Administrative Law, CARS and Courts: Life After *Smalley*

A paper by Mark Robinson SC and Jnana Gumbert, Barrister, to the NSW Bar Association's 2014 Personal Injury/Common Law Conference, held in Sydney on 15 March 2014

Current Legislative Provisions and Guidelines – Section 81 Notices and Exemptions

Section 81 of the *Motor Accidents Compensation Act 1999* ("the Act") provides a Compulsory Third Party (CTP) insurer is required to make a determination as to liability, and give written notice of that liability to the claimant, within 3 months of receiving a personal injury claim form.

A burning and unresolved issue in the scheme of the Act was – what does the word "liability" mean in this context. It was a simple but fundamental question on which much of the practical operation of the Act depended. After many years of the Act's operation, that question was finally answered by the Court of Appeal in *Smalley v Motor Accident Authority of New South Wales* (2013) 65 MVA 82.

Section 81 provides:

> **81 Duty of insurer with respect to admission or denial of liability**
>
> (1) It is the duty of an insurer to give written notice to the claimant as expeditiously as possible whether the insurer admits or denies liability for the claim, but in any event within 3 months after the claimant gave notice of the claim under section 72.
>
> (2) If the insurer admits liability for only part of the claim, the notice is to include details sufficient to ascertain the extent to which liability is admitted.
>
> (3) If the insurer fails to comply with this section, the insurer is taken to have given notice to the claimant wholly denying liability for the claim.
>
> (4) Nothing in this section prevents an insurer from admitting liability after having given notice denying liability or after having failed to comply with this section.
>
> (5) It is a condition of an insurer's licence under Part 7.1 that the insurer must

comply with this section.

Section 68 of the Act gives the Motor Accidents Authority the power to issue Claims Handling Guidelines ("CHG"), which are guidelines with respect to the manner in which the insurers and those acting on their behalf are to deal with claims. The current CHG were issued by the Authority on 1 October 2008. In respect of section 81 notices, they provide as follows, at clause 5.4:

> 5.4 The insurer will give written notice to the claimant as justly and expeditiously as possible whether the insurer admits or denies liability for the claim within 3 months of receiving notice of the claim under section 72 of the Act. An admission of breach of duty of care will satisfy as an admission of liability for the purposes of compliance with this part.

The content of a Section 81 notice has significant ramifications, particularly in relation to whether the matter will proceed to the Claims Assessment and Resolution Service ("CARS"), and if so, whether the assessment of the CARS Assessor will be binding on the insurer (or to what extent - s 95(2)), and if not, whether the claim will be exempted from CARS and proceed to Court (s 92).

Section 92 of the Act provides:

> **92 Claims exempt from assessment**
>
> (1) A claim is exempt from assessment under this Part if:
>
> (a) the claim is of a kind that is exempt under MAA Claims Assessment Guidelines or the regulations, or
>
> (b) a claims assessor has made a preliminary assessment of the claim and has determined (with the approval of the Principal Claims Assessor) that it is not suitable for assessment under this Part.
>
> (2) If a claim is exempt from assessment under this Part, the Principal Claims Assessor must, as soon as practicable, issue the insurer and claimant with a certificate to that effect (enabling court proceedings to be commenced in respect of the claim concerned).

By section 69 of the Act, the Motor Accidents Authority has the power to issue "Claims Assessment Guidelines" ("CAG"). The current version of those Guidelines, dated 1 October

2008, relevantly provides at Clause 8.11 (in relation to exemptions under s92(1)(a), commonly referred to as "mandatory exemptions"):

> 8.11 For the purpose of section 92(1)(a), the PCA shall issue a certificate of exemption when satisfied that, as at the time of the consideration of the application, the claim involves one or more of the following circumstances:
>
> 8.11.1 the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle is denied by the insurer of that vehicle in its written notice issued in accordance with section 81;
>
> 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.)
>
> 8.11.3 the claimant, or in a claim for an award of damages brought under the Compensation to Relatives Act 1897 one of the dependents, is a 'person under a legal incapacity'; (**Note**: See definition in Chapter 1 at clause 1.6.27) (**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.)
>
> 8.11.4 the person against whom the claim is made is not a licensed or other CTP insurer;
>
> 8.11.5 the insurer has declined to indemnify the owner or driver of the motor vehicle against which the claim is made under the third-party policy provided for in section 10 of the Act; and/or
>
> 8.11.6 the insurer alleges that the claim is a fraudulent claim in terms of the circumstances of the accident giving rise to the claim. (**Note**: For example, where it is alleged that the accident may have been staged or where a person claiming to have been a passenger in the vehicle is alleged to have been the driver of the vehicle.)

Of particular relevance to the issue of section 81 notices are the first two sub-clauses of clause 8.11.

In accordance with those sub-clauses, matters where there was a denial of liability used to only be exempted from CARS if the insurer had specifically denied that the accident occurred due to the fault of the owner or driver of the vehicle (clause 8.11.1) or if there was an allegation of contributory negligence of more than 25% (clause 8.11.2).

Accordingly, in cases where the insurer denied liability for procedural reasons rather than a denial of fault (for example, where the insurer denied liability due to the claim being lodged late) or where the insurer had failed to issue a section 81 notice and liability was deemed denied under section 81(3), the MAA would not issue a Certificate of Exemption, as there was no specific denial of fault.

Exemptions on the grounds that the matter is not suitable for assessment, pursuant to section 92(1)(b) of the Act (commonly referred to as "discretionary exemptions") are dealt with in clause 14.16 of the CAG. Clause 14.1.8 of the CAG included, as a relevant consideration when determining a section 92(1)(b) exemption, whether the insurer is deemed to have denied liability under section 81(3) of the Act.

Accordingly, the combination of these provisions had the effect that there could be a number of cases that were not exempted from CARS despite the fact that liability was not admitted, particularly cases where liability was denied for procedural reasons rather than because the fault of the driver or owner of the vehicle was denied. The Guidelines also had the effect that cases where 25% or less contributory negligence was alleged were not entitled to an exemption from CARS pursuant to section 92(1)(a) and, unless those cases were entitled to an exemption from CARS on discretionary grounds, those cases would also remain within the CARS scheme.

Section 95 of the Act provides, in relation to the status of assessments made by CARS Assessors:

> **95 Status of assessments**
>
> (1) An assessment under this Part of the issue of liability for a claim is not binding on any party to the assessment.

(2) An assessment under this Part of the amount of damages for liability under a claim is binding on the insurer, and the insurer must pay to the claimant the amount of damages specified in the certificate as to the assessment if:
(a) the insurer accepts that liability under the claim, and
(b) the claimant accepts that amount of damages in settlement of the claim within 21 days after the certificate of assessment is issued.
Note: If the amount of damages is not accepted by the claimant within that period, section 151 makes provision with respect to liability for legal costs incurred after the certificate of assessment was issued.

(2A) The amount of damages payable by an insurer (including any costs assessed as payable by the insurer) must be paid within such period as may be prescribed by the regulations and the regulations may require the payment of interest on so much of the amount payable as is from time to time unpaid after the end of that period. The rate of interest may be set by reference to the rate of interest prescribed for the purposes of section 101 of the *Civil Procedure Act 2005* but may not exceed that rate.

(3) It is a condition of an insurer's licence under Part 7.1 that the insurer complies with this section.

Section 95 makes it plain that it is only in cases where liability is "*accepted*" by the insurer that an assessment by the CARS Assessor in relation to an amount of damages will be binding on the insurer (if accepted by the claimant within 21 days).

Accordingly, in cases where liability is denied for procedural reasons (such as late service of a claim form), the decision of a CARS Assessor is not binding on an insurer.

It was determined by the Court of Appeal in *Lee v Yang* (2006) 46 MVR 243 that unless the insurer had accepted liability for the claim in full, or accepted the CARS Assessor's decision in relation to liability, any decision of a CARS Assessor is <u>not</u> binding on the insurer.

In that case, the insurer had admitted liability but alleged contributory negligence of "up to 25%".

The Claims Assessor assessed damages and contributory negligence, finding that the amount of contributory negligence was 10%. At first instance, in the District Court, it was found that the CARS Assessor's assessed damages were binding on the insurer. The Court of Appeal overturned this decision, finding that the insurer had not accepted the liability assessed on the issue of liability for the claim, and that the insurer was entitled to contest the assessment.

Accordingly, even in cases where liability is admitted by the insurer, a CARS Assessment will still not be binding on an insurer (in any respect) if there is an allegation of contributory negligence made by the insurer, and the insurer does not accept the Assessor's decision in relation to contributory negligence.

The Game Changers – *Smalley, Anderson* and *Harrison*

In 2013, there were three significant decisions handed down in respect of the interpretation and operation of sections 81 and 95.

Despite being the last of the decisions to be handed down, it is convenient to start with a discussion of *Smalley v Motor Accident Authority of New South Wales* (2013) 65 MVA 82; [2013] NSWCA 318.

Smalley v Motor Accident Authority of New South Wales (2013) 65 MVA 82

The claimant lodged his claim after the six month period required by section 72 of the Act. The insurer had rejected the claimant's explanation for the delay, and the claim had proceeded to a special assessment under section 96 of the Act. The CARS Assessor determined that a late claim could be made. However, section 96(4) made it clear that the decision of a CARS Assessor in relation to a late claims dispute is only binding on the parties to the extent that it relates to the duties of the parties with respect to the claim under Part 4.3 ("Duties with respect to claims"). Accordingly, the decision of the CARS Assessor was not binding on the insurer, and the insurer made it plain that it did not regard the decision as being binding on it, and did not accept liability for the claim. The insurer also did not issue a section 81 notice (so there was a deemed denial of liability). The letter from the insurer stated:

> *"Although the decision was made in favour of your client and it was determined a late claim could be made in this matter, the writer notes this assessment and the Certificate is not binding on the Insurer. The Insurer maintains this claim may not be made pursuant to Section 73 of the MACA.*
>
> *Because the Insurer maintains this claim may not be made, the Insurer is not required*

> *to admit or deny liability for the claim pursuant to Section 81(1), and will not do so. The fact that the Insurer declines to give written notice to the claimant pursuant to Section 81(1) is not to be taken as a denial of liability pursuant to Section 81(3).*
>
> *The Insurer does not accept any liability for this claim regardless of whether the matter proceeds to assessment under Section 94 of the MACA. The Insurer will not regard any assessment under Section 94 as binding on the Insurer."*

The claimant applied for an exemption from CARS under s 92(1)(a), on the basis that the insurer had denied fault (clause 8.11.1 of the CAG). The Principal Claims Assessor rejected the application, noting that the insurer had not issued a section 81 notice, and that it was not possible for her to tell what the insurer's attitude to liability was.

The Principal Claims Assessor based her decision here in part on the case of *Gudelj v Motor Accidents Authority of New South Wales* (2010) 55 MVR 357, which held that in cases where the insurer rejected a claim on procedural grounds (such as a failure to comply with section 72 of the Act) the insurer was not required to issue a section 81 notice. That case was overturned by the Court of Appeal shortly afterwards: *Gudelj v Motor Accidents Authority of New South Wales* (2011) 81 NSWLR 158.

After the first application was dismissed, the claimant then made a further application for exemption from CARS pursuant to section 92(1)(b), on the basis that the claim was not suitable for assessment (a discretionary exemption application).

Shortly thereafter, the insurer sent a letter to the claimant entitled "Section 81 Notice" in which the insurer specifically denied liability for the claim, but accepted that the accident occurred due to the fault of its insured driver. The section 81 notice stated:

> *"The insurer denies liability for this late claim.*
>
> *The insurer accepts the accident occurred due to the fault of the insured driver, Ju Xian Zhu."*

The application for exemption pursuant to section 92(1)(b) was refused by the Claims Assessor.

The claimant then made a further application for exemption pursuant to section 92(1)(a), this time relying on the purported section 81 notice. The further application for exemption was again rejected by the Principal Claims Assessor, on the basis that although the insurer had denied liability, it had not denied fault, and therefore clause 8.11.1 of the CAS was not satisfied.

The claimant applied to the Supreme Court for judicial review of the three decisions of the CARS Assessors. At first instance, the primary judge found that the first decision was vitiated by legal error. However, in relation to the second and third decisions, the primary judge relied on *The Nominal Defendant v Gabriel* (2007) 71 NSWLR 150 and found that an admission of "*part of the claim*" under section 81(2) included an admission of just part of the "*ingredients*" for a claim (ie, an admission of only breach of duty of care and not consequential damage). Accordingly, the primary judge regarded the insurer's purported section 81 notice as a valid notice, and found that there was no error in the second and third CARS decisions.

On appeal, the Court of Appeal overturned the primary judge's decision. The Court (per Leeming JA, Meagher JA and Barrett JA agreeing) found that an admission of liability for only an element of the tort of negligence (e.g. "*fault*") does <u>not</u> constitute an admission of liability for only part of a claim under section 81(2) because there is no admission of any obligation to pay anything to the claimant.

In order for an admission of liability to constitute a "partial" admission of liability there needed to be established an express or implied obligation to pay some damages (at [59] and [60]).

Accordingly, in this case, there was no valid section 81 notice, and instead there only remained a deemed denial of liability pursuant to section 81(3).

The Court also found that a deemed denial of liability, pursuant to section 81(3), constituted a "*written*" notice denying liability. Accordingly, under the current CAG, in <u>all</u> matters where there is a deemed denial of liability, CARS would be required to issue a certificate of exemption pursuant to section 92(1)(a) (a mandatory exemption). This is because a deemed

denial is a complete denial including a denial of fault (which is the wording used in Clause 8.11.1 of the Guidelines).

Leeming JA stated (at [70]):

> *"Where as here there is no actual s 81 notice, but a deemed s 81(3) notice, cl 8.11.1 will always be satisfied. That is not altered by the fact that the insurer chooses, outside the time constraints imposed by s81, subsequently to admit the fault of its insured. Nor is it altered by the fact that the insurer chooses to describe the letter evidencing that admission as a "SECTION 81 NOTICE".*

Even if the parties both consent to a matter with a deemed denial of liability staying within the CARS scheme, CARS will have no choice but to exempt the matter. This is because the language of section 92(1)(a) is directive, and does not give the Principal Claims Assessor any discretion not to exempt a matter that falls within Clause 8.11.1.

It was left undecided by *Smalley* as to what would happen if, after having been deemed to deny liability, an insurer subsequently issued a section 81 notice admitting liability (as distinct from merely admitting "fault" as referred to in the above excerpt), pursuant to s81(4) - see discussion at [67]. It is arguable that if the insurer does that, then the s81(4) notice would supersede the deemed denial and the claimant would then no longer be entitled to an exemption. Having said that, it would seem that the s81(4) notice admitting liability would have to be a proper admission of liability (in the sense that it would have to include an admission as to an obligation to pay some damages to the claimant) otherwise it would be invalid.

The decision of Rothman J in *Allianz Australia Insurance Ltd v Anderson* (2013) 64 MVR 392 (which will be discussed in more detail below) is to the effect that an admission of liability following a deemed denial of liability does constitute a section 81 notice, which supersedes the earlier deemed denial. This finding was not criticised in *Smalley.*

Also in some doubt following *Smalley* is whether an admission pursuant to section 81(4) must be a full admission, or whether it is possible to admit liability for only part of a claim (pursuant to section 81(2), using the power in section 81(4)). It is not clear whether a section

81(4) admission of liability could include, for instance, an allegation of contributory negligence. However, it is arguable that a section 81(4) admission could include an allegation of contributory negligence, because there is still an admission of a liability to pay something. It can be argued that the reasoning in paragraphs 64-66 of the judgment supports this contention. Leeming JA suggests that the purported s81 notice of 21 September 2011 was not valid because there was no admission of liability to pay any damages and that therefore it was not a section 81(2) notice and did not engage section 81(4). It is arguable that implied in that reasoning is the suggestion that if the letter had complied with section 81(2) (in being a partial admission of liability, with an admission of some obligation to pay damages) then that may have engaged section 81(4), and it might have displaced the section 81(3) notice. This was not conclusively determined however.

Allianz Australia Insurance Ltd v Anderson (2013) 64 MVR 392

The judgment in *Allianz Australia Insurance Ltd v Anderson* (2013) 64 MVR 392 was handed down shortly before the judgment in *Smalley.*

In *Anderson,* Allianz issued a section 81 Notice admitting "breach of duty of care", in the following terms:

> *"We refer to previous correspondence in respect of the above matter and wish to advise we are now in a position to admit a breach of duty of care in relation to the circumstances of the above accident.*
>
> *This admission is made after considering all the relevant information available at this time. However, we reserve our right to withdraw our admission and reassess our position if, at a later date, further information is received that would cause us to alter our view."*

Subsequently, in an application to CARS, the claimant indicated that there was no dispute about liability and indicated (by failing to tick boxes) that the insurer had neither denied liability or breach or duty of care, and that there was no deemed denial of liability. In a CARS 2R form, Allianz (by its solicitors) indicated that the details provided by the claimant about liability were correct.

The matter was allocated to a CARS Assessor. Following the first preliminary conference, the CARS Assessor issued a report stating that liability was not in dispute. Neither party took issue with this.

At the second preliminary conference it was noted that there was a significant issue regarding causation. The matter proceeded to assessment conference and the Assessor delivered a decision.

Allianz sought a declaration that the decision of the Assessor was not binding on it, pursuant to section 95, as Allianz had never admitted "*liability*".

Rothman J considered the provisions of section 81 and stated (at [52] – [53]):

> *"The provisions of s 81(2) of the Act allow the insurer, and allowed Allianz, to admit liability "for only part of the claim". It does not allow Allianz, or an insurer in any other claim, to admit part of the liability for the entire claim.*
>
> *In other words, liability must be admitted or denied. The provisions of s 81 do not allow some, but not all, criteria giving rise to liability to be admitted. Such an "admission" would be a statement denying liability, if the remaining criteria, essential to the establishment of liability, were denied."*

This is consistent with the later decision of *Smalley.*

His Honour found that the following admissions and conduct of Allianz effected an admission of liability:

1. The section 81 Notice admitting breach of duty of care. His Honour noted that this was probably a deemed denial of liability, but that pursuant to section 81(4), Allianz was permitted to admit liability where a denial had earlier been made (at [59]).
2. The admission on the CARS 2R form that there was no dispute about liability (at [60]).
3. Failing to retract the answer in the CARS 2R form (if that were legally possible) before the Claims Assessor (at [60]).
4. Conducting itself on the correctness of the comments of the Claims Assessor in the Preliminary Conference reports (at [60]).
5. Conceding that damage had been suffered as a result of the breach of duty of care which it had admitted (at [64]).

His Honour stated (at [88] – [92]):

> *"On the facts in these proceedings, Allianz by the issue of the s 81 Notice and its subsequent documentation has admitted breach of the duty of care and damage, thereby admitting liability, and has also admitted liability by acknowledging that liability was not in issue."*
>
> *Section 81 requires an insurer either to admit or to deny liability. It does not require such an admission or denial to be in any particular form. Further, s 81 allows an insurer, after initially denying a claim, in whole or in part, later to admit liability. That later admission, also, requires no form.*
>
> *The Act is permissive, in that, it makes clear that the section does not prevent an insurer from later admitting liability. Nothing in the provisions of s 81 requires formality. Nothing in the Guidelines requires formality.*
>
> *For obvious reasons, mainly associated with the statutory imposition of compliance with s 81 as a condition of the insurer's licence, insurers are keen to ensure that a Notice under s 81 is headed a s 81 Notice and there is a clear indication that compliance with the section has occurred. The Act, however, does not require any particular form. The section does not require any particular heading. An admission as to liability may be made in precisely the same way as it is under the general law.*
>
> *For the foregoing reasons, Allianz has admitted liability. Given that Ms Anderson accepts the amount of damages assessed, Allianz is bound by the assessment and, pursuant to the terms of s 95 of the Act, must pay to Ms Anderson the amount of damage specified in the certificate, together with the amount specified for costs and for interest."*

As noted above, the Court of Appeal in *Smalley* came to similar conclusions as Rothman J regarding the interpretation of section 81. The Court of Appeal agreed that an admission of breach of duty of care only is actually a deemed denial of liability, as it cannot constitute an admission of liability for part of a claim under section 81(2).

Accordingly, even after *Smalley*, the purported section 81 notice issued by Allianz in *Anderson* was invalid and constituted a complete deemed denial of liability.

Had either party applied for an exemption from CARS at that stage, the Principal Claims Assessor would have been required to issue a certificate of exemption pursuant to s92(1)(a) (per the reasoning in *Smalley*).

However, Rothman J found that the deemed denial was effectively superseded by a subsequent admission of liability. The admission of liability was occasioned by conduct. Rothman J specifically found that there is no requirement for formality in relation to section 81 notices. The judgment in *Smalley* does not cavil with this. There is nothing in *Smalley* that would challenge the findings of Rothman J that Allianz' conduct amounted to an admission of liability, which was binding under section 81(4).

Section 95 specifies that an assessment is binding on an insurer if the insurer accepts liability under the claim. Having found that Allianz had admitted liability, Rothman J found that Allianz was bound by the assessor's determination, pursuant to section 95.

Allianz Australia Insurance Limited v Harrison (2013) 64 MVR 496

The judgment in this matter was handed down after the judgment in *Anderson*, but before the judgment in *Smalley*.

In *Harrison*, as with *Smalley* and *Anderson*, the insurer had issued a section 81 notice admitting only "breach of duty of care". The admission was in similar terms to the section 81 notice in *Anderson*, stating:

> *"We refer to previous correspondence in respect to the above matter and wish to advise we are now in a position to admit a breach of duty of care in relation to the circumstance of the above accident.*
>
> *This admission is made after considering all the relevant information available at this time. However, we reserve our right to withdraw our admission and re-assess our position if, at a later date, further information is received that would cause us to alter our view.*
>
> *We will now consider payment of all reasonable and necessary medical and rehabilitation expenses received by this office and request you forward any outstanding accounts/invoices in your possession. Reimbursement will only be made on original documentation being forwarded to this office.*

> *We support and encourage the early settlement of claims. If you feel you are in a position to discuss settlement, please contact the writer on the telephone number listed below."*

The matter proceeded to a CARS Assessment, following which the claimant purported to accept the Assessor's award, pursuant to section 95.

The insurer sought a declaration in the Supreme Court that it was not required to pay the damages assessed by the Assessor because it had not accepted liability for the claim and therefore, in accordance with section 95, it was not bound by the decision.

In his judgment, Hoeben CJ at CL found that the insurer's section 81 notice constituted an admission of liability for part of a claim in accordance with section 81(2) (note: after *Smalley* this would no longer be the case). His Honour also found that after having admitted only "breach of duty of care" in the section 81 notice, the insurer had then admitted an entitlement to damages, by the forms and its conduct, and it had therefore admitted "liability" in its CARS documents (as the insurer had done in *Anderson).*

Accordingly, His Honour held that the insurer did in fact admit liability and the insurer was bound by the Assessor's award due to the operation of section 95.

Changes to the MAA Guidelines

These decisions, particularly *Smalley,* created a significant, if not overwhelming, increase in entitlements for exemptions from CARS. Following *Smalley,* any case where the insurer had admitted merely "fault" or "breach of duty of care" without also admitting a liability to pay any damages, was now entitled to be exempted from CARS. Complicating this was the fact that even if the initial section 81 notice only admitted fault, the insurer may have admitted liability by conduct at a later stage (after *Anderson* and *Harrison),* and therefore it was often difficult to ascertain whether liability had in fact been admitted in a matter.

Given that it had been the practice of many insurers to issue standard or template section 81 notices admitting only "fault" or "breach of duty of care" (particularly due to the industry's

understanding that those notices constituted admissions of liability, and the fact that the CHG indicated as much) there were now many cases that were mandatorily exempt from CARS due to section 92(1)(a). They had to go to the District Court of the Supreme Court to he heard.

This was particularly problematic in the case of late claims, where the insurer denied liability for procedural reasons (as in *Smalley)* but where the claimant still wished to proceed through CARS for a special assessment of the late claim issue, pursuant to section 96. After *Smalley*, it is arguable that CARS had no jurisdiction to determine a late claims dispute.

This created an uncertain and undesirable situation whereby parties were potentially precluded from having a late claim dispute resolved at CARS, even if they wished to, and they were forced to commence court proceedings in claims where, once the late claim issue had been resolved, there ought to have been no need to go to Court.

In response to these decisions, and after receiving representations from the NSW Bar Association, the Law Society of NSW, and the Australian Lawyers Alliance, the Motor Accidents Authority issued draft revised Claims Handling Guidelines and revised Claims Assessment Guidelines.

These Guidelines have not yet come into effect – it is likely that the commencement date for the Guidelines will be some time within the next few months. The new Guidelines will apply to all new applications received at CARS after the date of commencement of the Guidelines.

The proposed new Guidelines (in their current form – which potentially could change prior to the Gazettal of the Guidelines) are available to be viewed. The changes (relevant to this paper) are summarised below.

Changes to the MAA Claims Handling Guidelines

The current Clauses 5.4 - 5.6 will be removed, and instead the following will be inserted:

Section 81 Liability notices

5.4 The insurer must give written notice to the claimant indicating whether the insurer admits or denies liability for the claim as expeditiously as possible, and within 3 months of the date the claim form is received by the insurer (or by the Authority in the case of claims made against the Nominal Defendant).
5.5 Unless liability is wholly admitted, the notice must give sufficient detail to the claimant to enable the claimant to understand the extent to which liability, and each of the elements of liability, are admitted, and must refer to the reasons for that decision and the evidence that supports those reasons.
5.6 If the notice indicates that contributory negligence is a reason for not wholly admitting liability, then the insurer must advise the claimant in writing of the percentage of contributory negligence it says can be attributed to the claimant, and refer to the reasons for that decision and the evidence that supports the percentage of contributory negligence alleged.
5.7 A letter that gives notice of the admission or denial of liability within 3 months in accordance with section 81 and these guidelines, must be clearly identified as a Section 81(1) Notice.

Other Liability decisions

5.8 An insurer which fails to issue a notice in accordance with Section 81(1) must advise the claimant in writing whether the insurer admits or denies liability for the claim within 7 days of the insurer discovering the failure.
5.9 An insurer which admits or denies liability other than by a Section 81(1) notice must also:

5.9.1 Unless liability is wholly admitted, the insurer must give sufficient detail to the claimant to enable the claimant to understand the extent to which liability, and each of the elements of liability, are admitted, and refer to the reasons for that decision and the evidence that supports those reasons; and

5.9.2 If the insurer indicates that contributory negligence is a reason for not wholly admitting liability, then the insurer must advise the claimant in writing of the percentage of contributory negligence it says can be attributed to the claimant, and refer to the reasons for that decision and the evidence that supports the percentage of contributory negligence alleged.

Changes to the MAA Claims Assessment Guidelines

The major amendments to the CAG are to Clause 8.11 and to Clause 14.16.

In relation to Clause 8.11, clause 8.11.1 will be amended to read as follows:

> "liability is expressly denied by the insurer, in writing, but only in circumstances where liability is denied because the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle is denied;
>
> (Note: Only denials of liability where fault is denied will satisfy this requirement. Denials of liability for any other reasons, but where the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle is not denied, will not satisfy this requirement).

The amendment to Clause 8.11.1 deals with the *Smalley* problem by expressly stating that only claims where fault is expressly denied will be entitled to an exemption under that Clause. It attempts to overcome the problem in *Smalley* whereby "deemed" denials were held to meet the criteria under clause 8.11.1 on the basis that a deemed denial of liability must include, by implication, a denial of fault.

The new CAG will also remove Clause 8.11.3 (the clause indicating that a matter was exempt from CARS under s92(1)(a) if more than 25% contributory negligence was alleged). There will now be no mandatory exemptions for matters where contributory negligence is alleged. It will now be a matter for discretionary exemption applications.

In cases where contributory negligence is alleged, or where there are any other issues in respect of liability, will have to be considered for exemption pursuant to section 92(1)(b) and clause 14.16 of the Guidelines. Clause 14.16.7 will be amended to read as follows:

> "whether the claim involves issues of liability including issues of contributory negligence, fault and/or causation;"

The other factors that are currently in Clause 14.16 will remain the same, and are not exclusive, so a party seeking an exemption pursuant to section 92(1)(b) can also argue other grounds as to why the matter is not suitable for assessment.

Thank You