UPDATE **FEBRUARY 2014**

Claims Assessment & Resolution Service Strategic Review

CARS Review 2011

Prepared for the

Motor Accident Authority of New South Wales

CoSolve Pty Ltd

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Preamble

The MAA contracted Transformation Management Services, one of the team of authors, to update the 2011 Review of the Claims Assessment and Resolution Service (CARS). The update was to integrate fresh material from the three years since the original investigation, to confirm the 2011 analysis and to ensure the Review and its findings were contemporary. Opportunity was taken during the update to reorder sections to align with the terms of reference and reduce some repetition. Despite a substantial reworking in some sections, the recommendations have remained unchanged.

The Review found that CARS was performing well, saving the scheme over $100m a year. It found that structural reform was essential to increase the standing and impact of CARS in the CTP scheme. Reforms would reverse the move of cases away from CARS, cut legal costs and minimise the reasons for legal challenge to CARS decisions. The MAA accepted the case for redesign and made key changes reflected in work undertaken for the 2013 CTP Reform package. This update in part explains the thinking behind those proposed reforms.

In 2013, on the basis of the Review work and other significant findings, the NSW Government developed specific CTP reform proposals intended to correct trends towards increasing costs and inefficiency. Legislative proposals were not accepted by the Upper House of the NSW Parliament in that form, and the MAA has instead embarked on an internal work program and consultation to implement different reforms that address the major underlying issues. Administrative and regulatory solutions have been explored, including updates to the Guidelines and Costs Regulation.

As the legislative components of the Review were not implemented, some of the Review recommendations drafted in 2011 do not now reflect the changed circumstances and should be read in the current context. For example, the underlying objectives of the recommendations may be addressed with regulatory mechanisms without the need for legislation. It should be noted that in this case, NSW Government agencies must apply cost benefit analyses before specific recommendations can be implemented. Similarly, other recommendations will need to be adjusted to take into consideration recent MAA organisational changes, such as the integration of Assessment Services (now including WorkSafe Merits Review) as part of the establishment of the Safety, Return to Work and Support Division (SRWSD) and its subsequent location in the Department of Financial Services (DFS). The detail behind these different approaches is not within the scope of this update.

The update has involved re-examination of the statistical analysis, checking each section, its observations and recommendations, and where possible condensing arguments to eliminate repetition and shorten the report. In addition, the MAA identified a series of minor changes requiring attention that would not affect the substance of the report but would improve readability and understanding in what is a complex area. The finalised report includes these changes:

- repositioning of the material in alignment with the original terms of reference
- a sharper focus on the stakeholder concerns as well as CARS efficiency and effectiveness performance measures.
- relocation of conceptual framework material to the attachments

- removal of outdated work undertaken by the MAA that has now been superseded, including subsequent restructuring and changes in strategic intent for the operation of the Assessment Service and
- the addition of NSW government changes that impact on CARS and relevant developments in other jurisdictions in the field of compensation dispute resolution.

While the emphasis may have shifted in some areas related to the updates, the revisited material fully supports the major findings of the 2011 draft and the original recommendations.

Notes on the data

The last data examined and analysed for the Review was from 2009/2010. This data was re-checked for the purpose of the update. In 2011, the Review's conclusions based on the data, analysis and other findings were that the trends identified above would continue. More recent information in the annual reports and performance reviews published on the MAA website confirm that these trends have continued. On this basis the conclusions from the 2009/2010 data have not changed with the passage of time and the analysis remains valid. In the opinion of the recent reviewers, the underlying issues remain the same.

The Review reports an analysis of 'legal costs' which is based on all costs from all sources including those of insurers. In contrast, in MAA published material on the scheme since 2011 and in particular, in material supporting changes to the scheme last year, legal costs may only include plaintiff legal costs. This is explained in the report.

How to read this report

The 2011 Review summary, including findings, key statistics and recommendations precedes the main body of the report. From this point, the Review has been updated as detailed above.

The first chapters examine the performance of CARS against the original 1999 legislative objectives, other Australian schemes and best practice. The middle chapters report stakeholder concerns in detail, and test the evidence for super-imposed inflation, bias and delay. None of these concerns were confirmed by the data.

The later Review chapters examine the structure and operations of CARS and present a case for re-design. The CARS approach is explained as part of a broader shift in tribunal practice in Australia to greater independence and informality; and reduced legal involvement. The last chapter details a proposed case management process that draws on proposals from stakeholders, best practices observed in other jurisdictions and reported in interviews with Australian CTP scheme managers.

➲ **Updated material is noted using this style in the section to which it applies and footnotes provide later references.**

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Abbreviations and terminology

ADR	Alternative Dispute Resolution, i.e. an alternative to formal court-based dispute resolution incorporating engagement of parties in the outcome through mediation, conciliation, arbitration or other instituted arrangements. As well as greater control over outcome, lower costs and delays are expected from using the alternative. In this report, ADR does not include negotiations conducted by the parties after court processes have begun.
CARS	the Claims Assessment and Resolution Service
CTP	Compulsory Third Party – generally used to describe compensation schemes for motor accidents
MAA	Motor Accidents Authority
MAAS	Motor Accidents Assessment Service (including CARS and MAS)
MAC	Motor Accidents Council
MAS	Medical Assessment Service
MAC Act	Motor Accidents Compensation Act 1999
MRG	MAAS Reference Group (comprising representatives of insurers, the legal profession and MAS)
Stakeholders;	Services providers to the CTP scheme insurers, legal representatives, medical service providers and MAA institutions (all of whom are also stakeholders in the system in the more generic sense)
Superimposed	the rate of increase in average claim costs over time, in excess of the increase in average wages, Inflation for a given injury/severity (real inflation, taking changes in average weekly wages as the base measure)
Scheme	the compensation scheme provided for in the MAC Act
Settlement Stage	point in the life of a claim where it is finalised – before, in or immediately after CARS or the Court
Court	the District Court

Appreciation

The consultants would like to express their thanks to the General Manager of the MAA, the Deputy General Manager of the MAA and senior officers of the MAA. Many other stakeholders and service providers from the insurance industry, the legal profession gave up much of their time in making formal submissions and informal inputs to the review. Special thanks are given to the Principal Claims Assessor and members of the assessor panel at CARS.

Executive Summary

1. The Claims Assessment and Resolution Service (CARS) is performing well. The evidence shows and the submissions of claimants, insurers and legal representatives confirm that CARS is an important and well-functioning institution that is broadly meeting its statutory purposes. Compared to the default court process, CARS is much quicker and less expensive. Its approach to dispute resolution is relatively informal and flexible.

2. Areas for improvement exist. More claims may be channeled through CARS than is currently the case aligning it with a key objective of the Motor Accidents Compensation Act in 1999: to direct the bulk of "standard" claims to CARS with its informal and expeditious procedures while reserving the balance of more complex matters for the District Court. At the end of the 2009/2010 financial year:

    - More unresolved claims are going to court (around 56% of all cases) than to CARS (around 44%). These cases are exempted from the CARS process on the basis of complexity, yet only around 6% of cases proceed to court judgments. The rest, 94%, settle, but often only after protracted delays and at much greater cost to claimants and to the Motor Accident Authority.
    - Whether all exempted cases are indeed so complex as to warrant court attention needs to be more closely investigated. The evidence suggests that many are not.
    - Exempted cases are generally not subjected to any early, formal ADR[1] processes. While the overwhelming majority of these cases settle, they settle late.
    - The delay associated with avoidable litigation cannot promote a claimant's speedy recovery from injury. Court proceedings also entail extra legal costs, reducing the compensation flowing to claimants and pushing up Scheme overheads.

3. This core cluster of findings and conclusions, along with other evidence, produces the following priority recommendations:

    - All unresolved disputes, including matters that may qualify for exemption from CARS assessments, should be the subject of early, active case evaluation and dispute resolution efforts by CARS.
    - Consideration should be given to expanding the jurisdiction of CARS to include categories of claims currently automatically exempted from CARS.
    - The resolution of claims would be advanced through the introduction of firmer and accelerated timelines, and simplified and rationalised processes. Some pointed recommendations have been made in this regard.

[1] Alternative dispute resolution

The adoption of these measures should see many more matters settling or being determined earlier and at lower cost, meaning real benefits for injured road users and more affordable Greenslip premiums for motorists.

4. A second key finding of the Review concerns superimposed inflation.[2] An insistent insurer submission is that CARS is driving such inflation in the Scheme, with premium implications. The most recent actuarial analysis of the relevant data[3] finds that while superimposed inflation has been evident in the Scheme over the last decade, this has not been a CARS-specific phenomenon. Claims finalisations at CARS, the District Court and settlements at every stage have all broadly displayed the same inflationary tendencies. The District Court and other superior court judgements feature as the main reference point for CARS assessors as they go about determining compensation amounts. Superimposed inflation has been relatively benign over the last three years.

5. A third key finding is that, viewed as a whole, the assessments of CARS show no pro-claimant bias, despite contrary perceptions amongst insurers. However, the profile of the CARS assessor group coupled with their part-time status is clearly a source of perceived conflict of interest for some (many assessors not only preside at CARS but are active practitioners in the CARS arena as well). This perception is understandable and should be addressed. The recommendation flowing from this assessment is that a nucleus of around six full-time or major-time assessors should be appointed to anchor the CARS assessor panel. The appointment of such a mainstay group would combat perceptions of conflicts of interest and simultaneously promote a higher degree of quality and consistency in decision-making.

6. A fourth and final key finding relates to the submission of both insurers and legal representatives that matters too complex for the expeditious CARS process are not being exempted. This submission is not sustained by the evidence. The Review finding is that criteria for the discretionary exemption of complex matters are appropriate and are being appropriately applied.

7. The full set of Review recommendations, categorised according to priority, are set out at the end of Part 2 of this Executive Summary.

[2] See the Glossary for an explanation of terms used
[3] Taylor Fry *Modelling of Superimposed Inflation within the NSW CTP Scheme*, April 2011, an annexure to this Review

Executive Summary – Part 2: A more detailed analysis

Throughout this Review, reference is made to particular categories of claims, as elaborated just below:

2.	**ANF Only**	3.	Settled as an ANF (Accident Notification Form, for claims < $5,000; both represented and unrepresented; legal representation in only 1-2% of cases)
4.	**Unrepresented**	5.	Section 74 (full claim settled without legal representation prior to any CARS steps or court proceedings)
6.	**Represented**	7.	Full claim settled with legal representation but prior to any CARS steps or court proceedings
8.	**CARS Settled**	9.	Settled within the CARS process before any assessment
10.	**CARS Assessment**	11.	Settled within CARS after a General Assessment (known as a "2A assessment")
12.	**CARS Exempted**	13.	Exempted from CARS and settled without any commencement of court proceedings (typically exempted because the claim is one where fault has been denied, or contributory negligence > 25% alleged, or vulnerable (child) claimants are involved or held by CARS to be complex on other grounds)
14.	**Court Other**	15.	Exempted from CARS, legal proceedings commenced, but settled without a court decision
16.	**Court Judgement**	17.	Finalised through a court decision

A. Through the Claims Assessment and Resolution Service (CARS), people who suffer trauma and disability through accidents on NSW roads are provided with access to a dispute resolution option that, for appropriate cases, is cheaper and speedier than the court system and yet provides impartial, just decisions. In comparative scheme terms CARS is the only place in Australia where such a service is available.

B. CARS has performed well in the first dozen years of its existence, broadly meeting its statutory charter. It has also attracted criticism from stakeholders and service providers. The Review has examined the criticisms. It has sought both quantitative evidence and the perceptions and opinions of stakeholders on each of the issues raised and the actions that could be taken to address them. The results are summarised below.

C. Not all of the developments with CARS have followed the original legislative plan. Lawyers have proved to be a ubiquitous and necessary part of the process. More fundamentally, though, a great many claims are being exempted from CARS and proceeding on to court for determination. The claimants in these matters are not, therefore, receiving the benefits of early alternative dispute resolution. Their cases take much longer to settle and attract significantly higher legal costs. The Review's conclusion is that, first; these exempted matters should be looked at again to see

whether they are indeed unsuitable for the expeditious and fair CARS formula. Second, even if they are not suitable for CARS, there are good grounds for believing that claimants would benefit if their unresolved matters were directed into alternative dispute resolution processes early in their lifecycle.

D. The resolution of claims would be advanced through the introduction of firmer and accelerated timelines. There is also room to simplify and rationalise the current CARS dispute resolution processes and make them more flexible. The Review proposes a new case management system centred in CARS to promote this objective.

E. For CARS to perform better in the performance of its assigned statutory role, it needs more autonomy and resources. The Review makes recommendations in this regard.

Findings that go the core Terms of Reference

While this Review ranges broadly, deals with many competing submissions and generates recommendations for change, including structural change, the overarching finding is the following one:

i. **The Claims Assessment and Resolution Service (CARS) is performing well.**

The evidence shows and the submissions of claimants, insurers and legal representatives confirm that CARS is an important and well-functioning institution that is broadly meeting its statutory purposes.

The Review's terms of reference capture those statutory purposes:

> CARS was established to provide the parties to a claim, the injured person and the CTP insurer, with a quick, inexpensive, informal, flexible and non-adversarial means of resolving disputes about the claim's process or progress and the compensation entitlements of the injured person, in otherwise 'standard' claims.

Further findings include that, compared to the default court process:

ii. **The CARS process is quick and improving.**

The engine room of CARS is its assessment process, the making awards of compensation in respect of motor vehicle injuries. Average assessment times have dropped from a high of nearly 500 calendar days in 2006/07 to a current average of less than 12 months. The timeline for finalising exemption applications – a screening process that allows over a thousand of the more complex cases to proceed on to court each year – has dropped from a high of 69 calendar days in 2003/04 to around 29 in 2009/10. Further improvements in these counts are anticipated.

- In the last financial year, 2009/10, it took CARS on average 273 days less to decide its (more standard) claims than it took the District Court to decide its (more complex) matters.
- When a matter settled at CARS (without an actual assessment being made), in 2009/10 it did so on average 545 days sooner than a matter that settled in court (without an actual

judgement), and 125 days sooner than a matter that was exempted from CARS but settled before any court proceedings commenced. A CARS assessment hearing will typically last half a day. A court hearing for a motor accident claim will typically last several days.

- The difference in disposal times for more straightforward cases in CARS and more complex cases in court is what the legislature intended.

As CARS has no direct equivalent in any other Australian CTP jurisdiction, comparisons with other state systems are difficult to make in respect of all measures, including timeliness.

iii. **CARS is relatively inexpensive.**

In 2009/10, the average total amount of legal costs per claim for a matter finalised by way of a court judgment was $197,000 (up from $89,000 in 2006/07, in constant prices). The equivalent CARS assessment amount was $58,000 (up from $41,000 in 2006/07). A claim that settled after the institution of court proceedings but without a court judgement attracted legal costs of $109,000 in 2009/10. A matter that settled at CARS in that financial year drew legal costs on average of $39,000.

iv. **CARS is relatively informal, flexible and non-adversarial.**

Its proceedings are conducted in unadorned (to a fault) hearing rooms in a relatively informal and inquisitorial style. Survey work shows that claimants enjoy a respectful hearing before assessors. However legal representation, contrary to original intentions, has become a near-universal feature of CARS proceedings. Given the complexity of the underlying law and of the attendant processes, such representation is understandable. The CARS assessor approach is inquisitorial rather than adversarial.

v. **A strong esprit de corps prevails amongst CARS Assessors**

While the reviewers conducted no formal survey amongst CARS assessors, in the course of many joint and individual consultations the morale and enthusiasm of the assessor group was very apparent. This speaks to good leadership and management.

Key issues identified by service providers in the Review process

Against this background of generally lower costs and improvements in service delivery, there are aspects of CARS that attract criticism from stakeholders. These stakeholders have legitimate concerns. Chief amongst them are the following:

vi. **Insurers see signs of superimposed (real) inflation in the trend of CARS assessments.**

They attribute this in part to the composition of the CARS assessor group.

Data made available to the Review shows superimposed inflation across all claims finalisation areas, including CARS assessments and the court judgements, over the period 2003/04 to 2007/08. Since 2008, superimposed inflation has been relatively benign. CARS assessments alone would not appear to have been driving inflation during the relevant period.

As one would expect, in a hierarchical judicial system where the courts determine compensation amounts on the same legal basis as CARS, assessors report referencing the judgements of the superior courts as a key influencer in their own decision-making.

vii. **Insurers perceive CARS as being overly sympathetic to claimants**

This, they say, is reflected in the quantum of assessments. They attribute this orientation and outcome to an over-representation of plaintiff lawyers in the complement of CARS assessors.

Data made available to the Review reveals no overt leaning to claimants on the part of the assessor complement.

viii. **Insurers consider the dual status of CARS assessors as decision makers and advocates to be a potential source of bias.**

The profile of the CARS assessor group coupled with their part-time status is a source of perceived conflict of interest for insurers (many assessors not only preside at CARS but are active practitioners in the CARS arena as well). This perception is understandable and should be addressed.

The Review recommends that a nucleus of full-time assessors (or major-time assessors without any potential conflicts of interest) should be appointed when a new panel comes up for selection in mid-2012.

ix. **Insurers have concerns about the quality and consistency of certain CARS decisions.**

Improvement in the quality and consistency of administrative, quasi-judicial and judicial decisions is a perennial challenge, and one, which applies to CARS as well.

The Review's recommendations on the appointment of a nucleus of full-time assessors and on further training initiatives go towards addressing this concern.

x. **Both insurers and legal representatives believe that matters too complex for the expedited CARS process are not being exempted.**

The Review finding is that criteria for the exemption of complex matters are appropriate and are being appropriately applied.

xi. **Claimants have concerns about the services being provided by their legal representatives.**

This emerges from the initial responses to a survey process still in development. Further survey work is needed to validate the finding before any remedial action is contemplated.

Findings suggestive of a need for larger system changes

xii. **A large number of unresolved matters are bypassing CARS and the early dispute resolution opportunities provided for in the statute.**

More unresolved claims are being directed towards the court (around 56%) via the exemption process than to CARS (around 44%). Complexity (and therefore incompatibility with the expeditious CARS process) is the main basis on which exemptions are made, but in fact only around 6% of cases proceeding to court end in a judgement. The rest, 94%, settle.

Whether all exempted cases are indeed complex and not suited to ADR processes is not definitively known.

Exempted cases are generally not subjected to any early dispute resolution processes; they take longer to finalise and attract higher legal costs. The result is that the MAC Act's original object of allowing the bulk of cases to be disposed of relatively quickly and inexpensively is not being achieved. The health consequences for claimants of the ensuing delay are likely to be adverse, while claimants' monetary compensation will be reduced because of increased legal bills. Three options for reform present themselves:

(i) At minimum, an expansion of the early dispute resolution net, requiring all to-be-exempted claims to be subject to early formal settlement efforts (but with no change to the current CARS jurisdiction).

(ii) A change to the mandatory exemption rules, requiring CARS henceforth to examine the merits of denial of fault defences and perhaps other exemption grounds to ascertain whether factors of complexity can objectively be said to exist. In the event that factors of complexity are found *not* to exist, such claims would be then be dealt with by CARS in terms of the usual general assessment procedure, and any assessment would be binding on an insurer. (The fault-denied mandatory exemption category accounts for around 60% of all exemptions.)

(iii) The matters that currently bypass CARS and the early dispute resolution provisions should be swept up in a new, flexible and comprehensive case management system centred in CARS.

xiii. **Bypass cases are driving excessive legal costs in the scheme and need to be treated differently.**

In the Australian context, the NSW CTP Scheme has higher legal costs than other fault states, with 18.6 cents in the dollar going to lawyers (15.5 cents in the case of CARS proceedings). This is still a significant improvement on the situation before CARS was established, when costs were at 22 cents. Australian experience shows that lower legal costs are achieved not only with CARS-style administrative ADR but also dispute management protocols that manage access to the courts of the equivalent by-pass caseload. The Review has made recommendations for their implementation.

xiv. **The introduction of a new, flexible and comprehensive case management system centred in CARS would promote the objects of the Act.**

Presently MAAS is the entry point for CARS applications. The proposal here is that CARS should be the first body to which all unresolved claims are referred, at an early juncture.

Case management officers should then be empowered to direct how cases should be managed further. Options should include –

- that the parties be given latitude on request or at the discretion of the case manager to settle the matter independently within a given period through whatever exchanges they deem suitable;
- that a matter be exempted and directed to court forthwith without any other mediatory measures coming into play;
- that a matter likely to be exempted should be the subject of a settlement conference between the parties, with or without supervision in the form of a chairperson, mediator or neutral case evaluator, and with or without the need for the production of further information;
- that a matter suitable for CARS assessment proceed direct to the preliminary teleconference stage;
- that a matter suitable for assessment be the subject of a settlement conference between the parties, with or without supervision in the form of a chairperson, mediator or neutral case evaluator, and with or without the need for the production of further information.

xv. **CARS needs greater autonomy.**

The Review conclusion is that CARS does not have sufficient authority or resources to discharge its statutory mandate. It is recommended that CARS should –

(i) have its own dedicated registry and registrar;

(ii) should be the first body to which all unresolved claims are referred, at an early juncture;

(iii) have greater resources;

(iv) have greater control over the formulation and expenditure of its budget;

(v) have reporting responsibilities both to the MAA and the Minister.

The role and status of the Principal Claims Assessor should be commensurately enhanced. The role of MAAS (the Motor Accident Assessment Service) and coordination with MAS would need to be reviewed. A more autonomous and resourced role for CARS would be necessary for it to perform the role proposed immediately above.

xvi. **Unrepresented claimants do not appear to be receiving their statutory due and should be better assisted, possibly through a new Claimants Advocacy Service.**

Most claims – currently over three quarters – are settled administratively on application. Some 3,500 of these relate to injured persons not represented by lawyers (not including ANF

settlements). The evidence suggests that unrepresented persons are not receiving their statutory due. This, however, is not something that the Review has conclusively established.

In 2009/10 the median amount for settlements amongst unrepresented claimants was $3,072 (average: $11,911[4]). The median amount for settlements amongst claimants represented by lawyers at the same pre-CARS stage was $41,369 (average: $90,195[5]). Data suggests the discrepancy between unrepresented and represented settlements amounts is not solely because of differences in injury severity in the two streams of claim finalisations.

The MAA should investigate more closely the experience of unrepresented claimants in the Scheme to establish with greater accuracy the level of their compensation benefits, measured against the expectations of the legislation. Should it emerge that unrepresented claimants are not receiving their due, but perhaps in any event, the MAA should consider –

(i) requiring insurers to introduce new measures in claims assessment and handling to address this (working off the principle that the first touch point for beneficiaries in any system is always the most important one);

(ii) the establishment of a *Claimant Advocacy Service* for all injured persons;

(iii) requiring the settlements of all currently unrepresented claimants to be followed by a cooling off period;

(iv) requiring that the settlements of all currently unrepresented claimants be scrutinised and endorsed by an independent official or lawyer, or by a claimant legal representative retained for this purpose.

A Claimant Advocacy Service should be staffed by a core of legally qualified professionals as well as para-legals authorised to assist claimants with all aspect of their claim, including legal advice. Their primary role would be to help claimants in the early exchanges and negotiations with insurers. The expertise of the professionals would need to include a good knowledge of the substantive law but then also extend to the suite of ADR skills. Their role would be to work on matters before they harden into disputes, and so solution-finding and negotiation skills would need to feature in their competencies. It is this early stage intervention that is likely to translate into maximum benefit for the Scheme stakeholders – injured persons and premium-paying road users.

[4] An amount that includes around $700 of insurer legal costs

[5] An amount that includes around $12,700 of legal costs, both claimant and insurer. The amount of compensation actually received by a claimant would be net of a further component of solicitor-client legal fees, and other costs (such as insurer investigation costs) averaging around $3,000.

There is merit in considering such a service whatever the outcome of an enquiry into the compensation benefits of claimants. While the service could indeed help the currently unrepresented, it could also reverse the drift towards legal representation in non-disputed settlements.

Concluding observations and a cautionary note

More than a decade on from the enactment of the reforming legislation, evidence emerging from the review process reveals some significant gaps between the original intent of the Scheme and how it has in fact come to operate. Chief amongst these would be –

- the pervasive role of legal practitioners within CARS processes (a development the Review sees as inevitable given the complexity of the underlying law);
- a growing role of legal practitioners in the early claims-making and claims-settling process (a development which suggests that the primary claims handling processes of insurers and the information services of MAA do not leave injured persons feeling confident enough to manage and settle their claims unassisted);
- the large number of claims that bypass both CARS and the MAC Act's primary ADR net (a development the Review believes needs to be addressed);
- a CARS assessor cohort drawn predominantly from plaintiff quarters (a development which has led to perceptions of bias, something which the Review believes should not be overstated but none the less addressed).

The Review has recommended that the MAA consider some potentially far-reaching structural changes in response to the last three developments noted just above. In addition, the Review has recommended that the MAA consider a number of other process and organisational changes.

These Recommendations need to be seen in the context of the primary Review finding: that CARS is operating successfully and achieving its statutory purposes. Changes intended to bring benefits will also incur costs, so any changes should be effected only in the wake of a careful cost/benefit analysis that engages the primary stakeholders to the extent feasible and then also the major service providers.

Clive Thompson
May 2011

Review Recommendations

Set out below are three categories of recommendations: *priority recommendations*, *other recommendation*s and then *other actions* to improve the contribution of CARS to the CTP Scheme. All recommendations are subject to administrative cost effectiveness findings to be made by the MAA.

Priority Recommendations

The priority recommendations are a product of the headline analysis. In a nutshell, these are that the MAA should,–

(i) introduce firmer and accelerated timelines, and simplified and rationalised processes;
(ii) afford all unresolved disputes the benefit of early ADR processes;
(iii) consider expanding the jurisdiction of CARS to ensure that all standard cases are directed towards CARS assessments and only genuinely complex cases proceed on to court;
(iv) appoint a nucleus of full-time or major-time assessors.

Recommendations that fall under each of these subheadings appear just below. They are drawn from the main body of the report, numbered according to their place in the report.

xvii. **Provide for firmer and accelerated timelines, and simplified or rationalised processes**

Several insurers submitted that solicitors acting for injured persons would wait until close to the six-month section 72 deadline before submitting a claim. This impedes insurers from taking earlier remedial steps in relation to injuries, and the claims process itself is then characterised by delay from the outset. Late claims – and there are many – may only proceed after a hearing that establishes a full and satisfactory explanation for their lateness. In around 95% of cases the claims are allowed to advance, but the hearing requirement means delays and costs.

Several service providers stated in their submissions that the current claim form is unnecessarily long and constitutes a duplication of information requirements pertinent only later in the process. A brief notification to the relevant insurer of the occurrence of an accident along with basic particulars would be sufficient to allow an insurer to take matters further. The format of the Accident Notification Form should be followed. Generally speaking, the repeat furnishing of particulars should be avoided wherever possible. To address all of the above, the following changes are recommended:

Recommendation 29 The basic MAA claim form should be shortened and simplified and the periods and obligations in respect of the making of claims should be changed:

- First, section 72 should be amended to read: "A claim must be made as soon as possible after the relevant date for the claim but in any event within 4 months after the relevant date".
- Second, fresh measures should be adopted to facilitate the early notification of claims via hospitals and doctors rooms, accident reporting to the police and other information channels.

- Third, any late notifications should be visited by a modest diminution in the amount of any compensation that may be assessed or awarded, plus a modest reduction of the regulated or agreed legal costs if it is found that a legal representative was responsible for the delay.
- Fourth, any claim brought later than 12 months after the relevant date should require a full and satisfactory explanation for the delay before being allowed. [Page 103]

Recommendation 28 Full s 85 particulars should be submitted in respect of all claims, even if an application for exemption is anticipated. [Page 111]

Recommendation 31 The requirements for s 85 should be aligned as far as possible with the requirements for the District Court's statement of claim. [Page 111]

The fact that an insurer cannot withdraw from an admission of liability once made, even in the light of new facts, encourages a disposition to deny liability for precautionary reasons. That in turn sets claims down a particular path, usually more adversarial than need be. In addition, a rule that disallows a change in negotiating stance notwithstanding the emergence of new and relevant facts is essentially inimical to fair and effective dispute resolution. The next recommendation is intended to reverse this current statutory feature.

Recommendation 32 Section 81 should be amended to allow insurers on good cause shown to deny liability even after an initial notice admitting it, to provide for bona fide changed circumstances and to maximize negotiating flexibility and hence settlement prospects. [Page 111]

A cause of considerable claims processing delay arises from the entitlement of a party to seek a further medical assessment "on the grounds of the deterioration of the injury or additional relevant information about the injury".[6] Submissions show that the right has often been exercised by both claimants and insurers on grounds better described as wistful or tactical than well-founded. This is something that calls for decisive attention.

Recommendation 15 In order to reduce delays in finalising matters, section 62 should be amended to provide that any further medical assessment should be by the direction of the court or an assessor, or with the leave of the court or an assessor on application. [Page 77]

While court proceedings must commence within three years of the date of accident, there is currently no time limit for bringing a matter to CARS. So if a claim relates to a matter not subject to exemption, that claim may be brought to CARS and must be assessed even if the application is only made (many) years later. This open but belated passage to CARS might be available, for instance, if the claim had been duly made within six months of the accident and the insurer had accepted liability shortly thereafter. In order to oblige the timely resolution of all claims, it is recommended that the MAC Act be amended to provide that an application for a CARS assessment should be made within three years of the accident to which the claim relates (lining up with the time limit for court proceedings, as

[6] Section 62(1)

provided for in s 109). Any late application to CARS should require a full and satisfactory application to proceed.

Recommendation 33 The MAC Act should be amended to provide that an application for a CARS assessment should be made within three years of the accident to which the claim relates. [Page 111]

xviii. Afford all unresolved disputes the benefit of early ADR processes

As already noted, the majority of unresolved claims bypass court and go into the formal litigation system. No early, active case evaluation and dispute resolution efforts are provided for these exempted matters, something that translates into delayed settlements and extra legal costs.

Beyond that, at present all claims destined for a CARS assessment must follow a set path made up of several steps, not all of which are indicated in many cases. Were a very well-resourced CARS registry to have early command over these matters and a flexible processing capability, claims and processes could be better matched. The recommendations that follow seek to promote these ends.

Recommendation 34 As soon as a claim crystallises as an unresolved dispute (after s 85A particulars have been supplied and either the insurer has denied liability under s 81 or the insurer's s 84 offer has been rejected) and in any event if a claim has not been settled within 2 years and 9 months after the date of the relevant accident, CARS should be notified and thereafter actively manage the matter further. [Page 114]

Recommendation 35 All unresolved disputes notified to the relevant Registry, including those eligible for exemption, should be the subject of early and active case evaluation. Unless otherwise directed by the Registrar or case management officer, the parties should exchange relevant documents and other information and engage one another in formal settlement discussions, either as provided by Division 1A or some substitute process. [Page 114]

Recommendation 36 Case management officers should be empowered (under assessor supervision) to direct that settlement discussions be chaired or otherwise facilitated by an independent, expert person drawn from CARS or another MAA body. One or more of the parties may also request such assistance. The case management officers should be empowered to direct further that –

- the parties be given latitude on request or at the discretion of the case manager to settle the matter independently within a given period through whatever exchanges they deem suitable;
- a matter be exempted without further administrative action and proceed to court;
- a matter suitable for assessment proceed direct to a preliminary conference (as currently provided for);
- any unresolved matter likely to be exempted should go to a settlement conference with or without supervision of an independent chairperson, mediator or neutral case evaluator, and with or without the need for the production of further information;
- a matter suitable for assessment be the subject of a settlement conference between the parties, with or without supervision in the form of a chairperson, mediator or neutral case evaluator, and with or without the need for the production of further information. [Page 114]

xix. **Consider expanding the jurisdiction of CARS to ensure that all standard cases are directed towards CARS assessments and only genuinely complex cases proceed on to court**

As noted, more unresolved claims are going to court via the mandatory exemption process than to CARS. But whereas complexity is the basis on which exemptions are provided for, in fact only around 6% of cases proceeding to court are the subject of court judgements. The rest settle; but often only after protracted delays and at much greater cost. Whether all exempt cases are indeed so complex as to warrant court attention needs to be more closely investigated. The evidence suggests that many are not.

Children's cases are currently automatically exempt from CARS assessment. However, not all children's cases are necessarily complex and in fact many of them are for small amounts of compensation – $30,000 or less. District Court judges have noted that many damages awards in this are treated by all concerned as the proverbial "go-away" payments.

As contributory negligence cases of any serious dimension are likely to introduce elements of complexity, it is appropriate that they be exempted from the CARS assessment process. However, in order that less complex, CARS-amenable cases not be screened out too readily, it is recommended that only in cases where contributory negligence in excess of 35% is alleged should CARS be deprived of jurisdiction. A minor raising of the bar from the current 25% is therefore recommended.

The Review conclusion is that the discretionary exemption grounds are being properly applied.

Recommendation 37 Depending on progress made with the further resourcing of CARS, consideration should be given to expanding the jurisdiction of CARS to include categories of claims currently exempted from CARS assessments. [Page 115]

Recommendation 11 All claims currently exempted from CARS on the basis of a denial of fault should be subjected to early case review by CARS as part of a larger case management reform initiative. The purpose of the review should be to determine whether such claims would benefit from formal settlement steps, or should be exempted and directed to court forthwith, or be determined through CARS processes culminating in an assessment. [Page 59]

Recommendation 12 Consideration should be given to expanding the jurisdiction of CARS to include some or all children's cases. Consultation would be required to inform any expansion decision. This should include –

- consultation with the NSW Commission for Children and Young People and the NSW Trustee & Guardian;
- the revision of the legal costs regulation to provide adequate reward for legal representatives;
- considering restricting any revised CARS jurisdiction in respect of children to claims where less than $50,000 is in dispute [Page 60]

Recommendation 20 The current exemption from CARS for claims with significant contributory negligence components should be retained but the threshold for exemption raised to where negligence of greater than 35% is alleged. [95]

Recommendation 22 The current provisions and procedures dealing with discretionary exemptions should be retained. The 2008 Guidelines should, however, make explicit mention of two additional factors to guide exemption applications, namely, whether the claim raises important new issues of law and whether the claims may give rise to a "strategically significant case". [Page 96]

xx. **Appoint a nucleus of full-time or major-time assessors**

The profile of the CARS assessor group coupled with their part-time status is clearly a source of perceived conflict of interest for some Scheme participants (many assessors not only preside at CARS but are active practitioners in the CARS arena as well). This perception is understandable and should be addressed. The recommendation flowing from this assessment is that a nucleus of around six full-time or major-time assessors should be appointed to anchor the CARS assessor panel. The appointment of such a core group would combat perceptions of conflicts of interest and simultaneously promote a higher degree of quality and consistency in decision-making. It would also boost the legitimacy and credibility of assessors if their appointment process saw greater stakeholder input.

Recommendation 24 Assessor appointments should be made in terms of criteria and a process in respect of which stakeholders have had an opportunity to make a formal input. [Page 103]

Recommendation 27 A nucleus of around six full-time or major-time CARS assessors who no longer practice in motor accident law (and ideally not personal injury law either) should be appointed. [Page 103]

Recommendation 28 Confirm the engagement of full-time assessors as independent decision makers through Ministerial appointment. [Page 103]

While not all of the above recommendations are of equal importance, it is suggested that if CARS is to make an improved mark then reforms that capture and promote the essence of the four major headings above need to be introduced. Reforms, therefore, that: (1) introduce accelerated timelines and rationalised processes; (2) afford all unresolved disputes the benefit of early ADR processes; (3) expand the jurisdiction of CARS where appropriate; and (4) provide for the appointment of a nucleus of full-time or major-time assessors.

Other Recommendations

Some of the following recommendations are supportive of the priority ones, while others deal with different objectives. All are, it is suggested, worthy of careful consideration. The context for each recommendation appears in the body of the report at the pages indicated.

Recommendation 9 The MAA should develop strategies to improve claimants' understanding of CARS. [Page 52]

Recommendation 10 The MAA should establish evaluation procedures to assess the effectiveness of those strategies by conducting ongoing studies of claimants' perceptions of CARS. [Page 52]

Recommendation 16 Regular claimant surveys should be conducted that include polling users' views about the dispute resolution methods used in CARS processes, including teleconferencing and the assessment hearing. [Page 84]

Recommendation 1 The structure of the legal costs regulation should be amended to support the early dispute resolution objects of the Act. [Page 26]

Recommendation 2 The legal costs regulation should be reviewed and adjusted every two years to ensure that it continues to serve objects of the Act under changing circumstances. [Page 26]

Recommendation 3 All amounts which claimants are obliged to pay their legal representatives should be required to be disclosed to the Motor Accident Authority. [Page 26]

Recommendation 17 The MAA should give consideration to sponsoring the development of a MAC Act-specific ADR educational program open to assessors, legal practitioners and insurer representatives. [Page 84]

Recommendation 18 Consideration should be given to initially encouraging and then obliging, legal practitioners and insurer representatives who engage with CARS to receive formal training, and accreditation in ADR processes (perhaps as part of the maintenance of their professional qualifications. [Page 84]

Recommendation 23 CARS assessors should receive training in a range of areas essential to the professional and expeditious control of ADR cases. The training should integrate with ongoing professional development offered by relevant professional organisations for people exercising decision-making roles in judicial or quasi-judicial forums. This training should include recognition of precedents and the creation of documentation establishing clear and defensible reasoning for the precedent. [Page 99]

Recommendation 25 The training and education of CARS assessors should be extended to regular information sharing and presentations on the quanta of assessments being made on all the major heads of damages both by CARS and other personal injury tribunals and courts. [Page 103]

Recommendation 26 CARS decisions should be published, with due regard to personal privacy concerns. [Page 103]

Recommendation 7 The MAA should investigate the feasibility of adopting Dispute Management Protocols and applying lessons learned by other schemes. [Page 49]

Recommendation 8 The MAA should consider establishing a Dispute Management Unit to guide the development, implementation and management of the protocols. [Page 49]

Recommendation 21 The MAA should establish and manage award-setting information and feedback mechanisms between CARS, insurers and other stakeholders to ensure the adoption of lessons from precedent cases into local claims decision-making and to reduce work and disputes. [Page 95]

Recommendation 22 The PCA should provide regular structured reports to the MAA Board (now SRWSD and Board) on the performance of insurers against standards of claims decision-making evidenced in CARS; as well as experience relevant to scheme viability and risk. [Page 96]

Recommendation 20 The PCA should exercise greater budget control over CARS. This role is essential to support the broader recommendations for independent exercise of decision-making powers, appropriate, timely control of resources and the efficient operation of the registration and case management processes. [Page 93]

Recommendation 19 The CARS docket system should be retained with appropriate changes to support PCA control of streaming, and more sophisticated referral of cases. [Page 88]

Recommendation 38 The MAA should adopt a comprehensive model of caseload management including new functions, dispute management protocols and differentiated case management. [Page 115]

Other actions

This third category begins with a cluster of potentially very far-reaching recommendations. They are directed towards developments in the pre-CARS stages of claims-handling, and as such not perhaps the immediate concern of a CARS-focussed review. None the less, they relate to developments that are feeding into the CARS pipeline, and the recommendations if adopted would have profound consequences for CARS (and indeed the entire Scheme). The motivation for these recommendations is set out under sub-heading (xv) of Part 2 of the Executive Summary just above.

Recommendation 4 The MAA should investigate the compensation paid to unrepresented claimants in the Scheme and establish with greater accuracy the level of their compensation benefits measured against the expectations of the legislation to ensure that unrepresented claimants are receiving their statutory due. [Page 33]

Recommendation 5 The MAA should then require insurers to introduce new measures in claims assessment and handling to address any shortcomings identified in processing unrepresented claims and consider the establishment of a Claimant Advocacy Service for all injured persons. [Page 33]

Recommendation 6 The MAA should consider requiring settlements for all currently unrepresented claimants to be endorsed by an assessor, an independent legal representative or claimant legal representatives retained for this scrutiny purpose. [Page 33]

The restrictions on advertising have drawn the wrath of claimant legal practitioners. On the strength of comparative lessons, the Review has a single recommendation to make in this regard.

Recommendation 39 Under section 121 of the MAC Act, the MAA should consider permitting advertising by service providers to the extent that it raises the awareness of injured motorist's right to make a claim and to options for resolving claim disputes and does not promote either legal advice or legal advocacy as a first step. The Claimant Survey results should inform the MAA's consideration. [Page 116]

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Terms of Reference

This review into the Claims Assessment and Resolution Service (CARS) was initiated by the Motor Accidents Authority (MAA) in November 2010 following the Ninth Report of the Standing Committee on Law and Justice of the Legislative Council of the New South Wales Parliament[7]. That report considered and made recommendations about the role and functioning of CARS. The MAA also sought input from insurers, lawyers, assessors and claimants before settling the review terms of reference.

The review is to identify options for improvement to CARS. To achieve this, the review will:

- *Advise on the level of continued efficiency and effectiveness of CARS, with reference to:*
  - *the original policy objectives for CARS (stated as a service providing quick, inexpensive, informal, flexible and non-adversarial means of resolving disputes arising in otherwise uncomplicated claims);*
  - *an analysis of the strategic context of the Motor Accidents Scheme including current scheme performance, operations and underpinning legislative framework; and*
  - *consultation with stakeholders and user groups;*
  - *relevant actuarial analysis and advice, separately commissioned by the MAA, for example on trends in claim numbers and costs.*
- *Compare the current CARS service delivery model with best practice in similar alternative dispute resolution models, consider stakeholder views and identify any options for improvement.*

While not purporting to be a conclusive or exhaustive list, the considerations and measures are expected to include such issues as:

- *Structure and approach*
  - *Status, role and powers of assessors*
  - *The mix of mediation and arbitration approaches and methods of case appraisal including issues such as late claims*
  - *Legal representation and use of Counsel and Senior Counsel in the CARS process*
  - *Accessibility, including barriers to either claimants or insurers accessing CARS such as cost, formality of processes, inflexibility, complexity and impact on the health and well-being of injured people/claimants*
- *The matters CARS is best suited to deal with*
  - *Consideration of the types of matters being assessed at CARS and the types of matters being assessed at Court, including matters that move between CARS and the Courts*
  - *Appropriate methods for resolution of more complex claims and timely redirection of specific matters to the Courts*
  - *Special provisions that may be required for vulnerable claimants*
- *Decision-making*

[7] *Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council*, September 2008 http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/bdfbbe30b3b28139ca2574b7000e3cb0/$FILE/Final%20Report.pdf Accessed January 2014

  - *Opportunities for review of CARS decisions*
  - *Appropriate use of other experts, including referral to the Medical Assessment Service*
  - *Promoting evidence-based decisions*
  - *Impact of CARS decisions on other services such as the Medical Assessment Service or Lifetime Care and Support Authority and the interaction between them*
- *Performance*
  - *Reviewing performance measures, both qualitative and quantitative, including timeliness of CARS processes and decisions, methods for measuring client satisfaction and complaints handling processes and procedures*
  - *Protecting the reputation of CARS as fair, consistent and impartial, including minimising potential for real or perceived conflicts of interest*
- *Operational considerations*
  - *Procedural fairness including protection of privacy of parties and the appropriate level of access to procedural information across both the insurance industry and legal profession to minimise perceptions of bias*
  - *Communication with parties, particularly claimants, regarding processes and procedures and expectations of compensation entitlements*
  - *Recruitment processes and appointment terms and conditions for assessors in light of the review of the 2009 recruitment program, and the appropriate composition of the assessor cohort*
  - *Allocation of matters to assessors and availability and use of appropriate guidelines, practice manuals and assessor education programs*
- *Suggest options to improve the fairness, timeliness, consistency and cost-effectiveness of CARS in order to benefit people injured in road crashes, green slip policy holders and the NSW community in general.*

Conduct of the review

The consultants undertook an assessment of historical, contemporary and comparative documents relating to dispute resolution in similar schemes. Extensive consultations and workshops were held with key parties and stakeholder groups. Further survey input was obtained from a random sample of claimants and a detailed analysis of this data was provided by the consulting actuaries, Taylor Fry. The consultants drew on previous work across a number of jurisdictions to compare the operation and performance of the NSW Cars scheme to established best practice principals and examples.

- Stakeholders were invited to make formal submissions to the review, which, once received, were published (See Annexure 2).
- The MAAS Reference Group was consulted in mid-December 2010.

Stakeholders were further consulted during January and early February 2011, including:

- Individual insurers
  - Insurance Council of Australia
  - Bar Association
  - CARS assessors
  - MAS
  - Law Society of New South Wales
  - Claims Advisory Service

- Members of the judiciary were consulted, including:
  - the Civil List Judge Sydney District Court and the Judicial Registrar of the District Court
  - the President and Registrar of the New South Wales Workers Compensation Commission
  - CARS assessors, the MAAS Reference Group, other insurance representatives and other legal practitioners attended workshops.
- The MAAS Deputy General Manager and the Principal Claims Assessor attended workshops with Taylor Fry.

Formal written submissions were received from the persons and organisations listed in Annexure 2. At the request of the MAA General Manager, Compulsory Third Party (CTP) schemes around Australia and in New Zealand shared comparative data and other information. A research exercise was conducted examining similar schemes as well as other compensation schemes, relevant court reform literature and international standards for tribunals.

The review employed a conceptual model as the basis for evaluating the performance of CARS in delivering on its goals, and then sought to uncover the reasons for specific outcomes by examining the interactions between CARS personnel and the stakeholders that create the environment in which CARS operates. The conceptual model is based on best practice techniques and is set out in Annexure 3. It identifies key performance measures from Australia and overseas, including disputation and settlement rates, the incidence of legal involvement and the proportion of costs associated with each claim. The source of these measures for CARS included internal CARS statistics, annual reports, actuarial analyses, interviews and submissions.

The reasons for performance outcomes against these measures were identified, by looking at drivers of behaviour in the scheme as well as incentives, disincentives and inefficiencies identified in the submissions. Options were then developed based on best practice and successful initiatives in other schemes and submitted material. These were designed to improve outcomes against CARS goals and MAA objectives. The identification of drivers of behaviour and pressures on operations were assessed and refined through:

- information gathering: stakeholders, written submissions from organisations
- feedback on initial observations and stakeholder comments
- analysis of the validity of claims made by stakeholders, particularly around superimposed inflation and exemptions.

In essence, the review addressed the following questions.

- Has CARS developed into the institution it was intended to be, providing persons injured in motor accidents and CTP insurers with a quick, inexpensive, informal, flexible and non-adversarial means of resolving disputes in otherwise uncomplicated claims?
- Is CARS supporting fair, just, appropriate and expeditious resolution of claims and in a way that provides value for money for CTP policy holders?

CARS - original policy objectives

About CARS

1. The Claims Assessment and Resolution Service (CARS) is part of the Compulsory Third Party (CTP) scheme in New South Wales that protects the interests of persons injured in motor accidents through treatment, rehabilitation and compensation.[8]

2. CARS was established by the Motor Accidents Compensation Act 1999 (MAC Act). It introduced reforms intended to:

   provide motorists with cheaper green slips, to improve access to early treatment and rehabilitation expenses for people injured in a motor vehicle accident, and to increase the proportion of the premium dollar going to injured people … by reducing scheme administrative costs.

3. The MAC Act maintained the privately underwritten, common law scheme where awards of compensation for damages (awards) could only be made after a finding of negligence.[9] The Motor Accidents Authority retained its regulatory role. [10,11] The intention to reduce administrative costs was a reference to legal costs and the costs associated with dispute resolution. The means of reducing these was the introduction of CARS – an independent dispute resolution service operating outside the courts.

4. CARS was to provide a process to resolve claims early, outside the court system and in a non-adversarial manner:[12]

   > *The procedure for matters being assessed by CARS will be flexible, with an emphasis on dealing with matters on the papers* [without the need for a hearing] *or with a conference rather than with formal hearings. There is a right for parties to be legally represented, although the system will be designed to ensure that legal representation is not necessary, particularly for smaller claims.*[13]

5. The process at CARS was to be compulsory with all disputed motor accident claims in New South Wales to be considered by CARS.

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[8] See section 5 of the *Motor Accidents Compensation Act 1999* http://www.austlii.edu.au/au/legis/nsw/consol_act/maca1999298/s5.html Accessed January 2014

[9] *Motor Accidents Act 1988* (NSW), s. 2A (1b)

[10] MAA, Scheme history, accessed 10 April 2011, <http://www.maa.nsw.gov.au/default.aspx?MenuID=134>

[11] The Hon John Della Bosca MLC, Minister for Finance, Motor Accidents Compensation Amendment Bill, Second Reading Speech, 4 April 2006, para 69

[12] The Hon John Della Bosca MLC, Minister for Finance, Motor Accidents Compensation Amendment Bill, Second Reading Speech, 4 April 2006, p. 903

[13] Ibid p. 905

6. CARS and the similarly established Medical Assessment Service (MAS) now comprise the Motor Accidents Assessment Service (MAAS), a function of the MAA.[14]

CARS origins and differences to other NSW dispute systems

7. CARS copied successful private industry complaints systems that used informal processes to resolve customer issues that might otherwise end in court action. In these systems, industry members agree to be bound by decisions and pay awarded compensation in return for simpler, cheaper and faster processes than courts. The CARS 'alternative' dispute resolution process or ADR process was not a voluntary option for insurers or claimants and referrals were made compulsory. Delays were also to be cut – in the previous system up to 565 days - with new faster deadlines. While provision was made for injuries to stabilise, benefits and rehabilitation would be more quickly paid out.

8. CARS was to act as a gatekeeper to the courts and to avoid the higher legal costs by dealing with the bulk of standard claims. At the same time the legislation ensured that the cases that did go to court were only the more complex claims or cases where awards would be of sufficient size to not be absorbed by costs. These cases were to be 'exempted' from the CARS process under criteria set by 'guidelines' to be overseen by the Minister and with the same authority as legislated regulation.

9. Sessional assessors as well as full-time assessors were appointed. The sessional appointees were legal practitioners with active motor accident caseloads in which they acted for injured road-users or for insurers. As both assessors and practising lawyers, they were appearing in front of assessor colleagues on a regular basis.

10. The appearance of a conflict of interest arising from assessors appearing as advocates for parties at one time and then at other times sitting in a role of neutral assessor was considered to be offset because the two roles provided:

    - access to specialist skill and
    - access to knowledge of 'going rates' from contemporary practice in the courts.

11. CARS was functionally (if not physically) located within the Motor Accidents Authority (MAA) and was made subject to funding, resourcing and accountability decisions through senior officials in the MAA. Assessor decisions in cases were to be made independently and were not to be subject to any interference. The justification for this structure and legislative framework was that the MAA is purely a regulator in contrast to workers compensation where insurers are 'agents' of the regulator. The arm's length relationship of the MAA with the insurers diffused concerns over any potential for undue influence in individual cases.

[14] MAA, Annual Report 2009–2010, p. 4

Changes since CARS 1999 establishment - Division 1A

12. The most significant change to CARS since 1999 was designed to increase settlements prior to the CARS process. This was successful and about half of the claims now resolve in 'Division 1A' processes. The amending legislation to the MAC Act came into effect on 1 October 2008. The provisions require insurers and claimants to hold mandatory settlement conferences after first exchanging information and then to make final offers of settlement. These steps must occur before a claim may be referred to CARS except if the claims have been exempted from CARS. The CARS Application for General Assessment 2A form was changed, requiring disclosure of documentation that was to be relied on to support the claim, together with a schedule of damages.

13. More resolutions now occur because the parties obtain an earlier understanding of each other's position as well as a structured opportunity to negotiate. The impact on CARS is that it now resolves a smaller caseload of reportedly more difficult and complex disputes.[15]

CARS model variations from other successful compensation schemes

The CARS model varies from dispute systems that operate effectively and with the same objectives. CARS varies in the following ways:

- codification of a relatively long list of exemption criteria narrowing the discretion of the gatekeeper role and providing scope to avoid the process. I in other schemes a simpler 'genuine dispute' definition is provided
- CARS assessor's primary role is as a decision-maker rather than as a conciliator or mediator. This raises a greater likelihood of administrative review challenge
- CARS has no formal recommendation power that may be exercised instead of a decision, with an option of costs penalties if later replicated by a similar award or settlement agreement
- part-time CARS assessors work as representatives in other CTP cases, potentially raising criticism of their impartiality and the impartiality of the service
- CARS costs scale applies to CARS matters but not to exempted matters settled outside of court processes, and
- Division 1A processes only apply to CARS matters and not to exempted matters

14. Division 1A represents an essential element in best practice design. By enforcing the actions of consideration, discussion and negotiation, most disputes are settled. If the information is not to hand, or the insurer fails to commit to an offer, negotiations are more likely to fail. The impact of Division 1A would be expected to increase pre-CARS settlements.

[15] Referred to as 'pre-litigation protocols' in civil jurisdictions and in workers compensation schemes, they have been largely successful in the latter although recently criticised in the civil arena. See 75 below and discussion on the more sophisticated Dispute Management Protocols at 0

15. CARS has systemic points of potential failure, that in the absence of mitigating local factors would be expected to produce increasing avoidance of its services and in turn adversely impact the CTP scheme.

16. Nevertheless, all stakeholders who were involved in the review process support CARS and there is a broad understanding that it has a far-reaching impact and strategic position in the CTP scheme.

Strategic context of CARS in the scheme

17. The MAA is responsible for regulating a privately underwritten scheme so that is effective and efficient and delivers low cost green slips to New South Wales road-users. CARS is important to these goals reducing inefficiencies derived from legal and associated costs and giving a fair hearing to injured road-users. Its strategic role in the scheme is to provide a focus for early, balanced and relatively cheap resolution of disputes, providing an offset to what would otherwise be potentially uncontrolled costs. CARS assessors and operatives must also be sensitive, in dealing with people generally unfamiliar with disputes over insurance claims. They have to be seen to be fair and technically accurate in their decision-making and they have to both decide cases and set standards for the many more claims decisions made by private insurers.

18. CARS as an institution should play a role in shifting the focus of insurers and claimants from taking adversarial positions which result in lengthy delay to the swift payment of benefits and early rehabilitation. CARS should also provide early resolution where simple mistakes by insurance claims officers may have created an unjust outcome. This is in contrast to later, more expensive attention from a judge. CARS management of cases can provide important meta data about emerging claims decision patterns or other recurring issues, and can provide feedback in a similar manner to an ombudsman, leading to better decisions and as a result fewer disputed claims.

19. Each of these functions is important to the scheme and so any changes in CARS effectiveness directly impacts the scheme.

Scheme effectiveness measures

- Key points

- CARS is assisting the strategic objectives of the CTP scheme in reducing inefficiencies by finalising 10% of claims that may otherwise have gone to court or settled at greater cost to the scheme.
- Total legal costs have steadily increased while costs associated with CARS have stayed relatively stable indicating that its contribution to efficiency is relatively effective where it has control of matters.

20. Important measures of overall scheme effectiveness are:

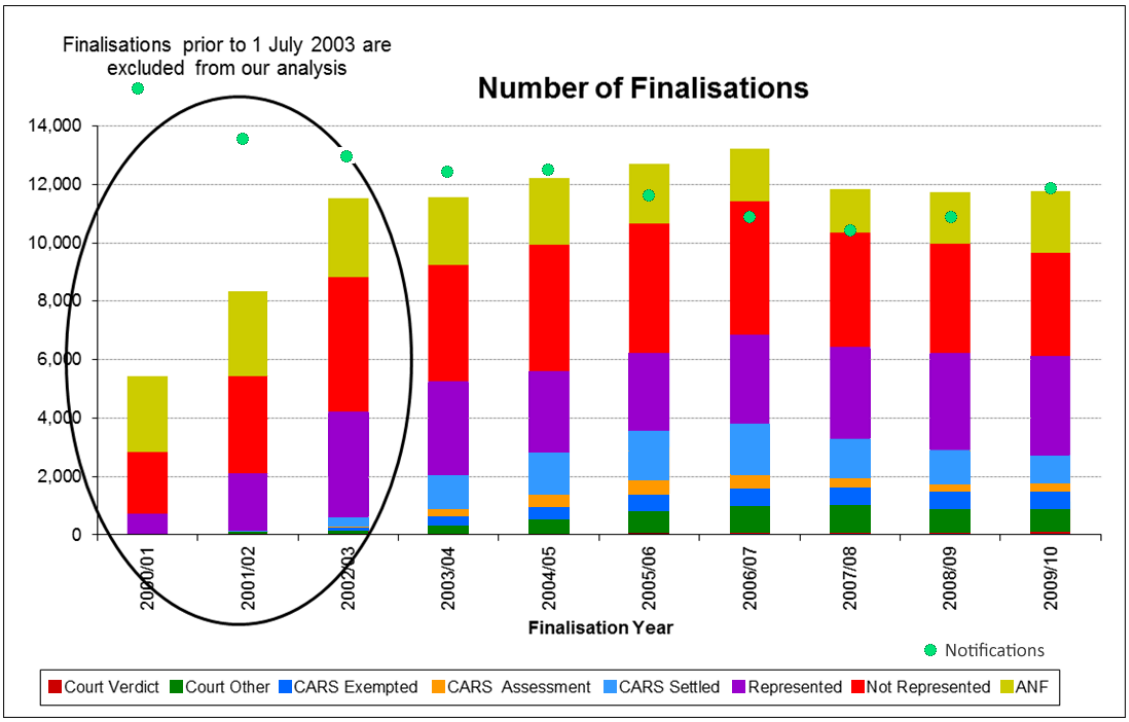
- the proportion of appropriate disputes that CARS finalises in comparison to other stages where costs and delay are less controlled
- the comparative costs of settlement in the different stages, their fluctuation with time and their contribution to scheme viability.

21. CARS finalised 10% of claims in 2009/2010. Most other claims are finalised in settlement negotiations between plaintiff and defendant lawyers or directly between insurers and

claimants. These negotiations occur before CARS, at CARS, immediately after CARS, and after cases are issued in the District Court. Very few claims are finalised at a court hearing. The proportions may be seen below in Figure 1. CARS has consistently finalised approximately 10% or slightly more of matters that would otherwise have gone to court since 2003/2004. Figure 1 also highlights how the Division 1A changes are increasing the numbers of cases settled before CARS. From Figure 1:

- 77% of cases settled before reaching CARS in 2009/2010.
- Of the remaining 23%, CARS settled 2% and made an assessment in 8%.
- 13% were exempted from CARS processes.
- A very small proportion (0.8%) was finally determined by the District Court.

Figure 1: Numbers of finalisations by forum



22. CARS settled claims peaked in 2006/07 at 1,775 and almost halved to 962 in 2009/10. This is partly due to an 11% drop in all finalisations between 2006/07 and 2009/10 but is more likely to result from the introduction of new Division 1A provisions on 1 October 2008.

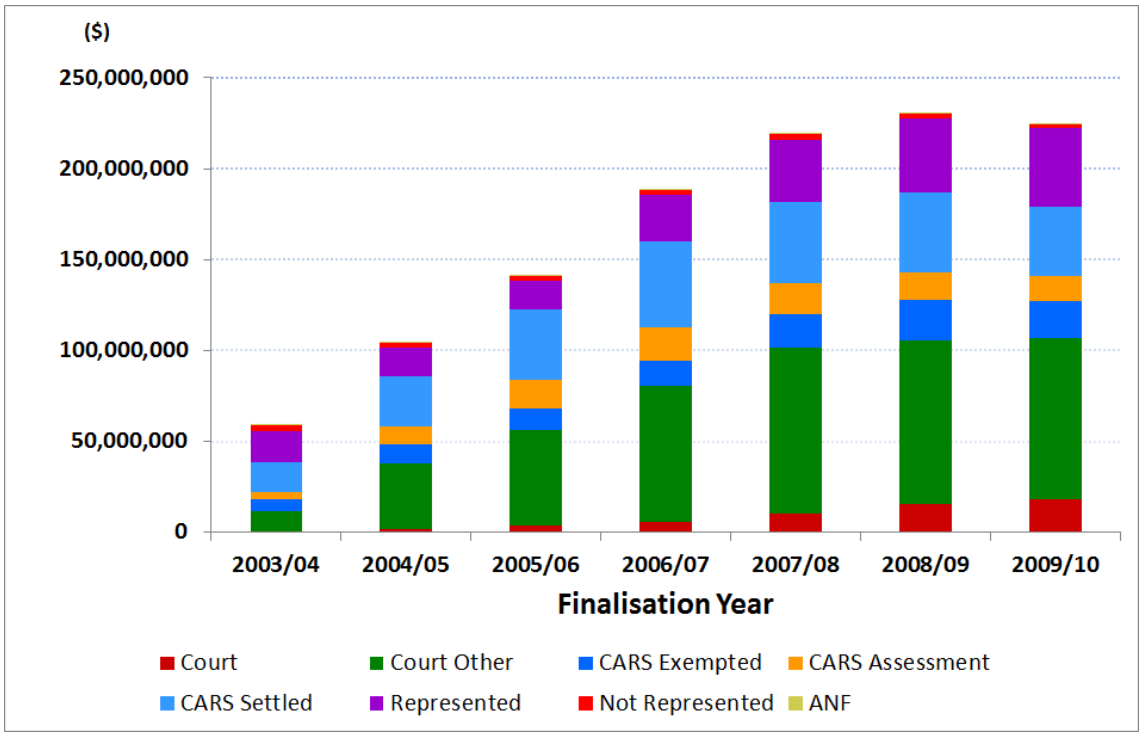
23. What is clear from Figure 1 is that the majority of growth since 2006/07, when the population of claims had stabilised, is attributable to stages that are not managed by CARS. The two largest are Court Other or court settled finalisations (green), negotiated by lawyers, and the Represented finalisations (purple) that are pre-CARS and also negotiated by lawyers.

24. Both CARS Settled (pale blue) and CARS Assessed (orange) show initial growth to 2006/7 and then a slight decrease in total finalisations to 2009/10.

25. Costs associated with claims, such as medical and legal costs must also be met from the green slip premium collection. Unnecessary costs are called ‘friction costs’ or ‘inefficiencies’ because

less of the final compensation dollar ends up with the injured motorist. Figure 2 shows the total legal payments paid to defendant and plaintiff lawyers (less contracted-out costs) for work associated with each finalisation stage.

Figure 2: Total legal payments (defendant + plaintiff) by settlement stage (inflated)



26. Legal payments comprised $230m in 2009/10 and 18.6% or 18.6 cents in the dollar paid to injured motorists. This has increased from around 13 cents in the years immediately after CARS was established. (This data is further explained below at 50. on page 15).

27. The strongest growth can be seen in court verdict costs and in settlement activity with Court Other settlements (green), and pre-CARS Represented settlements (purple) from 2005/06 to 2009/10. Legal payments have reduced slightly in CARS Assessments (yellow) and CARS Settlements (light blue) in 2019/10.

28. CARS processes have lower and more stable legal costs while costs associated with the other stages have all increased. On this fairly simple analysis, the question must be raised as to why more matters could not be finalised in CARS. Common answers to this question are that fault proofs are complex so require more legal intervention or that the current exemption criteria are too strict.

29. The better run compensation schemes provide settlement opportunities at the earliest possible time, taking into account the need for proper investigation, assessment and stabilisation of medical conditions. Early settlement reduces costs and delay because successive stages from administrative forums through to court will generally, but not always include the full costs of the previous stage yet, regardless of this, they will always be more expensive.

30. Table 1 shows the definitions of the finalisation stages used in all figures in this report, the numbers of matters finalised in each stage in 2009/10 as well as the percentage of all finalisations compared with 'optimal' percentages drawn from better performing or more efficient schemes.[16] The optimal stage comparison shows more matters are finalised administratively and fewer within the ambit of the court.

31. From this comparison with an optimal scheme, 'exempted' and 'court other' categories emerge as areas meriting further investigation, where costs and delays may be reduced. These are the stages where cases are settled immediately after by-passing the CARS process.

[16] See Annexure 2

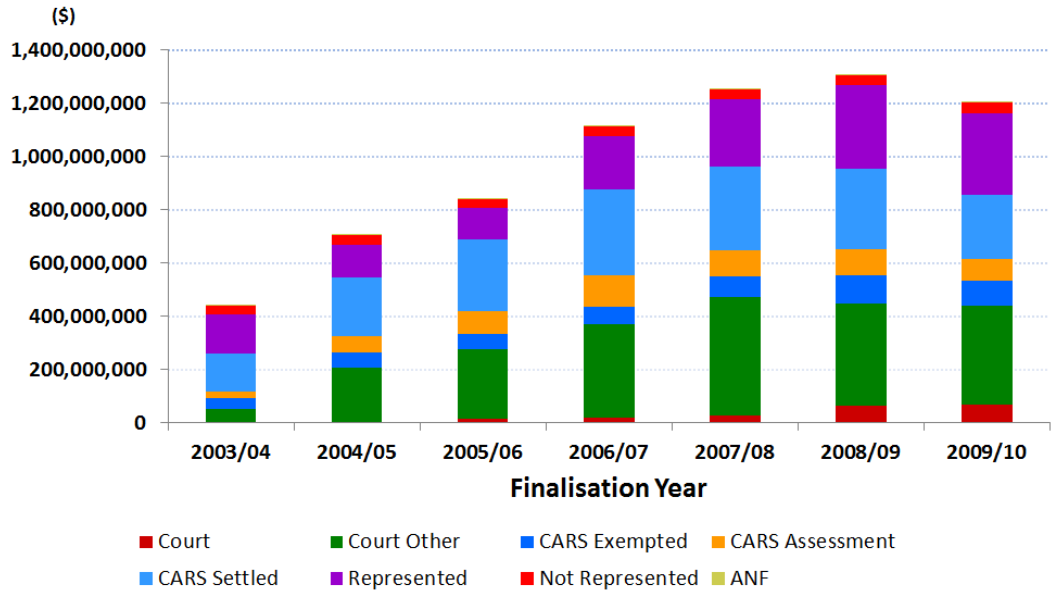
Table 1: Motor Accidents Authority (MAA) 2009/10 caseload finalisation proportions by stage compared with optimal profile and including proportion of cases involving legal representation

Stage finalised	Description	2009/10 finalised	2009/10 % of total	Optimal %
COURT				
Court judgement	Finalised through a court decision	91	1%	<<1%
Court other	Exempted from CARS, legal proceedings commenced, but settled without a court decision	808	7%	<5%
ADMINISTRATIVE				
CARS exempted	Exempted from CARS and settled without commencement of court proceedings (typically exempted because the claim is one where fault has been denied, or contributory negligence >25% alleged, or vulnerable (child) claimants are involved, or held by CARS to be complex on other grounds)	626	5% Not subject to CARS cost regulation	<5% Lower costs scales than court apply
CARS assessment	Settled within CARS after a general assessment (known as a '2A assessment')	235	2%	2%
CARS settled	Settled within the CARS process before any assessment	962	8%	8%
Represented	Full claim settled with legal representation but prior to any CARS steps or court proceedings	3395	29%	0%
Unrepresented	Section 74 (full claim settled without legal representation prior to any CARS steps or court proceedings)	3537	30%	60%
ANF only	Settled as an ANF (Accident Notification Form, for claims <$5,000 – both represented and unrepresented; legal representation in only 1–3% of cases)	2121	18%	May be higher dependant on jurisdiction thresholds 25%

Changes in finalisation payments

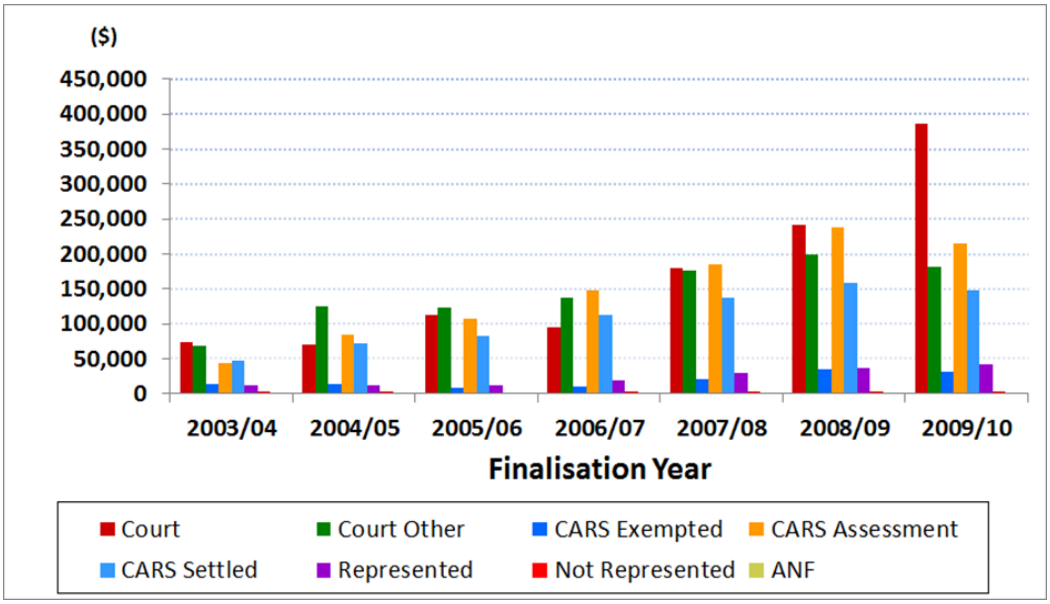
33. The major cost to the CTP scheme is award payments. Figure 3 shows how the total of payments made in awards has increased in real terms since 2006/07 and then decreased slightly in 2009/10.

Figure 3: Finalisation payments by settlement stage (inflated)



34. Individual payments have risen. Figure 4 shows median finalisation payments with the bulk of growth reflected in the court verdict stage. In contrast, in 2009/2010, CARS Assessment, CARS exempt and Court other settlements reduced. The growth in the median payment from court verdicts has been around 23% in real terms, over the past 4 years.

Figure 4: Median finalisation payments & awards by settlement stage (inflated)



35. The review analysed data in terms of medians and averages. Medians are used as being far more representative of the typical finalisation payment for each stage. Small numbers of outliers with very high or extremely high settlements distort the average for a group but do not impact as much on the median. This same data analysed to show averages rather than medians shows a different picture. From the perspective of insurers who may be examining settlement outcomes using averages, CARS awards and CARS settlements come out as higher than either exempt finalisations or court finalisations. These observations may provide some explanation for the view of insurers (tested below) that CARS awards drive super-inflation.

CARS assessments and superimposed inflation

- Key points

- Insurers made submissions that CARS, was driving superimposed inflation Superimposed inflation has been a factor in the scheme for most of the past decade.
- While superimposed inflation was apparent, CARS did not drive it. Rather it was a characteristic of all finalisation processes, from the courts through CARS to direct inter-party settlements. Superimposed inflation reversed in the last year.
- While initially (2003/04) producing lower finalisation amounts, in 2008/09 and 2009/10, CARS assessments have produced higher amounts at the same increasing rate but for more claimants than court-related or exempt alternatives.
- Causes of the variation between higher decided cases and lower negotiated outcomes may be due to other factors such as Court precedent setting and compromise in negotiated cases. More recently, increases across all groups moved at the same rate.

36. Superimposed inflation is a term that describes a tendency for tribunals to award increasing amounts of compensation for the same injuries over time. The term "inflation" implies that the increase is above what might be required to match CPI changes. Actuaries Taylor Fry have supplied this definition of superimposed inflation:

> "the rate of increase in average claim costs over time, in excess of the increase in average wages, for a given injury/severity."

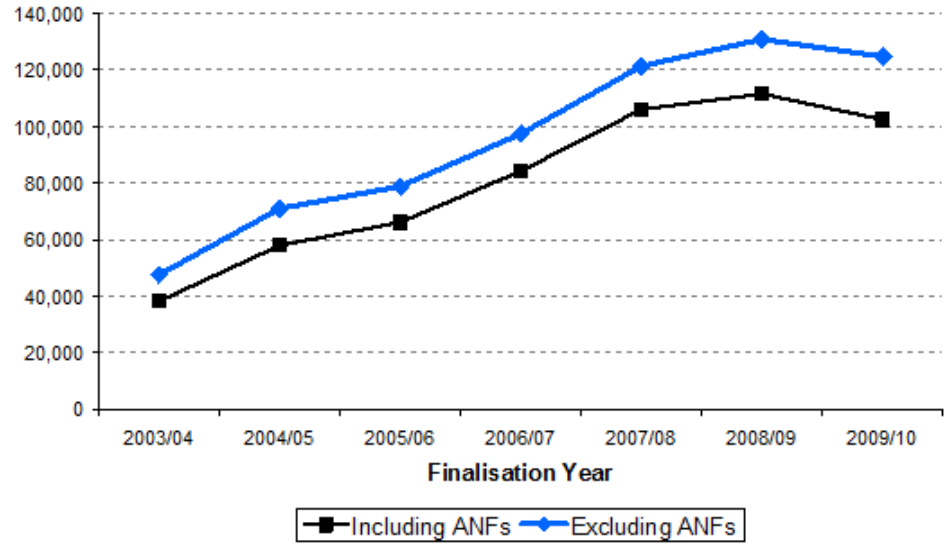
37. Insurers made submissions that CARS was creating or stimulating superimposed inflation by setting ever higher compensation benchmarks year-on-year. They suggested that this behaviour then permeated the entire compensation system.

38. Taylor Fry have produced a separate report[17] showing finalisation amounts in inflation-adjusted dollars.

[17] Taylor Fry, *Modelling of Superimposed Inflation within the NSW CTP Scheme*, April 2011

39. Figure 5 reproduced from their report, shows rising payments until 2007/08 and then a reversal to 2009/10. ANF adjusted finalisations are sown on the same figure. CARS does not manage of influence ANF settlements, yet they show the same 'superimposed inflation' profile.

Figure 5: Average total finalised amounts paid, inflated ($)



40. When all finalisation stages are disaggregated, all show an increase in average finalised amounts paid until 2008/09 (in inflation-adjusted dollars) across all categories (from ANF settlements, pre-CARS settlements, CARS assessments, court settlements to court judgements).

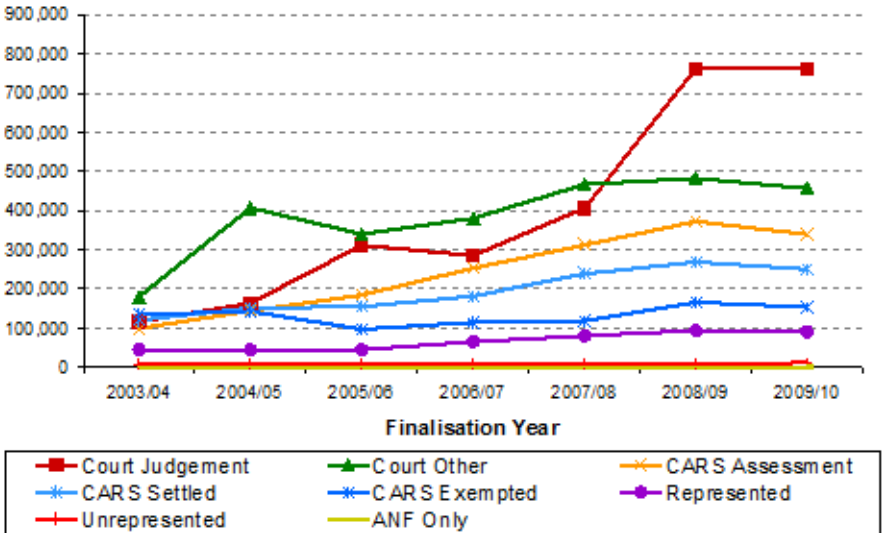
41. Figure 6 below shows a sharp increase in Court Judgements, while Court Other finalisations and CARS Assessments show similar smaller increases for the same period. Figure 7 shows the same data using medians rather than averages.

42. It is clear from the comparison of average and median finalisations that although court judgements are small in number, the high relative size of a small number of judgements pulls up the average and contributes significantly to the observed inflation.

43. Taylor Fry commented as follows on these figures.

> The general increases in average costs over and above wage inflation are observed across most finalisation groups, but notably in the Court (both Judgement and Other) and CARS (both assessed and settled) groups.

Figure 6: Average finalisation amounts, inflated ($)

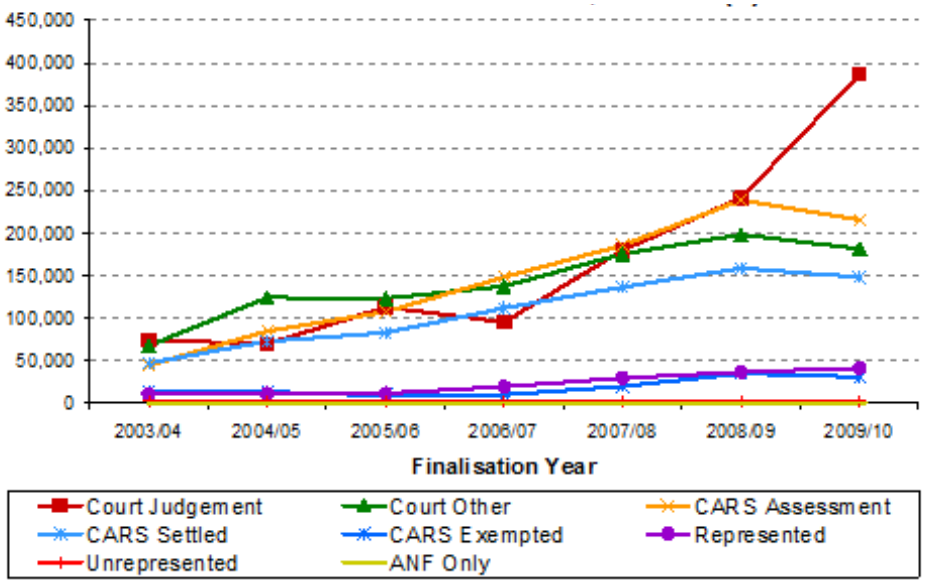


44. Taylor Fry also observe that, even within a particular group of claims, claim cost increases above the level of wage inflation are observed over time, thus dispelling the argument that increases are solely the result of changes in claim severity mix. Taylor Fry conclude:

> *Our broad conclusion is that superimposed inflation is evident in the experience, that it manifests through both increases in average amounts per head of damage and the propensity to receive particular heads of damage, and that it is evident both within and outside the CARS process*.

45. The similarity between the average and median increase in (2009/10) in court judgement finalisations reflects a materially higher number of very severe claims (see Figure 7), not just a few outliers.

Figure 7: Median finalisation amounts, inflated ($)



46. Taylor Fry's general conclusion is that superimposed inflation is evident up until 2007-2008, but not clearly apparent since then. Taylor Fry proposed the following as sources but not necessarily causes of superimposed inflation during the period 2003/04 to 2007/08:

- increases in average costs for particular head of damage (injury) or treatment types
- increased utilisation of a particular head of damage, i.e. an increase in the proportion of claimants receiving compensation under that head of damage
- changes in claims management and settlement practices, e.g. the introduction of buffers in settlement amounts.

47. Cutter (2009) found that between 2005 and 2008, New South Wales experienced markedly less such inflation than Queensland, which has no CARS-style institution:

> In NSW over the period examined, the overall level of superimposed inflation has been moderate. The main contributors have been –
> - the economic loss and care heads of damage
> - severity 1 claims with legal representation
>
> In Queensland over the period examined, the overall level of superimposed inflation has been very high. The main contributors have been –
> - the economic loss head of damage
> - severity 1 claims with legal representation[18]

48. The increase in compensation amount aligns with upward trends in other Australian CTP schemes. A study presented to the Institute of Actuaries in 2009 showed the trends in average claim size across the country were generally increasing at a similar rate.[19]

[18] Cutter Karen, *Measuring and Understanding Superimposed Inflation in CTP Schemes* (Presentation to the Institute of Actuaries of Australia, 12th Accident Compensation Seminar 22-24 November 2009) Pages 11 and 14. Note: Severity 1 relates to the level of severity. Paper may be accessed at http://www.actuaries.asn.au/Library/ACs09_Paper_Cutter.pdf

49. The District Court makes decisions in complex cases that merit much higher awards. CARS, as the other decision-maker must follow precedent and discussions with assessors confirm that this is how they approach assessments. Similarly, lawyers negotiating outcomes in Court other and CARS exempted groups may also be following precedent (or the 'going rate') and the same rate of increase. Stakeholders also noted the delay before precedent set by the Court in 2009/10 would flow through to other settlement stages.

50. The analysis points to a continuation of the increase in awards in CARS and a flow-on effect from future settlements just from the latest cases.

CARS and legal costs in the scheme

- Key points

- Scheme-wide average legal costs have risen from about 13% of payments in 1999 to 18.6% for claims finalised in the 2009/10 financial year.
- For most injured motorists who settle either at the District Court or at CARS, the cost of CARS processes compares favourably with Court processes: 15.8 cents compared to 24 cents in the dollar. This figure does not include out-of-pocket solicitor–client costs, which also come out of the award dollar.
- Legal costs have remained high because more than half of cases bypass CARS and CARS is not a lawyer-free forum, with 95% of all cases involving lawyers.
- Despite this, CARS is less expensive. Court matters (decided and settled) account for 44.3% of the legal spend and only one third of that percentage in terms of proportion of finalisations.

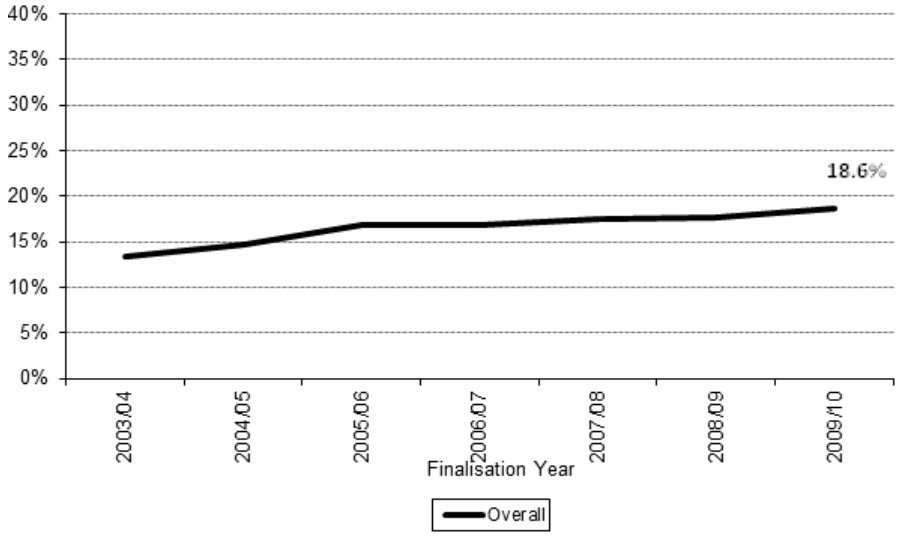
51. Many stakeholders identify legal costs as a friction, a potential source of inefficiency and an expense, to be avoided or minimised. As noted above, prior to the establishment of CARS, the amount paid by insurers for their own and claimant legal costs made up about 22% of the total incurred costs for claims finalised in 1996/97.[20] The CARS scheme was designed to ensure that legal representation was not required for simpler claims. Against this, the legal profession promotes legal representation as the best means to obtain just compensation outcomes. Lawyers now represent claimants in over 50% of claim disputes and appear in, and settle most CARS matters.

52. In 2009/10, the total legal bill to the scheme for insurers (defendant) and claimants (plaintiff) payments as a percentage of total scheme payments was lower than in 1997, but had risen from 13.4% in 2003/04 to 18.6% in 2009/10 (See Figure 8 below).

[19] See Slide 26, 12th Accident Compensation Seminar 2009 *Rising to the Challenge* CTP Working Group: P Driessen, A Cutter, N Donlevy, S Ley and M Stollwitzer. http://www.actuaries.asn.au/Library/1530.2%20CTP%20Schemes%20Comparison2.pdf

[20] See comments of The Hon. I Cohen, Second reading debate Legislative Council, http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC19990622057

Figure 8: Legal (defendant + plaintiff) payments as % total payments



53. Insurers' returns provide the data for this graph and others relating to legal costs. The data does not include private 'gap' costs charged by plaintiff lawyers and retained by them when the insurer pays the settlement direct to their trust account. These costs also called 'solicitor–client costs' or 'contracted-out costs' are discussed below.

54. The payments to plaintiff lawyers in all of the figures shown are court scale costs, or party-party costs. Claims that are more expensive attract higher scale costs. These costs price individual legal services and are payable according to outcome at full scale if the claim is successful or reduced proportionately according to the proportion of contributory negligence.

55. With this qualification, that the actual amounts received by lawyers are likely to be higher and to be paid out of the awards made to claimants, the following observations may be made about CARS impact on legal costs in the scheme.

- Legal costs have risen for each settlement stage in constant dollar terms over the seven year period of the review. (See Figure 2)
- Court processes attract a higher proportion of legal spend for fewer finalisations
  - The 91 (mainly District) Court cases account for 5.7% of the total legal payments.
  - The 808 cases that settled after the commencement of court proceedings accounted for 30.6% of total legal payments.
  - In contrast, a slightly smaller 626 claims that were exempted from CARS, but settled without legal proceedings commencing accounted for only 8% of total legal payments.
- CARS achieves more finalisations for less of the legal cost.
  - In 2009/10, CARS processes account for 27.4% of legal costs against 10% of finalisations
  - Court-related or other proceedings (including CARS exemptions) made up 44.3% of the total scheme legal costs yet represented 13% or just under a third **in** finalised matters.
- Cases settled at court are more expensive than those settled in CARS attracting over two thirds more of the same legal costs.

  - The 962 claims that settled in the CARS process attracted 20% of the legal costs.
- The least expensive legal cost category in terms of achieving finalisations in 2009/10 was that for legally represented claims that settled pre-CARS where 3,395 or 29% of matters consumed 25.4% of the scheme legal bill.

➲ **MAA reported that the percentage of total payments paid as legal costs was 12% in 2012**[21]

➲ **The figure of 12% represented an average from 'underwriting years' 2000 to 2010. This figure may not have included insurer legal payments which were separately described within 'insurer costs'.**

Private legal costs (solicitor-client costs or contracted-out costs)

56. The extent of additional legal costs paid by claimants from award amounts is not easily established. FMRC, a consultancy firm studied private legal costs in 2008 and found that:

- the actual legal costs of court-related finalisations and settlements would increase legal fees by more than 100% above scale costs for settlements over $50,000, and
- in settlements below $50,000 the additional legal costs would be more than 400%[22].

➲ **In its final July 2011 Report on the National Disability Insurance Scheme, the Productivity Commission reiterated its concern over the lack of data however included limited data from the Supreme Court of Victoria. This indicated that for catastrophic injury TAC motor accident claims, solicitor-client costs constituted 28.92% of the plaintiff's net payment and 22.43% of total claims costs. These figures may not fully translate to NSW but do give some basis for estimating the reduction in finalisation amounts from private legal costs arising from complex motor vehicle injury claims.**[23]

➲ **The Productivity Commission is currently undertaking a comprehensive review of the legal costs of accessing civil justice including the extent of solicitor-client costs with a report due in April 2014.**[24]

Legal costs as a proportion of awards

57. The proportion of legal fees is greater in complex cases that attract higher payouts. The demand for legal fees is influenced by the need to establish fault or proportion of fault as well as the determination of injury severity, compensation and treatment costs that may be required. Fixed fees charged by legal firms for various services regardless of complexity may be high in any event. The study from FMRC found settlements below $500,000 attracted proportionately higher 'gap' legal costs compared with settlements over $500,000.[25]

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[21] See *Reforms to the NSW Compulsory Third Party Green Slip Insurance Scheme February 2013* – http://www.maa.nsw.gov.au/default.aspx?MenuID=515 and Ernst & Young *NSW CTP Performance Update,* 2012 at p 3.

[22] FMRC Pty Ltd report prepared for MAA in 2008 (Report to the Motor Accidents Authority of NSW – report on the study conducted on the impact of the Motor Accidents Compensation Regulation 2005 and legal costs on CTP insurance claimants).

[23] Productivity Commission 2011, Disability Care and Support, Report no. 54, Canberra See p 840 -844 http://www.pc.gov.au/projects/inquiry/disability-support/report

[24] http://www.pc.gov.au/projects/inquiry/access-justice

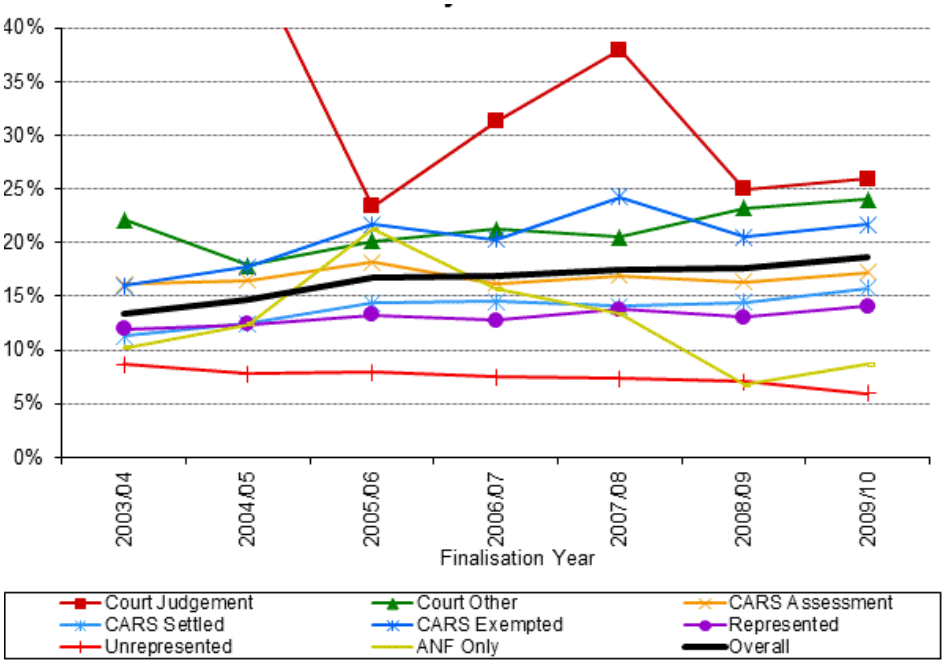
[25] Regulation legal fees of $15,000 and additional fees of $24,000 for settlements of $100 to $200k.

58. From the MAA perspective, the standard measure used in CTP schemes is how many cents in the total payment dollar go to legal costs. This measure reflects the extent of benefits withheld from injured road-users and added costs that may increase the cost of green slips.

59. Figure 9 takes total payout rather than total legal fees as the base for comparison.

- With higher Court payments the proportion of legal costs is higher. In 2009/10 these proportions were as follows:
  - 25.9% of the total payments for a court case.
  - 24% in court settled
  - 21.7% for cases exempted without legal proceedings commencing.
- CARS matters attracted a lower proportion of legal costs:
  - 17.2% went to legal costs for assessments
  - 15.8% was absorbed by legal costs in CARS settled cases

Figure 9: Legal (defendant + plaintiff) payments as % total payments by finalization stage

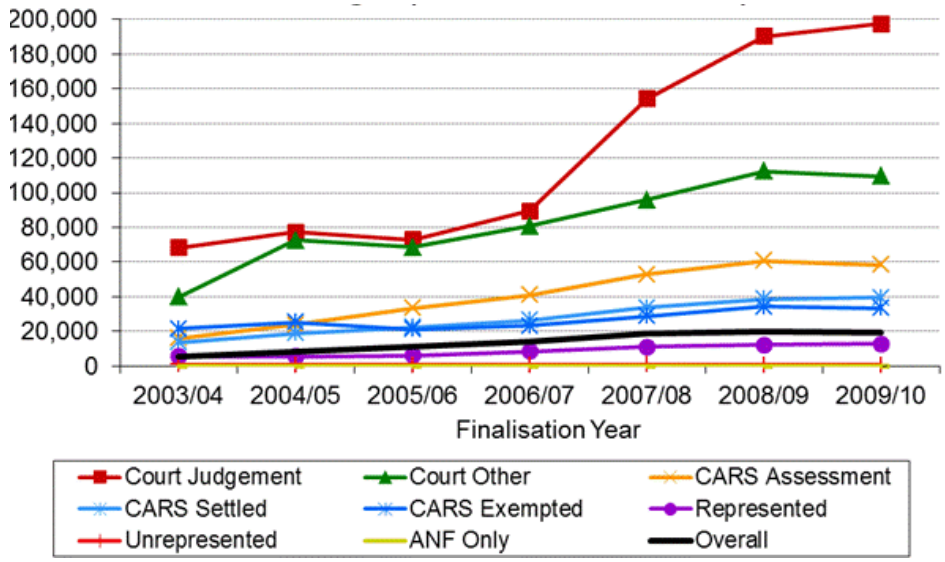


60. Figure 10 below shows the acceleration in court costs since 2003/2004 analysed as average legal payments per claim:

- Average legal costs per matter are higher in court than in CARS. In 2009/10, the average legal costs were as follows:

- $197,000 per case in court[26]
- $58,000 in CARS assessments

Figure 10: Average payment per finalised claim - total legal costs (defendant + plaintiff), inflated



Reducing legal costs

- Key Points

- Complexity derived from fault is a factor in increasing legal involvement in the scheme but insurers and claimants also have valid reasons to engage legal representation.
- 26c in the dollar is spent on legal costs at court hearings with CARS 10 c lower.
- 56% of matters by-pass CARS to court and CARS still attracts 95% legal involvement but CARS remains a major brake on costs and delays in the scheme.
- If these cases never reached court, but were finalised in the same way as CARS exempt or Court settled cases, they would have cost the scheme an additional $67m in finalisations and another $39m in legal fees.
- Insurers use lawyers to control anomalous factors and manage liabilities

61. The data shows that legal costs per dollar are currently lower than the 1999 pre-*Motor Accident Compensation Act* period when the Parliament reported them as 22 cents. Since then the overall trend in legal costs has been moving steadily upwards, from 13.4% in 2003/04 to 18.6% in 2009/10.

62. Court litigation has become more expensive along with CARS processes. On average, nearly 26 cents in each dollar of each claim that proceeded all the way to judgement in 2009/10 went to

[26] The acceleration in court costs in 2008/09 and 2009/10 may arise from an unusually high number of cases involving severe injuries in those two years, but the increase in 2007/08 is not attributed to this.

legal costs, as did 24 cents of each claim dollar that settled in the court system. The equivalent figures for formal CARS assessments and CARS settlements in 2009/10 were 17 cents and 15.5 cents respectively. Despite the incentive of lower legal costs in CARS a large proportion of cases move into the court system.

63. The review concluded that:

- The CARS process is not used to attempt resolution of claims in the bulk of cases. In fact in 2009/10 about 56% of claims bypassed CARS because of the mandatory and discretionary exemption provisions.
- CARS has evolved not as a lawyer free forum. Parties are represented in about 95% of cases,[27] including by counsel and even senior counsel.

64. The benefits to the scheme of CARS dealing with the current caseload are significant in terms of cost. From 2009/2010 figures, without CARS settlements and assessments there would have been another 1197 cases in the pre-court and court settlement stages.

65. If these cases never reached court but were dealt with as CARS exempt or Court settled cases, they would have cost the scheme an additional $67m in finalisations and another $39m in legal fees.

66. These advantages from CARS should be pursued. A prime focus should be on those matters that by-pass CARS and that do not enter the court process raising the potential that settlement could have occurred within the CARS process and with less cost to the scheme. This is discussed further at 0 on page 58.

Complexity, the need for legal representation and no-fault approaches

67. New South Wales has maintained a fault-based system for CTP claims, whereas other similar jurisdictions have not. One reason other schemes have made the change is to remove complexity from the law and the resulting need for legal representation.[28] These other jurisdictions retain common law thresholds and therefore fault as an option for claims that are more serious and injuries where awards are generally more than $200,000. The bulk of matters are resolved with no-fault processes.

68. As fault is a major determinant of the settlement amount, the legal complexities required to be argued before a court are greater and more time consuming in New South Wales than in the no-fault jurisdictions. The arguments put by the insurers that court processes that test evidence are required to resolve these questions must be taken on face value. Judges, assessors and legal representatives also report that the governing law is complex. The medical assessment process

[27] A CARS assessors' estimate. The Sourdin survey of March 2011 (see Annexure 3) found that in only two of 334 finalised matters (99.4%) did a claimant *not* have legal representation (see para 1.41).
[28] For a history of the no-fault schemes established as early as the 1880s see generally
Guyton, Gregory P *A Brief History of Workers Compensation* Iowa Orthop J 1999; 19; 106-110
http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1888620/ accessed December 2013

can also be complicated and detailed analysis is unavoidable; assessment of damages is complex as well.

69. What this means for NSW motor accident victims is that they may be disadvantaged if they do not retain legal representation to navigate and advocate their claims. In either case, the settlement process is lengthy; injury rehabilitation is consequentially not a focus and is consequently delayed.

70. The review found that additional factors related to claimants may drive legal involvement in CTP claims:[29]

- Miscommunication in the claims process particularly if claims are delayed
- Higher injury severity
- Claimant's increased age[30] [31]

71. For insurers, the retention of fault as a criteria and the potential of a court verdict before settlement are major drivers of expensive litigation. Alternatively, it may be that insurers compare the CARS process to exempt settlements and base their preference on average unit cost. Whatever the reason, insurers prefer negotiation in the shadow of the court to CARS settlement processes. The data shows large numbers of cases by passing CARS and an increasing use of lawyers in pre-CARS negotiations.

72. The real issue is whether the system should require those questions to be resolved as part of a motor accident compensation case, or to be determined administratively and if it does, whether streamlining options in the way that the legal market and courts operate might be available.

Additional pressures on insurers that affect use of legal services

73. Insurers are subject to risk management pressures in managing predictability in cost outcomes. This means they must:

- process claims within timelines
- meet actuarial targets to ensure that their profit from operations meet corporate expectations
- control anomalous awards that may set precedents.

74. Insurers interviewed confirmed that legal involvement was necessary to clarify arguments, schedule interactions and reduce the negotiable elements in a claim settlement to understandable monetary amounts that may then be 'traded'. Lawyers were integral to

[29] See generally, Victor, Richard A, *How to keep Unneeded Lawyers Out of Workers' Comp, CFO Publishing LLC*. November 27, 20912http://ww2.cfo.com/risk-management/2012/11/how-to-keep-unneeded-lawyers-out-of-workers-comp/

[30] See also Victor, Richard A, Savych, B *Avoiding Litigation: What Can Employers, Insurers, and State Workers' Compensation Agencies do?* July 2010 WC-10-18 www.wcrinet.org reported in WCRI Annual Report 2012 p 28.

[31] See footnote 30 Guyton, *A brief history*. Arguments for and against legal involvement are also described and parallel those put by stakeholders. See P 27 in particular.
http://www.wcrinet.org/studies/public/books/WCRI_2012_Annual_Report.pdf

achieving the goal of increased certainty and predictability, over claims managed by individual injured parties. In aggregate, insurers want to ensure that individual case costs are constrained within limits and that professional interactions control case time lines.

75. Insurers may see lawyers as providing discipline that maintains control of a case or at least ensures individual claims do not get 'out of control'. Issues of compensation and treatment then become inextricably linked to the lawyer-mediated interaction. The fault-based 'settlement environment' adds new complexities where different evidence and admissions may become tradable, in pursuit of a settlement.

Fundamental reform options

76. The opportunities open to the MAA are to ensure that low cost resolutions options remain viable alternatives to injured motorists. Where complexity pushes parties towards court-managed settlements the scheme can reduce costs by ensuring triage of cases to reduce the issues requiring argument and, that more focused discovery processes limit delays. In practical terms, complexity can by reduced by adopting practices held to be useful in other jurisdictions. For example, requiring negotiation on injury to conform to heads described in a table of maims or establishing criteria that define proportion of fault for parties in common accidents.

77. The lower end of the NSW scheme operates as a no-fault claim settlement scheme for claims that fall under a limit. High numbers of claims are finalised on this basis and legal costs are minor. The greatest benefit from extending no-fault will be where legal costs and delays are shown in the data to be highest – in the court verdict and court other stages. A reduction in complexity with the removal of fault as a criterion would reduce both.

- **No fault legislation was introduced to the NSW Parliament in 2013 as part of a CTP Reform Package and did not pass in August due in part to concerns that new claims costs of now uninsured negligent road-users would offset savings from a no-fault approach.** [32] **Relevant principles of reform in the package included:**
  - **A simpler and less adversarial claiming process that encourages early resolution and reduces Scheme costs particularly the need for legal expenses**
  - **An independent Review Officer**
  - **Claims assessors to approve all offers of settlement to unrepresented claimants**
  - **Common law thresholds of 10% impairment**
- **The package incorporated features that address issues raised in this review as well as the identified strengths of the CARS system, most importantly an opportunity for claimants to be heard. It was in line with best practice schemes seeking to reduce friction costs, ensure legal and other expert assistance is provided only where necessary, benefits are appropriately distributed and that the costs of premiums and longer term liabilities are kept low.**

[32] Details may be seen at http://www.maa.nsw.gov.au/default.aspx?MenuID=515

Legal costs schedule

- Key Points

- Most claimants enter into costs agreement with their lawyers, an arrangement that allows lawyers to recover more in fees than the amounts provided for in the costs regulation governing CARS processes.
- A substantial percentage of the compensation for injury and loss of income that an injured person receives goes to paying lawyers agreed legal costs over the scheduled costs borne by the insurer.
- The fact that the court does not determine settlement payments and that the bulk are privately negotiated in the court negates the intentions of the CTP legislators that the court costs are only justified as a last resort when all settlement attempts have failed.
- There is little information available on how much a claimant becomes bound to pay because of these solicitor-client agreements.
- It may well be that legal service payments for early stage settlement do not adequately cover costs, but the lack of information on real costs and high payments for later stage settlements mask this when total scheme payments are considered.

78. A detailed costs schedule regulates legal costs and amounts paid out in addition to any compensation awarded. Claimants therefore have some of the legal fees recognised in their settlement. In practice however, legal practitioners can and regularly do contract out of the scheduled rate (party-party costs), entering into costs agreements with their clients. This allows them to charge out their services at a higher, agreed basis (solicitor-client costs).

79. Effectively what this means is that the compensation payable to claimants reduces by the amount that solicitor-client costs exceed the regulated tariff. The efficiency of the legal profession in providing services to CTP claimants is hard to gauge, as privately contracted fees are not readily available for comparative purposes.

80. Legal stakeholders, however consider the payment they receive is not adequate to support their advocacy services in complex matters. [33] This merits attention with one option refocussing legal payments where they best encourage rather than delay settlement and reward more complex work.

➲ **An additional set of drivers is now operating where shareholders of public law firms expect profit. This must increase pressure on the system to raise legal payments whether these are warranted or not.**[34]

[33] http://www.thebull.com.au/premium/a/42476-slater-&-gordon-up-120-this-year---legal-firms-to-watch.html accessed 5 Jan 2014.

[34] Plaintiff Lawyer aadvertising is seen as another CTP scheme risk. See Injury Schemes Seminar – Balancing Outcomes Proceedings Institute of Actuaries Presentation – MAIB Scheme Update Slide 5. http://www.actuaries.asn.au/Library/Events/ACS/2013/HillMAIBScheme.pdf

- **This is not accommodated in the design of the CTP scheme. The need to meet profitability expectations for public company law firms can also be expected to impact growth in litigated cases. The simple facts are that cases moved to the court managed processes generate more legal fees both in quantum and in proportion for legal services consumed. For the new public law firms especially, there will be a continuing pressure to avoid the low-cost but low-profit alternative dispute resolution processes.**
- **Other jurisdictions have examined the impact of public company law firm management on litigation. While the UK may follow Australia in allowing public ownership of legal firms, the United States does not allow public law firms, both through legislative prohibition and ethical conduct standards set by the American Bar Association. The problem cited is potential conflict of interest between shareholders' interests and interests of the clients of the firm.[35]**

Legal fees as an incentive

81. The MACA Act at s 149(2) provides for legal fees as follows:

> *An Australian legal practitioner is not entitled to be paid or recover for a legal service or other matter an amount that exceeds any maximum costs fixed for the service or matter by the regulations under this section.*

82. Well-designed legal costs regulations should provide incentives that support early settlement and exchange of information. Most claims could be resolved at any time from pre-CARS to pre-court hearing if: information is available, injuries are stabilised and parties are successfully communicating. Court costs scales from which regulated fee scales are modelled traditionally scale-up payments for legal work according to their proximity to the courtroom. Reversing this approach is done elsewhere. It provides an incentive to promote settlement behaviour at earlier stages and to engage cooperatively with informal ADR approaches. [36] [37].

83. In CARS, the data indicates that perverse incentives may be operating with larger groupings of settlements occurring where costs rewards are greatest, and not necessarily as the legislation intended. Currently:

- Regulated, fixed-costs do not apply to exempted claims meaning that higher court scales are available after exemption.
- Similarly costs penalties apply for matters taken to court after a CARS assessment and there are very few of these cases. (See below)

[35] http://online.wsj.com/news/articles/SB10001424052702304750404577317761468323458 accessed 5 Jan 2014.

[36] (RA Posner Economic Analysis of Law 1973)

[37] The work done by the Costs Working Party of the MAA in 2010 is relevant. The key recommendations of the Working Party's report in relation to the restructuring and uplifting of fees should serve to provide incentive for earlier preparation.

84. The structure and amounts provided for in the legal costs regulation should be reviewed to consider better-structured incentives. Fees that are more lucrative should be available to reward settlement behaviour at times that meet the objectives of the legislation.[38]

- **Recent reforms in South Australia replicating legal costs arrangements in Qld provide cost reimbursement (cost scales for party/party costs) as follows;**
- **Claims between $30,000 and $100,000 – up to $2,500**
- **Claims between $50,000 and $100,000 – apply Magistrates Court scale which is lower than the District Court scale.**[39]

Transparency in legal fees and solicitor–client costs

85. The Council of Australian Government's National Legal Profession Reform Discussion Paper: Legal Costs (4 November 2009) calls for greater scrutiny and control of legal fees.[40]

> *Regulatory oversight of legal costs can … be justified because lawyers enjoy a monopoly on the provision of most legal services. Independent review of legal costs therefore is a reasonable counter-measure to the maintenance of restrictions in market competition within this sector.*[41]

- **Costs disclosure now requires a focus on substance or 'informed consent' to ensure the client has understood and given consent to the proposed course of action and proposed costs.**[42]

86. The Productivity Commission's *Draft Report Disability Care and Support*, Vol. 2, February 2011, has criticised the dearth of information in relation to legal fees.

> *Chapter 15 assessed the issue of legal fees and charges and, in particular, identified significant difficulties in ascertaining the nature and size of these costs. While the Commission was able to secure a detailed source of systematic evidence and draw some useful insights, it was difficult to come by. The unmatched paucity of such systematic evidence limits the prospect for informed public commentary and constrains policy judgements.*
>
> *There are good grounds to pursue increased transparency, especially to the extent that the paucity of accurate and comparable data to analyse the frictional costs of existing common law arrangements acts as an additional obstacle to policy reform that might otherwise direct resources more efficiently. Similarly, it is undesirable that consumers have little idea of the real fee they pay in compensation cases, with no way of comparing their experiences with the average, making informed judgements about how their experience is likely to play out, or whether there might be a basis for negotiating or disputing costs, such as through an independent cost assessment.*

87. The MAA Costs Working Party has proposed:

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[38] The work done by the Costs Working Party of the MAA in 2010 is relevant.
[39] http://www.mac.sa.gov.au/ctp-support/reforms-to-ctp
[40] See generally http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/lpr_background_info
[41] COAG National Legal Profession Reform Discussion Paper Legal Costs 4 November 2009 See p 1 available at http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/lpr_documentlibrary
[42] See above for latest law applicable in NSW.

- in claims under $20,000 that legal practitioners charge only the regulated rate with no contracting out and
- in larger claims with contracting out legal practitioners be required to give full disclosure to the claimant before finalisation to enable the claimant to advise the MAA of all fees charged.

➲ **The Office of the Legal Services Commissioner in early 2013 issued MAC Act guidelines on the current regulated costs arrangements including those relevant to 'contracting out' arrangements. Legal Practitioners must disclose in writing the basis of costs and give an estimate; enter into a costs agreement with the client and advise the client in a separate written document that the client will have to pay the difference between the fixed maximum recoverable under the MAC Act and the amount payable under the costs agreement.** [43]

Recommendation 1.

The structure of the legal costs regulation should be amended to support the early dispute resolution objects of the Act.

Recommendation 2.

The legal costs regulation should be reviewed and adjusted every two years to ensure that it continues to serve objects of the Act under changing circumstances.

Recommendation 3.

All amounts that claimants are obliged to pay their legal representatives should be required to be disclosed to the Motor Accident Authority (as proposed by the 2010 Costs Working Party).

[43] See generally http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/fact_sheet_6_reg_motor_accident_feb2013.pdf

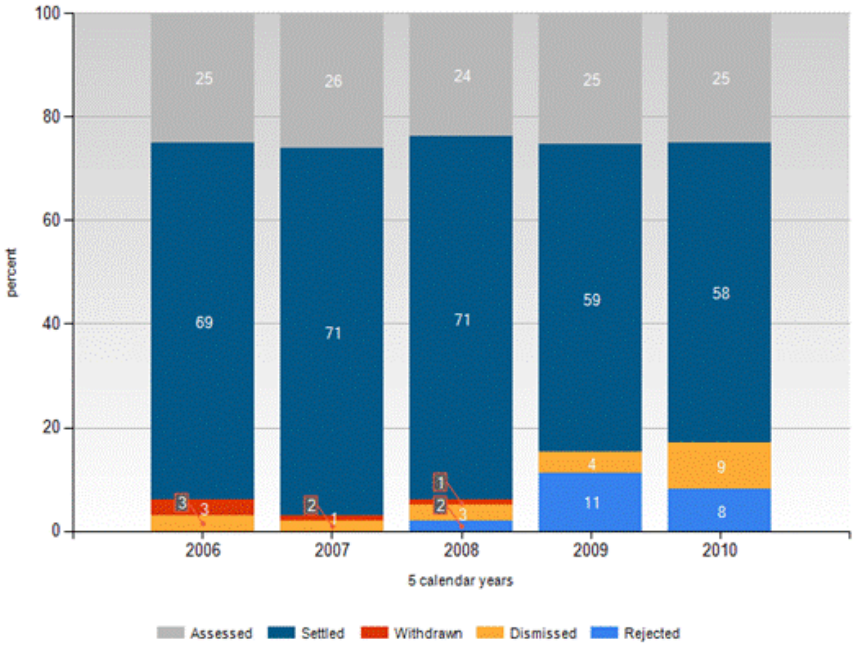
Outcomes within CARS

- Key points

- Outcome patterns in CARS have not changed – 1 in 4 by assessment and the remainder by settlement, rejection or dismissal
- One in four claimants reject assessments choosing court. Few go, presumably settling later.

CARS finalises 12% of all cases. One in 4 resolves by assessment and the remainder by settlement, rejection or dismissal. Figure 11 shows the proportion of finalisation through assessment is constant, with some recent slight increases in rejections and dismissals.

Figure 11: Total CARS finalisations by type as percentage %

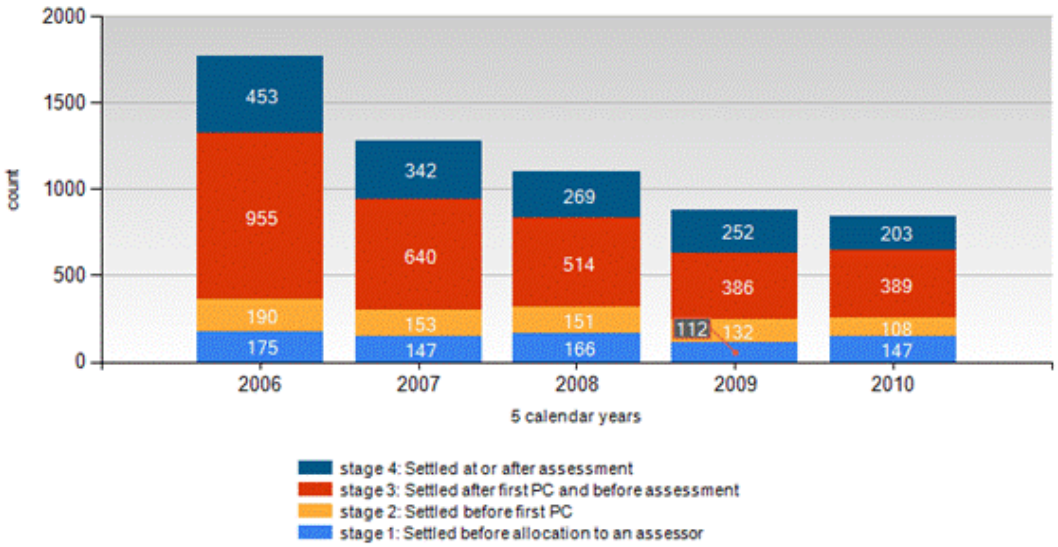


CARS Preliminary Conference

88. The preliminary conference (PC) is the first stage at which there is an exchange of information. Figure 12 shows the conference and the period immediately after it is where most finalisations occur. This is consistent with experience elsewhere with intermediate disclosure events prompting settlement discussions.

89. The settlement numbers have been decreasing from 2006/07 and the decrease is reportedly due to the effects of scheme changes. These changes generate the same settlement discussions that might otherwise have occurred at CARS. The parties arrange conferences themselves and are required to disclose information themselves. This means CARS only has to be involved if third party intervention skills are necessary. The success of these provisions in engaging the parties earlier is reportedly just beginning to influence settlement patterns overall.

Figure 12: Total CARS finalisations by process stage



Claimants appealing CARS assessment decisions

90. Claimants have 21 days to accept general assessments after assessors make them and if they do not do so, they challenge at their own risk. Under s.151, a claimant is liable to pay the insurer's legal costs if the amount of court-awarded damages does not improve on the assessment amount.

91. In 2009 and 2010, 25% (67 and 64) of claimants made the choice not to accept assessments and to take the matter to court. The actual number may be lower as claimants regularly accept offers after the 21-day limit or settle subsequently for reasons unknown. Claimants may consider that further negotiation may generate a better option and insurers may settle to avoid further court activity. Others may decide not to proceed at all possibly for reasons of cost.

92. Only 32 CARS assessed cases over the past 10 years proceeded to a final court judgement.[44] This minimal number does not explain why one in four assessments was rejected or how the risk arrangements affected appeal options. Further information on these and other post CARS matters should be routinely collected and analysed, to discover how CARS assessments affect the choice, if at all.

[44] Data supplied by actuaries Taylor Fry, subject to disclaimers

Unrepresented claimants

- Key points

- Compensation amounts paid to unrepresented claimants in the finalisation of non-disputed claims are considerably lower than those paid to represented claimants. The median settlement for unrepresented claimants in 2009/10 was $3,072; for represented claimants it was $41,369.
- Evidence suggests that lack of representation adversely affects awards
- Unrepresented claimants may have less meritorious claims or in negotiations with insurers are less well informed.

93. Unrepresented claimants comprise 30% of 2009/2010 finalisations. They receive lower settlement awards than represented claimants. The largest group of unrepresented claimants comprised of those who settle after receiving an offer from the claims assessor and before having an opportunity to enter the CARS process.

94. Assessors submitted that one reason these claimants remain unrepresented may be that on legal examination, the case lacked merit and that the amount achievable at settlement was not sufficient to pay solicitor-client costs.[45] They may also be injured road users that for a variety of reasons are simply receiving lower awards.

Low award values

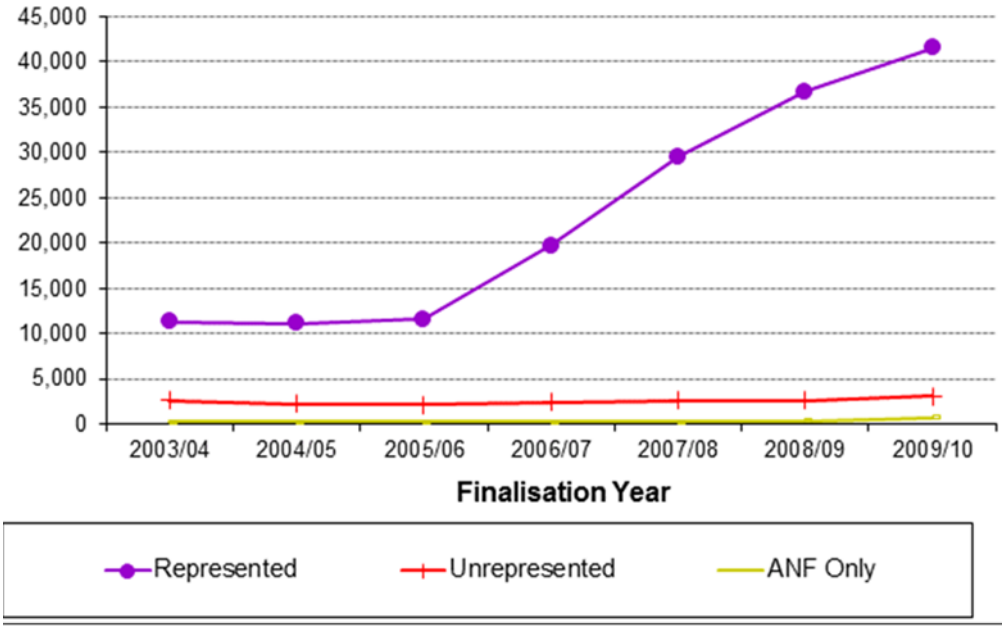
95. As Figure 13 shows below, the settlement amounts for unrepresented claimants have been marginal since 2003/04. In strong contrast, the median settlement for claimants assisted by lawyers, is much higher and has risen steadily:

- in 2009/10, the median settlement amount for unrepresented claimants was $3,072 (average: $11,911) and
- since 2005/06, the median settlement amount for a represented non-disputed claim has moved from $11,583 to $41,369 and the average settlement amount from $45,138 to $90,195.46.

[45] Litigants in Personal Management Plans: Issues for Courts and Tribunals. Published 2001 by the Australian Institute of Judicial Administration Incorporated, *Litigants in person management plans: issues for courts and tribunals* 2001 at 2 onwards

[46] These figures reflect the costs of these settlements to the system, via insurers. They are not the actual compensation amounts received by claimants, as they include the scheduled legal costs paid out to both claimant and defendant lawyers, and do not take account of additional solicitor–client charges borne by claimants. The average settlement amount of $90,195 incorporates total legal costs paid by insurers to both claimant and defendant legal representatives of some $12,500.

Figure 13: Median finalisation amounts represented and unrepresented claim



96. The injury severity profile among all claimants in the scheme has not deteriorated over the past decade.[47] Accordingly, an increase in severity of injury is not the reason more lawyers are now used. Lawyers are simply increasingly representing those who were previously unrepresented, with much the same injury profile.

- In 2005/06, 72% of all claims were finalised without formal disputation.
- In 2009/10, that figure was 77%
- In 2005/06, 37% of claimants were assisted by lawyers (excluding ANF finalisations).
- By 2009/10 the proportion had risen to 49%.

97. For unrepresented claimants, the settlement amounts may simply represent acceptance of uncontested offers. They may be accepting what they may believe is standard compensation under a government insurance scheme and are not aware they are being made a first offer from an insurer used to negotiating in an adversarial context with lawyers.

98. Looked at in this way, if were claimants in possession of full information about settlements reached for similar injuries and claims, they may be less likely to accept the insurer offer.

[47] Data show that the average injury severity score for various severity categories (1–5, 6–10 etc.) for all settlements has been stable over the period. Taylor Fry analysis March 2011

99. Unrepresented claimants or 'litigants in person' are not unknown in other tribunals and courts. There are other reasons lawyers are not engaged by parties. A survey conducted by the AIJA[48] found the following on the issue of justice outcomes for the litigant in person.

100. The AIJA found in respect federal courts and tribunals:

- representation is relevant to outcome
- settlement by negotiation is more effective with representation
- the failure rate of litigants in person is significant.

  Representation had a significant relationship, across all major case categories, on the type of outcome, that is, on whether cases resolve by consent, by determination or another outcome. In particular, cases where represented applicants more often have consent outcomes and go to a hearing less often. Representation had a significant impact on when cases were resolved. More cases with unrepresented applicants are disposed of before any pre-hearing case event or after one pre-hearing case event and more stay on to a final hearing.[49]

101. The Productivity Commission has also recently commented on the broad question of out-of-court settlements in the absence of protective structures:

102. The main mechanism for early resolution of claims is out-of-court settlement. While not disputing the range of benefits listed above, several problems remain with settlement processes. In particular, faults in negotiation processes and the lack of a structured process for systematically assessing liability and damages mean that full compensation is unlikely to be achieved in most circumstances.[50]

Informing unrepresented claimants

103. Unrepresented claimants are potentially vulnerable. They should have access to relevant and impartial information at the time award offers are made and preferably from the time of the accident and from when the claim is made. This would require additional activity on the part of the insurers and if shown to be cost-effective, the establishment of new advisory services by the MAA. Initiatives the MAA should include the following:

- require insurers to introduce new measures in claims assessment and handling (i.e. establishing a table of maims approach to settlement offers or making the 'book' value of settlements public)
- consider the establishment of a claimant advocacy service for all injured persons

[48] Litigants in Personal Management Plans: Issues for Courts and Tribunals. Published 2001 by the Australian Institute of Judicial Administration Incorporated, *Litigants in person management plans: issues for courts and tribunals* 2001 at 2 onwards

[49] See reference to AIJA above. Data supporting those findings is to be found in Discussion Paper 62 ALRC Review of the Federal Civil Justice System 1999 at page 8 http://www.austlii.edu.au/au/other/alrc/publications/dp/62/consultant_rept1/report1.pdf accessed December 2013

[50] See Productivity Commission – Disability Care & Support Schemes Injury 15.13

- while these measures are under review, consider requiring the settlements of all currently unrepresented claimants to be endorsed by independent experts.

Claimant advocacy service

104. The existing Claims Advisory Service offers general and procedural information about the scheme excluding legal advice.

105. A claimant advocacy service may be a useful adjunct to MAA services staffed by para-legals and legally qualified professionals authorised to coordinate and assist claimants with aspects of their claim. One advantage would be to provide an alternative to legal representation for claimants in non-disputed settlements.

106. The role will be to help claimants:

- in the early exchanges and negotiations with insurers.
- to generate solutions
- in relation to matters proceeding to CARS and the courts

107. A more sophisticated model is that of coordinated assistance bringing in legal expertise only for certain aspects of the matter. Compensation schemes exist which do this. Various non-legal advocacy services support the Veterans Affairs Tribunal with this type of assistance.

108. The service could be provided in addition to services already provided by the MAA except, that it would be funded by insurers. Insurers would be charged based on the numbers of claimants holding insurance policies with them and using the service. The charge would enable comparisons with other insurers and would provide an incentive for service improvement by the insurer.

➲ **The MAA Annual report 2012-2013 reported that the 'Claims Advisory service provides an outreach service to claimants who are not legally represented and who have a dispute being assessed by the MAAs medical and claims assessment services. The outreach service ensures that these claimants know about assessment or meeting dates, are informed of the process and are aware of the documents and other information they need to provide at their assessment. During the 2012–13, all identified outreach clients were contacted by CAS.**[51]

➲ **Recent research for the Commonwealth Attorney-General's department shows that legal qualifications may be unnecessary for these roles and that coordinating services offer better cost-benefits to both unrepresented people and funding agencies.** [52]

➲ **2012 reforms introduced in workers compensation in NSW incorporate a 'legal aid' style grants process managed by the WorkCover Independent Review Officer, in effect inserting a triage and management layer over claimant legal costs, previously managed only by cost scales. Lawyers are on a WIRO panel and are engaged by WIRO to offer three levels of assistance ranging from help with documentation to appearances.**

[51] See *MAA Annual Report 2012-2013* at p 26
[52] Attorney-General Media release 24 July 2013 See www.ag.gov.au

109. The MAA should investigate the experience of unrepresented claimants to establish the range of awards and the reasons for the level of awards accepted and if consequently additional advisory or information services are required. In addition, The MAA should further investigate the cost effectiveness of requiring insurers to introduce new claimant support measures at all stages of claims handling particularly immediately after claims are made, including procedures to remedy stalled claims and to maintain communication with claimants over the progress of the claim. This investigation should extend to the efficacy of a claimant advocacy service based on recent Australian non-legal case-coordination services for self-represented litigants, changes to WorkCover NSW enabling legal aid 'grants' and a user-pay model funded by insurers.

Recommendation 4.

The MAA should investigate the compensation paid to unrepresented claimants in the Scheme and establish with greater accuracy the level of their compensation benefits measured against the expectations of the legislation to ensure that unrepresented claimants are receiving their statutory due.

Recommendation 5.

The MAA should then require insurers to introduce new measures in claims assessment and handling to address any shortcomings identified in processing unrepresented claims and consider the establishment of a Claimant Advocacy Service for all injured persons.

Recommendation 6.

The MAA should consider requiring settlements for all currently unrepresented claimants to be endorsed by an assessor, an independent legal representative or claimant legal representatives retained for this scrutiny purpose. †

Delay in settlement finalisations

▪ Key points

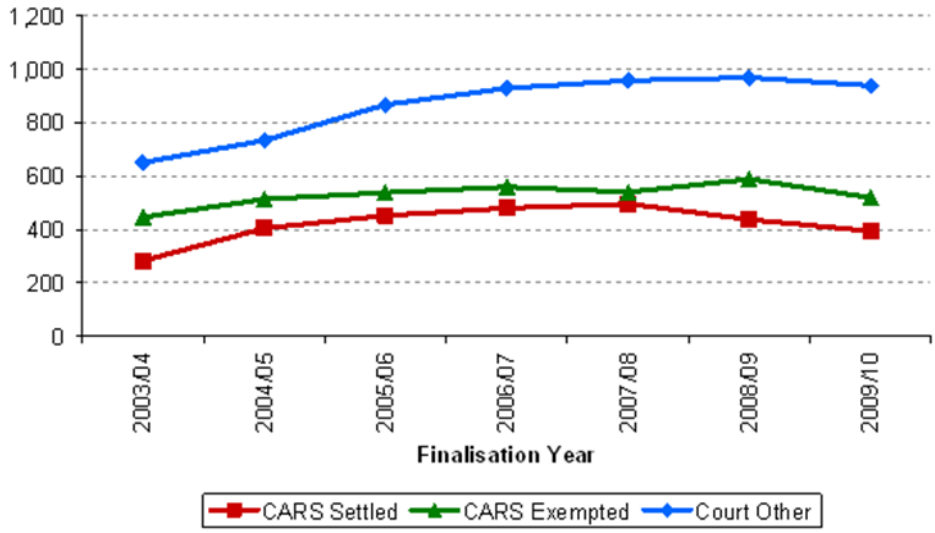
- CARS exempted cases typically settle 125 days after they would have if settled in CARS
- Court proceedings add another 545 days before settlement.
- The statistic of daily legal costs is approximately $100 for court and $70 for CARS

110. Cases finalised at later settlement stages where legal representatives often control timing may generate lengthy delays. For claimants, the costs of delay can be both economic and social. Legal costs also compound with delay. In 2009/2010:

- CARS settled cases, without a general assessment, took an average of 125 fewer days to finalise than CARS exempted claims that settled without any commencement of court proceedings.
- Longer delays that averaged an additional 545 days applied to CARS exempted cases that were settled after commencement of court proceedings, but without a court judgement.

111. Figure 14 below shows the upwards drift in delay. Since 2007/2008 delays have slightly reduced.

Figure 14: Elapsed time (days): 1st CARS Application to Claims Finalisation



112. Delays interact with and increase the opportunities for increased costs. Table 3 below shows the delays and costs as well as calculations that may be used to forecast costs of additional cases and of additional delays.

- Court cases settled for an average of $109,607 per case, after an average delay of 545 days, over cases settled within CARS where average payments were $39,477 per case.
- When the impact of delay is converted to a daily rate, the data shows the incremental legal costs for cases settled in a court process (but not going to court) is $115 per day.
- For CARS settled cases, it is $83 per day and for CARS exempted cases, $73 per day.

113. Case complexity has been discussed and contributes to delay as do the differences in available costs scales between CARS and the District Court and contracting out practices. Outside this, the imperative should be to settle cases early, to remove barriers to early settlement and to create incentives that assure this outcome. Incentives that may increase delays also require investigation.

114. Delay is typically due to waiting times for the collection of medical evidence and in accumulation and exchange of other relevant information. It is clear that these delays are out of step with civil waiting times in other jurisdictions. Structured interventions could be usefully applied in the form of modern case management techniques or dispute management protocols as discussed below.

115. For the most 'complex' cases that are not CARS settled, the typical (median) legal costs are between 61% and 104% of the settlement amount. The legal costs/average settlement is smaller in relation to the settlement amount. In reality, the median (or middle) settlement amount is more representative of all settlements than the average.[53]

Table 2: Median analysis of case outcomes and proportionate legal costs 2009/10

Process	Av. days	Legal costs	Legal costs $/day	Average settlement amount	% Legal cost/Av. settlement	Median settlement amount	% Legal cost/median settlement
Court other	945	$109,000	$115	$458,000	24%	$178,000	61%
CARS exempted	545	$33,400	$83	$153,700	22%	$32,000	104%
CARS settled	400	$39,500	$73	$250,600	16%	$149,000	27%

116. Table 2 also shows that case complexity is part of the interaction between these measures. In cases where liability is denied or contested, the typical settlement offer will be reduced. In some cases, claimants may even receive zero or minimal compensation, yet legal costs would be the same as for any other case that ran as long.

CARS claims processing times

- Key points

- Most claimants have their CARS matters finalised within 8 months
- Exemptions applications are mostly finalised within 1 month

[53] An explanation of the effective difference between median and average as a measure of central tendency is given in the attachments.

- CARS matters finalise well before the District Court and CARS is ahead on national comparative indicators in terms of timeliness, backlog and clearance
- Initiatives in CARS have successfully reduced specific backlogs
- CARS assessors meet the 21 day target for decisions in 95% of matters

117. CARS matters are dealt with expeditiously in comparison to courts and other similar forums. In the last period reviewed:

- The average overall application life cycle for matters finalised in the 2009/10 reporting period reduced by 12 %, from 186 working days to 164 working days. [54]

118. In addition, for the largest grouping of claims in 2009/2010:

- 73% of all CARS applications for general assessment were finalised within 7 months.[55]

119. The decrease in average times between the lodgement of a notification and the date of decision are the long term outcome of efforts to reduce times since 2003/2004. The MAA Annual Report of 209/10 states that the average life cycle of all matters that required an assessment conference was reduced in 2009/10 by 15% from 266 working days in the previous year to 226 working days, a reduction of 40 working days.

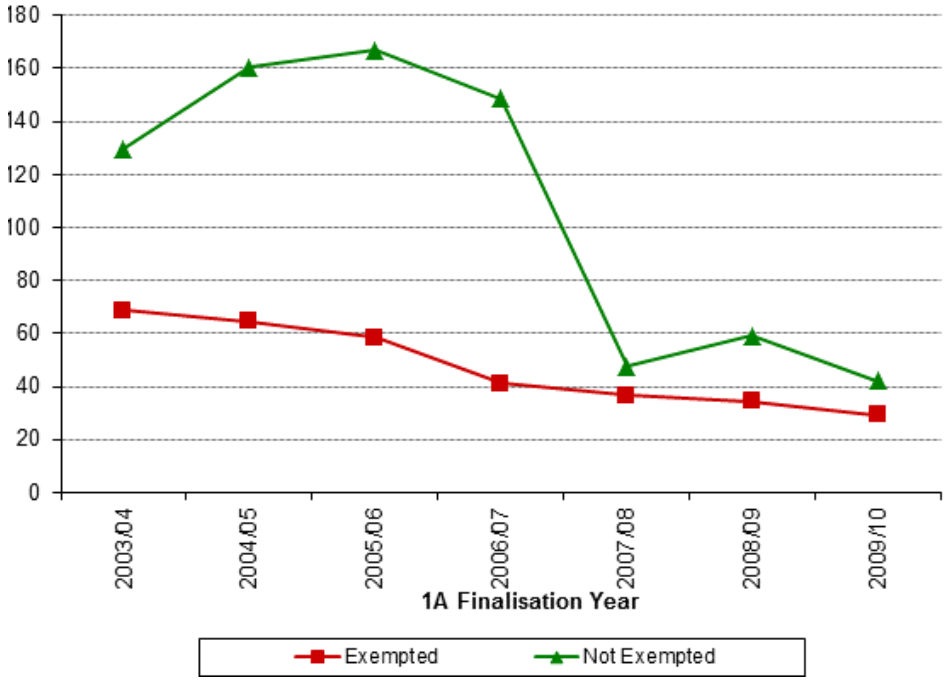
120. Closer examination of the different caseloads shows the following. 'Elapsed times' have reduced in both exemption applications (1A matters) and general assessment applications (2A matters).

121. Exemption applications shown in Figure 15 below that were:

- Successful, were processed within 29 calendar days in 2009/10 or within 1 month - a drop of 58% from an average of 69 days in 2003/04 and
- Unsuccessful, and that would be expected to require more time, were processed within 42 days in 2009/10 or under 2 months, a more significant drop of 74% from an average as high as 161 days in 2004/05

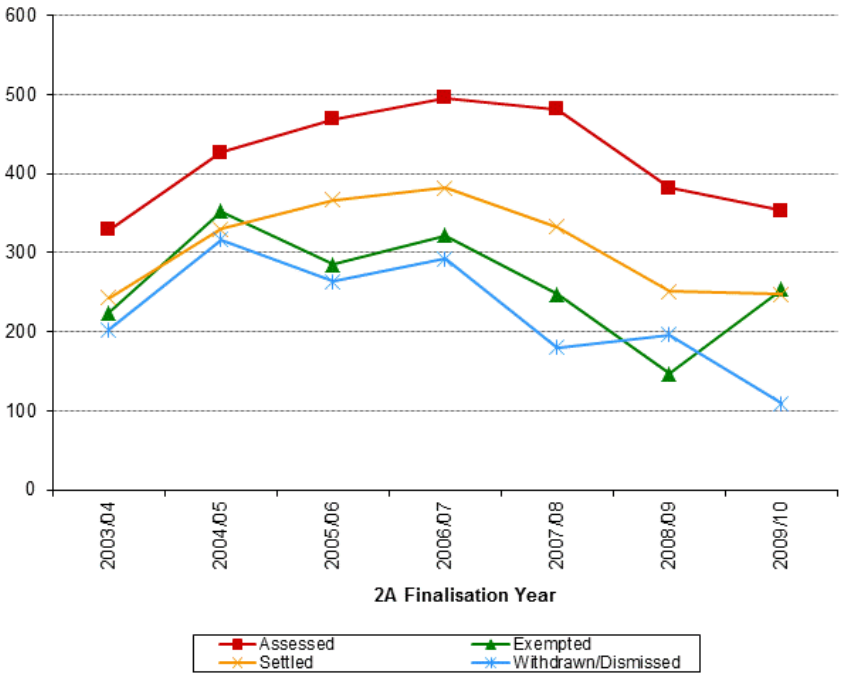
[54] MAA Annual Report 2010
[55] Cassidy, B *Stat info for the CARS Review*

Figure 15: Exemption applications – trends in average processing times (calendar days)



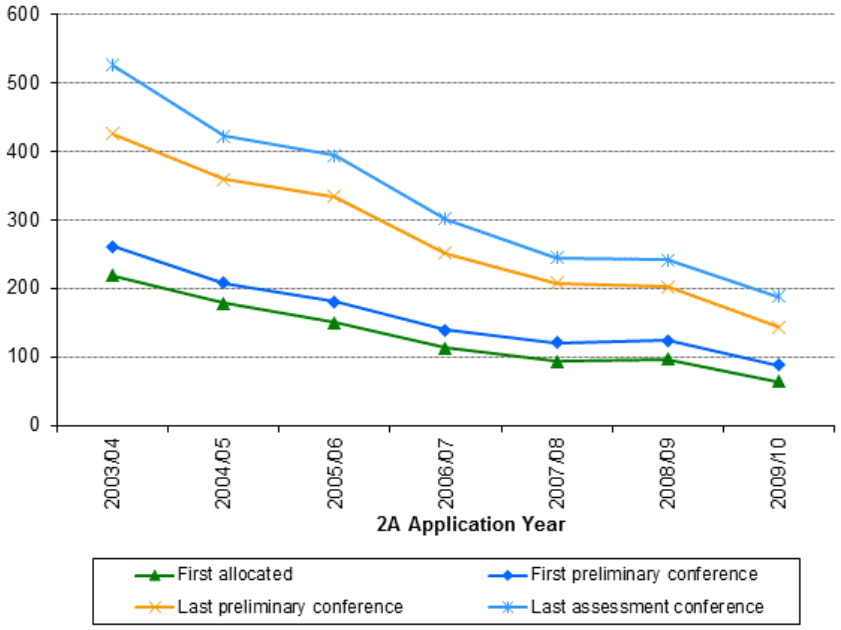
122. General assessment applications have dropped from a high of 496 days in 2006/07 to 354 days in 2009/10 or to just under 12 months. The earlier high point coincided with the increased workload in CARS at that time.

Figure 16: General assessments – average decision delay (days)



123. Elapsed times have also been reducing from the date that a general assessment application is received to each of the allocation date, first preliminary conference, last preliminary conference and assessment conference.

Figure 17: Average delay (days) from general assessment application received to finalisation



124. These improved general assessments times should be seen in the context of the reducing caseload from the Division 1A reforms and the resulting increased capacity, however they are also due to internal CARS initiatives in targeting older claims for priority decision-making.

125. CARS assessors are required to deliver decisions for their assessments within 21 days of the final assessment conference. Assessors are consistent. This benchmark is achieved 96% of the time.[56]

Comparisons with the District Court

126. The *Report on Government Services* (ROGS) provides national performance measures that establish standards for court and tribunal performance measurement in Australia. The 'backlog' standard is that no more than 10% of lodgements pending finalisation should be more than 12 months old and none should be more than 24 months old.

- In the New South Wales District Court for 2009/2010, the backlog was 17.2% (at 12 months) and 4.4% (at 24 months). In effect, 1 in 5 or 6 matters had been waiting for more than 12 months and another 1 in 25 more than 2 years.
- In CARS all matters are resolved within 12 months and backlog indicators were 0% and 0% respectively during 2009/2010.

127. These CARS figures are well within the District Court comparator and reported median civil delay of 10.5 months in the Court's 2009 Annual Review[57]. The 545 days or 18 month delay reported

[56] *CARS Business Unit Six Month Review* (internal document) 30 June 2010 at 23

above for 'court other' settlements in the District Court is well above this reported indicator, although it may in part be explained by a lag between the exemption date and issue of proceedings. In either case, it is not optimal.

128. An additional national measure of efficiency is the clearance indicator, measured by dividing the number of finalisations in the reporting period by the number of lodgements in the same period. The District Court's rate was 101.9%. CARS show a similar turnover with 99%.[58] On these indicators, CARS meets the objective of reducing delays associated with court processes.

[57] See The District Court of New South Wales Annual Review 2009 p 32
http://www.justice.nsw.gov.au/lawlink/district_court/ll_districtcourt.nsf/pages/dc_publlications

1. [58] Comparisons with the Victorian Traffic Accident Commission (TAC) in Victoria and the comparable merit reviews in the Victorian Civil Appeals Tribunal (VCAT) show a lower clearance rate of 70%. It should be noted that concurrent common law claims lodged in the County Court create delays and were issued in more than half of these so comparisons are more a comment on delay as a result of jurisdictional design.

Comparison with best practice

129. Best practice for dispute systems in compensation schemes emphasise cutting friction costs and promoting early resolution of claims. At the same time, reforms in the court systems promote reducing delays and costs associated with litigation. The trends in both are described below.

Trends in courts and in compensation schemes

- Key points

- Court reforms trend to including more mediation and pre-litigation protocols
- Tribunals are amalgamating and are retaining internal specialisation
- Administratively based decision-makers are likely to have statutory independence
- Australian CTP schemes are successfully using informal conferences and dispute management protocols

Courts

130. Court-based settlement remains the predominant dispute resolution model for serious fault or common law personal injury claims in Australia. The courts have developed a series of initiatives in the last decade to improve access and to cut costs and delays. These include:

- pre-litigation protocols that ensure settlement offers must be made at certain times with cost consequences if they vary too widely from later court outcomes
- court-annexed mediation where parties are required to attempt mediation as a condition of obtaining a hearing date, and
- tighter controls over traditional sources of cost and delay such as the lodgement and exchange or 'discovery' of documents.

131. "Front-loading" administrative procedures similar to those established under Division 1A are now built into uniform civil procedure laws in most jurisdictions in Australia. One view is that with these changes, reformed courts may rival the efficiency and lower costs of alternative super tribunals such as NCAT, QCAT or VCAT[59] set up to replace them. A trend in this direction has yet to become apparent.

132. Courts continue to lose 'market share' to alternatives, a phenomenon known as 'darkened court rooms' in the United States. Court costs remain prohibitively high even for court-annexed mediation and debate in the legal profession about legal fee-setting is emerging as a critical

[59] New South Wales, Victorian and Queensland Civil Administrative Appeals Tribunals, respectively.

industry consideration. Recourse to the courts and high levels of legal involvement remain prevalent in CTP schemes.[60]

Tribunals and CARSs style services

133. Administratively based dispute resolution organisations have proliferated in compensation schemes. Western Australia, for example, has adopted a variation of the New South Wales Workers Compensation Commission model.

134. In line with the drift to informal processes has been the growth of 'super tribunals', each of which now promotes compulsory mediation processes, combined mediation and arbitration or 'med-arb' models[61] and arbitration. All options are under the supervision of a Supreme Court judge.

135. Justification for combining a range of smaller tribunals is given in shared costs and the capacity to move mediators and arbitrators between different jurisdictions.[62] While early expectations were that efficiency would be enhanced by a sharing of personnel, this does not seem to have occurred and specialisation takes precedence in work allocations. In fact, most of these smaller tribunals have survived as 'divisions' of the super tribunal. All have developed expertise in the training and selection of staff and in communicating their processes to often unrepresented claimants. ADR is now an accepted mainstream model with greater legitimacy in the community.

136. Even with the greater acceptance of alternatives, there is still an expectation that decisions that affect people's livelihood will be made by courts or 'in the shadow of the court'. This means that the prospect of expensive administrative review in the superior courts is not removed and therefore schemes that build in this possibility by including outright decision-making are rare. In designing a scheme to settle cases, the much more attractive option is to seek ways to engage people in making decisions that will affect them.

137. Conciliation models are common, where parties are required to participate in a mediation process. If they cannot settle, the conciliator will make a recommendation to resolve the dispute or in limited circumstances refer the case to a tribunal or court for a decision. Other agencies use a 'med-arb' model, seeking cooperation from the parties in the decision before imposing an outcome, but these are more common in independent bodies.

138. In what is now the National Disability Insurance Scheme (NDIS), the Productivity Commission reviewed all of the available options and has proposed an administrative complaint handling body led by a statutory appointee for its no-fault scheme.[63] In New South Wales, a recent

[60] Actuaries conference November 2013 CHECK
[61] See discussion below on managing transitions in different styles of ADR at 0
[62] See, for example, Commercial and Consumer Tribunal Bill 2003 Explanatory Notes Qld http://www.legislation.qld.gov.au/Bills/50PDF/2003/CCTB03_AinC.pdf
[63] See Productivity Commission Inquiry Report, *Disability Care and Support* at p 464 to be found at http://www.pc.gov.au/projects/inquiry/disability-support accessed December 2013

review of the Workers Compensation Commission found that full-time arbitrators were preferable to sessional arbitrators. The concentration of expertise was considered to create perceptions of greater legitimacy.[64]

Overseas schemes

139. Canada has a range of CTP schemes similar to those in Australia. The Canadian schemes are mainly common law or fault schemes with ratings agencies attached (similar to Queensland), or part of bigger state-based insurance commissions, (similar to Western Australia). Others Canadian schemes have a mix of no-fault and fault components. The Automobile Injury Appeal Commission of Saskatchewan is an independent organisation that mediates and then determines no-fault statutory benefit disputes.[65] Fault claims go through the courts.

140. A review of the published reports showed that these schemes were variously engaged in:

- removing review officers from 'line reporting' so making them more independent
- publishing benchmarks for setting awards
- requiring insurers to publish settlement outcomes
- establishing 'fair hearing' guidelines for conciliation processes and
- in one instance, abolishing informal settlement services.

141. The tensions described in Chapter 2 between formal and informal process and costs pressures are evident. Unfortunately, little information is available publicly to evaluate the success of these measures.

Australian CTP schemes

142. Informal conferencing and court processes are the most common features of claims finalisation in Australian CTP schemes. With the exception of New Zealand's Dispute Resolution Services, CARS is the only Australasian administratively-based organisation that formally determines awards.[66] Australian CTP scheme administrators reported various degrees of success in reducing friction costs but were clearly focused on doing so. Successful initiatives included:

- informal conferences, compulsory or otherwise and one or more of:
  - mandated preliminary document exchange requirements
  - evidence caps where fresh evidence cannot be lodged at court unless it has already been produced at the CARS equivalent process

[64] Interview with Workers Compensation Commission – In-house research.
[65] www.autoinjuryappeal.sk.ca/
[66] New Zealand's Dispute Resolution Services (DRS) is a commercial enterprise sponsored by the Insurance Council of New Zealand and governed by an independent representative board. It operates a conciliation model with limited decision-making powers and conducts hearings similarly to CARS that result in awards. Some parallels exist but it was not included in the comparison in Australia because it is predominantly a no-fault scheme and New Zealand has a small legal industry. Legal costs are low and delays minimal. Of interest is the fact that moves to establish DRS as a statutory entity are under consideration following concerns over independence.

  - quasi-independent review officers operating within insurer offices and with limited arbitration powers and
  - capped legal costs scales or set fees, effectively fixing prices[67]
- courts or tribunals with one of more of:
  - dispute management protocols
  - offers of compromise and costs disincentives
  - prescribed preliminary settlement conferences
  - voluntary mediation
  - compulsory mediation and
  - capped legal costs scales.

143. A closer analysis of data from these schemes is described in the next section. It shows that the initiatives that may be most effective for NSW are supervised informal conferences and dispute management protocols.

➲ **South Australia's Motor Accident Commission reported a drop from 32.3% of legal involvement in claims to 10.7% in the year to September 2013. New tort reforms setting thresholds to common law for classes of injury claims, capped injury payments, limited legal payments, and accreditation of medical reports were cited as the reasons for the decrease. Premiums have reduced from $512 to $408.[68] .**

Comparing schemes – legal involvement and legal costs

▪ Key Points

- Injured road-users attending CARS have direct access to a decision-maker in respect of their claim. In other jurisdictions, judges play this role at greater cost and later in the life of the claim than in New South Wales. However, this access is only available to a small proportion of claimants. As in the rest of Australia, most claims settle by negotiation between insurers and legal representatives.
- In NSW, Supreme Court review cases are far more frequent than in other states with fault-based schemes because a CARS type operation is not present in these schemes to provide the decisions to review. These cases flag a pressure point for CARS and the scheme.
- NSW paid more legal costs expressed as a proportion of money paid out of the schemes – 18.6% compared to proportions of 14%, 9%, and 4% for comparable Australian jurisdictions.
- Two factors make the difference in the states that pay the least:
  - supervised informal conferences at insurer claims office level keeping more cases out of courts and

[67] In NSW, changes to workers compensation in 2012 included provisions making claimants responsible for their own legal costs regardless of the outcome of the claim, effectively replacing the traditional costs follow he event rule that meant the loser of the case had to pay the winner's costs according to court scale rates.

[68] MAC South Australia Presentation to Injury Schemes seminar Institute of Actuaries - November 2013 See http://www.actuaries.asn.au/Library/Events/ACS/2013/MaguireSAMotorists.pdf

  - dispute management protocols used by MAA equivalent agencies that keep costs down by proactively streamlining and structuring legal firm interactions prior to court.
- The trends are to give more resource independence to decision-makers (i.e. Assessors) that need it to provide credibility. This is not as important for conciliators and mediators that may only have recommendation powers.
- Evidence caps and capped costs scales cut legal activity and costs.
- Australian successes in cutting friction costs in CTP schemes are in supervised informal conferences and dispute management protocols prior to courts.

Issues for New South Wales road-users compared to other jurisdictions

144. 'Friction costs' provide a standard comparison between compensation schemes as to which may have more sophisticated approaches to common problems. Similar measures are routinely examined in workers compensation schemes.

➲ **In CTP schemes these costs are described in reverse as a measure of scheme 'efficiency' with the exception that insurer legal costs may be separated from plaintiff legal costs and may be counted differently. In some instances, this will mean legal costs are not completely identified.**

145. Friction costs are defined as follows:

> Friction cost can be expressed as the proportion of every dollar paid to an injured person that is held back to meet legal or other types of costs (investigation and medical) associated with processing that person's claim.[69]

146. With cooperation from the other schemes in Australia, an analysis was undertaken of the friction costs in similar schemes. The focus of the analysis was on determining the impact of CARS on legal costs in lieu of court actions. The contention was that if comparable schemes to CARS have lower friction costs, then CARS may not be effective in reducing friction costs or other states have identified better approaches to avoiding unnecessary legal actions.[70]

147. In Australia, some CTP schemes are no-fault schemes and others are similar to NSW in retaining fault-based awards. As already noted it would be expected that legal costs are higher in the fault determining states. Accordingly, only fault schemes are reported here, to give a fair comparison. Data was obtained from both the public record and after discussion with Australian and New Zealand scheme representatives directly from their own data collections.

148. CARS is unique in Australia as an administratively based dispute resolution institution. In other fault schemes the local 'public' administrative appeals tribunal (i.e. NCAT, VCAT) or scheme-managed settlement conferences are used to avoid or reduce court related costs. Most

[69] See generally Workers Compensation Research Institute. US http://www.wcrinet.org/benchmarks/benchmarks_14/benchmarks_14_fig_4.a.html

[70] Propensity to litigation, which may vary between jurisdictions, is another factor. See generally Wolff, L *Litigiousness in Australia: Lessons from Comparative Law* at p287 which shows NSW and Victoria lodge more civil matters than other states per 100,000 people. http://www.deakin.edu.au/buslaw/law/dlr/docs/vol18-iss2/03_wolff.pdf accessed December 2013 Deakin University 2013

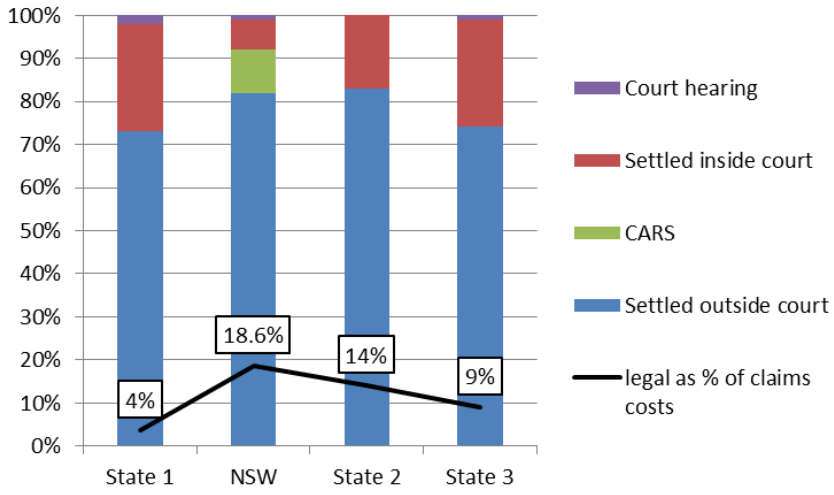
schemes measure legal costs as the scale cost payments made as a result of an award to claimants (plaintiff) lawyers or to lawyers acting for the defendant or insurer. [71] Claim costs include the cost of medical and investigation reports used in the course of proving the claim. The two types of payments are usually combined to obtain an overall costs figure for each claim.

149. The schemes also provided information about the stage at which matters were finalised. Figure 18 reports the proportion of claims finalised for the most recent financial year and the point in the system at which they were finalised. Figure 18 below shows that:

- the proportion of matters finalised in court processes in other schemes is generally higher than in NSW
- the jurisdictional arrangements in each of the fault states including those in NSW mean that fewer claims end in court processes in NSW
- CARS is unique and significant in reducing court finalised claims, but
- legal costs, subject to the cautions below are higher in NSW.

[71] These payments do not include solicitor-client costs that claimants pay directly to their lawyers.

Figure 18: Fault states comparison – estimated caseload dispositions shown with estimated legal costs as a proportion of all claims costs 2009/10



Notes: Sources & and cautions

Sources: Annual Reports and Review interviews.

Cautions:

(1) Information was provided strictly for this Review and is not to be released externally to the MAA.

(2) Caseload settlement stage measurements were drawn from interviews and data provided.

(3) Some states have a higher rate of average awards, and the higher awards may include greater proportions of solicitor-client costs accounting for the lower party-party costs. Lawyers may charge the same around the country but obtain differing contributions from court scales and client out-of-pockets in each state. Most states considered all legal costs were shown, but not all were necessarily reported by insurers, especially where in-house counsel were used.

(4) MAA data is historical, extracting data from cases that were finalised in 2009/10 but for which legal costs had been accumulating from previous years. A comprehensive review would compare in the same way. Other schemes may simply use paid sums for both legal and non-legal in the same year

The information for the figure came from interviews. Taylor Fry assisted in the identification of sources.

Discussions with each of the scheme administrators indicate that informal conferencing and dispute management protocols are the differentiating factors in the states with lower costs. This is despite more court and court settlement activity meaning that scheme administrators intervene successfully to reduce the cost of court processes.

150. In both of these approaches, access to the courts is controlled by the scheme as are settlement activities outside court proceedings even after they had been issued. Their experience was that legal costs reduced following the introduction of these initiatives. Each is discussed further below.

Supervised informal conferences

151. Supervised informal conferences differ in how they are implemented in the various jurisdictions. The essential components are that times and places are set for interactions between claimants

and insurers, and that all information relevant to the claim must be available for discussion in those interactions. The purpose is to achieve a settlement of the claim.

152. Some schemes use internal legal counsel to assist insurers in resolving claims. They send officers out to insurer officers and work through a batch of claims. Others insist on conferences involving the parties managed by strict rules. In yet other states, conferences are initiated and run by insurers without any intervention by the scheme. In the no-fault schemes, independent review officers run informal conferences. In NSW, Division 1A conferences serve the same purpose. The difference is that the rules require a conference and the exchange of information and the MAA has little if any input into the conference process.

Dispute management protocols

153. Dispute management protocols reduce costs and delays in court and therefore reduce court caseloads if actively managed by scheme administrators. They work by applying incentives for early settlement, in particular negotiated fee scales with plaintiff lawyers in exchange for early and comprehensive information and certainty in scheduling.

- Protocols include structured settlement offers.
- Examples in fault schemes in Australia are successful.
- Compulsory informal conferences for less complex claims paired with dispute management protocols keep more cases out of court and further lower legal costs.

154. Dispute management protocols are used in schemes to reduce legal costs by fostering the settlement of cases that would otherwise settle in court.[72] The schemes that have been successful have taken a proactive stance and taken control of the administration of this population of claims. They have negotiated with plaintiff law firms, finding ways to share cost reduction benefits. These can include offering simplified and less costly access to discovered documents or computerised transaction savings in exchange for lower costs scales or lump-sum fixed fees. Even more proactively, some schemes have developed in-house legal teams, recruiting senior partners from legal firms. These teams review all cases and run structured settlement processes operating at a level of sophistication that cuts unnecessary legal costs for both plaintiffs and defendants.

155. The protocols governing these processes are usually in the form of ministerial guidelines that may be changed more easily than legislation. They allow appointment of a mediator, facilitator, joint expert or special referee to resolve any issue or claim at any time. Costs are covered by the

[72] Victorian Law Reform Commission http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/LAWREFORM+-+Civil+Justice+Review_+Report http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/LAWREFORM+-+Civil+Justice+Review_+Report See p. 130 for a full description of the TAC protocols origin. See 3.4 of the attached for the history. See also Lord Justice Jackson's report on Civil Justice – March 2010, which is the latest authoritative document in the field. http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports http://www.slaw.ca/2010/03/30/lord-justice-jacksons-final-report-on-civil-costs/

scheme and the defendant representatives must respond within a fixed time-frame after the facilitated process, indicating whether or not the claim is accepted. If the offer is not accepted, claimants can only then issue proceedings in a court. Protocols also include the following provisions:

- only one offer and counter-offer may be made in each case
- the parties may be penalised if they decide to proceed to court after an offer is made. They must pay the other side's cost as well as their own if the court outcome is the same as or close to the offer (within 20%). The costs order must override any existing court costs scales
- early collection of all relevant information is required and the timing of the exchange of information is controlled
- late lodgement of new information after the issue of court proceedings is restricted (evidence cap)

156. Complementary system-wide structures must also be put into place to support the effective use of dispute management protocols. For example:

- contracting full-time senior lawyers to the scheme to manage and monitor the interactions with plaintiff lawyers and defendant lawyers. These in-house experts ensure that the broader interests of the scheme are always considered and that settlement negotiations are conducted in a professional and transparent manner
- obtaining the full support of senior management and government for the relevant scheme initiatives, including public statements and reporting in annual reports on outcomes
- establishing ongoing consultative mechanisms with relevant legal stakeholders
- negotiating the establishment of court liaison committees to monitor the operation of court lists.[73]

157. The Victorian Law Reform Commission noted the advantages and importantly the reduction in common law litigation and delays upon the introduction of TAC protocols in 2004:

> *One important advantage of the protocols is that they streamline and seek to expedite the various procedures and processes involved in dispute management. They also seek to facilitate early mutual disclosure of relevant information and documentation. This will no doubt enhance the prospect of early resolution of disputes in many instances. The constraint on the subsequent use in court proceedings of information or documents not disclosed serves an important incentive for both early investigation and compliance.*
>
> *According to the Transport Accident Commission (TAC), since the protocols were introduced in December 2004, there has been a 27% decline in VCAT* [Victorian Civil and Administrative

[73] See example documents at www.workcover.vic.gov.au Search on WorkCover Legal Costs order 2001 and Ministerial Directions for Section 134AB of the Accident Compensation Act 1985 pursuant to Section 134AF and Section 20C. and also at - http://www.tac.vic.gov.au/jsp/content/NavigationController.do?areaID=21&tierID=3&navID=D9D2B0167F00000101A5D1935F6366B8&navLink=null&pageID=741

Tribunal] *applications for review. It would appear there has also been a reduction in common law litigation and a decrease in the time taken to resolve serious injury disputes. As the TAC notes in its submission to the commission, in the future the court may be able to fast track the minority of disputes that have not resolved at the pre-issue stage because there will already have been mutual exchange of documents and clarification of the key issues of law and fact in dispute. Importantly, the protocols reflect the agreement of representatives of the various stakeholders. They also incorporate mechanisms for regular review and modification. Thus, they may be adapted in the light of experience. This provides for greater flexibility and stakeholder input than a number of other methods of prescribing procedural rules, including legislation, subordinate legislation or practice notes.*

The specification of fixed costs payable in prescribed circumstances, with regular adjustments based on the Consumer Price Index, achieves a greater level of predictability and less complication and expense than other methods for the individualised determination and quantification of party–party costs.[74]

158. The opportunity exists for the MAA to take the lead with insurers to introduce similar protocols following appropriate consultation.[75]

Recommendation 7.

The MAA should investigate the feasibility of adopting dispute management protocols (pre-litigation protocols) and applying lessons learned by other schemes.

Recommendation 8.

The MAA should consider establishing a dispute management unit to guide the development, implementation and management of the protocols.

- **The model litigant policy[76] was adopted by all government agencies in NSW on 8 July 2008. Now (2014) the model has been in place for some time, there is potential to introduce key elements to both the MAA and to insurers. The policy emphasises fair dealings and prompt resolution of issues without resort to technical legalities. Consideration may be given to either giving recognition to the policy or reproducing it in redrafted Guidelines. Insurers would be required to engage legal firms that met those requirements. Similarly plaintiff firms may be engaged as discussed above and encouraged to comply.**
- **A redraft of the MAA CARS Guidelines is in train. The suggestion that model litigant standards should be considered for inclusion may now be timely.**

[74] See www.tac.vic.gov.au 2005 TAC Annual Report

[75] The NSW Attorney-General has recently repealed the civil jurisdiction equivalent – pre-litigation protocols - while the Commonwealth continues its inquiries into mirroring commonwealth legislation. It is noted that dispute management protocols are distinguished by the existence of a regulatory agency competent to control pre-court processes and responsible for supervising beneficial public legislation in contrast to private parties suing. See http://www.parliament.nsw.gov.au/Prod/Parlment/nswbills.nsf/0/ea0dcb6efe3fc1a8ca257abc0022588b/$FILE/2R%20for%20Courts.pdf accessed December 2013

[76] http://www.lsc.lawlink.nsw.gov.au/lsc/legal_manage_govt_legalprac/legal_manage_model_litigant.html

User views – claimants and stakeholders

160. The views of the participants in the New South Wales Compulsory Third Party (CTP) scheme were canvassed to establish the most important issues from each of their perspectives. They fall into two groups – those rarely having contact with the scheme (claimants) and those regularly involved (stakeholders).

161. Views from both groups were sought given that the 'customers' of the scheme, the NSW claimants and premium payers had not been regularly surveyed, as is the case in other schemes. The owners of registered vehicles in New South Wales and the claimants suffering the consequences of motor vehicle injury arguably have the greatest interest in the success of the scheme, given they both pay for it and receive its services. Others that gave views were:

- Motor Accidents Authority (MAA) and CARS, Medical Assessment Service (MAS) as well as the private insurers operating the scheme and their representative organisations and
- Stakeholders or service-providers to the scheme including legal representatives of injured claimants and of insurers (plaintiff and defendant lawyers respectively) and medical service providers.

Surveys and submissions

▪ Key Points

- Claimants appreciate the respectful style of CARS assessors
- The CARS process is not well understood by many claimants
- Some claimants believe they are not being well served by their legal representatives
- Some claimants have objections to the way in which they are treated by insurers
- About half of claimants believe that CARS assessments are completed on time
- About half of claimants are satisfied with the results of the assessment process
- These perceptions are in step with surveys of similar dispute schemes

Claimant perceptions of CARS

162. A study of about 50 claimant's perceptions and experiences was conducted by Professor Tania Sourdin in early 2011. A copy of the study, *User Perspectives of CARS – Interim Report for Use in CARS Review, March 2011*, is attached (Annexure 6). Specific findings were as follows.

- Claimant understanding of the CARS process is limited. Only 60% stated that 'they knew what the CARS process could do for them'.[77]

[77] Sourdin Report, para 1.19

- 'Many of the claimants who attended a face to face meeting with a CARS assessor had very positive views about the role of the assessors. [But] some claimants were angry about their own solicitors, the insurers and all others involved in their case other than the assessor, who was "good". For example, one claimant who thought the CARS process was good was still very disappointed about his lawyers. He noted that: "I was treated like a criminal by the insurer."'[78]
- There was appreciation for the actions of CARS assessors from a number of respondent claimants. Examples were:

  'The main flaws are in the MAS system which the CARS assessor could see.'
  'If we hadn't gone to CARS it would have gone on and on …'
  'I was very happy with CARS.'
  'I felt the assessor was understanding.'
  'I felt very put down at the conference … the CARS assessor was very kind and understanding'
  'The CARS assessor was great.'
  'I was treated like a criminal by the insurers .....CARS were excellent and very fair.'

163. Despite concerns about the insurer, many survey respondents rated the CARS scheme highly in relation to 'respect'. Eighty per cent of respondents considered that they had been treated respectfully by CARS.[79] Where there was dissatisfaction with CARS, it tended be associated with a lack of engagement in process.

  'They did not want my opinion, why was I even there?'

- About half of the respondents were satisfied with the time it took to dispose of a matter, but for many the cumulative CARS–MAS interactions took too long.
- About half of the respondents were fairly satisfied (47%) or very satisfied (3%) with the compensation they received. Twenty-nine per cent were fairly dissatisfied and 21% very dissatisfied. Part of the dissatisfaction related to legal fees.

164. On legal costs, and the amounts actually received by claimants, Professor Sourdin also noted that:

  Despite concerns about costs and 'money in hand', approximately 71% of claimants thought that the process was 'affordable'. This is an interesting finding as many claimants appeared to have no knowledge or understanding about how their legal fees were made up.[80]
  'I was awarded $65,000 but I only got $22,000 after all the deductions. '

165. Professor Sourdin made the following proposal based on the findings:

  Many claimants who were surveyed had positive views about CARS assessors but were disenfranchised by other processes that were used to deal with their disputes. An education

[78] *Op cit*, para 1.24. Professor Sourdin noted a discernible level of dissatisfaction among claimants in respect of the services provided by their own legal representatives (personal communication).
[79] *Op cit*, para 1.60
[80] *Op cit*, para 1.82

campaign specifically targeted at lawyers and focused on how to engage with claimants in a respectful and inclusive manner could be helpful.[81]

166. The survey results and recommendations support previous work done by the Motor Accidents Council (MAC), which represents injured road-users who have lodged claims.[82]

167. Over the period 2004 to 2006, user group perceptions of MAS and CARS were the subject of studies conducted by the Justice and Policy Research Centre of the School of Law at the University of Newcastle. The value of the studies is limited due to the small sample of CARS claimants and because those surveyed had not had matters that had actually finalised at CARS. That survey noted a low uptake by claimants of the services of the MAA's Claims Advisory Service, suggesting that claimants may not be aware of sources of information about claims processes other than legal representatives.

Recommendation 9.

The MAA should develop strategies to improve claimants' understanding of the CARS.

Recommendation 10.

The MAA should evaluate the effectiveness of proposed new claimant familiarisation strategies by conducting ongoing studies of claimants' perceptions of CARS.

[81] *Op cit,* para 1.82

[82] See, for instance, Recommendation 3 of the Ninth Report of the Standing Committee on Law and Justice: 'That the Motor Accidents Authority make its strategies to improve claimants' understanding of the Claims Assessment and Resolution Service a priority and allocate resources accordingly, and that it evaluate the effectiveness of those strategies by conducting a further study of claimants' perceptions of the Claims Assessment and Resolution Service'.

Stakeholder views

- Key points

- Stakeholders support CARS and want more mediation and more specialisation and no change in jurisdiction
- Stakeholders, however share concerns about super-imposed inflation, withholding of exemptions and bias amongst the assessors

169. The various stakeholder groups have some commonly held views as well as individual views about CARS, including views on reforms. The most widely supported are included in this chapter and are drawn from written and oral submissions of insurers, legal practitioners, the views of the MAA, CARS assessors and the CARS Claims Assessment Team. A presentation of all of the views including the individual views is tabulated in Annexure 1, *Service providers' submissions: summary of issues and responses*,

170. The tables below set out areas of agreement and concern in terms of how CARS is operating now. All stakeholders were concerned about consistency of decision-making and credibility and there was general consensus on what might be done about improving these issues in CARS.

Stakeholder suggestions for consistency and credibility

171. Measures to improve the consistency of decisions and the credibility of CARS decision-making include:

- develop a framework of objective criteria to determine exemptions on the grounds of complexity
- revise the system for managing the performance of CARS assessors
- introduce stakeholder satisfaction surveys
- educate CARS assessors on aggregate trends. Currently, CARS assessors are not informed of the determinations and damages award by their peers, and so have no benchmark for comparison
- release all MAA publications, including e-bulletins, to stakeholders
- publish KPIs regularly and, perhaps through a central database, summary statistics on a regular basis and tag de-identified data to improve its useability
- for regional areas, create a circuit so that the identity of the assessor is not known prior to processing.

Table 3: Stakeholder view – areas of agreement

AGREED	
View	**Comment**
CARS is largely achieving its policy aims.	The CARS system is providing a 'good, practical, quick and cheap mechanism for resolving claims within the motor accidents scheme' (Australian Lawyers Alliance submission, p. 1). Allianz reflected the insurer view generally: CARS operates efficiently and effectively, compared with the alternative of having courts decide compensatory amounts for claims. [However], Allianz believes there are shortcomings in the current arrangements that undermine the scheme's objectives of providing a cost effective and rapid resolution to the majority of disputed claims. (Allianz submission, p. 1) Even those parties with a stated preference for courts – specifically, the Bar Association of NSW and the Australian Lawyers Alliance – expressed support for the role for CARS.
The current alternative dispute resolution (ADR) model is supported and may benefit from increased use of mediation.	The current arbitration-oriented model is seen to be appropriate and responsive by representatives from the CARS assessors and legal community: Whilst CARS provides a less stressful experience for claimants due to its lack of formality, it is accepted that Claimants generally like some degree of formality and CARS assessors acknowledge an assessment is an important day for them. Claimants (and insurers) must see that they are being listened to and their matter is being taken seriously. It is felt the CARS process has achieved the right balance between more formal court case and informal processes. (CARS Assessors submission, p. 7) There is resistance from the legal groups to formal mediation and to the introduction of additional 'hurdle steps' (on the way to court) such as mediation. In contrast, three insurance firms explicitly laid out support for the development of a new ADR model, one which places greater emphasis on mediation and interdisciplinary approaches.
Any reform must be balanced against the adjustment costs.	Deep structural changes are cautioned against. Any benefits derived from change need to be weighed up against the cost of introducing additional uncertainty into the scheme. Moreover, the system has been 'tinkered with endlessly ... [meaning that] accumulated experience is rendered redundant' (NSW Bar Association submission, p. 4). Any major changes proposed should be thoroughly supported by evidence. Changes volunteered in most of the submissions were 'more in the nature of fine-tuning' (e.g. Allianz submission, p. 4).
Recruiting specialist practitioners as CARS assessors is supported.	CARS assessors argued that familiarity with motor accidents law and developments in the District and Supreme Courts were essential to their role. Other stakeholders agreed that specialist knowledge was an advantage in the scheme. See below where this was countered with concerns over bias.
Legal representation of parties in the CARS process is supported.	The legal practitioners' view is that experienced professional advocates help ensure proceedings run smoothly and fairly for both parties. Their view is that given the complexity of the underlying law, the average claimant would have little prospect of appreciating the issues likely to arise and would have minimal or no prospects of complying with all the pre-filing requirements of Division 1A.
The CARS jurisdiction should not be expanded.	With the exception of CARS assessors and the CARS Claims Assessment Team, stakeholders considered the CARS jurisdiction should not be expanded. Their view was that denial of liability, vulnerable claimants and contributor negligence matters should continue to be exempted from CARS and proceed to court.

173.

Table 4: Stakeholder views – areas of concern

CONCERNS	
View	**Comment**
Insurers perceive pro-claimant bias among CARS assessors, and shortcomings in transparency and accountability.	One of the key themes to emerge as a result of experience to date is a real or perceived lack of transparency, accountability and performance monitoring of the CARS Assessors. (QBE, p. 4). There is consensus among insurers that this is a real issue. A particular source of concern is the variation in damages assessments between assessors. In response, CARS assessors have raised the point that they are not made aware of other assessors' determinations, and work in something of a vacuum. See suggestions below. Parties explicitly raised the importance of ensuring that appropriate resourcing be provided by the MAA so that initiatives such as performance management systems and regular reporting on aggregate trends can be introduced or improved. See below for suggestions.
CARS is not exempting enough of the matters that are complex and therefore unsuited for CARS assessment.	The CARS assessors' view is that complex matters are well within CARS capacity. The Bar Association would prefer more matters being referred to Court, insurers want a greater right of review but the Law Society favours the status quo. The Supreme Court has in at least four cases affirmed that CARS assessors are in the best position to determine whether a claim is or is not suitable for assessment and that they can bring their own expertise to bear in doing so. CARS assessors are probably dealing with more complicated cases than they were 10 years ago, no doubt due to the increasing experience and competence of the assessors. (CARS assessors submission, p. 11). All agree that the system was designed for simple cases. However, many service providers contend that CARS is determining cases too complex for its approach. Every submission has included commentary on the issue of discretionary exemptions for complex cases, but there is no consensus on a preferred course of action.
Superimposed inflation is threatening scheme affordability.	The insurers repeatedly raised concerns about what they see as an emerging trend of superimposed inflation that may significantly affect the scheme's overall affordability for consumers. Investigations undertaken on behalf of the industry found dramatic increases in certain assessment areas (such as an increasing proportion of assessments being made for care for soft tissue injuries) as well as wide inconsistencies in assessments. Submissions called on the MAA to recognise this as a serious issue and to respond accordingly.
Pre-filing requirements are complex and onerous.	According to the Bar Association, 'the entire claims procedure is now of Byzantine complexity' (Bar Association submission, p. 10). All stakeholders believed that the average claimant could not navigate it successfully without assistance. The service providers question whether the complex provisions of section 82, Division 1A and section 91 are achieving the desired underlying statutory objectives. A frequently cited problem is that claimants fail to provide detailed particulars under sections 85A and 89A.
Late claims decisions favour claimants and no time limits are set on applications to CARS.	The approach to the treatment of late claims should be revised. Claims brought outside the stipulated six-month period regularly attract opposition from insurers, with argument then ensuing over whether a 'full and satisfactory explanation' has been provided for the lateness. In the overwhelming majority of these cases, CARS finds for the claimant, but only in the wake of hearing delays and costs. The Bar Association has proposed that late applications be accepted without the need for any hearing, but subject to an economic penalty (e.g. 5% of the ultimate damages, with a cap). In contrast, most insurers submitted that compliance with deadlines is very important for the administration of the scheme as a whole, and are not in favour of any relaxation of the current requirements. In addition, most propose the introduction of a time limit for the bringing of any application to CARS (currently there is no time constraint).
The general public's understanding	The Motor Accidents Assessment Service Reference Group (MRG) and CARS assessors agree there is a lack of knowledge in the general public. As evidenced by their over-representation in late claims, WorkCover claimants in particular appear unaware of their rights and remedies

CONCERNS	
View	**Comment**
of CARS is poor.	under the MAC Act. There is a need to address the level of 'ignorant potential claimants' in the community.
The interplay between MAS and CARS is creating delays and adversely affecting health outcomes.	Firstly, a key issue here is the 'to-and-fro' that occurs between the two services. Secondly, objections have been raised by legal practitioners over MAS making determinations of causation, gratuitous domestic assistance and future needs (including treatment expenses) given the complexities of the law in these areas. Thirdly, proposals for a more multidisciplinary approach both within and between MAS and CARS have been raised. Suggestions have included medical training for CARS assessors, CARS assessors sitting in on MAS determinations (and vice versa) and MAS assessors sitting in on CARS determinations involving issues such as physiological impairment.
Cost regulations need to be reformulated.	Legal costs regulations do not adequately reflect the time involved and nature of the work for the legal profession within the CARS scheme. Change is required to properly reflect the work, especially given the front-end loading of the system. Consideration must also be given to ensuring the gap between what is customarily charged to the client and what is recoverable by the injured claimant is reduced. Allianz explicitly supported ensuring that the cost regulation is structured to promote early resolution.

174. Annexure 1 summarises stakeholder submissions in more detail. Each of the issues and suggestions for reform are covered in the following chapters.

175. CARS attracts intense scrutiny from stakeholder groups. This is true of other administratively-based dispute systems in compensation schemes. Allegations of bias and of limited access to courts are common complaints. It is also common that concerns are not completely borne out by the data as can be seen above with super-imposed inflation and the positive impacts that CARS is having on costs and delay. This is not an argument for avoiding reform. It does underpin the need for information about how the dispute system operates and performs before responses to criticism are formulated.

176. Accordingly where data was available, further analysis was undertaken to establish the facts relating to the most prevalent concerns. These were:

- the extent of the withholding of exemptions and
- evidence of assessor bias.

177. Further fact finding was also undertaken on delay issues between CARS and MAS. The results of these analyses are included in the next chapter.

Testing stakeholder concerns

178. Under the exemption provisions, it is insurers and claimants who characterise the facts relating to each case and therefore largely determine whether CARS is best suited to deal with the claim. As stated in the MAA Annual report 2009-2010, the MAC Act provides for two types of exemptions:

- *mandatory exemptions by the Principal Claims Assessor (PCA) (claims that must be exempted when certain specific circumstances exist as provided for in the Claims Assessment Guidelines)*[83] *and*
- *discretionary exemptions where a claims assessor, with the approval of the PCA, may find that a claim is 'unsuitable for assessment'.*[84]

Mandatory exemptions

▪ Key points

- CARS exempts more matters than it deals with. Exemptions comprise:
  - fault denied 60%
  - vulnerable claimants 15%
  - contributory negligence 10%.

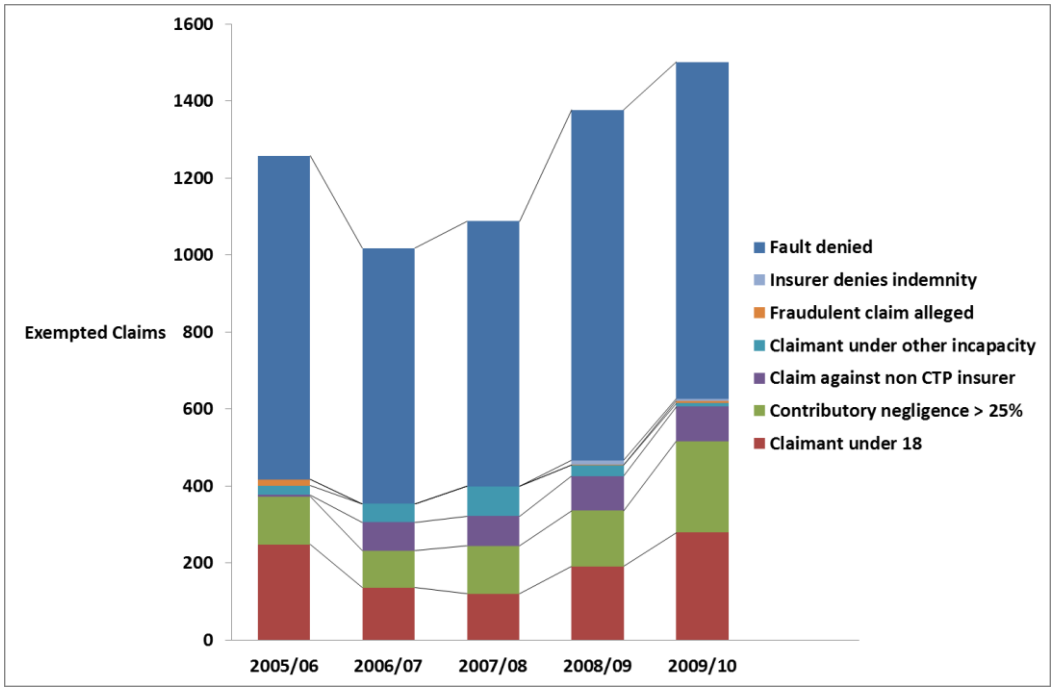
179. In 2009/10 CARS approved 96% of applications for mandatory exemptions from a reported 1501 claims.[85] The circumstances that the PCA must consider and be satisfied with in order to grant a mandatory exemption were also reported. These are listed with the specific Guideline reference below.

- Denial of fault - 8.11.1
- Contributory negligence by claimant alleged by insurer to be greater than 25% - 8.11.2
- Person under a legal incapacity - 8.11.3
- Claim against non-CTP insurer - 8.11.4
- Insurer denies indemnity 8.11.5
- Fraud 8.11.6

[83] s.92(1)(a) read with clause 8.11 of the Claims Assessment Guidelines 2008
[84] Section s.92(1)(b) read with clause 14.11 of the Guidelines
[85] See Motor Accidents Authority (MAA) Annual Report, Page 72

180. Figure 19 shows that the major grounds are: denial of fault, contributory negligence and children's cases. Each of these is examined below.

Figure 19: Reasons for Section mandatory exemption s.92 (1) (A) – 5 years to FY 2009/10



Note: The number of reported reasons for matters exempted from CARS may exceed the number of matters that have been exempted as there may be more than one reason for the exemption. Outcomes relate to matters finalised during the reporting period including applications for Exemption, General Assessment, Further General Assessment, or Special Assessment where an exemption may be issued.

Source: Motor Accidents Assessment Service (MAAS)

Denial of fault

181. Only 6% of all exempted cases reach a court hearing leading to a court decision. This raises the question as to whether more matters might have been resolved within the CARS process.[86] As can be seen, the most prevalent exemptions arise from a denial of fault on the part of the insurer – 58% of cases in 2009/10. Stakeholders also reported that despite the requirement in s.85A for claimants to produce details of their claim in denial of liability exemptions, very often s.85A particulars had not been produced. This raises the issue of how denial of liability is reliably supported on the part of the insurer at the time of the application for exemption. The lack of information is compounded by exempted claims not being subject to Division 1A and the compulsory conferences and information exchange required. The conclusion may be drawn that for exempt claims, serious collection and exchange of information only occurs once court proceedings have commenced.

[86] Submission from CARS Assessment Team – small sample analysis

182. Subject to cost-effectiveness investigations, the options available include:

- requiring all claims attracting exemption applications to be subject to early formal settlement
- a change to the mandatory exemption rules, requiring CARS to examine the merits of denial of fault defences to ascertain whether factors of complexity – making a matter unsuited for an expeditious CARS hearing – can objectively be said to exist. In the event that factors of complexity are found *not* to exist, such claims would be then be dealt with by CARS in terms of the usual general assessment procedure, and any assessment would be binding on an insurer
- the introduction of a new flexible and comprehensive case management system centred in CARS, to manage both of the above options and enable the inclusion of matters that currently bypass CARS.

183. The proposed case management restructure is described below in Chapter 10.

Recommendation 11.

The MAA should investigate the cost-effectiveness of providing that all claims currently exempted from CARS on the basis of a denial of fault should instead be subjected to early case review by CARS as part of a larger case management reform initiative. The purpose of the review should be to determine whether such claims would benefit from formal settlement steps within the CARS costs scales, or should be exempted, or be determined through CARS processes culminating in an assessment.

Vulnerable claimants – children

184. 19% of exemption cases in 2009/10 related to vulnerable claimants, mainly children under 18 years of age requiring court supervision of their interests.[87] Court supervision extends to directions for payments of awards to the New South Wales Trustee and Guardian. Most are claims of $30,000 or less which are well below the levels of claim dealt with by the District Court and with the scale costs payable potentially outweighing the award. Legal representatives have also indicated that the work required to undertake these cases is as onerous as more expensive court cases.[88]

185. The Principal Claims Assessor (PCA) has proposed CARS take on these cases given the reduced workload arising from the 2008 reforms and CARS expertise. This expansion should also include cases designated as simple that would otherwise go to the courts.

Recommendation 12.

Consideration should be given to expanding the jurisdiction of CARS to include some or all children's cases. Consultation would be required to inform any expansion decision. This should include:

- *consultation with the New South Wales Commission for Children and Young People and the New South Wales Trustee and Guardian*
- *revision of the legal costs regulation to provide adequate reward for legal representatives in children's cases*
- *consideration of restricting any revised CARS jurisdiction in respect of children to claims where less than $50,000 is in dispute.*

[87] Person under legal incapacity includes: (a) a child under the age of 18 years; (b) a temporary patient, continued treatment patient or forensic patient within the meaning of the Mental Health Act 1990; (c) a person under guardianship within the meaning of the Guardianship Act 1987; (d) a protected person within the meaning of the Protected Estates Act 1983; and (e) an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs. For the full list of exemption grounds, see s.92 (1) (a) and clause 8.11 of the Claims Assessment Guidelines 2008.

[88] Verbal submission – CARS Assessors practising in children's matters.

Contributory negligence claims – greater than 25%

▪ Key Point

- Claims with contributory negligence of greater than 25% alleged against claimants by insurers are an increasing exemption category - now 16% of all CARS claims.
- The incidence of contributory negligence as a defence has increased more rapidly since 2004 and now stands at 6-7% of all claims.
- Analysis is required to determine the outcome of claims in this category at court. A higher threshold for CARS may be justified.

186. Almost all motor vehicle injuries will involve at least an element of negligence on the part of both parties. Exemption certificates from CARS have been available since 1 October 2009, if there is an allegation of contributory negligence of 25% or more by the insurer against the claimant.

> 8.11.2 the fault of the owner or driver of a motor vehicle, in the use or operation of the vehicle, is not denied by the insurer of that vehicle, but the insurer of that vehicle makes an allegation in its written notice issued in accordance with section 81, that the claimant, or in a claim for an award of damages brought under the Compensation to Relatives Act 1897 the deceased, was at fault or partly at fault and claims a reduction of damages of more than 25%;
> (Note: this clause applies to all new applications received at CARS on or after 1 October 2009 and all matters current at CARS on or after that date that have not been determined.)[89]

187. Figure 19 above shows that in 2009/10, 16% of all claims at CARS were exempted on this basis.

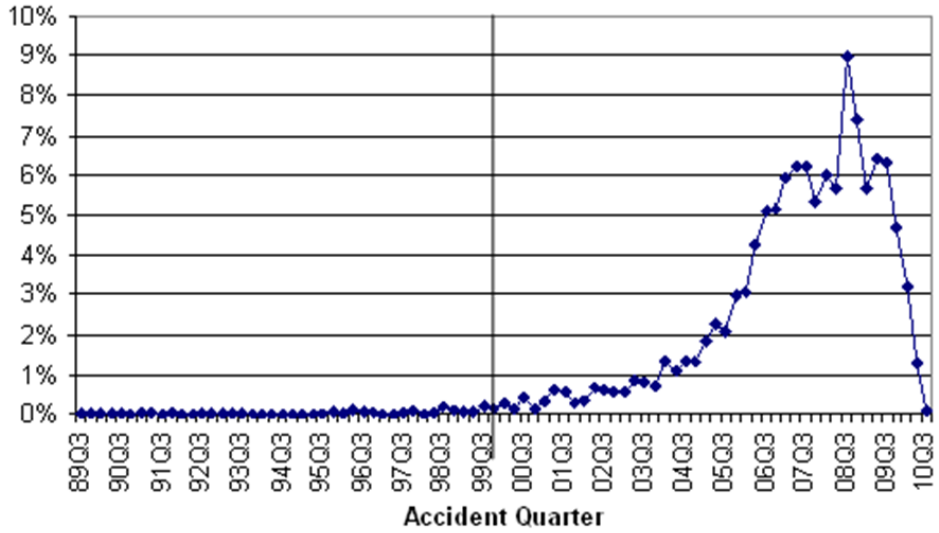
188. Additional analysis of claims where a contributory negligence value has been assigned in the data collections shows how this growth fits in context with previous years:

- contributory negligence has increased from 2004 to 2009 by 6-7%, and
- of those claims, 70-80% are for levels of negligence greater than 25%.

189. Figure 20 below shows that contributory negligence as a defence appears to have emerged after the introduction of the Motor Accidents Compensation Act 1999. (Note: figures in 2009 and 2010 below are not mature, in that all claims have not been received, and should be ignored).

[89] See Guidelines at P 18

Figure 20: Proportion of claims with contributory negligence -

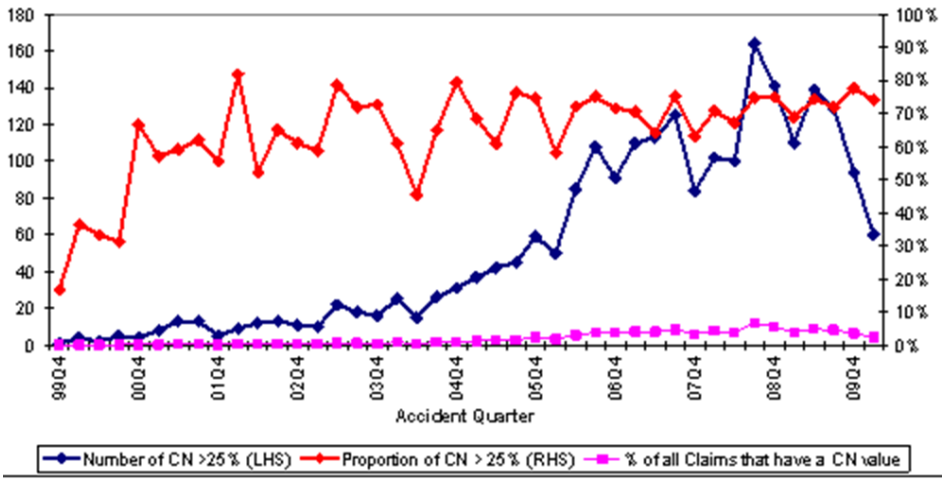


1989–2010 Q3 compared*

*Note: Data in 2009 and 2010 is not mature and should be discounted.

190. Figure 21 below shows the proportion of claims with contributory negligence alleged at greater than 25% (red line), numbers of claims (blue) and percentage of claims (purple).

Figure 21: Contributory negligence >25% as a proportion of contributory negligence claims *



*Note: Data in 2009 and 2010 is not mature and should be discounted. LHS and RHS mean left/right hand side axes

191. The growth in contributory negligence defence may be as a result of legislative changes in 1999 and a growth in injuries where those circumstances occur. [90] It may also be a reflection of other factors. No analysis was conducted on the outcomes of these matters after they had left CARS or if they correlated to the 'court other' case-load identified above which were subsequently settled and settled quickly. There is also no analysis on how these cases eventually settled and if the arguments for 25% fault was able to be sustained.

192. From the point of view of insurers, there may be cases where the allegation is made to remove cases from CARS for other reasons of complexity enabling access to the evidence testing of a court hearing or access or the evidence-based negotiation stages of the court process. Unresolved investigations may be one reason. In this situation, a 'safety valve' may be necessary and the little used discretionary exemption discussed below may not be sufficient as such a safety valve.

193. However, if the practice is becoming 'normal' then the objects of CARS are not being met and the cost-benefits to the scheme are being undermined. Accordingly, the review recommends further analysis to establish the facts in relation to fault for all matters that are exempted from CARS.

194. The exemption grounds in the Guidelines may require revision in light of such an analysis. One option is to increase the threshold. This would follow the assumption already in the Guidelines that contributory negligence that is substantive will introduce more complexity elements. (See discussion on complexity in Chapter 3 above). The real issue is how substantive this is. If further analysis shows that these cases are settling without reference to the 25% level, it may also show that these cases are less complex and may have been dealt with at CARS. On this basis a higher level – say 35% - may be warranted, considering difficulties surrounding any set level of percentage or value used as a threshold measure discussed below at 0. Additional analysis will show the likely size of the group of cases that this would affect and an appropriate level.

195. In any event, these cases represent an increasing use of the 25% threshold by insurers as a means of by-passing CARS, in part explaining a declining CARS caseload and an increase in court activity and the associated costs.

[90] For example, claimant passengers not wearing seat-belts or aware of driver alcohol consumption are now deemed to contribute to the injury. See section 138 MAC Act

Discretionary exemptions – complex claims

- Key points

- Discretionary exemptions account for 35 of over 1000 exemptions per year.
- More discretionary applications (57%) succeed than fail. The rule is to grant where both parties ask for exemption.
- In 68% of cases where a discretionary exemption application is requested, the assessor concerned recommends to the PCA that the case is not suitable for CARS.

196. Discretionary exemptions are claims considered 'not suitable for assessment' by the assessor. The assessor either on their own initiative or after application from either party first decides whether the case is suitable to be dealt with by CARS after hearing submissions from both parties. The PCA then separately either approves or does not approve the decision[91]. The criteria to be considered for both the decision of the assessor and the PCA are set out below.

Table 5: Discretionary exemption criteria

Criteria for discretionary exemption – 'unsuitable for assessment' s 92(1)(b) Extract from Claims Assessment Guidelines 14.16
In determining whether a claim is not suitable for assessment, an Assessor and the PCA shall have regard to the circumstances of the claim as at the time of the preliminary determination including, but not limited to: – whether the claim is exempt under s.92(1)(a) (the mandatory exemption grounds) – the heads of damage claimed by the claimant and the extent of any agreement by the insurer as to the entitlement to those heads of damage – whether the claim involves complex legal issues – whether the claim involves complex factual issues – whether the claim involves complex issues of quantum or complex issues in the assessment of the amount of the claim including but not limited to major or catastrophic, spinal or brain injury claims – whether the claimant has been medically assessed and is entitled to non-economic loss pursuant to s.131 and the claim involves other issues of complexity – whether the claim involves complex issues of causation in respect of the relationship between the accident, the injuries sustained and disabilities arising from it including but not limited to multiple accidents or pre-existing injuries or medical conditions – whether the insurer is deemed to have denied liability under s.81(3) – whether the claimant or a witness, considered by the assessor to be a material witness, resides

[91] s.92 (1)(b)

outside New South Wales

- whether the claimant or insurer seeks to proceed against one or more non-CTP parties
- whether the insurer makes an allegation that a person has made a false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the claimant in the accident giving rise to the claim.

197. The most common grounds in applications for a discretionary exemption reportedly are involvement of s92 (1) (b) complex legal or factual issues, including complex issues of causation.

198. Statistics on discretionary exemptions have been maintained on the CARS Sirius IT system since 1 October 2008.

- Of the 79 cases recorded, 57% (45) of matters were exempted.
- In some instances applications that have both the support of the insurer and of the claimant are immediately exempted by the PCA, 24% (19).

199. A detailed breakdown of the disposition of applications is shown below.

Table 6: Discretionary Exemption outcomes*

Outcome and number of discretionary exemptions – total 79
23 - both parties submitted claim not suitable and should be exempted: – **19 not allocated and exempted by the PCA** – **3 allocated with suitability to be decided by assessor** – **1 settled prior.**
54 - assessor found not suitable and should be exempted. – **45 PCA approved for exemption** – **9 PCA did not approve** – **25 - assessors found suitable for CARS and not exempted**
Claimants asked for exemption in 31 cases, insurers in 48.
One insurer has not brought a single exemption application since 1 October 2008.

*Not cumulative

200. As can be seen above, the numbers are low and the majority of applications for exemption are accepted by both assessors and then by the PCA. However, discretionary exemptions attracted significant attention from stakeholders.

201. Insurers submitted that any claim with significant complexity should be outside the jurisdiction of CARS. Together with the Australian Lawyers Alliance they submitted that:

- the assessors and the PCA were acting outside of the scope of the legislation in how complexity was characterised and

- in finding an expanding range of case content to be retained by CARS.[92]

202. The stakeholders proposed reform was to remove the discretion entirely by replacing the subjective complexity test with that of an objective standard such as claim value. Claims for an amount greater than $500,000 or $750,000 should be automatically exempt.

203. CARS assessors and the Law Society, on the other hand, contended that assessors were well qualified to determine whether a claim was suitable for assessment on a case-by-case basis. The CARS assessors added:

> CARS assessors are probably dealing with more complicated cases than they were dealing with 10 years ago no doubt due to the increasing experience and competence of the assessors.[93]

Extension of grounds for exemption and fast tracking

204. New thresholds for exemption or new definitions may generate perverse impacts and these should be considered in any changes to the Guidelines:

- a new figure would still be arbitrary and inflexible for individual circumstances and still require a new discretionary process to manage the anomalies, and
- fresh superior court scrutiny on any definitions would be available involving more costs to the scheme.

205. Grounds that are largely accepted in other tribunals may be usefully adopted. For example, fast-tracking is available for cases with wider implications:

- if both parties provide grounds for saying that a claim raises important new issues of law, and
- if insurers flag an impact from a case that would affect the insurance fund and a test case is required to deter a spate of claims. [94]

206. Applied to CARS, the grounds for such exemptions might include:

- the court outcome must have significant and unique potential to influence a large class of similar cases, or
- there must be a potentially significant impact on green slip prices.

207. For both types of exemptions changes are merited despite the difficulties raised.

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[92] See Robinson, Mark SC *Challenging Awards of Claims Assessors and Decisions of MAS Assessors, Review Panels and Proper Officers of the Motor Accidents Authority of NSW,* at *http://www.robinson.com.au/monoartpapers/papers/2013%20MAR-Paper%20Challenging%20CARS,%20MAS%20and%20Proper%20Officers%202%20March%202013%20NSW%20Bar%20Assn%20PI%20Conf%20Sydney-final.pdf*
- and in ALA and Bar Association submissions to the current Parliamentary Inquiry. See generally https://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/8EEA6BBDACB2FF4ECA257BE200198079 accessed December 2013

[93] CARS assessors submission

[94] Workers compensation schemes exercise a right to make submissions in 'strategically significant cases' brought by self insurers that would constitute an unexpected risk to the scheme through a potential precedent.

Recommendation 13.

The current exemption from CARS for claims with significant contributory negligence components should be retained but the threshold for exemption raised to where negligence of greater than 35% is alleged.

Recommendation 14.

The current provisions and procedures dealing with discretionary exemptions should be retained. The 2008 Guidelines should, include additional factors to guide exemption applications, - whether the claim raises important new issues of law and whether the claims may give rise to a 'strategically significant case'.

Bypassing claims

- Key points

- 1525 claims bypass CARS and settle very quickly after exemption
- Costs for these settlements are much higher than in CARS
- Cost to settlement ratios show the contrast. In 2009/10 the average settlement amounts and average legal costs ratios were:
  - Cars 15.7%
  - exempt claims without court proceeding 22%
  - exempt claims and court proceedings 24%
- On this basis, the argument for reform to reconsider exemption provisions and to introduce earlier and more focussed settlement mechanisms is compelling.

208. The exemption provisions raise costs issues for the scheme and have created a group of claims characterised as 'by-pass' claims. The figures and table above show the following:

- Of those matters that are not resolved in early direct dealings between the parties and their representatives, well more than half (13% of finalised matters) are directed past CARS towards the court and less than half (about 10%) stay within the CARS processes.
- Of the 1,525 cases that bypassed CARS and were directed towards the court in 2009/10, only 91 (six percent) were actually the subject of completed court hearings and determinations. The great majority, 94%, were settled either without either court proceedings commencing (41%) or after commencement of court proceedings; they did not go to court judgement (53%).

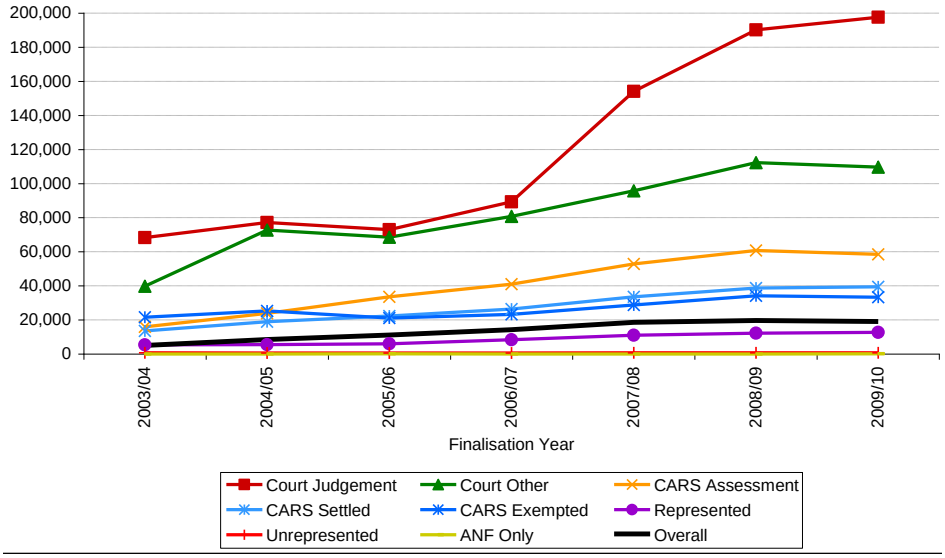
209. These figures should prompt an enquiry that goes to the very reason for the establishment of CARS. Claims are exempted from the CARS because they are characterised as being too complex. But in fact, as can be seen, the vast majority of these cases are finalised without being heard by a court and given the short period of time between exemption and court-auspiced settlement, may have been settled within CARS.

210. As already noted above, a claim that was lodged with CARS and then settled in the CARS process (without a general assessment) in 2009/10 took on average 125 days less to finalise than a claim that is lodged with CARS, exempted but then settled without any commencement of court proceedings. A claim that is lodged with CARS, exempted and finally settled after commencement of court proceedings (but without a judgement) takes around 545 days longer to finalise. See Figure 14 above.

211. A comparison of the average amount of legal costs per claim for cases that are exempted from CARS, where litigation is commenced but which settle without a Court judgement (the green line in Figure 22 below) and in CARS settled cases (the light blue line), shows:

- $109,607 per case for cases settled within the court, against
- $39,477 per cases settled at CARS.

Figure 22: Average Payment per Claim Finalised Total Legal (Defendant + Plaintiff, Inflated



212. The same comparison, between CARS exempt settlements (the dark blue line), with settlements within CARS (the light blue line), shows $33,372 and $39,477 respectively.

213. Cost to settlement ratios show the contrast. In 2009/10 the average settlement amounts and average legal costs ratios were:

- Cars settled 15.7%
- exempt claims without court proceeding 22%
- exempt claims and court proceedings 24%

214. On this basis, the argument for reform to reconsider exemption provisions and to introduce earlier and more focussed settlement mechanisms is compelling.

CARS Decision-making – concerns over bias

▪ Key points

- Statistical analysis of awards over 10 years of the 10 busiest Assessors showed no bias.
- Bias concerns should be offset by increased transparency
- Median analysis showed minimal variations with more variation in small caseloads and more consistency in high caseloads
- Assessors with high caseloads are more likely to be consistent

216. Common issues raised by insurers and other legal stakeholders in submissions to the review and in discussion related to the composition and decisions of the CARS assessor panel. Specific criticisms related to the Assessor Panel and there were several related elements:

- a lack of transparency about the decision-making process linked to a view that some decisions were not backed by adequate supporting reasons including exemption decisions and they were unable to be scrutinised
- inconsistency in decisions reflected in amounts assessed for similar cases.
- perceptions that outlier decisions tend to favour claimants and
- tended to set new benchmarks, a factor that then drove superimposed inflation.

Part-time assessors appearing in CARS in other roles

217. CARS Assessors who are also legal practitioners may appear in CARS hearings or be called on to make a decision in relation to propositions that the practitioner has previously advocated. This has led to perceptions that:

- there is a potential conflict of interest for legal practitioners in executing these roles
- the assessor–practitioner conflict of interest is especially acute in regional centres where there is a very small pool of personal injury lawyers
- claimants may challenge decisions in further court proceedings whereas damages assessments are binding on insurers (appeals) and
- certain assessors show bias, leading insurers to settle cases allocated to such assessors on an inflated basis

218. There is also a perception of an over-representation of claimant practitioners among the ranks of the assessors. This is correct. Claimant practitioners make up two-thirds of the panel. The Law Society and New South Wales NSW Bar Association expressed the view that despite this skew, CARS Assessors were fair and unbiased in their decision-making.

219. Insurers saw bias as entrenched and evidenced privileged access to internal communications as providing a tactical advantage when part-time assessors were acting in their private roles. While Assessors rejected this, it is indicative of potentially misinformed insurer attitudes to CARS and indicates that greater transparency may be warranted.

Insurer forfeiture of appeal avenues

220. There are several aspects to decision-making in CARS. The first is the quality of the decision-making and the second the opportunity to appeal and overturn decisions.

221. Some insurers, for example, are concerned that CARS is not making awards in line with insurer expectations, that this will destabilise case estimates and raise the risk of the scheme. Some claims are reportedly deliberately settled in order to avoid determination by assessors. Even if such a fear is baseless, as a driver of behaviour it has potential to distort the scheme outcomes over time.

222. Insurer concerns that they have forgone 'appeal' rights enjoyed by claimants when the scheme was established are the same issues the government dealt with when the CARS scheme was established in 1999. In the insurance industry generally, the agreement to give away a right to take matters to court in exchange for speedy, less costly resolution of claimants' complaints and disputes is common.[95] The current Financial Ombudsman Organisation is based on a similar premise and agreement with the banking industry. The assumption is that insurers have more resources with which to appeal and that if such an appeal right was made available then this would be inequitable for claimants with fewer resources.

223. The lack of the insurer's right to challenge is balanced by a cost disincentive for claimants. If claimants choose not to accept an assessment, they are subject to costs penalties if the eventual award of the court does not improve on the rejected settlement amount.[96]

224. The fact that over 10 years on, some insurers query this fundamental element as a basis for the operation of the scheme is not a criticism of the assessors and would not be likely to be impacted by changes in assessor behaviour.

Remedial measures proposed by the insurers

225. The integrity of the assessors was not raised as a concern. Bias was seen to be unconscious or the result of one-sided experience. Insurer proposals to address the perceived problem of a pro-plaintiff bias within the ranks of CARS assessors were to:

- 'balance the panel' through a selection and appointment process that would deliver more defendant-orientated assessors
- undertake more diligent performance management of assessors and
- promote assessor education.

226. An alternative approach to securing consistency used in other jurisdictions would be to appoint a panel of permanent, professional assessors appropriately qualified and trained. This was not advocated by insurers but was supported by defendant lawyers.

[95] See s 95(2) of the MAC Act
[96] See s.151(2)(b)

Assessing Bias: Comparing Assessor award amounts for consistency

227. In an effort to detect any evidence of bias, Taylor Fry conducted further analysis. The resulting work was examined against the pressure points outlined above and evaluated against fluctuations in decisions expected in any group of decision-makers. The results are explained as follows:

- In a statistical or actuarial analysis of case decisions, there will be individual cases that represent anomalous results – often called outliers. It is these outliers that are always the source of criticism and that are cited as evidence of inconsistency or bias.
- In well-managed schemes, outliers also represent the cases that break new ground or test the limits of legislation. It is these cases that set the precedents for succeeding cases to follow.
- Therefore, in an examination of outliers, care must be taken that conclusions do not overreach the data. While identifying outliers, statistical information cannot be used for determining anomalies in decision-making by individual assessors or in relation to specific case decisions.

228. In scheme management, consistency and potential bias must be addressed in two ways:

- clear statistical analysis to determine whether the number of outliers is anomalous or is part of normal variability
- establishment of processes that can review potentially anomalous decisions and feedback information to improve decisions in the future.

229. For scheme sustainability, consistency and bias must be addressed in perception as well as reality.

Data analysis to assess bias in the decisions of the 10 busiest assessors over 10 years

▪ Key point

- Statistical analysis of awards over 10 years of the 10 busiest assessors showed no bias.
- Bias concerns should be offset by increased transparency
- Median analysis showed minimal variations with more variation in small caseloads and more consistency in high caseloads
- Assessors with high caseloads are more likely to be consistent

230. In February 2011, actuaries Taylor Fry provided an analysis of the ten most active CARS assessors (by number of assessments) from 2002/04 to date. The analysis shows:

- the proportion of each assessor's assessment amounts that were above the overall median for that year, adjusted for injury severity (to assist in an attempt to compare like with like)
- the average assessment for each assessor relative to the overall assessment average for that year, adjusted for severity.

231. These assessors decided more than 1000 cases, averaging more than 100 each. The most active dealt with 140 matters and the least with 91). The pool of cases examined was adjusted for the severity of the injury, to reduce the potential for complex cases to unduly influence results, the cases were adjusted for the severity of the injury.

232. The annual CARS median award was determined and the proportion of each assessor's decisions, above the median for each year was plotted. As the median is the middle value in any collection, for any one assessor, half the assessments in any year would be expected to be above the group median and half below if there were no other factors present. If cases were randomly allocated to assessors and if the basis for assessments were similar, each assessor's settlement would be as likely to fall below the median as above in any one year. Over time, assessors would be expected to sometimes be above and sometimes below the median.

233. The average assessment for each assessor, relative to the average for all assessors was also plotted on the same axis. In this case, if decisions were consistent for each assessor, their average assessment would be as likely to fall above the group average as below it in any year. If bias was not present, over time, about half an assessor's average determinations should fall above the overall average and about half below.

- Six of these high workload assessors gave decisions that generally fell below the CARS medians and averages.
- Two gave decisions that came above them while two gave decisions in and around the medians and averages.
- Except in the case of one assessor – who only ever gave decisions below the medians and averages – all assessors made assessments that fell variously above or below the medians and averages from year to year.

234. A year's average assessment for any assessor could vary from the average. So, for instance, one of the most heavily used Assessors in one year gave assessments that were on average 60% higher than the CARS average that year. Two years later, the same assessor gave assessments on average 60% lower than the CARS average. Two years later, the picture had changed again.

235. As averages can move up or down due to just a few exceptional cases, medians provide a more accurate view of volatility. All assessors bar one had proportions of assessment outcomes variously above and below the median from year to year.

236. The following observations can be made in in relation to the assessor sample analysis:

- Some assessors showed a tendency to consistently make awards below the group median and some consistently above. When years with low assessment numbers were excluded, only one assessor made assessments that were never above the median, but this assessor's assessments were less variable than some others and tended to be just below the median since 2007.
- Those assessors with median assessments above the CARS median tended to have a small number of cases pf extremely high assessments in one or two years. These assessors were not consistently above the median in all years – it was a few anomalous cases that pushed

their median up. It cannot be said whether these cases were exceptional in their circumstances as well as the quantum of the determination.

- The assessors providing lower than median assessments did handle more cases. This may not be a reflection of a conservative bias but, coupled with the observation on anomalies pushing up assessments; it may be that more practice gave more consistent determinations.

237. In summary, while there is volatility from year to year in individual assessors' assessment averages and medians, this may be as much a product of a change in the substance of matters under scrutiny from year to year as anything else. All but one assessor had years above and below the median, indicating no bias in the group towards conservative or generous decisions.

238. The annual CARS median award was determined and a table was prepared of the proportion of each assessor's decisions above the median for each year. Removing data points with too few cases, the spread can be seen in Table 7 below.

Table 7: Assessor awards – incidence of adherence to medians and variations from medians; above and below –

10-year data set of 10 busiest assessors

Assessor	Above median	On median	Below median	Total
1	4	2	1	7
2	0	1	6	7
3	2	0	5	7
4	1	2	3	6
5	3	2	2	7
6	3	1	1	5
7	4	1	1	6
8	1	2	4	7
9	2	2	3	7
10	1	4	2	7
Total	21	17	28	66

239. An observation from the general figures in Table 8 that is relevant to any discussion of changes in the composition of the assessor panel is that in recent years even the most heavily used CARS assessors delivered about eight (the lowest number) to twenty (the highest) assessments per year.

240. Following a series of interviews with assessors and other service providers, the conclusion of this review is that assessors have discharged their duties with integrity. No evidence of consistent bias in determinations is discernible.

CARS and MAS delays

- Key points

- Minimal controls over referrals to MAS by claimants and insurers result in unnecessary costs and delays for CARS and the Court.

241. CARS and the Medical Assessment Service (MAS) have discrete and complementary roles to play in relation to dispute resolution. Coordination and management, including case management is provided by the Motor Accidents Assessment Service (MAAS). In the normal course, any medical dispute generated in the context of a claim will be determined by MAS before any dispute of the compensation amount is determined by CARS.

> The purpose of MAS is to ensure that medical disputes are determined efficiently and effectively by independent medical experts as early in the life cycle of a claim as possible, instead of being determined in a final court hearing by a Judge, often many years after the accident. This is to better enable the possibility of early treatment and rehabilitation, and early clarification of entitlements, and to help enable a fully informed resolution of the claim as early as possible, avoiding the need to proceed to Court wherever possible.[97]

242. When an application is lodged with MAAS in respect of an unresolved claim, a file is created and allocated to a case manager responsible for the end-to-end management of the matter. The insurer is invited to respond and MAAS conducts an allocation review to determine the eligibility of the dispute, whether the matter is ready for assessment and the way the assessment is to proceed. If a medical dispute has emerged, that dispute will be allocated to one or more of the panel of medical assessors.

243. Under s.58 (1) of the MAC Act, a medical assessor is empowered to decide disputes over:

> *(a) whether the treatment provided or to be provided to the injured person was or is reasonable and necessary in the circumstances*
> *(b) whether any such treatment relates to the injury caused by the motor accident*
> *(c) whether the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10%.*98

244. Stakeholders shared concerns about delays between CARS and MAS and a pattern of continuous cross-referrals that was seen to be the cause. The potential for delay was seen to arise from the entitlement of a party to seek a further medical assessment -

> *on the grounds of the deterioration of the injury or additional relevant information about the injury'*.[99]

[97] MAAS *2008/09 Internal Staff Review* at 65
[98] s.58(1)
[99] s.62(1)

245. The right has reportedly been exercised but with little supporting evidence provided by both claimants and insurers to justify it. The effect has been to delay the further processing and finalisation of matters at CARS. This is a common cause of delay in tribunals and similar systems interacting with medical assessment panels or other types of expert panels.

246. The accepted approaches to control these delays are designed to shift process control from parties with no interest in pursuing deadlines to the tribunal, so that process powers may be exercised to control timelines.[100] These approaches include:

- screening applications for further assessments making sure the requisite supporting information is included,
- making further assessments available only with the agreement of the relevant tribunal,
- making further assessments available only on the volition of the tribunal member or, in this situation the assessor.

247. Both courts and assessors currently have significant process control powers and could appropriately control the demand for additional assessments. Section 62 should be amended so that only a court or an assessor is empowered to refer a matter for a further assessment, whether of the decision-maker's own volition or on the application of a party.

MAS, CARS and the Workers Compensation Commission

▪ Key points

- CARS and MAS roles overlap in some circumstances. Better role clarification and training may assist as well as integration of MAS with the Workers Compensation Commission

248. Proposals for a more multidisciplinary approach both within and between MAS and CARS have also been raised. Suggestions have included medical training for CARS assessors, CARS assessors sitting in on MAS determinations (and vice versa) and MAS assessors sitting in on CARS determinations involving issues such as physiological impairment.

249. Another contention raised with the review was that CARS rather than MAS should be assessing whether treatment is reasonable and necessary in the circumstances, especially in relation to gratuitous domestic assistance and future needs given the complexities of the law in these areas.

250. These matters are outside the scope of this review; however the issue and the structural solutions are common. In some situations medical tribunals are established; in others, specialist

[100] See a discussion of the principles for reducing delays and supporting research in *The Timeliness Project* October 2013 published by Australian Centre for Justice Innovation (ACJI) MONASH UNIVERSITY http://www.law.monash.edu.au/centres/acji/projects/timeliness/index.html

panels advise tribunals or as in this case, medical opinions are binding and careful clarification between medical and evidentiary matters is made. In others again, qualified gatekeepers such as CARS assessors craft medical questions for medical assessors and their opinion is binding.

251. The President and Registrar of the Workers Compensation Commission (WCC) suggested that consideration should be given to integrating the services of the WCC's approved medical specialists with those of the MAA's medical assessors. This and the matter above should be considered with any reassessment of the role of CARS, MAAS and MAS.

Recommendation 15.

In order to reduce delays in finalising matters, s.62 should be amended to provide that any further medical assessment should be at the direction of the court or an assessor, or with the leave of the court or an assessor on application.

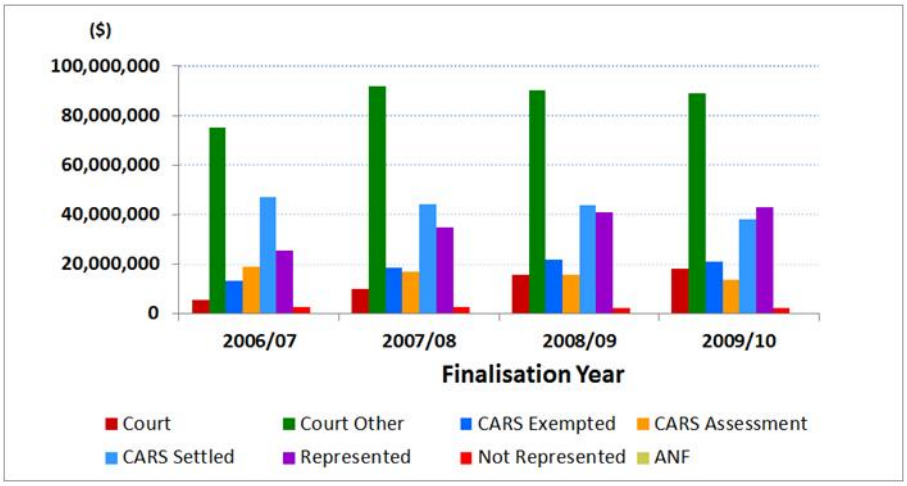
- **2012 reforms to workers compensation arrangements in NSW have emphasised early intervention and management of disputed claims and a move away from formal processes. Two new offices, the WorkCover Independent Review Office and the Independent Legal Assistance and Review Service (ILARS) have been established. Both are independent of WorkCover and of the Workers Compensation Commission. (Note: WorkCover manages and is accountable through its fund for claims so acts through insurer agents. It is perceived by workers to be making decisions necessitating fully independent claimant advisory bodies. This is unlike MAA which simply regulates a privately underwritten scheme and has no financial interest in individual decisions made by CARS. Legislative independence, however for CARS is still provided subject to Chapter 7 discussed below.)**
- **WIRO acts similarly to an Ombudsman looking at insurer procedures and complaints but can only do so after internal review by the insurer and after a merits review by the WorkCover Authority (now managed by MAS in the MAA). Medical assessments are to be binding. WIRO can only investigate and make 'non-binding' recommendations for specified action to be taken by the insurer or the worker'.8**
- **ILARS will receive and determine applications for legal funding (similarly to Legal Aid) for matters in the WCC and only 'approved legal service providers' will be engaged. WIRO will ensure early take-up of legal assistance to collect and collate information so disputes may be quickly resolved.**
- **The WCC no longer determines disputes about work capacity decisions and costs orders may no longer be made thus reducing disputation and legal costs.**[101]

[101] See http://www.workcover.nsw.gov.au/formspublications/publications/Documents/wc-dispute-resolution-3958.pdf

Pre-Cars Assessments – Division 1A

252. Stakeholders were concerned that Division 1A processes are onerous, creating costs for both claimants and insurers, enabling opportunities for legalistic and adversarial behavior and most descriptively they were 'byzantine'. Despite these concerns, the processes are resulting in increased pre-CARS settlements, shorter delays and lower costs. At the same time the CARS option may have had prompted greater lawyer involvement so that the pre-Cars assessment process may be effectively navigated. This can be seen below with increases in the represented group (purple) after 1 October 2008 balanced by decreasing CARS settled payments (light blue).

Figure 23: Legal payments by settlement stage - 2006/07 to 2009/10



253. The concerns that the process may be too onerous hinge on the efficiency of the insurers and claimants in collecting information, arranging events and in negotiating according to 'model litigant' principles. Deadlines require that offers must be made within 1 month of the claimant's injuries stabilising (as agreed by the parties or assessed by MAS) or within 2 months of the claimant providing all relevant particulars (whichever is the later).

254. Delays and inefficiencies that mean these deadlines are not met are inevitable, if the process is not managed or if there are no incentives to cooperate. The key feature of Division 1A is that it leaves the process to the parties to implement in each individual case. If their interests are not aligned the cooperation that this requires may not be readily forthcoming unless there is some prescriptive regulatory guidance, supervision by a regulatory official or other incentive.

➲ **In 2012, the PCA undertook an analysis of all Division 1A matters filed with CARS and found that applications for dismissal because parties had not complied with deadlines were the same as under the previous less onerous system, indicating that a lack of timeliness was not necessarily the reason for non-compliance with Division 1A The main reason dismissals were sought after Division 1A attempts was that the claimant's information or 'particulars' were insufficient for the insurer to make an offer within the timelines. This raised a variety of concerns over whether the insurer could make such an offer. Some insurers were over-represented in these applications indicating confusion on the part of one or two insurers rather than a problem with the provision. The PCA recommended that CARS decisions on dismissal applications be published to provide clarity to insurers on the practical interpretation of Division 1A and for the MAA to proscribe new forms to streamline both offers and statements of particulars. Similar powers to courts to waive timelines were also proposed. These reforms with the exception of the latter are now underway.**

A closer look at approach and structure

255. CARS operates similarly to many tribunals in Australia. They are less formal, adopting methods of operation that that are quite different to those accepted as standard in the Australian court system. The 'inquisitorial' approach that is commonly used is based on a European justice model and while accepted as a legitimate means of arriving at a fair and equitable outcome, is unfamiliar to many stakeholders.

256. Partly because of this, CARS assessments generate a degree of criticism that amount to real concerns with the system and a set of apprehensions that arise from unfamiliarity. Various stakeholders raised these concerns as a basis for reforming CARS.

Case appraisal and decision-making

- Key points

- Assessors should take a more stringent approach to eatablishing the sources of critical evidence. Insurers should recognise that the low-cost nature of CARS requires non-adversarial informality. However, more transparency around sources of information used by assessors is required, as already noted by the Supreme Court.
- Legal practitioners are still perceived to act in an adversarial way, countering the benefits of delay reduction and cost effectiveness of the inquisitorial approach envisaged by the legislation.

Inquisitorial approach used by CARS

257. CARS uses an inquisitorial rather than adversarial approach when conducting hearings, settling claims and assessing exemption applications. This approach borrows from processes used in low cost tribunals in Australia and is underpinned by the MAA Claims Assessment Guidelines. [102] The Objects of CARS contained in the Guidelines require assessors:

> *to assess claims and disputes fairly and according to the substantial merits of the application with as little formality and technicality as is practicable and minimising the cost to the parties (1.14.2)*

The Guidelines also give detailed directional power over proceedings.

> *The Assessor shall determine the way in which an assessment is to proceed and may:*
> *16.8.1 decide the elements of a claim on which oral evidence or oral argument may be submitted;*

[102] See note 115 above

16.8.2 direct that evidence or argument be presented in writing;
16.8.3 direct that submissions be presented in writing;
16.8.4 determine whether an Assessment Conference is necessary and the time and place for any Assessment Conference that is to be held;
16.8.5 determine whether any other conference is necessary; and
16.8.6 direct the number and/or type of witnesses who can give evidence at the conference.

258. The legislation also sets out the legitimate basis for departing from the more familiar adversarial model:

- S104 (6) of the MAC Act enables an assessor to proceed to a decision if they are satisfied that sufficient information has been supplied, effectively enabling proceedings to be truncated.
- Section 105 (4) also gives assessor power to obtain advice which could be advice from sources other than the traditional sources in an adversarial process where the adjudicator is limited to information brought by the parties.

259. An inquisitorial approach is defined as a decision-maker having– 'a role in questioning witnesses, in deciding what evidence is to be collected and presented, and in conducting investigations'.[103]

260. The approach is the standard judicial practice in Europe and is a recent adjunct associated with relatively new tribunals in Australia. It replaces the traditional British adversarial approach where parties present their side of the case and test the evidence put by the other side. The advantage of the inquisitorial approach is that it removes the costs and delay associated with unnecessary leading of some evidence. Instead, a qualified expert adjudicator identifies the relevant evidence and ensures that it is heard and subsequently tested before making a decision.

261. Inquisitorial approaches are criticised in Australia because of the differences to the prevailing adversarial legal culture used in the courts and governed by long-standing and well-known rules of evidence. The legislation that establishes tribunals with this approach often does not clearly spell out the proactive nature of the role and can bring processes like CARS into conflict with advocates where the legal cultural preference is to test evidence from an adversarial position [104]

262. Stakeholders echoed these concerns and raised others including confusion experienced by claimants and regular users of CARS. Assessors are seen to change roles from facilitation in teleconferences to conciliation or mediation techniques in conferences and then may exercise investigative questioning with final decision-making at the end of the process.

[103] See generally 'Information about the law in NSW' http://www.legalanswers.sl.nsw.gov.au/guides/hot_topics/australian_legal_system/other_influences.html accessed December 2013

[104] Bedford, N & Creyke R, *Inquisitorial Processes in Australian Tribunals* Australian Institute of Judicial Administration 2006, p64 http://www.aija.org.au/online/Pub%20no79.pdf accessed December 2013

263. Claimants may be concerned about having said too much under a misapprehension of informality only to find that their comments may have been taken into account against them later. Some schemes overcome this by splitting the roles of assessors and mediators while others rely on the skills of the decision-maker to be very clear about the process and to obtain the trust of the parties over how it will proceed.

264. CARS assessors are clear that they must gain the trust of the parties. They do this by ensuring that the parties are 'heard and taken seriously, while striking a balance between formality and informality'. They described their approach as follows:

> There is a debate about whether CARS is inquisitorial or adversarial or whether it should be more inquisitorial or more adversarial. There is also debate about whether CARS assessments should include some form of mediation or whether there should be more arbitration. It must be remembered that there are 30 CARS assessors and whilst the basic model of assessment is the same there are 30 individuals undertaking this work in a flexible environment all with their own personal experience and backgrounds. Barristers who are part time CARS assessors are used to the adversarial nature of the courts and may bring that experience to the CARS assessment. Solicitors who are part time CARS assessors with training and experience in mediation may bring that experience with them. It should also be remembered that not all claims are the same. Straightforward claims lend themselves more to an assessment where the assessor might make attempts to conciliate them. More complicated claims may require an inquisitorial approach. Claims where there are significant credit issues may need to proceed in a more formal court or arbitration-like manner. One of the best features recognised by all of the assessors is the flexibility of the assessment process and its ability to accommodate the variety in assessors and the variety of claims.
>
> Whilst CARS provides a less stressful experience for claimants due to its lack of formality, it is accepted that claimants generally like some degree of formality and CARS assessors acknowledge an assessment is an important day for them. Claimants (and insurers) must see that they are being listened to and their matter is being taken seriously. It is felt the CARS process has achieved the right balance between more formal court case and informal processes. Of all the assessors spoken to during the preparation of these submissions (noting that almost all work in both the CARS and court systems) not one of them agreed with the suggestion that CARS has become too court-like. Some CARS assessors have observed that some members of the legal profession act in a very adversarial manner.[105]

Evidence-based decisions and procedural fairness

265. CARS stakeholders had further issues with the inquisitorial approach. Insurers were concerned that its use in CARS enabled assessors to avoid making 'evidence-based' decisions. This is because CARS assessors intervene in the hearing process to question claimants and insurers rather than allowing representatives to present their own case and to be questioned by the other party, all of which takes time. Insurers have rightly or wrongly claimed that this amounts to a breach of natural justice as:

- points that they felt should have been made by representatives are interrupted and missed

[105] CARS assessors submission

- decisions are based on assumptions that are not clear from the information provided to the hearing and assessors may take advice themselves from unknown sources about the case
- Claimants and other witnesses are questioned directly by the assessor and answers are not tested in cross-examination.

266. The tensions between legislative intent to achieve low costs with more targeted evidence testing processes and the needs of litigants have been described as an issue for all tribunals in Australia. The Australasian Institute of Judicial Administration (AIJA) reported:

> Tribunals have been set up with the functions and powers to be investigative bodies. They should be encouraged to exercise those powers particularly when more than one party at a hearing, when one or other party is not represented, or when critical evidence has not been provided to the tribunal. At present, the adoption of a more active role by tribunal members is inhibited by lack of resources and by concerns that taking such an approach will amount to a breach of natural justice. These deficiencies in the resources of tribunal should be acknowledged and remedied in order to reflect better the original intention behind tribunals' intended mode of operation for those cases in which a more investigative approach is appropriate, and to take account of the High Court's recognition of a duty of inquiry in Applicant Veal.[106]

267. As suggested by the AIJA, the solution may be to put a greater onus on assessors to seek critical evidence. This would mean higher-level skills for assessors and further training, together with more communication to CARS users about the process. Insurers should also be consulted on how the guidelines might be reviewed to better identify 'critical evidence'. Assessors do have power under the legislation to seek advice for their own purposes; however, they should be more transparent about the process that they are undertaking and the materials that they are relying on.

Alternative Dispute Resolution approaches and standards

268. Outside of the inquisitorial role, CARS assessors exercise standard ADR techniques including: mediation (facilitating settlements reached between the parties), conciliation (making recommendations for settlement) and arbitration (deciding settlements with the agreement of the parties). They may also move between each of these approaches depending on the circumstances.

269. Assessors have different skill-sets to achieve and outcome using any or all of these techniques and as noted above some will rely more on mediation approaches and others on arbitration. This spread of approaches is common to any group of dispute resolution practitioners working privately, or to those in an institutional setting with legislative powers.[107] Professional standards govern these organisations incorporating the ethics and practices necessary for impartiality, confidentiality and process transparency. National standards developed in the last 5 years now apply. Assessors now all hold national mediation accreditation under recent

[106] Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals,* Australasian Institute of Judicial Administration, Report Number 79 (2006)
[107] See generally, Boulle, L. *Mediation: Principles, Process, Practice*. Sydney: LexisNexis, 2005

guidelines set by the Mediation Standards Board of Australia[108]. There is also considerable industry expertise in managing the competing roles of arbitrator and mediator in institutional settings which is a now a routine part of mediator training for practitioners in statutory roles.[109]

270. CARS assessors support further education about the professional standards expected with the new accreditation guidelines as well as more training in ADR for both assessors and regular participants at CARS hearings. The user training would assist in clarifying the processes undertaken by assessors and open opportunities for finding acceptable methods to be used by all mediators and arbitrators to address procedural fairness concerns.

271. It is also important as noted in the previous chapter that claimants are surveyed so that identified perceptions of assessor's practices and those of insurers and legal representatives are dealt with in any such training.

Consistency in decision-making

272. The assessors' Code of Conduct requires the following:

> 7.4 A Claims Assessor should ensure wherever possible that decisions are consistent with previous decisions and practice notes issued by CARS and provide detailed reasons where they are not followed.

273. The current training and education provided to assessors does not include unpublished court decisions, or general statistics on the range of assessment awards and trends from the body of assessor decisions.

274. Assessors advised they followed decisions of the courts for guidance on awards in terms of 'quantum'. From the perspective of administering the liabilities of the scheme this presents a challenge:

- The objects of the MAA act (2A) require decision makers like CARS Assessors and Judges to consider the impact of their decisions on *'… keeping the costs of the scheme within reasonable bounds…*' and that '*…the premium pool from which each insurer pays claims consists at any given time of a finite amount of money…*'. They may only do this in the presence of information or submissions that would allow them to consider the impact on the scheme of a decision in the case before them.

[108] http://www.msb.org.au/ accessed December 2013

[109] See commentary on the importance of the opening statements and signaling transitions in Bryson, David (1999) "When wearing different hats: suggestions for ADR practice," ADR Bulletin: Vol. 1: No. 10, Article 1.

Available at: http://epublications.bond.edu.au/adr/vol1/iss10/1
http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1048&context=adr accessed December 2013

- Courts may not be advised of the impact on the scheme of judicial decisions although they may take 'judicial notice' of contemporary public sources of information and in an extension of this concept other judicial information.[110]
- Court decisions are also relatively rare and decide the most complex hard fought matters and would be expected to produce high awards that establish precedent.

275. It may assist assessors if they are also provided with information, similar to Sentencing Advisory Council material in order to produce a body of decisions that fall within ranges regarded by all participants of the CTP scheme and the wider community as fair and acceptable. The information would need to be independently analysed and screened before publication, and in this form could also serve as a source for judicial notice.

Reasons for decisions

276. Training on decision-writing and clear and defensible reasoning is common to all judicial and quasi-judicial bodies and should be further implemented for CARS assessors.

Recommendation 16.

Regular claimant surveys should be conducted that include polling users' views about the dispute resolution methods used in CARS processes, including teleconferencing and the assessment hearing.

Recommendation 17.

The MAA should give consideration to sponsoring the development of a MAC Act-specific ADR educational program open to assessors, legal practitioners and insurer representatives.

Recommendation 18.

Consideration should be given to initially encouraging and then obliging, legal practitioners and insurer representatives who engage with CARS to receive formal training, and accreditation in ADR processes (perhaps as part of the maintenance of their professional qualifications.

➲ **CARS is now an active member of the Council of Australasian Tribunals which has developed resources in all of the issues outlined above with competency standards & practice manuals in line with the International Framework of Tribunal Excellence**[111]

[110] See for example material produced by the Sentencing Advisory Council of Victoria http://sentencingcouncil.vic.gov.au/
[111] See www.coat.gov.au

Quality in decision-making

- Key point

  - A range of well-proven mechanisms exist in legislation to ensure quality in decision-making - Guidelines and manuals

277. Individual assessors make independent decisions without interference as specified by the legislation. The legislation also specifies that assessors complete a '… brief statement … setting out the … reasons for the assessment'.[112]

278. The quality of decisions is a function of legal knowledge, experience and skills of assessors as well as recruitment and of ongoing professional training. Stakeholder concerns about consistency in assessor decisions and the credibility of those decisions arise in part from: the quality of the reasoning in decisions, the communication of decisions and from the conduct of assessors in conferences.

279. The mechanisms for maintaining and intervening to improve quality are built into the legislation and include:

- Principal Claims Assessor (PCA) powers of control and direction
- MAA issued Claims Assessment Guidelines with the status of regulations and which may only be issued after consultation with stakeholders identified in the legislation.
- PCA powers over the allocation of claims to individual assessors

The PCA powers of control and direction over assessors

280. With the exception of prohibiting influence in favour of one of the parties over individual assessment decisions, the legislation gives 'control and direction' of assessors to the PCA[113]. The legislation also includes provision for training and enables assessors to obtain advice to ensure consistent application of the provisions of the Act and other relevant matters.[114]

281. The manner in which this power is implemented will influence the quality and standard of decision-making and case appraisal. The PCA exercises this power as follows:

- A Performance Management Manual is in preparation and plans are in place for a comprehensive performance management framework including competencies, peer review and measures of quality.

[112] Section 94(5) MAC Act
[113] Section 105 MAC Act
[114] See above at s.113 sus (4)

- The MAA, at the direction of the Deputy General Manager, has prepared material and undertaken performance measurement activities. However, the PCA is not consistently involved in these initiatives, has no available resources to conduct them and does not take responsibility for them.
- The PCA does review Supreme Court cases where assessors are the subject of judicial scrutiny. She initiates conferences and training with assessors to develop consistent practices. External consultants are called in on occasion to assist assessors with quality in terms of their activities. A recruitment review process has been conducted. These initiatives are seen as successful by the PCA.

MAA Claims Assessment Guidelines

282. The legislation makes provision for Claims Assessment Guidelines to be produced and published by the MAA with the same status as regulation. The last version came into operation on 11 July 2008 and 4 September 2009.[115]

> These Guidelines are also intended to guide Claims Assessors as to the manner in which an assessment is to be conducted.

283. CARS objects within these Guidelines are cited as follows:

> The **objects of CARS** in dealing with claims and disputes in connection with claims referred are:
> 1.14.1 to provide a timely, fair and cost effective system for the assessment of claims under the Motor Accidents Compensation Act 1999 that is accessible, transparent, independent and professional;
> 1.14.2 to assess claims and disputes fairly and according to the substantial merits of the application with as little formality and technicality as is practicable and minimising the cost to the parties;
> 1.14.3 to ensure the quality and consistency of CARS decision making;
> 1.14.4 to make appropriate use of the knowledge and experience of CARS Assessors; and
> 1.14.5 to establish and maintain effective communication and liaison with stakeholders concerning the role of CARS.

284. The Guidelines also canvass how claims assessments are to be allocated to assessors. This is directly relevant to ensuring that the skills and experience of the individual assessors match the circumstances of the claim and that quality standards are maintained.

[115] http://www.maa.nsw.gov.au/default.aspx?MenuID=170 accessed December 2013

The allocation of matters to assessors

▪ Key points

- The PCA does not exercise all of the powers assigned to the position under the legislation and is not resourced to exercise the full complement of PCA powers and legislative responsibilities. This leaves CARs open to problems that the legislators were seeking to avoid, including less stringent control over the quality of decision-making.
- The docket allocation system used by CARS with assessors undertaking all tasks in managing cases has process control advantages; however, there are efficiency advantages in adopting expanded roles for case managers in supporting assessors.

285. The Principal Claims Assessor (PCA) has the following roles and function under the *Motor Accidents Compensation Act 1999:*

> 99A Principal Claims Assessor
> (1) The Minister is to appoint a person who is an Australian lawyer as Principal Claims Assessor.
> (2) The Principal Claims Assessor has and may exercise all the functions of a claims assessor under this Act.
> (2A) The Principal Claims Assessor is, in the exercise of his or her functions, subject to the general direction and control of the Chief Executive Officer. However, the provisions of section 105 (2)–()-(5) apply to the Principal Claims Assessor in the same way as they apply to a claims assessor.
> (3) The Principal Claims Assessor can delegate to any claims assessor any of the Principal Claims Assessor's functions under this Act, except this power of delegation.

286. Additional powers include:

- power to issue summonses to appear on any issue that the PCA so determines (s.102)
- power to exempt claims from the CARS process116 (s.92)(s.108)
- arrangements (allocations) as to which claims assessor will assess individual claims (s.93)
- correction of assessor certificates and other documentary errors (s.94)
- determination of applications for reinstatement of claims older than three years (s.85B)
- the giving of general directions to assessors on the running of conferences (s.104).

287. Powers similar to those in S93 that enable the PCA to allocate which specific case will be heard by which specific assessor, are found in most tribunals and courts. The thinking behind this power is to avoid any perception that allocations are made for any reason other than

[116] This style of legislative gateway to the court is similar to powers in other jurisdictions – see 'genuine dispute' provisions of the *Workplace Injury Management and Workers Compensation Act 1998* (s.- Section95).. Conciliators may refer cases to a court if they determine that there is a 'genuine dispute'. That decision may be 'revoked 'by another conciliator or a Commissioner of the Workers Compensation Commission (s.97).

specialisation or availability. If the function is to be delegated as also envisaged by the legislation, it is to be delegated to another assessor.

288. The Guidelines require the PCA to make allocations based on:

> 'the nature of the matter, the availability of the assessor, the experience of the assessor, the location most convenient to the parties and CARS for the assessment to take place and any other relevant information'.

289. In tribunals, the allocation of cases is used as a tool to develop skills and specialisations within the membership of the tribunal.

290. The MAA has initiated other best practice approaches including the docket method of allocation also supported with some qualifications by stakeholders.

Docket method of allocating cases

291. The MAA uses a standard 'docket' method of allocating cases. Docket systems, most famously in the Federal Court of Australia with the 'rocket docket', are effective in cutting delay. They work by immediately appointing a supervising judge to a newly started case and having preparation for the hearing managed closely by that same judge. Parties undertake the discussions that they might otherwise have had at the door of the court much earlier in the process. The judge scrutinises their preparation to ensure that they assemble all the relevant information. Fewer cases reach the courtroom. The judge is able to exercise authority in removing blocks to obtaining information and in speeding preparation for the hearing.

292. In a similar way in CARS, rather than cases being handed to an assessor on the day of the hearing, the assessor will have spent some time on the file before the hearing, including a teleconference and other interactions with both parties.

293. Stakeholders offered general support for docket management and assessors reported that it is cost-effective. They do the preparatory work on the file, rather than administrative officers and this cuts duplication. The alternative, which would involve an intermediary case officer or information officer, may be apparently less efficient but would mean that a lower paid officer was undertaking activities that may not be an efficient use of expensive assessor time.

Recommendation 19.

The CARS docket system should be retained with appropriate changes to support PCA control of streaming, and more sophisticated referral of cases.

Integrating CARS success with quality management approaches across CARS

294. The lessons learned from a team-based approach align with experience in the insurance industry generally and in other dispute resolution services. Teams organise to process batches of cases with a team leader ensuring timelines are managed and quality maintained. In dispute resolution services and in the absence of a docket system, these officers take a similar role to those in CMS. They act more proactively to ensure the parties are ready, and have collected, and exchanged information relevant to the case. They support assessors and may work for two or three of them. These officers do not take cases themselves. In effect, the resources are pooled, and supervised by team leaders and led by decision-makers.

295. In tribunals and courts, registry-based oversight by a judicial officer is a routine feature, particularly for process decisions as opposed to decisions in hearings that might affect people's livelihood. In quality management terms, an approach that builds in high-cost rather than low-cost resources at the beginning of a transaction process is more efficient and effective. For tribunals, courts, legal practices and insurance offices, this usually means lawyers or senior officers are available to review decisions and assist in getting it right at the time the process decision is made, rather than rectifying it later.

296. The success from using these approaches in the CARS environment would seem to indicate potential for replication outside exemptions.

Allocation using triaging approaches

297. The PCA indicated support for the introduction of intake officers or senior case management officers. Such officers could prepare matters more fully for assessors, including undertaking 'differentiated case management', 'screening and streaming' or 'triaging', under the supervision of an assessor. Appropriate tasks were suggested and include the following:

- identify procedural issues (such as lateness, due search and enquiry, etc.), ensure those issues are ready, attempt mediation or conciliation of them and then refer those issues to external assessors for assessment;
- identify liability issues and attempt mediation or conciliation of those;
- consider issues of mandatory exemption and/or discretionary exemption;
- identify and attempt to resolve (by conciliation or mediation) 'medical' disputes;
- deal with issues about the validity of the application (time limits)
- identify other issues associated with the quantum of the claim and attempt to resolve those (by conciliation or mediation). This could be where the claim could be 'differentiated' and recommendations made in respect of allocation – if there is going to be differential case management, e.g. 'This is a claim that involves a significant issue of causation and where the estimates of the parties vary enormously – it is recommended that three claims assessors be appointed to hear this claim.'[117]

[117] Submission PCA 28 February 2011

Governance of CARS

▪ Key points

- The status accorded to CARS and to the PCA in the legislation, is not as transparent to stakeholders as similar roles in the NSW public sector. This may lead to potential credibility issues.
- Equally, the scheme has an opportunity under the legislation to take advantage of reporting information provided by the PCA.
- The PCA would benefit from greater accountability in terms of budget and better recognition to support its specific role in the CTP scheme. This role is to act as a scheme gatekeeper attracting a wider range of pressures than ordinarily seen in tribunal roles.

298. The relationship between the Chief Executive Officer and the Principal Claims Assessor is as already noted above:

> (2A) The Principal Claims Assessor is, in the exercise of his or her functions, subject to the general direction and control of the Chief Executive Officer. However, the provisions of section 105 (2)–(5) apply to the Principal Claims Assessor in the same way as they apply to a claims assessor.

299. The provisions were reviewed by the Parliament in 2009, together with other structural changes under the *Public Sector Act*, and small changes clarified the lines of accountability. The changes made clear that the decision-making roles of the PCA and of claims assessors were not subject in any way to direction by the General Manager (now the Chief Executive Officer of the SRWSD), of the MAA or his staff.[118]

300. Several options are available to the MAA to ensure that the PCA is perceived as independent as envisaged by the legislation. These include:

- approval of the CARS budget by the Minister
- annual reporting by the PCA to the oversighting board of the MAA

➲ **Since August of 2012, the MAA is part of the Safety Return to Work and Support Division Board (SRWSD) and its board presides over WorkCover, MAA, and other compensation agencies in the NSW government.**

301. Reporting covers emerging trends in cases and issues in the legislation and case law that may need scrutiny. The information is provided for scheme management purposes and is another source of information. Reporting not only adds to the perception of independence, it is also

[118] See paper prepared by Cameron Player, Deputy General Manager, MAA Registrar MAS & CARS, *Motor Accidents Update Recent Legislative Reforms and the expanded scope of the CTP scheme,* 15 February 2011

one of the major strategic advantages of an administratively- based dispute resolution mechanism.[119]

PCA Tenure

302. The PCA is appointed by the Minister for a period of seven years and may be removed at any time by the Minister without cause.[120] Despite the 2009 legislation restating independence from the MAA, the tenuous tenure may be seen to lessen the credibility of the role, although similar provisions are to be seen in other schemes.

303. The PCA has observed that the role is limited in other aspects:

- The PCA has no capacity to move assessors as might be found in other tribunals.
- In terms of the compensation tribunals in New South Wales, the PCA is in a position of lower independence and status compared with the Workers Compensation Commission (WCC). The WCC operates independently; the President has control over resources and reports directly to the Minister. The constraints on the PCA limits the status and consequential authority of the PCA over assessors and stakeholders, in particular those that also interact with the Workers Compensation Commission.
- The PCA may be seen as an 'arm of the insurer.' Despite MAA being a regulator in contrast to WorkCover which contracts insurer, claimants perceive them to be similar. This reduces the perception of independence for the role of the PCA.
- In addition, the PCA has limited quality control over the 150 MAS assessors. This creates delay issues and case finalisation issues for CARS as well as reputational issues.[121]

304. Governance issues were externally reviewed in 2009 against 'good corporate governance' principles.[122] The 2009 Governance Report did note that the PCA did not have to be at arm's length from the MAA because the MAA is itself the regulator of the insurers. However, some distancing was recommended. Tentative proposals included:

- better defined and publicly documented role descriptions
- ministerial reporting
- communication protocols that emphasise regular reporting on the part of the PCA to *senior management of the MAA* as per the legislation – rather than the role being subject to direction.

305. More recently a determination by the NSW Government's Statutory and Other Offices Remuneration Tribunal (SOORT) responsible for the salaries of statutory appointments and judges found that the PCA's responsibilities and function were similar to the heads of other tribunals. SOORT made the observation that this was the first time the PCA role had come

[119] See Page 67
[120] Motor Accidents Compensation Regulation 2005 – Reg 16H is a transitional provision and should be looked at for completeness.
[121] PCA submission to the Review
[122] O'Connor Marsden, *Review of Structural and Governance Issues Surrounding the Authority's Statutory Position of Principal Claims Assessor* November 2009, Motor Accident Authority

before the tribunal. It could be concluded from this that within the NSW public service the PCA is a statutory role with accountabilities and responsibilities for CARS rather than an administrative functionary.

The PCA role in the broader scheme

306. Arguably, the PCA role has a greater impact than envisaged in either the Governance or SOORT report. The expectation from stakeholders is that there will be consistency in assessor decision-making. This is important because trends in assessor decisions influence the claims decisions and settlement actions of hundreds of claims officers and claimants. Pricing risk in the scheme may be materially affected. This is why consistency is a key concern of stakeholders and why the PCA has given a very high priority to training and guidelines for assessors.

307. In overseeing the competency of assessors, the PCA is looking to upgrade decision-making skills, improve the specialist technical knowledge necessary for grounding decisions and, most importantly, provide feedback and guidance on individual approaches. The PCA plays a pivotal role in the viability of the motor accidents scheme.

308. The other part of the PCA role is in having sole responsibility for dealing with exemptions. In effect, the role is the gatekeeper to the higher courts. This places significant pressure on the role. A string of poor decisions opening CARS to administrative challenge may be enough to cast the validity of decisions and the legitimacy of the scheme in question. If this were to happen, all cases currently finalised by CARS or settled by CARS would go to the public court system and costs would increase by over $100m (see chapter 3).

The PCA role compared with other similar roles

309. In motor accident schemes in Australia there does not seem to be an equivalent to the assessor or principal assessor role of the PCA role in CARS. Similar roles exist that undertake the following:

- review officers who preside over informal conferences between insurer and claimant representatives and who have recommendation powers
- court-annexed mediators who have facilitation powers
- District Court judges who have powers to determine matters.

310. In workers compensation, senior conciliation officers have similar powers to the PCA in respect of conciliators and are generally found in no-fault schemes. They preside over statutory benefit disputes as opposed to the assessment of damages awards or of liability. Conciliators, similarly to assessors, run informal processes and facilitate discussions. They differ in making recommendations for settlement that the parties may or may not choose to take. In limited circumstances, full-time conciliators may make determinations that are the equivalent of an exemption. The senior conciliation officer is the point of appeal for these determinations. Similarly to the CARS PCA, the senior conciliation officer generally takes a policy position that original decisions will be upheld unless there are exceptional circumstances. Guidelines are published setting out these circumstances.

311. The Productivity Commission has proposed a similar role for long-term disability claims determination to that of the PCA, but within an independent statutory authority. Following a review of the available dispute mechanisms in Australia, including CARS, this model was preferred for the new National Disability Insurance Scheme. (NDIS).[123]

Recommendation 20.

The PCA should exercise greater budget control over CARS. This role is essential to support the broader recommendations for independent exercise of decision-making powers, appropriate, timely control of resources and the efficient operation of the registration and case management processes.

Greater autonomy for CARS or WCC integration

312. The examination of the role of the PCA and of Case Management Services above suggests that CARS needs greater autonomy to enhance its standing and effectiveness in meeting its original objectives.

313. The conclusion of the Review is that CARS should:

- have its own dedicated registry and registrar
- be the first body to which all unresolved claims are referred, and at the earliest time (the point at which a dispute crystallises: as soon as insurer's offer under s.82 in response to a claimant's s.85 particulars has been rejected by the claimant)
- have resources required to meet increased responsibilities
- have greater control over the formulation and expenditure of its budget (a model may be for the PCA to set a budget for approval by the Minister that can then be audited and subject to appropriate accountability arrangements. Expenditure decisions would be a matter for the PCA within the agreed budget)
- have reporting responsibilities both to the MAA (through the General Manager, the Board and the Motor Accidents Council) and the Minister.

314. A complete alternative could be to attach CARS to the Workers Compensation Commission (WCC) as a division or stand-alone tribunal under the umbrella of the Commission. This would mean that CARS would continue to perform the functions it has with the same assessors and PCA under the legislation. The sections of the legislation that give MAA line reporting responsibilities over CARS would be removed. CARS would come within the 'judicial' supervision of the WCC, with the interposition of a judicial 'president' to hear appeals over exemptions. Administrative, case management and other functions would all be run through the WCC. The budget arrangements would be managed in the same way that the WCC currently negotiates budget with WorkCover, except that the negotiation would be with the MAA.

[123] See generally Productivity Commission, *Disability Report* at note 23

The Workers Compensation Commission view

315. In New South Wales there is a movement towards the consolidation of compensation jurisdictions. The Workers Compensation Commission view is that the current sharing of some services by CARS and the WCC: hearing rooms, IT and other managerial support services, is appropriate and valuable.

316. On the other hand, for there to be a common pool of full-time arbitrators and assessors would mean the loss of specialist expertise of WCC arbitrators and CARS assessors respectively. For this reason, a rationalisation of WCC arbitrators and CARS assessors would not be supported by the WCC.

➲ **The recent reforms to the Workers Compensation Commission suggest that these options would need to be revisited only after the impact of the reforms is known and if consolidation was considered at all. Subject to those qualifications, it is noted that super tribunals commonly operate with distinct lists and amalgamation into a pool may not be necessary. The issue of the desirability of arbitrators or part-time assessors is a separate issue and may be addressed with continuing appointment arrangements.**

Communicating CARS decisions

▪ Key points

- Greater use of published precedents will reduce friction costs and guide better decision-making. An example of one such channel of communication is the case bank of CARS precedents proposed by the Law and Justice Committee of Parliament.

317. A strategic function of CARS is to reduce the level of disputation in the scheme by providing high quality information to insurers and other participants. The information provides relevant feedback to prevent repeated errors, to improve the quality of applications to CARS and to lift information preparation standards in Division 1A processes. It may also inform the expectations of claimants. The types and sources of information that should be available include the following:

- Court produced legal precedents
- Assessors may develop 'options' or precedents for settling similar cases
- Insurers may produce claims handling standards
- The MAA may assist with claimant guidance information

Precedents and feedback loops within the scheme

318. Precedents in CARS should be documented as claims are settled so the influence of precedent is specific rather than misrepresented via misinformation or other less credible channels. The parliamentary inquiries into CARS have all identified the potential for new decisions to set precedents and to have a more immediate and significant case management impact than would a new precedent in the traditional court or tribunal system. The added advantage for insurers

and others in the scheme is that feedback from decisions should shape the primary decisions by insurers.

319. In the absence of a controlled precedent mechanism, opportunities arise for excessive friction costs. These friction costs can take the form of legal firms obtaining referrals where claimants' primary need is for information or insurers negotiating lesser awards with uninformed consumers, which in turn leads new clients to lawyers offering superior negotiated outcomes. Alternatively, extra friction takes the form of repeating errors with no remedial action in either claims handling standards or settlements. The result is more complexity, higher legal costs, delays and more disputes.[124]

320. Collected precedent data provides additional insights into efficiency and effectiveness, as well as influencing claimant expectations and behaviour. Specifically:

- the financial impact of precedent-setting cases on scheme viability
- the range of awards available for standard injury types and consequential impacts on claimants
- common disputes and common errors made by some legal representatives or claims officers (made available to all legal representatives in anonymised form)
- likely legal costs for claimants by injury/claim type
- internally available 'preventative' information about claims handling practices that lead to unnecessary disputes. (feedback from CARS to insurers in a regular reporting format)
- settlement data from the increasing population of pre-CARS and pre-court settlements
- information about claimants' experience throughout both CARS and the court process provided regularly to all participants in the scheme.

Reporting CARS caseload trends for scheme management

321. Most importantly, there should be regular instituted reporting by the Principal Claims Assessor to the Motor Accidents Authority Board. This will enable the Board to have direct information about immediate issues within the scheme that may have later impacts on green slips such as emerging spates of claims or insurer claims decision trends.

➲ **The Safety, Return to Work and Support Division and Board (SRWSD) commenced on 1 August 2012 and replaces the MAA Board. Reporting to the SRWSD and Board is proposed.**

Recommendation 21.

The MAA should establish and manage award-setting information and feedback mechanisms between CARS, insurers and other stakeholders to ensure the adoption of lessons from precedent cases into local claims decision-making and to reduce work and disputes.

[124] See previous reviews of the Law & Justice Committee of the NSW Parliament https://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/8EEA6BBDACB2FF4ECA257BE200198079

Recommendation 22.

The PCA should provide regular structured reports to the MAA board on the performance of insurers against standards of claims decision-making evidenced in CARS, as well as reporting on experience relevant to scheme viability and risk.

Assessor performance

323. The performance of CARS assessors attracted comment from stakeholders with concerns over how complaints are managed and the extent and perceived prevalence of the only other avenue of redress, Supreme Court challenges. Both were examined to provide a perspective on how well CARS is performing. The appointment process of assessors was also reviewed.

Complaint handling

- Key points

- CARS has a relatively high superior court challenge rate yet is successful in most cases
- Complaints about the behaviour of assessors are outside of the MAA capacity to decide and should be dealt with by competent external bodies.
- Formal complaints are rare

Adequacy of reasons

324. Insurers have raised with the MAA their concerns over the quality of reasoning in particular cases, as well as over perceived inconsistencies and anomalies in relation to a number of assessments. During the review consultation process, anomalous decisions were also raised by both insurers and defendant lawyers as illustrations in support of these concerns.

325. Charges of inconsistency and of deficits in the reasoning behind decisions are raised about all courts and tribunals. The recent Productivity Commission's *Draft Report Disability Care and Support* is relevant:

> Judicial interpretation of liability, particularly judicial assessment and application of the principles of contributory negligence, proximity, causality and foreseeable risk, is unpredictable. Many see the 'lottery' nature of the common law as one of its key weaknesses, generating dissatisfaction among both claimants and defendants. The high rate of out-of-court settlements, in part, indicates an aversion of both sides to the inherent risks of going to trial, with settlement amounts broadly reflecting the expected risks and benefits of a court hearing.[125]
>
> The calculation of damages also lacks clarity in some areas, such as accounting for gratuitous care, with the law in Australia not settled about the way particular heads of damages are quantified, with different case histories and methodological approaches holding precedent across jurisdictions. These judicial risks are a key motivation behind the use of mediation between the injured party and insurers to reach settlement prior to a court hearing.[126]

[125] Vol 2, February 2011 at 15.4
[126] Ibid

326. Misgivings over areas of assessors' performance have prompted insurers to urge a range of detailed measures to govern the work of assessors. This approach is not favoured.

327. While it is legitimate and in the public interest for stakeholders, service providers and user groups to call courts and tribunals to general account, it is not appropriate for them to prescribe or even propose detailed performance management systems. CARS is and should be treated as an independent tribunal dispensing justice in a specialist area. Its' status as an independent and largely self-regulating tribunal under the law, needs to be increased to reassure claimants that they will be treated independently.

328. Conflicts of interest, and certainly perceptions of conflict of interest, may arise where the persons who preside also practice in the same forum. On the other hand, it is also evident that the model of CARS assessors as a body of part-time assessors drawn from the practitioner pool has functioned as a source of assessor expertise.[127]

Supreme Court challenges

329. As insurers are required to accept CARS assessments, proceedings in the Supreme Court for a review of the law rather than on merit are the only form of challenge A claimant may challenge a CARS assessment on their own risk in the District Court (or on the law). Under s.151, a claimant is liable to pay the insurer's legal costs if the amount of court-awarded damages does not improve on the assessment amount.

330. Data provided by CARS shows that since 1999, the Supreme Court has set aside only 17% of CARS assessor decisions.

Table 8: Supreme Court outcomes – CARS assessments

CARS assessment related appeals to the Supreme Court 1999 to 2011 - Outcomes
29 finalised Supreme Court proceedings
15 CARS upheld,
9 settlements
5 set aside.

331. Of those decisions where CARS was upheld, challenges to:

- exemption decisions have resulted in seven decisions being upheld and five settlements.
- the quantum of the assessment only (where procedural fairness breaches may have been alleged) have resulted in three decisions being upheld, four decisions being set aside and three settlements and

[127] And largely for this very reason, the arbitrators in a closely allied tribunal, the Workers Compensation Commission of NSW, when engaged on a part-time basis (the principal form of engagement from 2002 until mid-2010), were not permitted to appear as legal representatives in the Commission.

- interlocutory decisions have resulted in five decisions being upheld, one decision being set aside and one settlement.

332. Supreme Court matters have increased in the last two years for the Motor Accident Authority and for CARS.

333. An analysis was conducted of all MAA cases in the Supreme Court in 2009 and 2010 (finalised and not yet finalised). This showed that:

- 34 related to the MAS and 14 to CARS.
- CARS decision were upheld in nine cases, one did not relate to either the PCA's or any assessor's performance and
- CARS decisions were set aside in four (two on the basis of jurisdictional error, one for an error of law concerning gratuitous assistance and one for procedural unfairness).

334. While the data needs to be treated with caution, (actuarial analysis shows 32 cases over the past ten years have rejected assessments and gone on to a final court judgement)[128] , court activity at this level is relatively low. However, it is still significant in terms of the credibility of CARS. Insurer lawyers in particular saw it as a weakness. These concerns and the concerns of insurers should be taken into account and further work done with current and new assessors to ensure that legal reasoning and an appreciation of precedent are paramount. The concerns also indicate that the credibility and reputation of CARS and the PCA need attention by MAA.

Recommendation 23.

CARS assessors should receive training in a range of areas essential to the professional and expeditious control of ADR cases. The training should integrate with ongoing professional development offered by relevant professional organisations for people exercising decision-making roles in judicial or quasi-judicial forums. This training should include recognition of precedents and the creation of documentation establishing clear and defensible reasoning for the precedent.

[128] Data supplied by actuaries Taylor Fry, subject to disclaimers

Complaints about process and behaviour

335. CARS assessors are seldom the subject of formal complaints about behaviour. According to the Motor Accidents Assessment Service (MAAS) complaints register, the MAA received 22 complaints in the 12 months to October 2010 but only one related to CARS. The MAA annual report of 2009/10 recorded 62 complaints in respect of insurer conduct.

336. Complaints about CARS however are an issue the MAA is unable to satisfactorily address. The General Manager of the MAA and other managers of the MAA have no technical expertise to determine complaints against decision-makers in personal injury claims. Medical Assessment Service (MAS) complaints are also problematic – there is no technically competent place to handle complaints about MAS matters. Both are subject to court review and scrutiny, however very few complainants will have a capacity to run such cases.

337. As with normal management practice and in common with other similar schemes, initially a complaint about behaviour or process should be subject to examination by the 'senior manager' in this case the PCA. Findings would then flow through to assessment and inform training needs. External examination by an independent body is appropriate where internal review does not satisfactorily resolve a complaint.

338. Unresolved, formal complaints could be referred to either the NSW Ombudsman for matters relating to administrative issues or to the NSW Judicial Commission for poor conduct in the course of conferences or assessments. In either case, complaints could be handled outside of the MAA and by competent complaint handlers with expertise in the field.

Appointment of CARS assessors

- Key points

- CARS assessors are selected for their expertise in the field. Stakeholders agree that expertise is important for the role.
- Thirty CARS assessors are part-time.
- The ratio of plaintiff lawyers to defendant lawyers is 2 to 1.
- Individual assessors averaging only eight decisions a year are less likely to be practiced decision writers.

Recruitment of assessors

339. CARS assessors are appointed pursuant to s.99 of the Act. They must be persons who, in the opinion of the MAA, are 'suitably qualified to be claims assessors'.[129]

340. There are currently 30 CARS part-time assessors, and their Terms of Engagement require them to make:

> *"General Assessments - determining liability, contributory negligence, and the amount or value of a claim for damages and costs under Section 94 of the Act" and "Special Assessments - determining procedural claim disputes between a claimant and an insurer under Section 96 of the Act*".

341. Two full-time assessors generally performing exemption-related work also assist assessors.

342. CARS assessors are appointed for three-year terms, and their status is that of an independent contractor rather than employee.[130] Their terms of appointment require: accessibility for work, timeliness, accuracy, attendance at up to two thirds of training days offered by the PCA as well as compulsory training, quality (monitored by a peer review program) and to respond to complaints. CARS also has a Code of Conduct which must be followed.[131]

343. The profile of the CARS assessors pool is as follows:

- CARS assessors are selected for expertise in personal injury law and motor accident compensation law in particular, with a preference for those that have experience in litigation work in the field.
- About two thirds of the assessors have a plaintiff background or current practice and around one third a defendant background or practice.[132] More claimant firms and lawyers apply for

[129] s.99
[130] Clause 1.7 of the current *Terms of Engagement*
[131] See http://www.maa.nsw.gov.au/default.aspx?MenuID=278 accessed December 2013
[132] A rough and ready estimate provided by the Principal Claims Assessor

assessor posts than do insurer firms and lawyers. Defendant lawyers report the remuneration and quality of work is not as attractive and may raise conflicts given the smaller number of insurers available as clients to defendant firms.

- CARS appointees are part-time. The policy behind this is to ensure a larger pool, contemporary expertise, a measure of independence from the MAA as well the potential for lower than market remuneration. Assessors effectively cross-subsidise the role through continued private practice as motor accident compensation law practitioners.

Collapsing the pool

344. The review conclusion is that the goals of reducing conflicts of interest and enhancing performance management, consistency, accountability and fairness within CARS would best be promoted by providing for the appointment of a nucleus of full-time, dedicated assessors, while retaining a smaller pool of part-time assessors for flexibility.

345. With a core of the equivalent of four to six full-time assessors, a number of objectives would be achieved:

- A higher degree of appropriate information-sharing and knowledge transfer would be facilitated, which in turn would promote greater consistency in decision-making.
- The PCA's exemption workload could be taken on by other equally skilled and tenured assessors
- Where sensitivities over perception of partiality or conflict of interest were in issue – particularly in regional centres, full-time assessors could be assigned to the claims concerned.
- Part-time or sessional assessors could continue to play an important role, including that of providing ongoing practitioner insights into the accumulating body of assessment decisions.

346. Full-time assessors may also be available for MAA initiatives in considering dispute management protocols. Sessional assessors should also be available. Similarly to other courts and tribunals, sessional assessors, either appointed from existing or retired assessors would:

- bring credibility to CARS if retained on professional reputation
- provide coalface expertise into decision-making and ongoing assessor education
- respond to fluctuations in the caseload from time to time
- perform regional work where appropriate (assuming perceptions of conflict of interest are adequately addressed).

The appointment process

347. Currently, assessors are appointed by the MAA on the basis that they are 'suitably qualified to be claims assessors'.

348. Given that the profile of the CARS assessors is a source of concern and criticism and that the legitimacy of CARS is central, it is suggested that in future assessor appointments should be made against public criteria accepted by stakeholders. The criteria should be the subject of

consultation with the members of the Motor Accidents Council (MAC) and the Council should have an opportunity to make a formal input.

➲ **The MAC no longer exists. In lieu, stakeholder representatives should be consulted.**

Recommendation 24.

Assessor appointments should be made in terms of criteria and a process into which the stakeholders have had an opportunity to make a formal input.

Recommendation 25.

The training and education of CARS assessors should be extended to regular information sharing and presentations on the quanta of assessments being made on all the major heads of damages both by CARS and other personal injury tribunals and court.

Recommendation 26.

CARS decisions should be published, with due regard to personal privacy concerns.

Recommendation 27.

A nucleus of about six full-time or major-time CARS assessors who no longer practise in motor accident law (and ideally not personal injury law either) should be appointed.

Recommendation 28.

Confirm the engagement of full-time assessors as independent decision-makers through Ministerial appointment.

Options for cutting green slip costs

349. There are options available to address the pressure on green slip premiums, scheme efficiency and outcomes, which many of the other CTP schemes have used successfully elsewhere. It is clear that any options suggested by stakeholders, need to be considered from an overall systems perspective. Minor changes are likely to have unintended consequences, if both immediate impacts and later flow-on effects are not considered. Similarly, superficially small changes may have significant impacts. With these qualifiers, common design principles behind successful schemes are shown to impact on premium costs by cutting the friction costs and delays associated with dispute resolution. These principles were used to guide recommendations and are set out below together with a targeted set of suggested reforms.

Best practice expectations

350. The key measure of success, in relation to individual CTP claims, is that within a viable scheme, injured people receive a larger proportion of the benefit dollar. Less of the premium dollar should be diverted to fund scheme processes or to be consumed by legal and associated medico-legal costs. For beneficiaries, stakeholders and other participants, red-tape activity needs to be low; understanding of benefits structures high and satisfaction with treatment throughout the process should be very high. Decision reviews by superior courts should be rare. [133]

351. In poorly designed systems, friction costs will be much higher, legal involvement will be at high levels, multiple medical reviews and delays will be common, and fewer people will reconnect quickly into the community at the same level they were before the accident. In these systems there are likely to be more cases involving review on the law.

352. Best practice in dispute system design is aimed at delivering:

- fewer disputed claims, expressed as a proportion of the numbers of claims
- speedier dispute resolution at every stage, expressed as the incidence of variation from pre-set standards of acceptable delay
- an early return of injured people to full or optimum participation in work and the community.
- less legal involvement, expressed as a proportion of disputed claims attracting legal costs and lower legal costs per claim
- lower friction costs or costs around the claim that divert money from the settlement payment to the injured person

[133] The conceptual framework explaining the research behind these principles is in Annexure 3 to this review.

Principles to deliver fairness, timeliness, consistency, and cost-effectiveness

353. Research into different compensation schemes and dispute resolution systems has identified a series of principles that are evident in better performing systems.

Table 9: Principles of Best Practice[134],[135]

	Design principles applied by better performing dispute systems in compensation schemes
1	High-quality communication by claimants in the early contacts with the scheme reduces the likelihood of a dispute.
2	Recognition exists that early interventions can change the course, cost and beneficiary satisfaction of disputed claims – conflicts are not intractable interactions that must inevitably be determined by an end decision-maker.
3	Human behavioural patterns may be worked with to achieve better outcomes, and alternative dispute resolution (ADR) methods are one of several approaches. Imposed decisions should be a last resort in only a very small proportion of matters. Most disputes can either be prevented or resolved by a series of preliminary options provided by the compensation scheme. These are in order of application after the injury: – extensive education about entitlements and expectations of claims processes to the point that cultural knowledge reflects how the scheme works – navigation assistance and advisory services – self-help options – assisted negotiations by informed representatives – technical authoritative advice or early neutral evaluation – facilitated resolutions, including mediation (ADR) – recommended outcomes by an authorised third party (conciliation) – binding outcomes by a third party by agreement (arbitration) – binding outcomes imposed by a third party (adjudication).
4	Parties are more likely to settle a matter if they have all the relevant information and have exchanged and absorbed that information prior to informal and formal exchanges.
5	All information should be provided to them, not just selected information that may be retained for gaming purposes.

[134] See generally www.transformation.com.au/publications

[135] 'Specific reforms have led to requirements for pre-litigation disclosure, case conferencing prior to the commencement of proceedings, exchange of offers, active use of cost orders to encourage early acceptance of reasonable offers and use of scale or fixed cost models for charging. The most obvious benefits of early resolution and reduced delays include:

- increased efficiency through a reduction in legal transactions costs
- shorter and less stressful litigation process for claimants and earlier attempts to mitigate permanent injury and other injury-related losses
- early investigation of the facts (mutual evidence disclosure and third-party subpoenas), before recollections become "murky."

Productivity Commission Draft Report Disability Care and Support, Vol. 2, February 2011 at 15.13

Design principles applied by better performing dispute systems in compensation schemes

6 Courts and dispute resolution organisations should supervise information collection and exchange and should offer pre-emptive authoritative evaluation services in cases where discovery processes are likely to be inefficient or not proportionate to the value of the claim.

7 Quality management principles apply – appropriately qualified professionals should review claims early and screen and stream to any of the resolution mechanisms. Cases should not be allowed to progress without supervision by the dispute resolution organisation. This supervision must be streamlined with scope for individual review and mostly relying on system rules and systematised technology processes.

8 Incentives and disincentives for better behaviours should be identified at every step in the process and readjusted appropriately. For example, front-end loading of discovery processes should be rewarded with costs scales that reflect the work at that point rather than higher costs rewards for activity later in the process – typically in a court. Given space, lawyers and other service providers will inevitably drive processes to the points of highest return for them, and those points must be functional for the system as a whole.

9 Tasks throughout the process should be assigned to the best equipped and properly qualified personnel to fulfil those tasks and in the most efficient order – for example, evidential testing should be concluded before technical advice can usefully be applied to the resolution of the dispute; otherwise the effort is likely to be wasted.

10 Delays between steps in the process should not be allowed, avoid 'refreshers' or rework of previous work for any transaction. Timing of these transactions needs to be managed according to 'standards' and a concentration of activity achieved using cost and convenience incentives and disincentives.

11 Reducing the need for legal activity at the court end of the process is balanced with increased use of legal skills to determine the most relevant information for resolution early in the life of the disputed claim. This cuts unnecessary disputation activity.

12 Navigation skills should not be confused with legal skills and should not be paid at the same rate by a scheme. If lower cost navigation skills are not available then legal firms will step into the vacuum, particularly if there is a market for legal costs harvesting.

13 Lump sums in a benefits structure will attract legal market activity particularly in no-win no-fee costs environments where receipt of part of the lump sum offers an incentive for market activity; and more so where an existing legal industry in the same sphere is operating. So, if such an industry is present, management of the legal market and how it operates should be a focus of the scheme administrators.

14 Decision-makers or gatekeepers to benefits are the major pressure points in dispute resolution organisations and should be within the 'shadow of a court' or under the supervision of a judicial officer to offset political and administrative law challenges. This pressure on gatekeepers increases where lump sums are available,

15 Referral to alternative dispute resolution should be compulsory or bypassing will increase.

16 Dispute resolution organisations must be transparent and regularly communicate with stakeholders – preferably with their own statistical and media units. The media exposure should be handled with care to ensure that it is not seen to overstep the perceived roles of attached government departments.

17 Dispute resolution organisations need to be seen to be independent.

18 Regular surveys of users are important and should be published – participants should have high levels of satisfaction in the process and should feel that they have been heard and that the process was fair, regardless of the outcome.

19 There should be a focus on dispute prevention by assisting claimants in respect of their needs first and rights later, thus avoiding litigious positioning, delayed rehabilitation while court matters are in progress and consequential delayed participation in the community.

The dispute steps and targeted areas for improvement

354. For CARS and the MAA, while many of the above principles are in operation, several improvements would reduce disputes. Within the constraints of a 'fault-based' scheme with lump sum awards, 'friction costs' may be better managed to ensure CARS is more sustainable.

355. The focus needs to be on:

- taking control of the cases reaching the District Court (labelled as 'court other' in section 3) and settling them very quickly to ensure that unnecessary costs are not created
- better servicing injured road-users in terms of high quality early contacts, navigation services and education about benefits. This is useful for insurers as well as claimants to reduce disputed claims
- better enforcement of early information exchange Division 1A
- better management of the series of transactions leading into and through CARS.

356. Best practice schemes use a series of legislative and regulatory devices to manage incentives and disincentives that ensure early exchange of information, prevent most disputes and cut friction costs. Those that are directly relevant to CARS and the MAA and that are not currently present are set out below as follows.

- Navigation services - navigation services to the website, brochures and the Claims Advisory Service that lead into CARS may usefully be expanded.
- Gatekeeper functions - gatekeeper functions include screening cases to ensure information exchange and preliminary conferencing has occurred as well as differentiated case management to divert cases immediately to court or to manage the case transfers between the MAS and CARS.
- Unrepresented claimants award review - Oversight function to validate settlements for unrepresented claimants as recommended above.

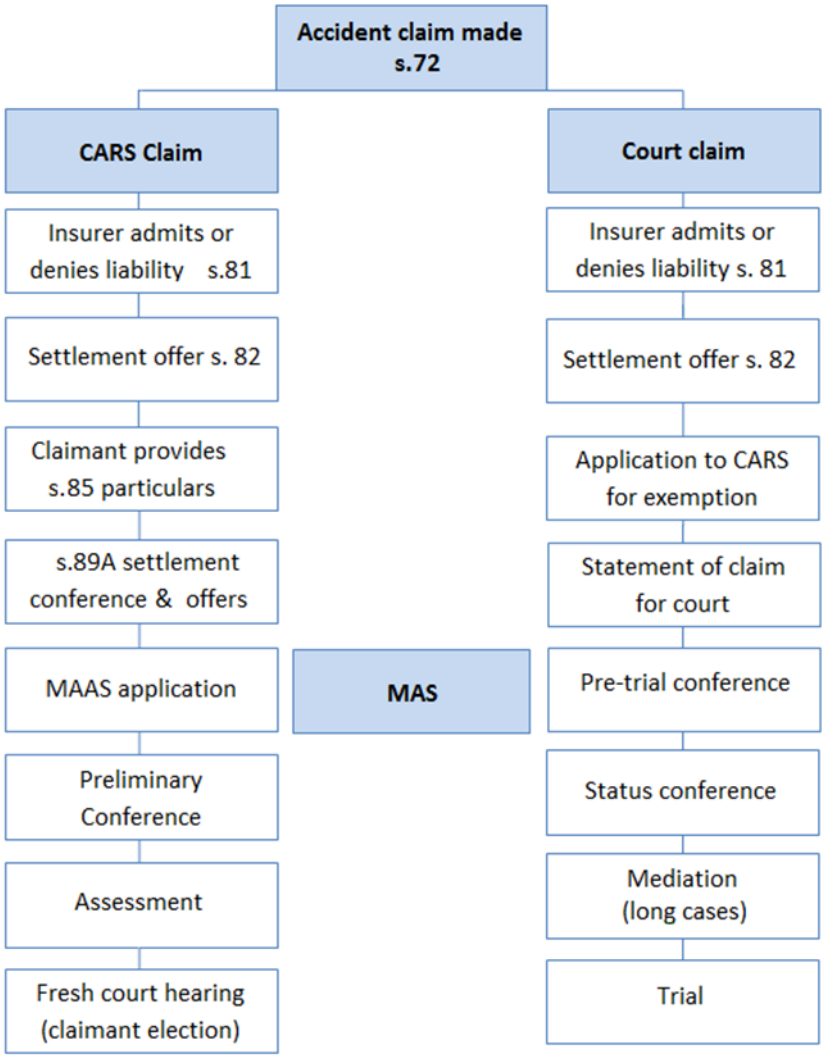
Detailed process reform

▪ Key points

- There is scope to simplify, accelerate and rationalise several areas of the claims handling process

357. Figure 24 below shows the current claims pathway and settlement options. Tracking the steps against best practice systems suggests areas for simplification, acceleration and rationalisation. Suggestions were also prompted in many cases by proposals made in the submissions to the review.

Figure 24: MAA CTP NSW Motor accidents claim flow by legislative reference



Changing the claim form

358. Several service providers have submitted that the claim form is too lengthy to serve the basic function of alerting an insurer to an accident and in addition to allow medical intervention, other interim support measures and further trigger enquiries. The simple terms of the Accident Notification Form for accident compensation up to $5,000 are preferable and should be adopted.

Deadline for making a claim

359. Several insurers submitted that solicitors acting for injured persons would wait until close to the six-month s.72 deadline before submitting a claim. Whatever the reason for this, the effect is that the insurers concerned cannot take steps to introduce the most appropriate medical services as close to the date of accident as possible, and the claims process itself is then delayed at the outset.

360. Insurers have asked for a shorter deadline to expedite matters. The proposal is supported by the review, but in conjunction with other measures:

- S.72 should be amended to read that 'A claim must be made **as soon as possible** after the relevant date for the claim but in any event within **4** months after the relevant date'.
- Fresh measures should be adopted to facilitate the early notification of claims via hospitals and doctors rooms, accident reporting to the police and other information channels.
- Any late notifications should be visited by a 5% reduction in the amount of any regulated or agreed legal costs if it is found that a legal representative was responsible for the delay.
- Any claim brought later than 12 months after the relevant date should require a full and satisfactory explanation for the delay before being allowed.

s. 85A particulars

361. All claims should require submission of a full s. 85 particulars form even if an application for exemption is anticipated.

362. For exemption cases, the requirements for s.85 should be aligned as far as possible with the requirements for the District Court's statement of claim, to avoid or reduce the need for rework.

363. Unless subsumed under the larger case management systems overhaul recommended below, all unresolved claims, including those eligible for exemption, should be subject to an early formal claims settlement exchange, either in the form of Division 1A or some substitute.

Admitting and then denying liability

364. In order to provide for bona fide changed circumstances and settlement prospects, s.81 should be amended to allow insurers to deny liability if good cause is shown, even after an initial notice admitting liability. Penalties should apply for abuse of this facility.

365. In order to curb abuse of process and delay, s.62 should be amended by the deletion of s.62 (1) (a), meaning that referral for further medical assessments should be with leave of the District Court or a CARS assessor only.

Division 1A

366. Many submissions were critical of the introduction of Division 1A with its compulsory conferencing, exchange of documentation and post-conference offers. The key complaints were that the procedures were overly prescriptive and a part duplication of the requirements of s.85A and the CARS application.

367. Procedures were said to introduce unnecessary formality to a claimant–insurer interaction, which needs to be informal if it is to be most productive.

368. Division 1A is necessary as a default position, but further reform will address the issues with the introduction of a more flexible case management system, as outlined below.

Time limits for the initiation of CARS proceedings

369. While court proceedings must commence within three years of the date of accident, there is currently no time limit for bringing a matter to CARS. If a claim relates to a matter not subject to exemption, that claim may be brought to CARS and must be assessed even if the application is made (many) years later.

370. A three-year limit on lodging a matter with CARS would serve the interests of insurers in being able to conduct investigations and manage their portfolios without unreasonably curtailing the rights of claimants.

371. In the interests of simplicity, the review recommends adopting the same period for CARS as the court. It is noted that once a CARS certificate of exemption is awarded, the parties are granted two months in which applications to court can be made - a provision that should ensure no claimant is caught out by hidden deadlines.

372. In order to oblige the timely resolution of all claims, it is recommended therefore that the MAC Act be amended to provide that an application for a CARS assessment should be made within three years of the accident to which the claim relates (lining up with the time limit for court proceedings, as provided for in s.109). Any late application to CARS should require a full and satisfactory application to proceed.

CARS assessments: binding on insurers

373. A number of service providers made submission that the provision in s.95 that makes CARS assessments binding on insurers be overturned. That would leave insurers, like claimants, free to proceed on to court for what is effectively a de novo hearing if they are dissatisfied with an assessment.

374. The review does not support such a change. The asymmetry is warranted given the resources open to insurers. Insurers are also continuous players in the system, whereas injured parties are one-time players with everything at stake in their single matter. Allowing insurers to challenge assessments would open the scheme to more litigation, to the overall detriment of the primary Compulsory Third Party (CTP) scheme stakeholders and arguably even to the insurers themselves.

Recommendation 29.

The basic MAA claim form should be shortened and simplified and the periods and obligations in respect of the making of claims should be changed.

- *Section 72 should be amended to read that 'A claim must be made as soon as possible after the relevant date for the claim but in any event within 4 months after the relevant date'.*
- *Fresh measures should be adopted to facilitate the early notification of claims via hospitals and doctors rooms, accident reporting to the police and other information channels.*

- *Any late notifications should be visited by a modest diminution in the amount of any compensation that may be assessed or awarded, plus a modest reduction of the regulated or agreed legal costs if it is found that a legal representative was responsible for the delay.*

Any claim brought later than 12 months after the relevant date should require a full and satisfactory explanation for the delay before being allowed.

Recommendation 30.

Full s.85 particulars should be submitted in respect of all claims, even if an application for exemption is anticipated.

Recommendation 31.

The requirements for s.85 should be aligned as far as possible with the requirements for the District Court's statement of claim.

Recommendation 32.

Section 81 should be amended to allow insurers on good cause shown to deny liability even after an initial notice admitting it, to provide for bona fide changed circumstances and to maximise negotiating flexibility and hence settlement prospects.

Recommendation 33.

The MAC Act should be amended to provide that an application for a CARS assessment should be made within three years of the accident to which the claim relates.

Refining the claims dispute resolution process

375. A fundamental component of best practice dispute resolution is control of the dispute process by an agency or agencies independent of the parties. This enables active case flow management which has been shown to deliver lower legal costs, higher user satisfaction, earlier return to participation in the community, earlier resolution and fewer contested claims. Improvements in meeting CARS objectives and in resolving disputes without recourse to court controlled processes will be made when greater process control is exercised by CARS and for court-related disputes with the MAA or another independent group.

376. The review recommends that the MAA investigate the cost-effectiveness of the following systemic improvements to move CARS to a best practice model. Specifically CARS should:

- become the prime body responsible for claims assessment and resolution and should have early and comprehensive responsibility for the case management of all unresolved disputes
- be the overseeing body for disputes at all stages of settlement and should engage in more active, more searching and more flexible case management
- control when the circumstances of a case indicate that standard dispute resolution steps will not assist and that they should be dispensed with

- ensure greater emphasis is given to the early disclosure and sharing of all information necessary to allow the parties to make an informed judgement in relation to settlement and allow case managers to treat the cases on their particular merits
- subject all unresolved claims to the settlement-promoting benefits of alternative dispute resolution (ADR)
- provide active assistance to the parties in the form of independent and expert chairing, neutral evaluation or mediation of settlement meetings
- ensure representation of parties as advocates in dispute resolution should be by persons who are at least as skilled in solving problems and reaching solutions as they are in the techniques of conventional litigation and
- revise the steps in dispute resolution with a view to providing fewer rather than more steps when compared to the status quo.

A proposed case management restructure

377. Presently, MAAS is the entry point for CARS applications. The process proposed is that as soon as a claim becomes an unresolved dispute CARS must be notified and from then on actively manage the matter.

378. Notification would occur:

- after s.85A particulars have been supplied and either the insurer has denied liability under s.81 or the insurer's s.84 offer has been rejected, or
- in any event if a claim has not been settled within two years and nine months after the date of the relevant accident.

379. Nothing should restrict the claimant and the insurer at any time from settling a claim independently, and consideration should be given to providing a specific opportunity for this, early-on and throughout the process.

380. A more comprehensive disclosure of particulars of a claim and the insurer response may be necessary. The claim information must be sufficient for qualified and skilled CARS case management officers under the supervision of an assessor to make sound initial assessments of the nature and features of the incoming cases.

381. Case management officers under supervision of an assessor should then be empowered to direct how cases should be managed further. Options should include:

- that the parties be given scope on request or at the discretion of the case manager to settle the matter independently within a given period.
- that a matter be exempted and directed to court without any other events
- that an unresolved matter that meets the criteria for exemption should be the subject of a settlement conference between the parties.
- that the conference should occur with or without supervision and with or without the need for the production of further information

- that a matter suitable for assessment proceed direct to a preliminary teleconference (as currently provided for)
- that a matter suitable for assessment be the subject of a settlement conference.

382. Where medical disputes arise, case managers would refer them to the MAS.

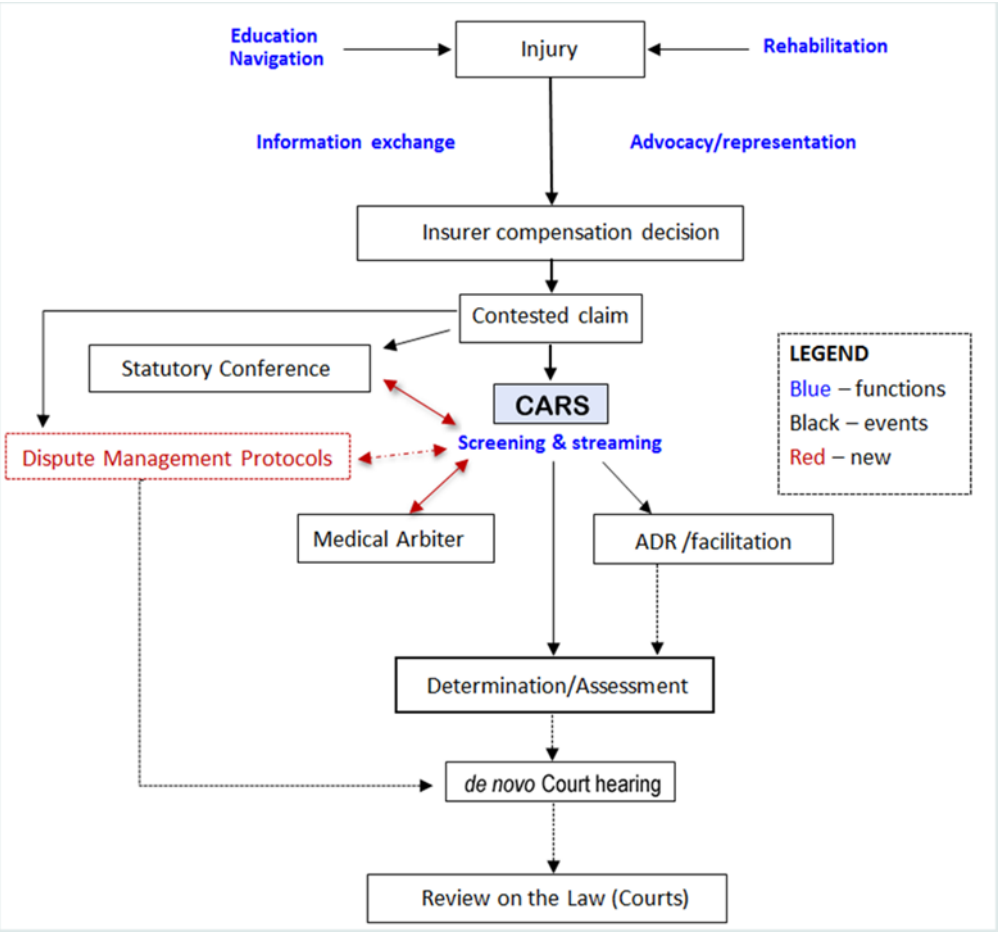
383. Court matters should be comprehensively managed using Dispute Resolution Protocols.

Components on Best Practice customised for NSW

384. The model recommended is shown below in Figure 25. It draws from best practice approaches in workers compensation and in CTP fault schemes as well as the above findings.

385. The model shows the functional components required to prevent and then manage a caseload of disputed claims. Here, CARS would undertake the screening and streaming of cases, sending cases back for statutory conferences or otherwise as described above. Dispute management protocols would operate in tandem. The underlying principle of both would apply – that a settlement conference must occur early rather than later with all relevant information. Conferences under s.89A would be clearly identified in this process and event certainty would become the norm.

Figure 25: Proposed CARS case flow model adapting best practice components



386. Quality management paths providing feedback should be established between all events back to the insurers and to CARS assessors and to a new Dispute Management Unit.[136]

387. A new registry would undertake screening and streaming. A new advocacy service would undertake navigation advice and a new dispute management unit would tightly manage new dispute management protocols. The changes are discussed in more detail below.

388. The recommendations depend on greater autonomy for CARS, with greater resources, and control over its budget, its own registry and its own registrar.

Recommendation 34.

As soon as a claim becomes an unresolved dispute, (after s.85A particulars have been supplied and either the insurer has denied liability under s.81 or the insurer's s.84 offer has been rejected), and in any event, if a claim has not been settled within two years and nine months after the date of the relevant accident, CARS should be notified and take active management of the dispute.

Recommendation 35.

All unresolved disputes notified to the relevant registry, including those eligible for exemption, should be the subject of early and active case evaluation. Unless otherwise directed by the registrar or case management officer, the parties should exchange relevant documents and other information and engage one another in formal settlement discussions, either as provided by Division 1A or some substitute process.

Recommendation 36.

Case management officers should be empowered (under assessor supervision) to direct that settlement discussions be chaired or otherwise facilitated by an independent, expert person drawn from CARS or another MAA body. One or more of the parties may also request such assistance. The case management officer should be empowered to direct further that:

- *the parties be given latitude on request or at the discretion of the case manager to settle the matter independently within a given period through whatever exchanges they deem suitable*
- *a matter be exempted without further administrative action and proceed to court*
- *a matter suitable for assessment proceeds direct to a preliminary conference (as currently provided for)*
- *any unresolved matter likely to be exempted should go to a settlement conference with or without supervision of an independent chairperson, mediator or neutral case evaluator, and with or without the need for the production of further information*
- *a matter suitable for assessment be the subject of a settlement conference between the parties, with or without supervision in the form of a chairperson, mediator or neutral case evaluator, and with or without the need for the production of further information.*

[136] See www.transformation.com.au/publications for background and explanation of the research supporting this approach.

Recommendation 37.

Depending on progress made with the further resourcing of CARS, consideration should be given to expanding the jurisdiction of CARS to include categories of claims currently exempted from CARS assessments.

Recommendation 38.

The MAA should adopt a comprehensive model of caseload management, including new functions, dispute management protocols and differentiated case management.

About claimant advocacy services

389. Advocacy services are services provided to litigants in person, usually through legal aid arrangements. Advocates are not necessarily legally qualified and in some jurisdictions are called 'para-legals'.

390. Services of this type are provided in New Zealand by the Accident Compensation Commission (ACC) for injured claimants and are reported as successful. The ACC funds the equivalent of citizens advice bureaus to advise claimants.

391. ACC advocates are trained and accredited by ACC and work from these bureaus. The ACC has a very low rate of disputes in comparison to Australian schemes, and since its service was established the number of spurious claims has dropped. The unexpected benefit for the ACC has been that advocates screen out claims without merit. Advocates are able to provide one-on-one advice to people involved in accidents and are able to give tailored information on navigating the scheme and the benefits available.

392. The 'screening-out' benefit compares with comments made by lawyers during the stakeholder workshops that they also screen out claimants. In fact, one explanation for the lower awards received by unrepresented claimants is that they have already gone to lawyers and been rejected as clients because their claims lacked merit; a factor reflected later in lower awards.

393. The ACC approach may provide the following uniform advantages to NSW claimants:

- all unrepresented claimants would be better advised rather than just those lucky enough to find a lawyer or to meet legal cost benefit criteria
- more unmeritorious claimants may be screened out
- more legitimate claims are likely to be lodged
- the MAA would have a better opportunity to deliver education and information about scheme benefits to those directly affected and using direct methods of communication.

394. Similar advocacy services are available through Legal Aid in New South Wales for veterans with compensation claims. Associations with memberships of returned service personnel also provide

such services. All are subject to accreditation and training arrangements from the Department of Veterans' Affairs.[137] In New South Wales, the Legal Aid scheme is partially no-fault but the extent of legal involvement is high. The issue is whether an advocacy service would reach unrepresented claimants and even if it did so, whether it would be seen to be competent to deal with the adversarial system and with legally represented insurers. Care would need to be taken to in appropriately selecting and training advocates and with the manner of their introduction.

395. As seen in other schemes when new services are established, more claimants may emerge. This should not be treated as a negative, since evaluation will establish the legitimacy of their claims and a scheme that depended on legitimate claims never being presented because information is kept from claimants has not been underwritten correctly.

396. Marketing of the advocacy function should be a function of the MAA claims advisory service.

397. The objective should be to ensure that there is widespread understanding, at least with doctors, that such a service exists. This will require marketing materials and campaigns similar to those run in other government programs.

398. Given the concerns raised by service providers over existing advertising restrictions, such programs may raise new concerns. One way to deal with these would be to examine the advantages of enabling advertising in certain circumstances.

399. Those circumstances would be that the advertising would raise awareness of an injured motorist's right to make a claim as well as the options available to resolve claims disputes. However, similar to some Canadian schemes, the advertising, usually by legal firms on their websites, would not promote either legal advice or legal advocacy as a first step. It would need to give clear messages and promote to potential claimants that such a service exists.

400. This option should be considered only following the envisaged further claimant survey studies.

Recommendation 39.

Under s.121 of the MAC Act, the MAA should consider permitting advertising by service providers to the extent that it raises the awareness of an injured motorist's right to make a claim and of options for resolving claim disputes and does not promote either legal advice or legal advocacy as a first step. The claimant survey results should inform the MAA's consideration. If permitted the advertising should be monitored and adhere to strict guidelines.

[137] See 1. http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=469; http://www.ranveteranswelfare.asn.au/pages/advocates.htm; http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=469 http://submarinesaustralia.com/health.htm

Annexure list: CARS Review 2011

The following documents are contained in the annexure to the CARS Review 2011 Report.

1. Summary of Service Provider Issues and Responses Matrix
2. Service Provider Submissions
   - (i) Allianz submission
   - (ii) Australian Lawyers Alliance submission
   - (iii) CARS Assessors submission
   - (iv) CARS Assessment Team submission
   - (v) Injury Compensation Committee of the Law Society of NSW Submission
   - (vi) Insurance Industry Submission on Assessor Variation
   - (vii) John Watts submission
   - (viii) NRMA submission
   - (ix) NSW Bar Association submission
   - (x) QBE submission
   - (xi) Suncorp submission
   - (xii) Zurich submission
3. Conceptual Framework
4. Taylor Fry SI analysis Modelling of Superimposed Inflation within the NSW CTP Scheme, April 2011
5. Taylor Fry CARS Review PowerPoint Presentation February 2011
6. Prof Sourdin *User Perspectives of CARS - Interim Report for use in CARS Review, March 2011*
7. CARS Review Terms of Reference