THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Injury:JDlw806175

10 December 2013

Mr Andrew Nicholls
General Manager
Motor Accidents Authority of NSW
Level 25, 580 George Street
SYDNEY NSW 2000

By email: Christian.fanker@maa.nsw.gov.au

Dear Mr Nicholls,

MAA's proposed amendments following Court of Appeal decision in Smalley

The Injury Compensation Committee ("the Committee") of the Law Society welcomes the opportunity to provide comments on the proposed changes to the Guidelines and other actions to be taken in response to the decision in *Smalley v Allianz Australia Insurance Ltd* [2013] NSWCA 318 ("*Smalley*"). The Committee has had the benefit of the early provision of the submission of the NSW Bar Association and the feedback via our Legal Forum representatives from the information sessions and meetings arranged by the Motor Accident Authority ("the Authority").

The Authority is to be commended for the prompt action taken to address the potential repercussions of the *Smalley* decision, in particular the possible increase in the number of claims automatically exempted from assessment at the Claims and Resolution Service ("CARS"). It is accepted by the Committee that the CARS scheme is fundamentally an efficient and cost effective system of assessment and that suitable cases should be retained by it. However, the Committee does have concerns that the proposed changes to the Claims Assessment Guidelines may have the effect of extending the boundaries of CARS beyond what was originally contemplated by the legislature and beyond what is appropriate for a dispute resolution system of this type.

Claims Assessment Guidelines

The Committee submits that the proposed amendments will inevitably lead to a significant increase in claims dealt with by CARS together with a substantial increase in the number of CARS decisions which are not binding on the insurer. The Committee believes that these developments are highly problematic for claimants in view of the costs penalty in section 151(2) of the *Motor Accidents Compensation Act 1999* and the current provisions of the *Motor Accidents Compensation Regulation 2005* (Schedule 1). In the case of the costs penalty detailed in section 151(2) the Committee believes that the legislature intended this to be a penalty against those claimants who chose unnecessarily not to accept a determination by a CARS Assessor. However experience has shown that these are not the only circumstances in which the costs penalty is imposed on a claimant. The difficulty arises from the wording of section 95 which fails to differentiate between an admission of breach of duty of care and an admission of liability.

As a result there are many cases where the claimant is quite prepared to accept a determination by a CARS Assessor yet the insurer nevertheless requires the claimant to take the matter to court because liability was never admitted (either because of an allegation of contributory negligence or because, for instance, of a late claim dispute). In these circumstances the claimant suffers the cost penalty in section 151(2) despite having no control over whether the claim goes to court. The proposed amendments will lead to far more cases falling within this unfair scenario. These cases will not only include the claims where liability has been denied (but will still be determined by CARS) but will also include the cases like *Smalley* where liability is deemed to be denied under section 81(3).

The Committee's view is that the cost penalty in section 151(2) should only apply in circumstances where it is the claimant rather than the insurer who makes the decision to take the matter to court after a CARS determination. Until an amendment can be made to section 151 to correct this anomaly the Committee believes that such proposed amendments to the Guidelines should not be contemplated.

Problems with respect to costs are not confined to section 151(2). Reference should also be made to Table A at Schedule 1 of the *Motor Accidents Compensation Regulation* 2005. The Committee submits there is an inbuilt prejudice in this regulation in favour of cases at CARS as opposed to cases that run at court (but are never exempted). The only extra amount that can be awarded under the Regulation for party/party costs after the commencement of court proceedings is that which is set out at stage 6 of Table A. This provides for an additional amount of 2% of the settlement or award for legal costs after the commencement of court proceedings. This will mean that, for instance, the only extra amount payable for party/party costs in a typical case worth say $200,000 would be $4,000, with some modest additional allowance for counsel of $2,110 per day. This figure for counsel is well below the market rate for even a moderately experienced junior counsel. Inevitably this will mean that any solicitor/client costs on top of this sum of $4,000 (or $6,110) will be directly borne by the claimant out of the settlement sum or judgment sum. It is the claimant and not the claimant's solicitor who is adversely affected. The Committee expects that even the Authority would accept that the general allowances for professional costs under the Regulation have not kept pace with the true commercial cost of legal services in 2013. This gap between solicitor/client costs and party/party costs will only increase if claimants are now increasingly required to litigate in court after a CARS determination.

Claims Handling Guidelines and Section 81 Notices

The Committee broadly supports the proposed changes to the Claims Handling Guidelines outlined with respect to section 81 notices, but believes the focus should be on achieving timely and informative liability decisions by insurers. The Committee accepts that the proposed changes to the Guidelines go some way towards achieving this. However the Committee believes that the Authority has not quite gone far enough. Rather than simply requiring the insurer to 'refer' to the evidence that supports the reasons for failing to wholly admit liability in the proposed paragraph 5.5 the Committee believes that the evidence itself should be served by the insurer with the section 81 notice. Further, the Committee suggests that there should be some definition of what is constituted by this 'evidence'. For instance, statements from any relevant witnesses should be served along with any photographs of the accident scene and any survey or accident reconstruction report.

The Committee also believes that expanding the Guidelines in this way will not completely solve the problems that have been caused to date by section 81 notices. The Committee takes the view that part of the problem with section 81 notices to date has been the fact that some insurers simply do not understand what is required of them. To this end it is suggested that the Authority issue a recommended standard form of section 81 notice with appropriate variables.

Another valuable step would be the vigorous enforcement of the three month time limit in section 81 through the Authority's Compliance Division.

The Committee also suggests that an additional clause be added between paragraph 5.5 (it is noted here that there are two clauses marked 5.5) and 5.6 as follows:

> If the notice gives medical causation as a reason for not admitting liability then the insurer must advise the claimant in writing of the reasons for disputing medical causation and the evidence which supports those reasons.

The Bar Association's Proposals

Without making any comment on the background arguments set out in its submission, the Committee does support the alternative amendments to the Claims Assessment Guidelines suggested by the Bar Association. The Committee does have some concerns about the likely delays associated with two deferrals of the exemption application for a combined period of six months. However the Committee believes that this is far preferable to a scenario where there are a substantially increased number of CARS assessments which are not binding on the insurer, such as is likely to be the case under the Authority's proposed amendments. In any event there is a strong argument that greater delays are likely to be caused by the Authority's proposal. Every claim which involves a denial of liability or an allegation of contributory negligence greater than 25% will now have to be determined by an assessor on discretionary grounds rather than, as is presently the case, by the Principal Claims Assessor on an expedited basis. The Committee also notes that in the case of late claim disputes or disputes regarding 'due search and inquiry', there is a significant delay experienced by the claimant in any event. This results from the need to obtain a certificate from a CARS Assessor dealing with such a dispute under section 94 before a CARS Application for General Assessment can be lodged.

Section 95

The Committee reiterates the point made by the Bar Association that none of these changes remedy the problem caused by section 95, whereby an insurer is not bound by a CARS assessment where there is a dispute about liability for the claim in whole or in part. Until section 95 is appropriately amended, there will always be an incentive on the part of the insurer to make an allegation of contributory negligence or to maintain a late claim dispute. If the need for legislative amendment to section 95 was not clearly apparent prior to the *Smalley* decision then it must be now given this decision that a deemed section 81(3) notice amounts to a denial of liability. This submission should not be interpreted as a dismissal of the need for an amendment to section 95, although the Committee accepts that such an amendment may not be possible in the short term.

Finally, the Committee submits that once the final form of the proposed amendments is decided practitioners should be given a period of notice, prior to implementation. Bearing in mind the time of the year, it is suggested that a commencement date of 1 February 2014 would be reasonable.

The Committee thanks you for the opportunity to respond to the Authority's proposals and for your time in considering this submission.

Yours sincerely,

John Dobson
President