



THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 9

MOTOR ACCIDENTS

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The Uniform Law is a suite of legislation including:

- Legal Profession Uniform Law (NSW) ["LPUL"]
- Legal Profession Uniform Law Application Act 2014 ["LPULAA"]
- Legal Profession Uniform Law Application Regulation 2015 ["LPULAR"]
- Legal Profession Uniform General Rules 2015 ["LPUGR"]

Prior legislation referred to:

- Legal Profession Act 2004 ["LPA 2004"]
- Legal Profession Regulation 2005 ["LPR"]

The Uniform Law applies for instructions first received from your client on or after 1 July 2015 ([LPUL Schedule 4 clause 18](#)).

The Uniform Law applies for proceedings commenced on or after 1 July 2015 ([LPULAR clause 59](#)).

NOTE: THE RELEVANT MOTOR ACCIDENTS LEGISLATION IN THIS CHAPTER IS CURRENTLY UNDER REVIEW

9.1 INTRODUCTION

This chapter outlines the two statutes governing costs for motor accident claims in NSW and the effects of the [Motor Accidents Compensation Regulation 2015](#) (“MACR”). This regulation repealed and replaced the Motor Accidents Compensation Regulation 2005, which would otherwise be repealed on 1 September 2015 by [section 10\(2\)](#) of the [Subordinate Legislation Act 1989](#).

The MACR commenced on 1 April 2015 and applies to all new claims lodged on or after 1 April 2015, except for the costs disclosure provisions.

As some claims to be assessed were made before 1 April 2015, only some of the costs incurred by a claimant are to be allowed in accordance with the revised amounts prescribed in the MACR. The [Motor Accidents Compensation Regulation 2005](#) still applies to some costs for claims lodged before 1 April 2015.

Some of the new provisions also apply to existing claims where a specified event occurs on or after 1 April 2015.

9.2 MOTOR ACCIDENTS ACT 1988 (NSW)

The [Motor Accidents Act 1988](#) governs motor accidents that occurred before 5 October 1999. Costs relating to these claims are not regulated. Practitioner/client costs will depend on written disclosure statements or costs agreements. In accordance with the relevant provisions of the LPUL, party/party costs must be based on the concept of fairness and reasonableness.

9.3 MOTOR ACCIDENTS COMPENSATION ACT 1999 (NSW)

The [Motor Accidents Compensation Act 1999](#) (NSW) (“MACA”), which commenced on 5 October 1999, governs accidents occurring on or after 5 October 1999.

9.3.1 LEGISLATIVE FRAMEWORK

There are a number of sections of the MACA (as amended) that are relevant to the assessment of costs by the Claims Assessment and Resolution Service (CARS).

[Section 94A](#) applies to claims made on or after 1 October 2008 and empowers a claims assessors to assess costs. The source of the claims assessor’s power to assess costs made before 1 October 2008 is [clause 12](#) of the MACR.

Sections [149](#) and [150](#) of the MACA contain the regulation-making power for the maximum costs recoverable by legal practitioners and medical practitioners undertaking medico-legal work in connection with a claims assessment

9.3.2 THE REGULATIONS

Since the passage of the MACA, the Australian Parliament has enacted the following regulations to cover, among other things, the assessment of costs for claims in the scheme:

- a. Motor Accidents Compensation Regulation 1999
- b. [Motor Accidents Compensation Regulation 2005](#) (noting that the amount of costs and fees was increased in 2008)
- c. [Motor Accidents Compensation Regulation 2015](#).

The [Motor Accidents Compensation Regulation 2015](#) applies generally on and after 1 April 2015; however, the following savings and transitional provisions require careful consideration:

- a. The amounts provided for in tables A and B apply only to claims made on or after 1 April 2015.
- b. Costs for Medical Assessment Service (MAS) matters apply only to **referrals** to the MAS on or after 1 April 2015.
- c. Costs for special assessments apply only to **referrals** to the CARS (CARS Form 5A) lodged on or after 1 April 2015.
- d. Fees for medico-legal reports apply only to **services requested** in writing on or after 1 April 2015.
- e. Costs for assessment conferences representation (including loadings) apply only to assessment conferences occurring on or after 1 April 2015.

When providing a schedule of disbursements to the claims assessor before the assessment conference, your submissions in respect of disbursements claimed in accordance with the MACR should refer to the transitional or savings provisions and in particular state:

- a. the date the claim was made
- b. the date any referral to MAS occurred
- c. the date of any CARS assessment or other conference
- d. the date any report was requested in writing from a medical practitioner.

Submissions concerning disbursements should include copies of accounts for all disbursements claimed.

The earlier regulation was the [Motor Accidents Compensation Regulation 2005](#), which was amended in 2006, 2008 and 2010. The 2005 regulation applies to all claims made after 1 September 2005 and **before** 1 April 2015.

The 2005 regulation was amended by the Motor Accidents Compensation Amendment (Costs and Fees) Regulation 2008 and the [Motor Accidents Compensation Amendment \(Costs and Fees\) Regulation 2010](#), and it is the amended regulation that applies to claims made after 1 October 2008 and **before** 1 April 2015.

The 2015 regulation applies to all claims made on or after 1 April 2015.

The 2005 regulation was not updated to take into account the enactment of the [LPA 2004](#), so it refers to sections of the [Legal Profession Act 1987](#), some of which do not have equivalents in the LPA 2004 (for example, [s. 180](#)). The 2015 regulation takes account the enactment of the LPA 2004 and the [LPUL](#).

The MACA and its regulations prevail over the legal costs legislation (as defined in [s. 3A](#) of the LPULAA), when there is any inconsistency ([s. 149\(4\)](#) of the MACA).

Reference to clauses, unless otherwise stated, refer to the MACR.

Practitioners instructed in motor accident claims, where the accident occurred on or after 5 October 1999, are governed by the scale. The scale relates back to the MACA (ss. [149](#) and [150](#)) and [clause 6](#) of the regulation, which provide for fixing maximum costs recoverable by legal and medical practitioners. A scale has also been introduced for medical witnesses and medical reports in [Schedule 2](#) of the regulation. [Section 150](#) of the MACA forbids medical practitioners from charging above scale for medico-legal services.

The maximum costs recoverable do not apply to practitioner/client costs ([cl. 8](#)). The scale applies to party/party costs. In accordance with [clause 7\(1\)](#) of the MACR, the scale does not apply to a claim that is exempt from assessment under [section 92](#) of the MACA.

The scale does not extend to any costs incurred before the matter became exempt ([cl. 7\(2\)](#)).

To allow for GST, practitioners may increase the fees allowed under the scale by an amount up to the amount of GST payable on the supply of the service to which the fee relates ([cl. 18](#) of the MACR).

For all claims, apart from exempt claims under [section 92](#) of the MACA, costs may be calculated using the costs calculator provided by the State Insurance Regulatory Authority (SIRA). The current costs calculator is for both the 2005 and 2015 regulations, and is available on the SIRA website at <http://www.sira.nsw.gov.au/motor-accidents/for-professionals/fees-costs-and-charges>. Scroll down the page until reaching the heading “Claims cost disclosure”. Here, you will find the “damages and costs calculator”. Click the link to upload the calculator. It is an Excel document. Please note, the calculator is revised when necessary. The scale does extend to costs incurred on a further assessment referred by the court under [section 111](#) of the MACA, after the issue of a certificate under [section 94](#) of the MACA ([cl. 12\(2\)](#) of the MACR).

It is **strongly** recommended that **all** practitioners use this costs calculator.

The main features of the costs provisions relevant to CARS are as follows:

[Clause 4](#) – Costs not regulated: certain fees are unregulated; for example, accident investigation reports, court fees and witnesses’

expenses. Disbursements that are in reality treatment (or diagnostic) expenses (for example, CT or MRI scans and reports about those scans obtained at the request of a solicitor and not by way of a referral from a doctor) are not likely to be allowed as disbursements. [Clause 4\(g\)](#) of the MACR relates to the **claimant's** travel costs and expenses for attending CARS or are court calculated at the rate of \$0.55 per kilometre.

[Clause 6](#) – Maximum costs recoverable by legal practitioners: fixes the maximum costs recoverable by legal practitioners listed at [Schedule 1](#).

[Clause 7](#) – Excluded matters: excludes matters exempted from the maximum costs set out in [Schedule 1](#) (but [Schedule 2](#) applies).

[Clause 8](#) – Contracting out: the maximum costs recoverable do not apply to practitioner/client costs.

[Clause 9](#) – Medico-legal fees and expert witnesses: maximum fees recoverable by medical practitioners for medical reports and appearance as witnesses.

[Clause 11](#) – Limit on costs for expert witnesses: limits the costs of expert witnesses recoverable by medical practitioners for medical reports and appearance as witnesses.

[Clause 12](#) – Assessment of costs by claims assessor: contains the power for a CARS assessor to assess costs.

[Clause 17](#) – Private motor vehicle travel expenses incurred by injured persons: relates to the travel expenses incurred by the **claimant** in attending the insurer's medico-legal examinations and MAS examinations calculated at the rate of \$0.55 per kilometre.

[Clause 18](#) – GST: GST may be added.

9.3.3 SCHEDULES

[Schedule 1](#): The maximum costs for legal services to be determined by reference to certain stages, depending on whether the practitioner was retained before the assessment was conducted (Table A), or after the assessment was finalised (Table B). It also provides for country and interstate loadings.

[Schedule 2](#): The maximum fees for medico-legal services.

9.4 EFFECTS OF THE REGULATION

The MACR has the following effects:

- (a) **For accidents that occurred on or after 5 October 1999:**
- it applies a scale, which limits recoverable costs and disbursements
 - it allows a grace period from 5 October 1999 to 17 December 1999, where costs were not affected by the scale if they were already paid or billed ([cl. 5](#) of the MACR).

(b) **Rolls up expenses usually separately claimed**

The scale regulates the maximum amounts for both practitioner costs and barrister fees. It also affects medico-legal and expert fees (see below).

The MACR expressly provides that the meaning of “legal costs” is in accordance with the legal profession legislation (as defined in [s. 3A](#) of the LPULAA. This means “costs” is an inclusive term that includes practitioner costs and barrister fees ([cl. 5\(2\)](#) of the MACR).

This is very important as it means that the lump sum amounts allowed for the costs of practitioners and barristers include expenses that are usually separately charged, such as copying, faxes, phone and travel.

(c) **Allows practitioner's costs based on banding**

Practitioner's costs based on banding lump sums are allowed, depending on the stage of the matter reached and the verdict (regardless of variables, such as hearing time, or other expenses, such as copying, faxes, etc).

If the claimant changes practitioners, the lump sum amount is apportioned between them ([cl. 6\(2\)](#) of the MACR).

(d) (i) **Restricts advocate's costs at CARS**

Before 1 April 2015 – A conference directly related to a CARS assessment of the claim or a court hearing is allowed at a maximum amount of \$170 per hour (or part of an hour).

After 1 April 2015 – A conference directly related to a CARS assessment of the claim or a court hearing is allowed at a maximum amount of \$300 per hour (or part of an hour).

Before 1 April 2015 – The cost of representation at a CARS assessment conference under [section 104](#) of the MACA is a flat fee of \$530 plus up to \$170 per hour in excess of two hours.

After 1 April 2015 – The cost of representation at a CARS assessment conference under [section 104](#) of the MACA is a flat fee of \$1,250 plus up to \$300 per hour in excess of two hours.

Country loadings are allowed in accordance with [Schedule 1](#).

There is no allowance for drafting documents or preparation time.

(e) (ii) **Restricts advocate's costs in court**

Before 1 April 2015 – The cost of representation in court is \$2,110 per day for an advocate, other than senior counsel, and \$2,950 per day for senior counsel.

After 1 April 2015 – The cost of representation in court is \$2,500 per day for an advocate, other than senior counsel, and \$3,550 per day for senior counsel.

An amount for the fees for senior counsel, or for more than one advocate, are not to be included unless the court so orders.

(f) **Fixes medico-legal fees**

The scale fixes maximum amounts for medico-legal services (for reports and attending as witnesses). [Section 150](#) of the MACA also provides that a medical practitioner is not entitled to be paid or to recover more than any maximum fee fixed under this section.

This part of the scale ([Schedule 2](#)) applies even if the matter is otherwise exempt from the scale under [section 92](#) of the MACA, as [clause 7\(1\)](#) of the MACR only refers to [Schedule 1](#) and not to both schedules 1 and 2.

(g) **Sets lump sum costs associated with medical disputes and special assessments**

For MAS applications lodged before 1 April 2015 – Costs associated with MAS disputes are allowed at up to \$670 for each medical dispute under [Part 3.4](#) of the MACA, but not exceeding \$1,600 for any one claim, regardless of the number or kind of disputes.

For MAS applications lodged after 1 April 2015 – Costs associated with MAS disputes are allowed at up to \$1,000 for each medical dispute under [Part 3.4](#) of the MACA, but not exceeding \$2,500 for any one claim, regardless of the number or kind of disputes.

For applications lodged before 1 April 2015 – Costs associated with a dispute (special assessment) referred to in [section 96](#) of the MACA, as allowed by the claims assessor, are up to \$800 for any one claim, regardless of the number or kind of disputes.

For applications lodged after 1 April 2015 – Costs associated with a dispute (special assessment) referred to in

[section 96](#) of the MACA, as allowed by the claims assessor, are up to \$1,200 per dispute and up to \$2,500 per claim (excluding [s. 96\(1\)\(e\)-\(g\)](#) disputes).

(h) Limits expert witnesses' fees

The MACR limits the costs of expert witnesses, both by limiting their number and the amounts paid to them. The costs of only one medical expert in each specialty will be allowed, unless there is a “substantial issue” as to a matter referred to in [section 58 \(1\)\(d\)](#) of the MACA. In that case, two experts will be allowed ([cl. 11](#)).

The claims assessor, or court, retains discretion to allow a greater number of expert witnesses. The costs of only two experts of any other kind will be allowed. This part of the scale ([Schedule 2](#)) appears to apply even if the matter is otherwise generally exempt from the scale under [section 92](#) of the MACA ([cl. 7\(1\)](#) of the MACR).

(i) Identifies unregulated costs

Costs not regulated in accordance with [clause 4](#) of the MACR ([cl. 12](#) excepted, which relates to assessment of costs by claims assessor) are:

- a. fees for accident investigators' reports or accident reconstruction reports
- b. fees for accountants' reports
- c. fees for reports from health professionals
- d. fees for other professional reports relating to treatment or rehabilitation (for example, architects' reports concerning house modifications)
- e. fees for interpreter or translation services
- f. court fees
- g. travel costs and expenses of the claimant in the matter for attending medical examinations, the CARS or a court
- h. witnesses' expenses at the CARS or a court.

(j) Establishes requirements for contracting out of the scale

While it is possible to contract out of the scale, requirements still need to be met as set out below; in particular, [clause 8](#) of the MACR, which provides that conditional agreements are only enforceable if they do not charge a success premium. Under the [LPA 2004](#), conditional agreements for matters involving claims for damages are prohibited in any event. Under [sections 181](#) and [182](#) of the LPUL (which came into force for instructions after 1 July 2015), conditional costs agreements may provide for the payment of an uplift fee.

The maximum amounts apply to both practitioner and own client and party/party, unless the practitioner contracts out of the scale ([cl. 8](#) of the MACR). Accordingly, practitioners will be limited to the scale, unless they properly contract out of it.

To contract out, the practitioner must give prior, separate, written advice that the claimant will be liable for the “gap” between party/party recovery and practitioner own-client costs (see Appendix).

The advice must be in a separate document to the costs agreement ([cl. 8 \(c\)](#) of the MACR). To allow clients time to fully consider its contents, the letter should be forwarded some time before the costs agreement. Special care should be taken in giving the advice, because in borderline [section 92](#) exempt matters, it is likely that the gap will be substantial and could significantly affect the client's “in hand” result.

The MACR expressly provides that the practitioner must also disclose as required under the [LPUL](#), and enter into a costs agreement ([cl. 8\(a\)](#)). Practitioners are advised to disclose costs as required under [Division 3](#) Part 4.3 of the LPUL.

Exceptions to disclosure are contained in [section 174\(4\)](#) of the LPUL. The effect of the MACR means that there are now no exemptions to the need to give disclosure in motor accident matters.

Practitioners are reminded that disclosure under the [LPUL](#) also requires that an estimate be given and be updated.

The practitioner must enter into a costs agreement within the meaning of the [LPUL](#). This means the agreement must be in writing.

In contracting out, the practitioner cannot enter into a conditional costs agreement that charges a success premium. The scale will apply if the costs agreement provides for the payment of a premium on the successful outcome of the matter, ([cl. 8\(b\)](#)).

See the Appendix for a model costs agreement complying with [clause 8](#) of the MACR.

(k) Sets out exemptions

The scale in relation to practitioner costs and barrister fees does not apply to any matter exempted under [section 92](#) of the MACA. However, the scale continues to apply to regulated maximum fees for medical reports.

A claim is exempt from assessment if it is exempt under the [MACA Claims Assessment Guidelines](#) (“the Guidelines”) or the MACR. [Section 92\(1\)\(a\)](#) exemptions are mandatory exemptions. Similarly, a claims assessor can determine that the matter is not suitable for assessment pursuant to [section 92\(1\)\(b\)](#) (with the approval of the principal claims assessor). [Section 92\(1\)\(b\)](#) exemptions are discretionary.

[Section 92](#) must be read in conjunction with the [MACA Claims Assessment Guidelines](#).

For the purpose of [section 92\(1\)\(a\)](#), the principal claims assessor (PCA) shall issue a certificate of exemption if the PCA is satisfied that, at the time of the consideration of the application, the claim involves one or more of the following circumstances:

- a. The insurer denies fault of its owner or driver of a motor vehicle in the [section 81](#) notice.
- b. The insurer makes an allegation in its [section 81](#) notice that the claimant was at fault or partly at fault, and claims a reduction of damages of more than 25 per cent.
- c. The claimant is a “person under legal incapacity”.
- d. The insurer alleges that the claim is fraudulent; for example, 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.

(See [MACA Claims Assessment Guidelines](#) 1 May 2014 in relation to [section 92\(1\)\(a\)](#) at 8.11.)

Matters to be considered when applying for a discretionary exemption under [section 92\(1\)\(b\)](#) include, but are not limited to:

- a. complex legal issues
- b. complex factual issues
- c. complex issues of quantum (including but not limited to major or catastrophic spinal or brain injury claims)
- d. entitlement to non-economic loss and the claim involves other issues of complexity
- e. complex issues of causation
- f. whether injuries are likely to stabilise within three years of the accident
- g. whether there are issues of indemnity or insurance
- h. whether a material witness resides out of the jurisdiction
- i. whether the matter involves non-CTP parties
- j. whether the insurer makes an allegation that a person has made a false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the claimant in the accident giving rise to the claim.

9.5 NOTES

- (1) If an insurer makes an allegation of “fraud” in terms of the circumstances of the accident, the matter will be exempt under [section 92\(1\)\(a\)](#) and [clause 8.11.6](#) of the Guidelines.
- (2) If an insurer makes an allegation that a person has made a false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the claimant in the accident, the insurer may be required to provide particulars in writing of the general nature of any such allegation under [clause 17.13](#), and an assessor may then consider whether a matter is not suitable for assessment under [clauses 14.11–14.16](#), particularly in light of [clauses 14.16.11](#) of the Guidelines.

(See [MACA Claims Assessment Guidelines](#) 1 May 2014 in relation to [section 92\(1\)\(b\)](#) at [clauses 14.16.1–14.16.11](#).)

MANDATORY REPORTING OF COSTS

Legal professional obligations

From 1 October 2015, any legal professional representing a claimant with a CTP claim must provide SIRA with a breakdown of costs for that claim when the claim is finalised.

What is required?

Sometime after claim settlement, when the insurer has finalised the claim, you will receive an email from SIRA, which will contain a secure link to an online form. Note the following:

- You will have 20 days from the date of the email to complete and submit the online form to SIRA.
- The online form requires all mandatory fields to be completed.
- On submission, you will receive a confirmation email containing a PDF copy of the completed form.
- Compliance with the time frame will be monitored by SIRA.

What should I do?

Ensure you provide a correct and current email address to the insurer at the time of claim settlement, and after the claim is settled, respond to the email from SIRA.

What is required?

You must report a breakdown of costs, including:

- the ordered (party/party) costs
- other legal fees, including barrister fees and previous lawyers’ fees, and deductions, including solicitor/client legal costs
- all disbursements, such as medical report and expert fees, and all other deductions, including prefunts to Centrelink, Medicare, workers compensation, and private health and income protection insurers
- unpaid treatment fees
- [Section 83](#) payments
- the amount paid to the claimant.

Why must this information be reported?

This disclosure of costs is required under [clauses 8\(d\)](#) and [23](#) of the MACR. Legal professionals must comply with this requirement of the regulation from 1 October 2015.

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