger people (not working, working in non-career oriented jobs usually part time or students) with a long working life ahead of them with some (but not total) impairment of their ability to work; and

c. persons running their own businesses with complex business records, spouses and other family members working in the business and being affected.

Adjustments to payment for care

50. Assessors noted that Insurers are often reluctant to pay for commercial care lest it sets a precedent for assessments of future care claims. Assessors also acknowledge that Claimants are often reluctant to claim commercial care from Insurers for the same reason.

51. Some Assessors are of the view that damages for gratuitous care is a significant cost to the scheme and access to it could be further tightened.

52. Other Assessors expressed caution with limiting access to gratuitous care and acknowledged that gratuitous care is necessary for some people (i.e. those who cannot afford paid care or cannot afford to wait to be reimbursed from insurer and some people prefer to have family members provide care or they live in remote areas where there is no access to commercial care).

53. Some Assessors expressed the view that access to damages for care should be limited for example by the current threshold in respect of gratuitous care or an increase to that threshold or that gratuitous care should be limited to past care only and Insurers should be encouraged to be more proactive in providing care particularly in the acute phase of injury.

Adjustments to legal fees

54. The options paper states that the complexities associated with negotiating claims and managing disputes is increasing levels of legal representation and imposing further costs to the scheme.

55. The Assessors note that there has been an increase in legal representation from 71% in 2008 to 83% now. In or shortly before 2008 the legislation was changed to implement:

    a. new multi-step pre-CARS procedures

    b. blameless accident provisions

    c. changes to late claim and other provisions

    d. increasing the ANF benefits

56. These changes have, in Assessors' views, increased the complexity of the scheme which might partly explain the rise in legal representation rate. Simplifying the process and the legislative provisions would assist in reducing the reliance on legal representation.

57. Claims Assessors consider the regulation needs to be amended to 'front end load' costs and recognise the amount of work done at the beginning of the claim which is likely to encourage earlier settlement of claims.

58. Claims Assessors are aware of the importance of the concept of access to justice. If legal expenses are to be cut or the right to obtain legal advice restricted then SIRA must take steps to:

    a. ensure that as much information and education as possible is provided to injured persons in English and community languages to assist them in navigating the scheme;

    b. that a pro-bono legal service be established in conjunction with the Authority's services; and

    c. that there should be protections in place for injured persons to ensure they are not exploited (e.g. the approval of any settlement or the right to revoke a settlement should circumstances significantly change in the future).

Medical excess

59. The Claims Assessors note the reference to the AMA list of medical services. It must be noted that this list only applies to the provision of medical services by a medical practitioner (a doctor) and that there are 13 other health professionals whose medical services are not regulated and who provide services to injured persons including physiotherapists, chiropractors, psychologists and so on.

60. Assessors are aware that the AMA list is not published free of charge and is not readily accessible to the public.

61. Claims Assessors are aware that in Victoria there is an excess for the first $250 of treatment and are generally supportive of the idea but note there should be an ability to seek a waiver of this for those that are destitute or cannot otherwise pay for it themselves. $250 to a pensioner is a significant amount of money.

62. An excess might discourage some of the smaller claims and deter fraud.

How does option 2 address the objectives

63. Claims Assessors feel that in addressing any changes to current benefits, that a significant impact on the cost of premiums could be achieved with modifications to the regime for claiming gratuitous care but that all proposed options if fair and flexible could contribute to Green Slip cost savings.

Option 3 – hybrid no-fault, defined benefits with common law benefits

64. Assessors raised concerns about the lack of detail of the proposed hybrid model noting that the current scheme **is** a hybrid scheme with no-fault benefits paid to a significant number of persons injured in NSW (ANFs, blameless accidents, pedestrians, children and the catastrophically injured). Assessors queried who (and how many) an expanded hybrid scheme will bring into the scheme (noting that some injured people will still be excluded in a no-fault scheme e.g. drivers convicted of serious traffic offences).

65. Assessors expressed serious concern about how this option could be afforded noting the Independent Review of Insurer Profit in the NSW scheme reports that 'a no-fault scheme would expand the number of claimants under the scheme and in some circumstances increase the total payout costs of the scheme and CTP insurance premiums' [page 18].

66. Reference was made to a number of no-fault schemes in the USA and NZ which had not succeeded in appropriately compensating injured people.

67. Assessors observed that another no-fault scheme, namely the current workers compensation scheme operating in New South Wales, has a long history (since 1926) of disputation. A lot of disputes currently heard in that jurisdiction are of an interim nature so a Claimant can have multiple disputes throughout the life of a claim.

68. Assessors acknowledge that defined benefits would provide greater clarity in respect of benefits but raised concerns about fairness noting that every Claimant is an individual human being and injuries affect individuals, individually. A no-fault scheme appears to be a solution to reduce complexity in claims management but not necessarily adequately support the injured people.

69. Assessors note that if entitlement to defined benefits is based on wage loss only then noting that 40% of Claimants are in employment at the date of the accident, many Claimants with an impaired earning capacity but not currently in employment (e.g. children, students etc) who would be compensated in the current scheme are unlikely to be compensated.

70. Finally, assessors raised the difficulty of the entry level or threshold for access to common law benefits. If the threshold was a WPI% this could operate unfairly as Assessors have the experience that people with an 8%, 9% or 10% impairment have quite significant economic losses. Assessors did acknowledge the difficulty of having a narrative test (e.g. the TAC/Victorian 'serious injury' test) and thought any threshold would require careful consideration and extensive modelling.

Payment of medical treatment and rehabilitation costs to anyone but fault determines access to other benefits (general damages and loss of earning capacity).

71. This proposal omits a reference to the current state which is that the Federal Government's Medicare system which currently pays medical, treatment and rehabilitation costs to anyone injured in a car accident including those injured because of their own fault. Insurers are only required to reimburse Medicare if a claim is made and succeeds on a liability/fault basis.

72. The Federal Government does not require the reimbursement of future medical expenses which

might be paid by an Insurer to a Claimant on the basis they will not be claimed on Medicare.

Increase the threshold of the current no-fault accident Notification Form to a higher level (possibly with defined benefits and/or maximum time thresholds)

73. This proposal gives benefits to those at fault but retains common law for those more seriously injured. If this proposal was combined with limitations on legal expenses this could significantly reduce transaction costs on smaller claims but Claims Assessors note that there might need to be allowances for the most vulnerable (those without legal capacity, the elderly, the homeless) who realistically cannot access the scheme without legal assistance.

74. Consideration would need to be given for a forum for resolution of disputes within an expanded ANF scheme as currently disputes about payments under the ANF scheme cannot be referred to MAS, CARS or the Courts.

Introduce benefits on a no-fault basis for anyone catastrophically injured (economic and non-economic losses)

75. Assessors also noted that the LTCS has already significantly increased the cost of a Green Slip. When first introduced the LTCS levy was $20, it is now close to $100.

76. The Claims Assessors are concerned the cost of a no fault system will exceed the cost of the current scheme and does not support the expansion of benefits (non-economic and economic losses) to those in the LTC scheme.

How does this option address the objectives?

77. This option does not address the objectives as it may be more costly and involve more interim disputes. It is also likely to draw out rather than limit the time taken to resolve claims as Claimants are likely to wait until their benefits are exhausted by the passage of time rather than commuting or settling those claims.

Option 4 - fully no fault defined benefits scheme no common law

78. The Assessors raise concern about the affordability of this model and the fairness of it, particularly in a privately underwritten model where if profits are not forthcoming the only option is to reduce benefits further (compare the New Zealand experience).

79. Fairness is important because caps, thresholds, defined benefits take little account of an individual's individual circumstances.

80. Another risk associated with this option is that it will prove electorally unpopular particularly when comparisons are made between the benefits and compensation payable in NSW for other injuries, accidents and incidents.

How does this option address the objectives?

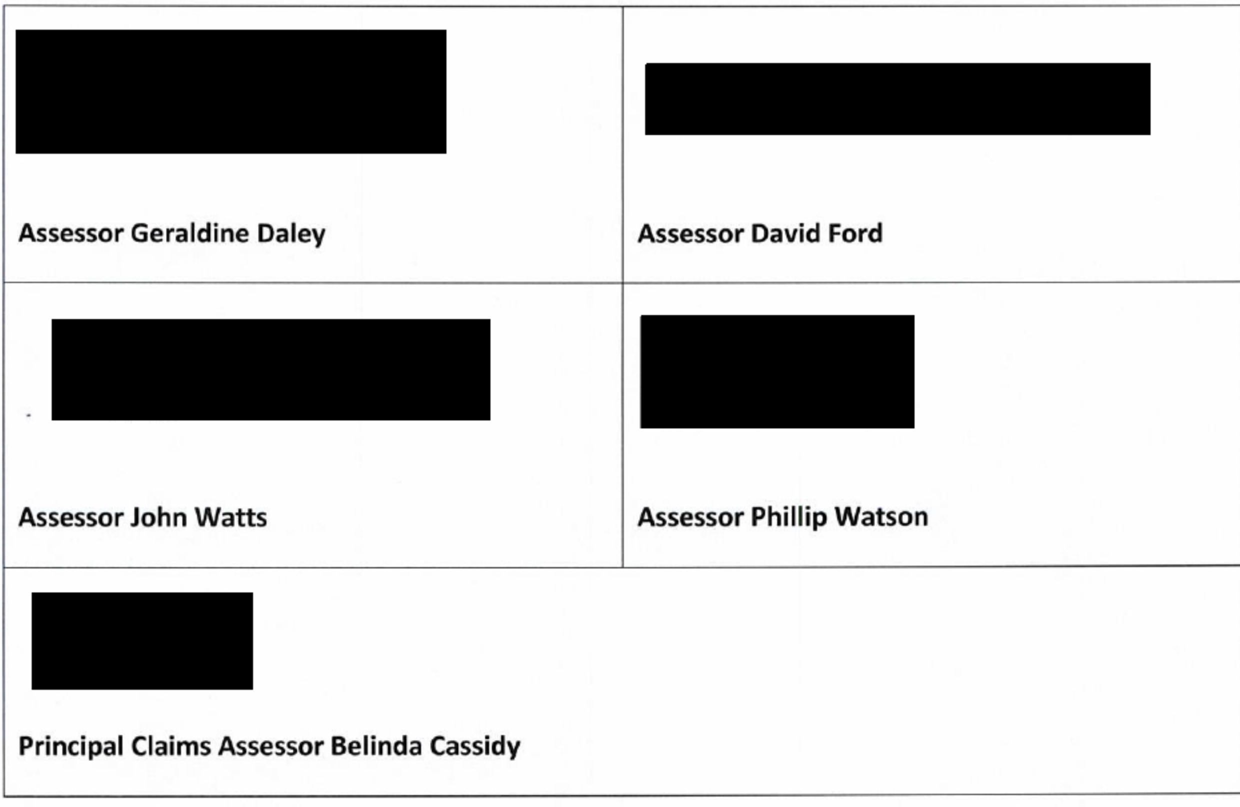
81. Like option 3 Assessors are concerned that embarking on a completely new model which is untested is risky particularly when there are steps that could be taken under the current scheme to improve efficiency and timeliness.

Sign Off

These submissions have been prepared by the following members of the CARS Assessors' Practice Group and circulated to all Claims Assessors for comment and feedback.

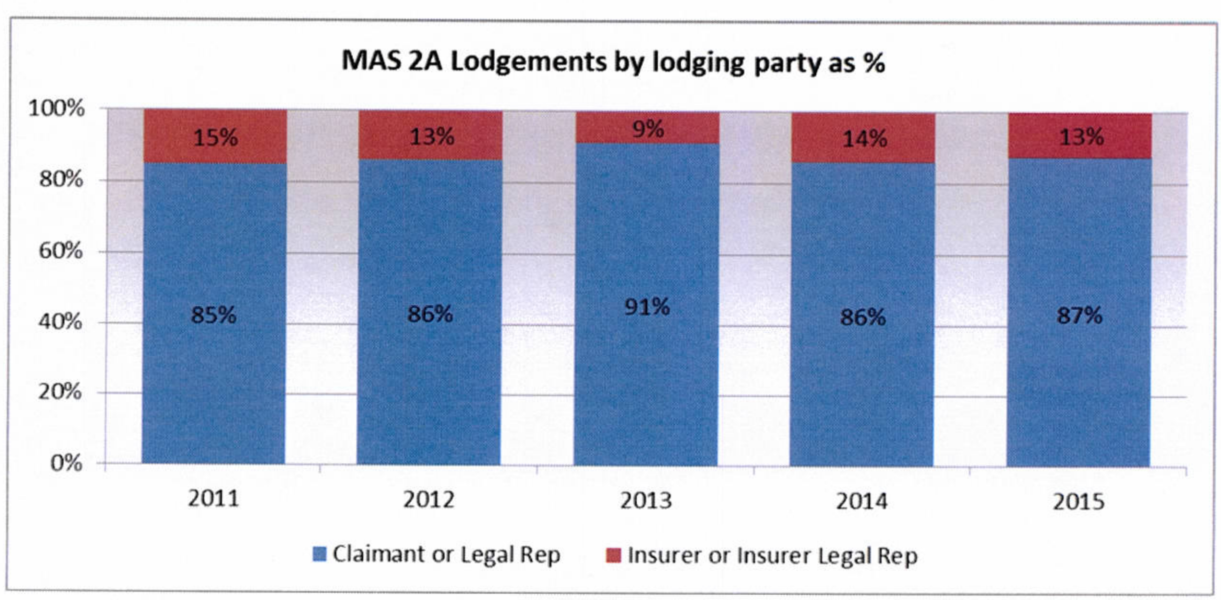
The Claims Assessors are grateful to have been given the opportunity to provide a submission in answer to the Government's options paper.

Any questions about these submissions should be directed to the Practice Group care of the Principal Claims Assessor, Claims Assessment and Resolution Service.

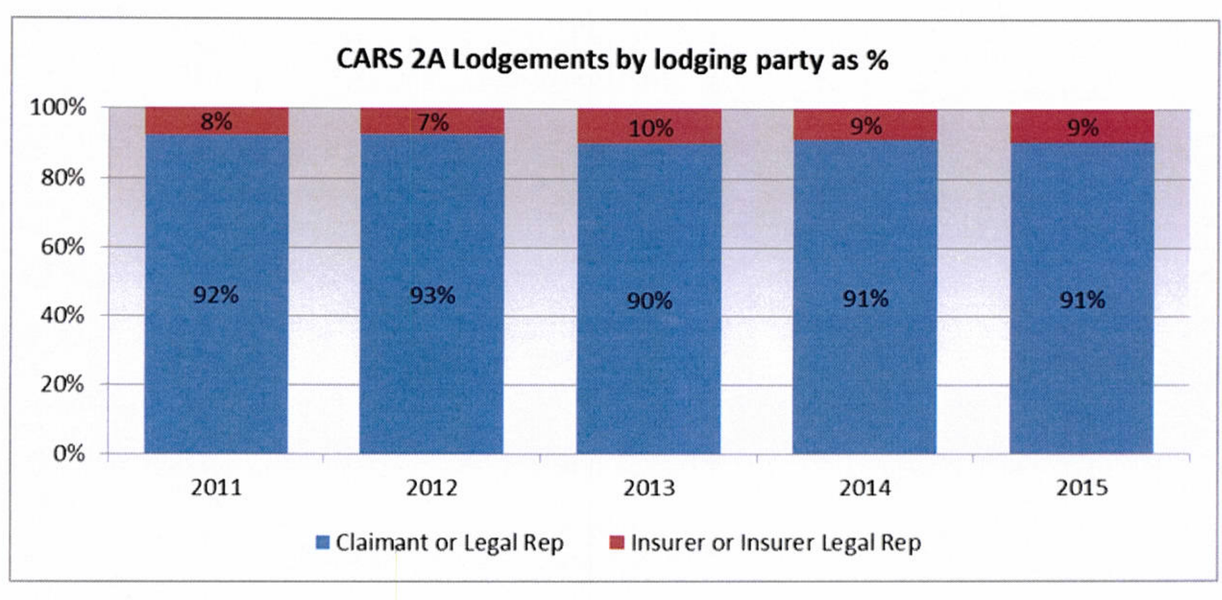


Assessor Geraldine Daley	**Assessor David Ford**
Assessor John Watts	**Assessor Phillip Watson**
Principal Claims Assessor Belinda Cassidy	

11. Appendix 1 – who refers disputes and claims to CARS



Graph 1 – In 2015, 3,830 disputes about whole person impairment (entitlement to non-economic loss) were referred to MAS



Graph 2 – In 2015, 1,540 claims were referred for assessment to CARS

12. Appendix 2 - Liability disputes in the current scheme vs liability disputes under a defined benefits no fault scheme

Liability dispute	Detail of liability dispute	When it is dealt with under current scheme?	Will dispute exist in defined benefits no fault scheme?	When will it be dealt with under a defined benefits scheme?
Is the vehicle, a motor vehicle?	• Mobile cranes, parked trailers, motorised bicycles, trail bikes, light rail vehicles, scissor lifts	Usually preliminary issue before quantum	**Yes**	Preferably preliminary issue before quantum
Is the accident, a motor accident?	• Use or operation e.g. loading and unloading claims • During a collision e.g. skateboard rider into parked car • Gunshots and thrown objects	Usually preliminary issue before quantum	**Yes**	Preferably preliminary issue before quantum
Who is the owner or driver?	e.g. Passenger grabs steering wheel from driver	Usually preliminary issue before quantum	**Unlikely if no fault scheme**	N/A
Procedural defect in claim	• Claim is late • Accident not reported to police • Claim form defective	Usually preliminary issue before quantum	**Yes**	Preferably preliminary issue before quantum
Who caused the accident?	For passenger – no dispute if sharing applies For driver – dispute if insurer does not concede For other road user – dispute if insurer does not concede	Usually at the time quantum is determined if dispute not settled	**Unlikely if no fault scheme** **May still be sharing disputes**	N/A
Blameless accident	• Is accident a blameless accident within meaning of s 7B? • Can driver of vehicle recover	Usually at the time quantum is determined if dispute not settled	**Unlikely if no fault scheme. May still be sharing disputes**	NA

Liability dispute	Detail of liability dispute	When it is dealt with under current scheme?	Will dispute exist in defined benefits no fault scheme?	When will it be dealt with under a defined benefits scheme?
Pure Mental Harm Claims (nervous shock)	• Whether Claimant witnesses accident (vs aftermath) • Whether Claimant is in sufficiently close relationship with deceased or injured person • Whether Claimant has sustained a recognisable psychiatric injury	Usually at the time quantum is determined if dispute not settled	**Yes**	Preferably preliminary issue before quantum
Nominal Defendant – unidentified vehicle	• Has Claimant conducted due search and enquiry?	Usually preliminary issue before quantum	**Yes**	Preferably preliminary issue before quantum
Nominal Defendant – uninsured vehicle	• Did accident occur on a road or road related area? • Is uninsured vehicle a motor vehicle?	Usually preliminary issue before quantum	**Yes**	Preferably preliminary issue before quantum
Contributory negligence	• Is Claimant partly responsible for causing accident e.g. drunk pedestrian or causing injuries e.g. failure to wear a seat belt	Usually at the time quantum is determined if dispute not settled	**Unlikely if no fault scheme**	NA
Contribution between vehicles - sharing	• Two or more insured vehicles share cost of claim • ND Uninsured vehicle shares cost of claim • ND Unidentified vehicles <u>do not</u> share cost of claim • Interstate vehicles <u>do not</u> share cost of claim	Sharing resolved by application between insurers when claims made. Cost of shared claim determined at finalisation of claim	**Yes**	Difficult to administer sharing in a statutory benefits scheme with small increments of claims being paid along the way

Liability dispute	Detail of liability dispute	When it is dealt with under current scheme?	Will dispute exist in defined benefits no fault scheme?	When will it be dealt with under a defined benefits scheme?
Causation of injury or injuries	• Nature and extent of injuries sustained in accident • Negligent medical treatment breaking chain of causation • Involvement of pre-existing conditions / previous accidents and injuries • Involvement of subsequent conditions / later accident and injuries	Usually at the time quantum is determined if dispute not settled	**Yes**	Potential for multiple disputes each time benefit is disputed
Frank injury vs nature and conditions	Self-employed driver of bus / truck with defective seat injures back over course of several years	Claim cannot be made requires frank injury not series of incidents	**Yes**	Preferably preliminary issue before quantum

Possible New Liability Disputes:

1. No-fault benefits for those accused / charged / convicted of 'serious wrongdoing' e.g. serious driving offence
2. Uninsured at-fault drivers – should they be allowed to recover benefits?
3. Self-inflicted injury/death – usually excluded from benefit recovery
4. Pure-mental harm claims from those who 'caused' the accident or are related to those who caused the accident
5. Other injured road users if scheme expanded to non-motorised vehicles