MOTOR ACCIDENT SOLICITORS SOCIETY

Competition Commission:

Private Motor Insurance Market Investigation

Response from the Motor Accident Solicitors Society

January 2014

Introduction

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Craig Budsworth.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has over 170 solicitor firm Members, representing over 2000 claims handlers. We estimate that member firms conduct upwards of 500,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

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Executive Summary

- MASS strongly advocates that the overriding objective must be for the accident victim to remain at the core of any changes, ensuring that they receive the access to justice they are entitled to and the appropriate service, compensation and any redress they may seek.

- MASS believes that it would be inappropriate to separate the issue of credit hire and repairs from personal injury. Personal injury claims are handled in their entirety and in order to maintain a fair, appropriate and cost effective process, MASS believes it is important to handle all aspects of a road traffic accident claim within the same principles of operation and cost.

- To that end, MASS is extremely concerned surrounding the issue of Third Party Capture (also known as Third Party Assistance) and believes that some of the remedies proposed in this consultation could enhance this practice and therefore lead to significant disadvantages to the accident victim and their right to receive independent advice and access to justice.

- MASS would urge the Commission to re-evaluate their proposed remedies to ensure that what is proposed and the work required to put in place is proportionate. MASS suggests that if all the remedies proposed are implemented, to save the amount of £6.00 - £8.00 per policy, the costs savings would be disproportioned to the other impacts.

- 2013 saw a significant number of changes to the claims handling process for personal injury in the form of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) and the Jackson Reforms. MASS would urge that sufficient time and consideration is provided for these changes, in both procedure and cost structure, to be allowed to bed in before implementing further ‘cost saving’ changes.

- MASS is concerned about the impact these proposals could have for those consumers who are in the lower socioeconomic bracket of society. In particular, the remedy concerning ‘add ons’ could create additional costs for purchasing an insurance policy, which many could find unaffordable. This would in turn introduce inequality for consumers, with only those who can afford it having access to ‘add ons’ like a replacement vehicle.

- MASS feels that the impact on the law of Tort and the differing approach to a commercial accident victim in comparison to a private accident victim would be an unworkable proposition.

Remedy A: Measures to improve claimants' understanding of their legal entitlements

Issues for Comment

a) What information should be provided to consumers?

On taking out a policy MASS believes that a breakdown could be given in relation to the impact of each element of the policy and a synopsis of what cover that provides. As an example of this, the actual premium could be broken down to reflect the actual cost, the increase because of any previous claim or licence endorsement and the amount for each additional benefit, such as legal expenses. There also needs to be an openness as to what the benefit can offer and notification if that is available through a different provider (eg legal expenses through a household policy, separate provider or bank account benefit) that may charge a different premium. However, what should be borne in mind is that the impacts listed in paragraph 17 do normally appear within a policy booklet which we doubt is read to any extent by the majority of consumers.

b) When is this information best provided to consumers – with annual insurance policies, at the first notification of loss, or at some other point? Should this information be available on insurers' websites?

We would reiterate our encouragement of openness and so this information should be provided at each of these stages and should be available on the insurers' website listed under what to do in an accident and impacts on your policy premium.

c) Would it be more effective for consumers to be provided with a general statement of consumers' rights prepared and periodically updated by a body such as the Association of British Insurers or are there any examples of existing best practice in relation to information given to consumers by insurers?

We do not feel that an accident victim would make any attempt to search for best practice from the ABI as they would most likely turn to those who they have acting on their behalf immediately after the accident. However, it would be perfectly reasonable for the ABI to provide this information to their members disclosure on their websites or when a policy is purchased.

d) Would this remedy give rise to distortions or have any other unintended consequences?

We do not consider that giving information to people would have any distortions or unintended consequences as long as all their options are made known to them. MASS' main concern would be to ensure that the information insurers give is honest about all the available options and not just those that benefit them, e.g, the choice of repairer. If best practice was stipulated as "You should use the repair network of your insurer" this would clearly not provide all the options. An alternative would be "You have the right to choose which repairer undertakes the repairs to your car".

e) What circumvention risks would this remedy pose and how could these be addressed?

As above, we have highlighted the type of risk. The way this could be addressed is a cross party working group putting together the information pack, or an independent group, similar to the CJC, being tasked with the work.

f) How would this remedy best be monitored, particularly in relation to a statement of rights at the first notification of loss?

The best way to do this would be by a questionnaire to the non-fault party at the conclusion of the claim. However, we do not feel that this would be proportionate to collect this data.

g) How much would it cost to implement this remedy?

To question each non-fault party would mean postage, letter, envelope, etc cost of around £1.00 per case. This would then need to be data monitored adding additional cost of staff implementation to report on the results. Whilst this may be possible as an online platform there may have to be a compromise in the coverage and feedback ultimately received. In our experience the majority of consumers are not interested in completing this type of feedback questionnaire.

h) Is there any reason why this remedy should not be implemented through an enforcement order?

We are not of the opinion that any enforcement order should be issued bearing in mind the issues we have over implementing amendments to part of a claim without considering the impact of the whole, including personal injury.

i) Is this remedy more likely to be effective in combination with other remedies than alone and, if so, which combinations of remedy options would be likely to be effective in addressing the AECs that we have provisionally found?

Providing information would seem to sit with the remedy of an independent ABI GTA model mentioned in the consultation responses.

j) Would the additional measure set out in paragraph 20 be likely to be effective in enhancing consumers' understanding of their legal entitlements?

MASS believes that it is sensible to do this but would suggest that data gathering, such as exchanging details but also taking footage on a mobile phone of the accident aftermath, at the scene of an accident is as important as knowing your rights and so would definitely encourage both.

Theory of Harm 1: Separation of Cost Liability and Cost Control

Issues for Comment 1

a) Whether the possible remedies under ToH 1 are likely to be more effective in combination with other remedies than alone and, if so, what particular combinations of remedy options would be likely to be effective in addressing the AEC we have provisionally found.

We would reiterate that we do not feel that any remedy is proportionate whether on its own or in conjunction with another. However, if the Commission were to proceed then introducing more knowledge, as mentioned above, a ban on referral fees (as commented on in Remedy 1G) and making the ABI GTA compulsory would seem the best combination.

b) Whether the possible remedies under ToH 1 should be implemented by the CC through an enforcement order or whether the CC should make recommendations to the Government (eg. MoJ), regulators or other public bodies to implement the remedies.

MASS believes that this issue cannot stand alone without considering the impact of the personal injury element to non-fault victims, and also the proportionality of savings.

There is a significant risk that any enforcement, without considering all the elements of a claim, would potentially implement a change that has not been foreseen by this inquiry as it is not dealing with all elements of a claim. Consequently we would prefer that the CC makes recommendations to the MoJ who then ensure that all rule changes are consistent with a personal injury claim in its entirety.

Remedy 1A: First Party Insurance for Replacement Cars

Our initial view on this proposal is that this is potentially going to impact the rights of those in the lower socioeconomic group. We are seeing that this benefit is an optional add on, costing around £30.00 per policy for a replacement vehicle. A number of points arise from this; the cover is not indefinite when a vehicle is written off and indeed does not always cover the time it takes to receive payment when a vehicle is 'written off'. Thus those who cannot afford to pay the extra premium would lose out in their right to have a replacement vehicle in the event of an accident. This has to be fundamentally wrong.

Issues for Comment – 1A

a) What aspects of the law would need to be changed?

The law of tort would need to be fundamentally changed into having no right of recovery in the event of another's negligence. As we mention later in this response, this would impact other areas of law, not just road traffic accidents (RTAs). What also needs to be considered is how this would interact with a commercial policy. You could have the situation where liability is 50/50 and a private motorist is involved in an accident with a commercial motorist. The perverse effect would be that the commercial policy holder could well have different rights to the private motorist.

b) How should policyholders be given a choice as to the extent of replacement car cover?

MASS considers that there would need to be a number of different products for the type of replacement vehicle available with different pricing structures. However, this would increase the cost of insurance, not decrease it, for the majority who do not pay for replacement vehicle cover.

c) To what extent would the need for consumers to pay a premium for replacement car cover be offset by the effect on premiums of the overall reduction in replacement car costs that would occur as a result of this remedy?

As mentioned, if the average policy additional cost is approximately £30.00 but only a £6.00 - £8.00 saving has been identified, then this is not a proportionate remedy.

d) How might this remedy affect NCBs and the premiums of non-fault claimants? Would non-fault claimants have to pay an excess when provided with a replacement car under their own policy? If so, would this be treated as an uninsured loss which should be recoverable from the at-fault insurer?

This anticipated effect is outside our experience.

e) How would this remedy affect the credit hire and direct hire activities of vehicle hire companies? How might the quality of service in the provision of replacement cars be affected if replacement car provision is contractually specified in motor insurance policies?

MASS believes that a consequence of this remedy would be that there would be no need for credit hire companies and so they would close down. The problem would then arise as to if that element of competition disappears then why would a direct hire company maintain a quality fleet of vehicles? This could then potentially impact on the type of vehicle provided. So for instance, if the claimant drives a Range Rover, and has good reason to do so, then would the policy cover a similar vehicle, of a similar age and quality? This would then increase the cost of a replacement vehicle when the insurance is purchased in the first place.

f) Would it be likely that the non-fault insurer providing the replacement car would also handle the repair of the non-fault claimant's vehicle? What would be the consequences of this? Would complexities and costs arise if the replacement car is provided by the non-fault insurer and the repair is carried out by a different service provider?

Yes, this would be likely as the policy for a replacement vehicle would be with the non-fault insurer. Thus, the identified issues on cost control by the at-fault insurer would fail to be met by this remedy.

g) Would this remedy give rise to distortions or have any other unintended consequences?

Only those mentioned above.

h) How long would it take to implement this remedy? What administrative changes would need to be made?

This knowledge is outside our experience but we would have thought that this would take 2 years to implement whilst renewals are undertaken.

i) Would this remedy need any supporting measures? If so, what are those measures?

Those mentioned above to changes to tort law and the disparity between a private and commercial accident victim are by far the most significant.

Remedy 1B: At-fault Insurers to be give the first option to handle non-fault claims

Issues for Comment – 1B

MASS is extremely concerned that this remedy provides a further avenue for insurers to continue their practice of third party capture (or third party assistance).

MASS strongly urges the Commission to reconsider this proposal taking account of what third party capture is and the many guises it takes and most importantly the adverse effect it has on the consumer.

Third party capture can include a wide range of practices within the motor personal injury sector, including;

- Contacting the claimant direct with an offer to settle without them having the opportunity to seek independent legal advice;
- Making an offer to settle for an injury claim without advocating or seeing a medical report;
- Remedy 1B – providing at-fault insurers the first option to handle non-fault claims, would be yet another form of third party capture.

There is a considerable conflict of interest when an at-fault insurer is attempting to settle the claim for their policy holder direct with a claimant who does not have the benefit of knowledge, experience and expertise, and at the same time is coping with the physical and emotional effects of being involved in an accident that is not their fault. Far from acting in the claimant's best interests, in reality the at-fault insurer will be concentrating on the most cost effective way of settling the claim and in the long run, satisfying their shareholders. Whilst costs should not and cannot be allowed to escalate disproportionately, what is in the claimants best interests must remain central to the management of the claims process.

As indicated previously, MASS believes the personal injury claims process must be dealt with in its entirety and that elements relating purely to credit hire and repair should be taken into consideration with all aspects of the claim. We would therefore include the undesirable practice of third party capture which can not only prevent, restrict or distort competition, but most importantly disenfranchise the accident victim and potentially deny them the access to justice that they are entitled to.

Personal injury claims are complex and it must be borne in mind that the accident victim is very unlikely to have much, if any, knowledge of the claims process, let alone what they are entitled to and what their claim may be worth.

MASS would also like to refer the Commission to comments by the Transport Select Committee who in their recent report[1] when commenting on raising the threshold of the small claims track limit, (which would in effect be another avenue for third party capture), stated in paragraph 50; "*We believe that access to justice is likely to be impaired, particularly for people who do not feel confident to represent themselves in what will seem to some to be a complex and intimidating process. Insurers will use legal professionals to contest claims, which will add to this problem".*

Access to independent advice must be maintained to ensure equality of arms and fairness. If at-fault insurers are given the opportunity (at any stage of the process for whatever element of the claim) to control the claim, taking away the claimants right to freedom of choice, then a fundamental principle of English law and access to justice will be compromised.

All of these points mean that we do not propose to answer the individual questions on this proposed remedy as we feel that it is fundamentally wrong and will have too big an adverse effect on access to justice.

a) Which of the variants in paragraphs 38 and 39 are likely to be most effective:

i) If the non-fault claimant retains the right to choose who handles the claim, what incentive would they have to choose to have claims handled by the at-fault insurer? Would this remedy favour larger insurers with stronger brands?

ii) If the at-fault insurer is able to capture the claim should it wish to do so, what incentive would the at-fault insurer have to provide the standard of service to which the non-fault claimant is entitled? What measures need to be put to safeguard against this risk (ie Remedy 2A)?

b) What are the implications of the non-fault claimant having the right to choose an alternative provider?

c) To what extent might this remedy inconvenience non-fault claimants, eg, if they have to wait for the at-fault insurer to make contact? How long should the fault insurer be given to contact the non-fault claimant?

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[1] Cost of Motor Insurance:Whiplash. 4th Report July 2013

d) **Should non-fault claimants who make the first notification of loss to their own insurer, broker or CMC have to wait for an offer from the at-fault insurer before deciding who to appoint to handle the claim even if they want their own insurer or CMC to do so?**

e) **Are there any advantages or disadvantages to the variant applying this only to replacement cars (paras 40 & 41) compared with applying this to both replacement cars and repairs? What might be the consequences of a replacement car being provided by the at-fault insurer but the repair being managed by the non-fault insurer?**

f) **Would this remedy give rise to distortions or have any other unintended consequences?**

g) **How might this remedy be circumvented? How could this circumvention be avoided?**

h) **How should insurers, brokers and CMCs be monitored to ensure that claimants are properly informed of their rights when making the first notification of loss? How should non-fault insurers and CMCs be monitored to ensure that the at-fault insurer is informed of the claim? Who should undertake this monitoring? What additional costs would arise as a result of monitoring?**

i) **How long would it take to implement this remedy? What administrative or legal changes would need to be made?**

Remedy 1C: Measures to control the cost of providing a replacement car to non-fault claimants

It is worth bearing in mind that invariably where a credit hire vehicle has been provided, the hire charges will often be recovered as part of the claim for personal injury by the non-fault Claimant. So whilst the Commission is not directly concerning itself with claims for personal injury, the methods of recovering the losses arising in relation to claims for credit hire will often be dealt with as part of the personal injury claim. Therefore, all remedies to be considered must be done so against a backdrop of the existing framework for recovery of these losses, both involving and not involving claims for personal injury. The current framework is still undergoing a significant amount of change, and over the last 3 years changes such as the implementation of the RTA Claims Portal, LASPO (Legal Aid Sentencing and Punishment of Offenders Act 2012) and the Jackson reforms have taken place. Whilst these deal with remedies in tort for non-fault Claimants, it is clear that the Commission must consider any suggested remedies within the existing legal framework. The Commission must concern itself here first and foremost with proportionality of its suggested remedies involving credit hire. The Commission in its own provisional findings report states that (paragraph 51) whilst the commission identified … “a net adverse effect on consumers of between £150 million and £200 million pounds per year … this net effect corresponds to … about £6.00 to £8.00 per motor policy”. The changes mentioned above have already resulted in a reduction in motor insurance premiums and MASS would counsel the Commission to consider very carefully the proportionality of any further remedies they are considering in this matter. MASS understands that certain motor insurers already offer a replacement vehicle service to consumers, the cost of which significantly exceeds the £6.00 - £8.00 mentioned above.

Issues for Comment – 1C

a) **What would be the most effective way of implementing this type of remedy? Possible ways could be an enforcement order made by the CC, an under taking to replace the GTA, or (in relation to the hire costs of TRVs subject to dispute) a**

recommendation for judicial guidance on the level of hire costs recoverable from at-fault insurers by non-fault insurers and other providers of replacement cars.

Given the existing legal and commercial framework that exists, MASS questions whether this remedy is actually proportionate to the theory of harm which the commission wishes to remedy. MASS would go further and in fact advise against a direct enforcement order. Any disputes in relation to the overall costs or individual aspects of hire, such as daily rate or period, are dealt with effectively by the General Terms of Agreement (GTA) and also the existing Court framework. The commission is referred to the case of *Bent –v- Utilities & Highways Construction Plc.* In this case the Lords confirmed that previous Court decisions had already established the principles concerning the basis on which the non-fault Claimant can recover the cost and level of damages of hiring a replacement car on credit terms. Judgment provided clarification on the value of contemporaneous evidence on comparable hire charges at the time of the accident. It saw no reason to depart from well-established principles.

b) Which parties should be covered by this remedy?

As stated above, any disputes with the credit hire claims of non-fault Claimants are dealt with in the existing framework. From the non-fault Claimant, to the CHO, Claims Management Company (CMC), the non-fault insurer and the at-fault insurer, there are checks and balances which protect the rights of the at-fault insurer as well as the non-fault Claimant. The non-fault Claimant under tort law is able to bring a claim via initially the RTA claims portal but which ultimately can be resolved at Court, with a judge determining whether, in all the circumstances, the credit hire charges were reasonably incurred.

c) What is the appropriate time period in which repairs should commence once a replacement car has been provided? How should the hire period be monitored and by whom?

Whilst it is sometimes a dispute between the non-fault Claimant and the at-fault insurer, such arguments are clear, straightforward and are settled upon the evidence presented in each particular case. In MASS' view it would be difficult for the Commission to impose strict timescales on what is an appropriate period for when repairs should commence, as there are many variables which may determine a reasonable period. The GTA stipulates in paragraph 4.1 that the CHO must advise the at-fault driver's insurer of a potential claim immediately their identity is known. Provided the at-fault insurer then replies to this within the prescribed 5 working days, then the CHO is able to make an informed decision regarding the authorisation of credit repair or to request the at-fault insurer deals with repairs. The GTA (paragraph 4.6) recommends "Hire period commences when the customer both needs and takes delivery of the replacement vehicle …". It is presently incumbent upon the hire company to monitor its own periods of hire for its vehicles as the at-fault insurer will only reimburse the hire company for what it deems to be a reasonable period considering all the factors and the individual case. The GTA also stipulates in paragraph 4.11 that the CHO must notify the at-fault insurer of any delay in repairs and keep them updated throughout the remaining period. Invariably however, it is the speed at which the at-fault insurers respond to correspondence that determines the speed at which repairs are authorised and therefore the eventual duration of hire.

d) What is the most appropriate mechanism for setting hire rates for replacement cars? Who should determine the hire rates?

Currently the hire rates are determined by individual credit hire companies, however, there are recommended daily rates contained within the GTA. It is for the individual hire company to consider whether or not they wish to be part of the GTA and rely upon those rates, and it should not be forgotten that the GTA rates are set by agreement between insurers and CHOs. Further, the reasonableness or otherwise of the credit hire rates

have been a matter that has been put before the Court on many occasions and the Court on a case-by-case basis has determined the recoverable rate.

e) What administrative costs should be allowed? At what level should administrative costs be capped?

As stated above, this has been before the Courts on many occasions, and whilst recommended rates are contained within the GTA, it is ultimately for the Court to consider on a case-by-case basis the reasonableness of any administrative costs.

f) Is it practicable for the relevant documentation to be exchanged through a web portal rather than in paper form?

The GTA is currently looking to formulate a credit hire claims portal and MASS supports this. Presently most claims are presented in email form rather than paper.

g) What costs would the measures in this remedy entail?

MASS is unable to comment on the costs of this measure.

h) Would this remedy give rise to distortions or have any other unintended consequences?

MASS are unable to comment on this as it has insufficient information at the present time to consider these issues.

i) To what extent is there a risk that this remedy could be circumvented by the evolution of new business models that are not subject to it? How could this risk be avoided?

If the portal is operated in line with the existing RTA portal where all claims are registered with it and only in certain circumstances do they fall out of the portal, this should remedy any proposed circumvention or new business models looking to evade using the portal? The definitions and requirements of the current PI portal is set out in the PI protocol and similar definitions if the proposed portal were to be implemented could be utilised which would ensure the portal would be used correctly.

As stated in the introduction to this section, all these issues are to be considered against the backdrop of existing changes which are reducing premiums.

Remedy 1D: Measures to Control non-fault repair costs

Issues for Comment – 1D

a) What would be the most effective way of implementing this remedy?

The aim of the remedy is to prevent subrogated repair claims being marked up.

The most effective way of achieving this aim would be for the non-fault insurer to produce to the at-fault insurer the repair invoice with a statement of any discounts or allowances applicable to the invoice – a wholesale invoice - together with confirmation that no commission or other payment is due from the repairer to the non-fault insurer.

b) Would either variant of this remedy give rise to distortions or have any other unintended consequences?

The two proposed variants of this remedy are:-

i) Non-fault insurers will pass to at-fault insurers the wholesale price they pay for repairs, plus an allowance for an administration charge;
ii) Standardised rather than actual repair costs would apply

Each proposed remedy gives rise to potential distortions, as each relies on the non-fault insurer not seeking to take advantage of the non-fault repair account.

There is a risk for example that some insurers may seek to include a profit element within the administration charge.

With regard to the second remedy, some insurers could on a case by case basis seek to dispute the categorisation of repairs, depending upon whether the standard repairs allowed is above or below the actual repair costs.

Issues for Comment – 1D(a)

c) How could repairers be prevented from inflating the wholesale prices they charge to non-fault insurers and passing excess profit to non-fault insurers through referral fees, discounts or other payments?

Repairers should be required to demonstrate that the composite aspects of their invoices do not differ by reference to the recipient of the invoice – particularly with regard to labour rates and hours charged. Parts should be standard across all invoices.

Insurers with repair networks should be required to implement an audit process that demonstrates that they have audited repairs carried out on behalf of their customers, and confirmed that charges have been calculated on the same basis for both fault and non-fault incidents.

d) Could this remedy be circumvented by insurers vertically integrating with repairers?

It should not be possible for this remedy to be avoided by vertical integration, as in third parties claims the non-fault insurer should be able to submit a wholesale invoice only, as set out above.

Issues for Comment – 1D(b)

e) Is it practicable to set standardised costs for all aspects of repairs in subrogated claims? If not, what are the potential problems?

If standardised costs were to be introduced, careful thought would need to be given to the categorisation of types of repair, to which standard repair costs would apply. The main potential problem is that a dispute could arise between the respective insurance companies as to the extent and severity of damage, and accordingly the category of fixed repair costs that should apply. If such disputes became common place then the position will not be far removed from a standard dispute about a repair invoice.

f) What are appropriate benchmarks for inputs into the price control? To what extent are cost estimation systems helpful? What other indices would need to be used?

This information is outside MASS' knowledge and expertise.

g) What would be the costs of implementing this arrangement?

This information is outside MASS' knowledge and expertise.

h) How would monitoring of this remedy work?

As part of the audit process described above, insurers would be required to audit and confirm that repairs for which they are responsible on fault incidents were treated in the same manner – and within the same category – as similar repair damage in non-fault incidents.

i) What would be the most appropriate organisation to review the inputs into price control on a regular basis?

In our view it would be appropriate for the FCA to assume responsibility for ensuring that price control mechanisms were operating effectively. This would be achieved through FCA and *audit of the audit* – by which the FCA would review individual insurers audits described above.

j) What measures would be required to ensure that the price control arrangements would not have adverse consequences for the quality of repairs?

We do not see any significant additional requirements in this regard. Insurers currently have commercial incentives to limit the cost of repairs as far as possible. Existing mechanisms to ensure that this does not have an adverse consequence and the quality of repairs could be maintained within a new price control mechanisms.

Remedy 1E: Measures to control non-fault write off costs

Before we deal with the questions in this section there seems to be no provision made for claimants who wish to keep their damaged vehicles in order to put them back on the road. As such, we would state that there should be no mandatory provision enforcing that the at-fault insurer be able to take responsibility for all salvage following an accident. This is also another area where there could well be a disparity between a commercial accident victim and a private accident victim.

Issues for Comment – 1E

a) Would either variant of this remedy give rise to distortions or have any other unintended consequences?

The Competition Commission found that the salvage company instructed by the non-fault insurer sometimes set the salvage value too low, which leads to an increased claim being brought against the at-fault insurer. It suggests two ways of resolving this:-

i) Allow at-fault insurers to handle salvage of non-fault vehicles
ii) Adjust the net PAV payment by the at-fault insurer to reflect actual salvage proceeds.

MASS considers that there are potential unintended consequences of these schemes. At-fault insurers may be reluctant to absorb the additional administration and costs associated with collecting and disposing of the non-fault vehicle and realising the salvage.

If there was a requirement that an adjustment should be made to reflect the actual salvage proceeds on sale of the written off vehicle, then there is a potential additional

administration cost for the insurers and salvage agents involved in that process. Having said that, if the Commission is correct that some vehicles are under-valued in the non-fault salvage process, then that problem should be improved by the introduction of a subsequent adjustment mechanism. Any incentive to under- value salvage should be removed.

Issues for Comment – 1E(a)

b) **Would at-fault insurers be likely to take up the option of handling the salvage?**

At-fault insurers are likely to prefer a more robust approach to identifying accurate salvage value, and avoid the additional administration cost of handling the salvage themselves.

c) At what point in the claims process should at-fault insurers be given this option?

The at-fault insurer should not be given the option to dispose of salvage until the non-fault party has agreed that his vehicle is written off, and the pre accident value.

Issues for Comment – 1E(b)

d) What impact would this remedy have on salvage companies? To what extent would this proposal reduce the incentives for insurers to get the best salvage value from salvage companies?

We do not see any significant impact of this proposal on salvage companies. Insurers should already be incentivised to get the best deal from salvage companies, and that should be based on accurate rather than under-stated salvage value.

e) What administrative costs would the adjustment mechanism have? What evidence would need to be provided to verify the salvage proceeds (and any referral fee)?

There would necessarily be administrative costs in effecting the adjustment, but these costs are expected to diminish because the very process of adjustment should avoid the suggested issue of under valuation. The process should be self-policing as the non-fault insurer no longer receives any benefit where the actual salvage value recovered is greater than that estimated, because any additional value would be returned to the at-fault insurer.

Remedy 1F: Improved mitigation in relation to the provision of replacement cars to non-fault claimants

MASS' views on this section are prefaced by the fact that we feel that the Commission may not fully understand the current law. Contained within the Provisional Findings Report at paragraph 10 is the statement: "Neither the at-fault party nor their insurer may choose the provider of these services, or specify the terms on which services are provided, notwithstanding their ultimate liability." The conjoined cases of *Copley v Lawn* and *Madden v Haller* in 2011 found that if an at-fault insurer provides an offer of a replacement vehicle, stipulating the terms of the offer and the cost to them, then this is the maximum that the non-fault party can recover, irrespective of whether or not this is a surrogated loss.
On need of a replacement vehicle, again, the Commission should be aware that this is not automatically a like for like vehicle. The 2013 case of *Singh v Yaqubi* is a clear demonstration of this. In practice, this means that non-fault parties are questioned at the start of hire as to their need as, when it comes to recovering the hire, if the non-fault party had no need then the at-fault party does not have to pay anything. The Commission should also be aware that when a case is presented in accordance with the ABI GTA then the at-fault party is provided with a copy of the mitigation statement of truth as part of the payment

pack. The fact that this mitigation statement is signed at the time of hire starting, does not change the fact that this has been dealt with before the documentation is delivered with the vehicle. Ultimately, it is already established law that a claimant has to answer to a court why he needed a replacement vehicle, and more importantly, why he needed that specific type of a replacement vehicle. Essentially, these are the only two questions that matter. As the claimant has to answer any question from the at-fault insurer on need before compensation is paid, we do not feel that this proposed remedy is needed and it would be disproportionate to introduce any changes.

Issues for Comment – 1F

a) Could this remedy operate on a stand-alone basis?

We do not believe that this remedy should operate at all for the reason given above.

b) Which other remedies would benefit from this remedy as a supporting measure?

As above.

c) What questions should the non-fault insurer or CMC ask non-fault claimants in order to assess the need for a replacement car, the appropriate type of replacement car and to demonstrate that the provision of a replacement car had been appropriately mitigated?

As stated above, we feel that the only relevant questions are why is a replacement needed and why that type of vehicle.

Should the cover provided by the claimant's own insurance policy be considered in assessing the claimants need; eg, if the claimant's own policy included provision of a replacement car in the event of an at-fault claim, would that be sufficient evidence of need for a replacement car in the event of a non-fault accident?

There are numerous cases that have dealt with this question but it is perhaps best addressed in the case *Daniels v Farish*. This case states that it is not for the tortfeasor (at-fault insurer) to dictate that the claimant should pursue their right in contract when they have a claim in tort. As such, we feel that the only way for the Commission to change this would be for a change in the law of tort. The trouble is that this would impact not just RTA law but have an impact on all different areas, such as shipping law whose cases are often referred to in RTA cases.

d) Would the right of the at-fault insurer to challenge the non-fault insurer or CMC and to see the 'mitigation declaration' and call record be sufficient for this remedy to be self-enforcing without additional monitoring?

As stated, we do not believe that this is necessary, for the reasons given above.

Would giving the at-fault insurer access to the non-fault insurer's or CMC's call records give rise to any data protection issues?

Numerous issues arise from this point that link with others in this section. Firstly, there would be an additional cost to the non-fault insurer or CMC who would need this facility for call recording in the first place, then strange for storage to keep these recordings. A non-fault party would then have to agree to the fact that calls could be recorded. A further issue would be releasing the relevant part of the call, which may well discuss numerous issues that are confidential, including discussions on liability and the assessment of the same.

e) How much would it cost to implement this remedy?

We are unaware of the cost as it will depend on the size of the firm. However, call recording equipment costs around £50.00 per phone and there will also be storage costs of the recordings, which may mean servers, hard disk space or cloud space.

f) Would this remedy give rise to distortions or have any other unintended consequences?

As we have mentioned above, the main issue surrounds the impact any potential changes in remedy will have on other areas of tort law.

Remedy 1G: Prohibition of Referral Fees

Issues for Comment – 1G

MASS believes that referral fees within the industry are one of the factors that contribute to the increasing costs for consumers. As the Commission is aware, referral fees for personal injury claims have been banned since April 2013 as part of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

Despite that, referral fees remain prevalent in other areas of the motor claims process, including, for example, fees paid for credit hire and repair to insurers and garages and from paint companies to insurers. As the OFT identified, these are some of the factors contributing to the increasing cost of motor insurance.

MASS believes that a more holistic approach is needed in respect of the existence and impact of referral fees and welcomes the Commission's proposals. Broadening the current ban on referral fees to cover every aspect of a motor claim, should help to bring down costs to the at-fault insurer, a saving which could then be passed on to the consumer through reduced insurance premiums.

a) **Could this remedy operate on a stand-alone basis?**

Yes. As stated above, MASS believes that the current ban on referral fees for personal injury claims should be broadened to encompass all elements of a motor claim.

b) **Would remedies 1A to 1F benefit from a prohibition of referral fees as a supportive measure? Or would remedies 1A to 1F have the effect of reducing referral fees in any event?**

This would be uncertain but we would refer you back to our comments on this proposal being disproportionate to the savings achieved by the consumer.

c) **What would be the impact on premiums if referral fees were prohibited?**

MASS can see no reason why motor insurance premiums could not be reduced if referral fees were prohibited in all areas involved in a motor claim.

d) **Would this remedy give rise to distortions or have any other unintended consequences? In particular, would a prohibition on referral fees create a greater incentive for insurers to vertically integrate?**

MASS would suggest that the Commission look carefully at the consequences of the referral fee ban for personal injury claims. As this coincided with the introduction of Alternative Business Structures this has enabled companies to integrate in various ways which in turn provides the opportunity for fees to be shared or charged in alternative

ways, which whilst technically are not regarded as referral fees, essentially they are. The result being that the concept of paying referral fees has not been completely prohibited which in turn has meant that costs have not been reduced, just transferred to a different business transaction. Furthermore, this has meant an inequality within the industry with some firms abiding by the ban and others being able to circumvent it.

e) **What circumvention risks would this remedy pose and how could these be mitigated? In particular, how could other monetary transfers (eg discounts) having the same effect as referral fees, be prevented?**

With the benefit of experience from the ban of referral fees in personal injury claims, MASS would urge the Commission to ensure that there are clear and precise Rules, for example surrounding the definition of a referral fee (to the respective element) and guidance as to what does and does not constitute a referral fee.

f) **How could this remedy best be monitored and what costs would be incurred in doing so?**

Monitoring and enforcing the prohibition of referral fees must be robust and visible. If a deliberate breach is found to have been committed then the penalty should be harsh and details of the breach published to prevent the same breach occurring again and enable consumer confidence in the industry. The responsibility to monitor this would have to fall onto the shoulders of the FCA, bearing in mind it is the MOJ for CMCs and the SRA for solicitors.

ToH 1: Remedies the CC are not minded to consider further

Issues for Comment – 1H
Views on these two possible remedies and any other possible remedies not included in the Notice which interested parties consider may be effective in relation to ToH1.

MASS agrees with the Commission not to consider the two remedies further.

Theory of Harm 2: Possible underprovision of service to those involved in accidents

Remedy 2A: Compulsory audits of the quality of vehicle repairs

Issues for Comment – 2A

a) **What costs would be involved in auditing the quality of repairs?**

Essentially, if you were to audit every repair, the cost would be that of an engineer report which is around £60.00 per inspection, which MASS would suggest is clearly disproportionate.

b) **How frequently should audits of repair quality be undertaken?**

MASS would suggest that a more realistic approach would be to follow similar lines as those undertaken in the identified PAS 125 scheme.

c) **Should audits of repair quality be undertaken by insurers and CMCs or an independent body? Is it necessary for the audits to be standardised and be performed by an independent body for the results to be comparable and credible? How would an independent body be funded?**

MASS believes there has to be a clear separator between those who pay and those who audit to ensure the process is independent. If data collection on repair quality is anticipated then a standard audit would need to be put together with random testing of completed vehicles. On funding, this is again a model where PAS 125 fits in that the repairer pays to be a member and thus the scheme would be funded by the repairer.

d) If the results of repair quality audits were to be published, who should collate the results? Should results be categorised by repairer or insurer?

The collation would be underdone by the scheme, i.e. PAS 125. As we have previously stated, an important aspect of a claim is for the non-fault party to have choice, thus the quality of the repair relates to the repairer, not the insurer. Of course if the repairer is owned by the insurer then they would be categorised in any event.

e) If audits are carried out by insurers, how would consistent standards be achieved?

We do not believe that they should be undertaken by the insurer in any event.

f) If this remedy were to be implemented through expanding the scope of PAS 125 and the scope of audits undertaken in relation to PAS 125, is it necessary for PAS 125 accreditation to be made mandatory for all repairers undertaking insurance related work?

MASS is not of the opinion that it should be made mandatory but should form part of the information provided to consumers when buying the policy and when presenting the claim. For example, "When choosing a garage to undertake your repairs you should look for a quality mark, such as PAS 125 that shows that garage is audited in relation to the quality of the repairs it undertakes."

g) Would this remedy give rise to distortions or have any other unintended consequences?

We cannot envisage any at this stage.

h) Whether this remedy is best made by the CC through an enforcement order or whether the CC should make recommendations to another party to implement the remedy, and if so who that party should be.

As we have previously stated, MASS would prefer that the CC makes recommendations to the MoJ who then ensure that all rule changes are consistent with a personal injury claim in its entirety.

i) Whether this remedy is likely to be more effective in combination with other remedies than alone and, if so, what particular combinations of remedy options would be likely to be effective in addressing the AEC we have provisionally found.

MASS suggests that this remedy could sit with the prohibition of referral fees and the change to the ABI GTA depending on the cost of ensuring that the audit is not paid for by the insurer and thus there would be no increase in policy premiums.

ToH 2: Remedies the CC are not minded to consider further

Issues for Comment – 2C

Views on this possible remedy and any other possible remedies not included in the Notice which interested parties consider may be effective in relation to ToH2.

MASS agrees with the Commission in this respect but should it later be shown that there is detriment to Consumer protection we would ask the Commission to revisit this matter.

At-fault insurers would need to ensure there is an adequate safeguard to protect non-fault Claimants with any issues of repairs so as not to interfere with the Consumer's legal rights of redress. If it is later shown to the Commission that at-fault insurers are not providing repairs to a reasonable standard, and there are no safeguards for consumer protection, MASS would ask the Commission to consider reviewing this matter. There should be no detriment (eg. cost) to a Claimant who has to rectify sub-standard repairs.

Theory of Harm 3: Market Concentration or horizontal effects

No remedies considered.

Theory of Harm 4: Add-ons

Issues for Comment – 4

a) **Whether the possible remedies under ToH4 are likely to be more effective in combination with other remedies than alone and, if so, what particular combinations of remedy options would be likely to be effective in addressing the AEC we have provisionally found; and**

We believe the possible remedies would be more effective in combination with other remedies, and that overall closer regulation of the way add-on products are offered by PCWs and insurers would address the AEC.

b) **Whether the possible remedies under ToH4 are best made by the CC through an enforcement order or whether the CC should make recommendations to another party to implement the remedies, and if so who that party should be.**

We feel the FCA should be given the task of implementing the remedies and regulating compliance.

Remedy 4A: Provision of all add-on pricing from insurers to PCWs

Issues for Comment – 4A

a) Should PCWs be required to enable consumers to compare the policies offered by different insurers including all add-ons on their websites or are they sufficiently incentivised to do so without such a requirement?

We do not believe PCWs are sufficiently incentivised to enable consumers to compare like with like, and that they should be required to provide meaningful information about add-ons that would enable consumers to understand the nature of the quote they are being offered and genuinely compare like with like. It creates perverse incentives both for insurers to keep basic premiums low (and incidentally as a side-effect of this persist in saying that private motor insurance is unprofitable) but make profits by selling add-on products, and for PCWs not to concern themselves with add-on products as PCWs make their profits on the basic premium not the add-on products.

b) Should the remedy be extended to brokers?

Possibly, depending on how the remedy were formulated. We would say that brokers should certainly be required to provide information that will enable consumers to

compare like with like and understand what they are buying, but brokers in many cases will be providing a more personal service to consumers, taking more detailed information to enable them to consider the consumer's requirements and make recommendations based on those requirements.

c) Should the remedy apply to all add-ons?

Yes. Although obviously some add-ons are more likely to be purchased than others, we feel it would be beneficial to apply the same rules to all, in particular to prevent insurers creating new add-on products that would not be covered by the remedy.

d) How long would it take for insurers to prepare the pricing information to pass to PCWs and for PCWs to alter the design of their websites to accommodate this change?

We do not feel able to comment on this other than to say that if competition is driving the changes (i.e. the quicker the calculation is done, the more likely a sale will be achieved) we suspect it will be done quickly.

e) How much would it cost to make these changes?

MASS is unable to comment on this.

f) What circumvention risks would this remedy pose and how could these be mitigated?

Possibly causing an increasing practice for all insurers to bundle in add-on products with basic insurance, which would result in a rise in cost, and may leave consumers with products they do not want or need or even know they have.

g) Would this remedy give rise to distortions or have any other unintended consequences?

See reply to f) above.

Remedy 4B: Transparent information concerning no-claims bonus

Issues for Comment – 4B

a) Is it necessary for consumers to be given the NCB scales both when choosing whether to take out NCB protection and when receiving their policy quotation?

Yes, we believe this is essential. It is apparent that many consumers do not know what they are buying when they take out NCB protection and that for them to make an informed decision they need to be given the scales.

b) What wording could best be used to help consumers that NCB protection does not prevent premiums rising following an accident?

The wording should be very simple and easy to understand, something along the lines: "Taking out NCB protection will not prevent your premium from rising if you have an accident."

c) Are there any obstacles to effective implementation of this remedy?

The main obstacle is likely to be that PCWs like to provide information in an easy-to-understand format and this is a relatively complicated issue and may create a need for

more one-to-one advice for consumers; in fact it may drive them to brokers who can provide that advice and away from PCWs.

d) How long would it take for insurers to prepare the NCB scale?

MASS is unable to comment on this.

e) What circumvention risks would this remedy pose and how could these be mitigated?

See reply to c) above – in terms of mitigation, we would simply suggest that the legal requirements to provide the additional clarification of NCBs be properly enforced.

f) Would this remedy give rise to distortions of have any other unintended consequences?

See reply to c) above – possibly reducing the market share of PCWs.

Remedy 4C: Clearer descriptions of add-ons

Issues for Comment – 4C

a) What are the key aspects of each add-on product that need to be explained in such descriptions and how should the quality of these descriptions best be established?

We do not wish to comment in detail on some of the products, which are outside our remit, but we do feel it important that in respect of MLEI, very clear explanations need to be given in terms that can be understood by a layman who has never been involved in making a claim or any form of litigation, as to what is and is not covered by the policy, and in particular how they will benefit if they purchase the policy. Many MLEI policies give nothing more than the opportunity for the insurer to send the consumer to their panel lawyer.

In terms of courtesy car cover, this is another complex subject, and it is important that consumers are advised that they are likely to have the right, in the event of a non-fault accident, to have a replacement vehicle provided on credit-hire terms either by the at-fault insurer or by a credit hire company at no cost to them, because the cost of hire will be recoverable from the insurers for the at-fault driver.

b) How should these descriptions be provided to consumers – eg, in the insurance policy documentation, on insurers' websites or on PCWs?

We would suggest in all three places. If the intention is to be transparent, it should be as easy for consumers to find as practicable.

c) How would this remedy best be monitored – both for initial approval of descriptions and ongoing approval?

The FCA should be tasked with monitoring it in both respects.

Theory of Harm 5: Most favoured nation clauses in PCW and insurer contracts

Remedy 5A: Prohibition on 'wide' MFN clauses

These are issues for the insurance industry on which we do not wish to comment in detail except to say that we agree that wide MFN clauses must distort competition and ultimately have the effect of increasing premiums.

Issues for Comment – 5A

a) **How would this remedy be best specified? Would the prohibition be best described in relation to all MFN clauses except those in relation to insurers' own websites?**

b) **Could this remedy take effect immediately (or within a short period to remove the clauses) or would an adjustment period be required?**

c) **What circumvention risks would this remedy pose and how could these be mitigated?**

d) **In addition to threatening to delist an insurer, what other actions could a PCW take that might have the same effect as a 'wide MFN'? How could the risk of a PCW taking these actions be effectively mitigated?**

e) **Would this remedy give rise to distortions or have any other unintended consequences?**

ToH 5: Remedies the CC are not minded to consider further

Issues for Comment – 2C
Views on this possible remedy in paragraph 102 and any other possible remedies not included in the Notice which interested parties consider may be effective in relation to ToH5.

Relevant Customer Benefits

Issues for Comment – 6
Views are invited on the nature, scale and likelihood of any relevant customer benefits within the meaning of the Act and on the impact of any possible remedies on any such benefits.

The current dysfunctional nature of the motor insurance industry is overall significantly disadvantageous to the consumer, and our responses within this document are intended to highlight the areas where we are particularly concerned about the adverse impact on the consumer. However we would again stress that we do not feel that changing the market drastically would be proportionate to the savings that have been identified.