REGULATORY IMPACT STATEMENT

Motor Accidents Compensation Regulation 2015

Title of Regulatory Proposal:	Motor Accidents Compensation Regulation 2015
Proponent:	Motor Accidents Authority
Responsible Minister:	The Hon Dominic Perrottet MP Minister for Finance and Services
Relevant Act:	Motor Accidents Compensation Act 1999

MOTOR ACCIDENTS COMPENSATION REGULATION 2015

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INTRODUCTION

1.1 Purpose of the Regulatory Impact Statement

The preparation of a Regulatory Impact Statement is required under the *Subordinate Legislation Act 1989*. This Act provides that all regulations in New South Wales are automatically repealed five years after they are made, unless their repeal is postponed for a limited period. The Act also provides that a Regulatory Impact Statement is to be made prior to the making of a statutory rule such as a regulation, by-law, rule or ordinance.

A regulation is automatically repealed on 1 September following the fifth anniversary on which it was published. The staged repeal of the *Motor Accidents Compensation Regulation 2005* has been postponed on four previous occasions and is now due on 1 September 2015.

The primary purpose of a Regulatory Impact Statement is to ensure that the economic and social costs and benefits of a particular regulatory proposal are fully examined. For a regulation to proceed, the costs must not exceed the economic and social benefits of the proposed regulation.

This Regulatory Impact Statement proposes that the *Motor Accidents Compensation Regulation 2005* be remade under the regulation making powers set out under the *Motor Accidents Compensation Act 1999* (MAC Act). The proposed Regulation repeals and remakes, with alteration, the *Motor Accidents Compensation Regulation 2005*.

1.2 Key Objectives

The key function of the *Motor Accidents Compensation Regulation 2005* (the 'existing Regulation') is to regulate the maximum recoverable costs for legal, medical treatment and medico-legal services provided in relation to motor accident claims.

Legal costs comprise the professional fees, expenses and disbursements charged by a legal practitioner. Medico-legal costs include the fees charged by medical practitioners for preparing medical reports and appearing as a witness in court and other proceedings. Medical treatment costs chargeable by a medical practitioner to an insurer are limited to those payable to a medical practitioner as prescribed in the Australian Medical Association *List of Medical Services* (AMA List) as varied from time to time.

The rationale for regulating the cost of these services is to ensure that transaction costs relating to motor accident claims do not unreasonably contribute to the cost of Green Slips payable by New South Wales motorists.

1.3 Proposed new Regulation

The proposed *Motor Accidents Compensation Regulation 2015* (the 'proposed Regulation') seeks to maintain the existing regulatory framework and processes while introducing amendments to improve and clarify the operation of the Regulation.

In particular, the proposed Regulation provides for increases in the maximum recoverable fees for legal and medico-legal fees provided in relation to motor accident matters. These increases will mean that a greater proportion of these costs will be paid by insurers, and less will be recovered from the injured person, thereby maximising the amount of damages that the injured person receives.

In relation to legal fees, the current Regulation fixes the maximum amount that a legal practitioner can charge or be awarded in motor accident compensation matters, set out on an individual event or activity basis. For example, the chargeable fee for the preparation and service of a notice of claim or for representation at an assessment conference. However the existing Regulation also provides that a legal practitioner can charge a client more than the fixed maximum costs by 'contracting out' or entering into a costs agreement with the client. This means that the client will be required to pay the legal practitioner the difference between the fixed maximum costs under the Regulation and the amount specified in the costs agreement.

The proposed new Regulation retains the same fee structure, and provides an uplift in the maximum allowable fees. In addition, the proposed new Regulation seeks to provide better information on how legal costs impact on the final amount of damages that injured people receives in motor accident matters. All legal practitioners acting for injured claimants under the Scheme will be required to disclose to the MAA a costs breakdown setting out the total amount paid by an insurer in finalising a motor accidents claim, a breakdown of all deductions, including all legal costs and disbursements, and the final amount paid to the claimant. The MAA will approve and publish a form for this purpose in the Gazette. The proposed Regulation also seeks to allow the MAA to use the information contained in a costs breakdown to produce statistics and to refer to the Legal Services Commissioner any costs breakdown which it reasonably believes may demonstrate overcharging.

In relation to medico-legal fees, the current Regulation prescribes the maximum fees payable to medical practitioners for preparing medical reports or providing expert evidence in relation to motor accident claims. 'Medico-legal reports' are those reports obtained for the purpose of use in proceedings before a court or the Motor Accident Authority's alternative dispute resolution bodies. The proposed new Regulation retains the same fee structure, and provides an uplift in the maximum allowable fees.

The proposed new Regulation also retains the current provisions in respect of medical treatment costs. The maximum costs paid by insurers for medical treatment that is provided by a medical practitioner are as specified in the AMA List. This does not include services provided in hospital for which payment is required to be made to the hospital. The insurer is not liable for any charge made by the medical practitioner in excess of the fee prescribed in the AMA list.

The proposed Regulation proposes a number of additional amendments that have been identified during the course of a review process involving Compulsory Third Party (CTP) insurers, legal professionals and the MAA. This includes new provisions to:

- Provide potential cost penalties for insurers if they do not accept an award of damages made by the independent Claims Assessment and Resolution Service (CARS) and commence litigation. This provision mirrors the cost

penalty provisions in the MAC Act that are applicable to injured people who reject a CARS award.
- Prevent the possibility of medical practitioners being paid twice for the provision of a medical report, where this has been requested by both parties.
- Clarify that a CARS assessor can assess the reasonable costs associated with complying with a direction to produce documents, required because parties have challenged this in the past.
- Prohibit legal practitioners from either paying or receiving referral fees in connection with a motor accident claim, an issue that was not previously included in the Regulation.

Other provisions in the existing Regulation are included unamended in the proposed new regulation.

Submissions

Submissions are invited on any aspect of the proposed Regulation.

The final date for receipt of submissions is Wednesday, 18 February 2015.

Submissions may be forwarded in the following ways:

Post

Motor Accidents Compensation Regulation Review
Motor Accidents Authority
Level 25
580 George Street
SYDNEY 2000

DX 1517 Sydney

Fax 1300 137 707

E-mail Regulation@maa.nsw.gov.au

Hand delivery

Level 25, 580 George Street, Sydney

1.3 Additional Information

Copies of this Regulatory Impact Statement are available from the Motor Accident Authority's (MAA) website at www.maa.nsw.gov.au or by telephoning the MAA's Claims Advisory Service on 1300 656 919.Any enquiries regarding the proposed Regulation and Regulatory Impact Statement may be directed to Christian Fanker, Manager, Scheme Policy and Community Assistance on 8267 1990 or cfanker@maa.nsw.gov.au.

BACKGROUND

2.1 Overview of the Motor Accidents Scheme

The New South Wales motor accidents scheme is a privately underwritten Compulsory Third Party (CTP) personal injury insurance scheme. The scheme is administered by the Motor Accidents Authority (MAA). CTP (Green Slip) insurance policies are only available from private insurers licensed by the MAA.

The motor accidents scheme is a modified common law, primarily fault-based scheme, operating under the *Motor Accidents Compensation Act 1999*. This means that everyone who is injured in a motor vehicle accident in New South Wales that is caused through another driver's fault is entitled to compensation under the motor accidents scheme. Compensation entitlements include current and future medical, rehabilitation and treatment expenses; domestic assistance; lost earnings; loss of earning capacity and in cases of serious injuries involving on-going impairment, damages for non-economic loss or pain and suffering. These are paid as a lump sum on finalisation or settlement of a claim.

Although primarily a fault-based scheme, since 2006 a number of changes have been introduced to provide coverage for those at fault in certain circumstances. On 1 October 2006 the New South Wales Green Slip scheme was expanded to include a no-fault benefit providing medical treatment, rehabilitation and care expenses for children aged up to 16 who are injured in motor vehicle accidents, regardless of who was at fault in the accident. From 1 October 2006, the no-fault Lifetime Care and Support (LTCS) scheme commenced for children who suffer very severe injuries in motor vehicle accidents. The LTCS scheme was expanded to provide no-fault long-term care for adults who sustain a very severe injury as a result of a motor vehicle accident from 1 October 2007. LTCS scheme participants are now guaranteed medical treatment, rehabilitation, care and support for the rest of their lives under this no-fault scheme.

On 1 October 2007 the motor accidents scheme was further expanded to provide compensation entitlements for injury or death resulting from a blameless or inevitable motor vehicle accident. A blameless or inevitable motor vehicle accident is one where no one is considered to have been at fault in the accident, such as those that result from a driver experiencing a sudden medical illness or condition while driving.

From 1 April 2010 the Green Slip scheme early accident notification process was extended to cover all persons injured as a result of a motor vehicle accident, regardless of fault, for up to $5,000 in medical costs and lost wages incurred within six months of the motor accident. This means that everyone injured in a motor vehicle accident in New South Wales, including those people who are considered to have caused the accident, are now entitled to re-imbursement for up to a maximum of $5,000 for medical treatment and rehabilitation expenses and any lost earnings related to the accident injury that are incurred in the first 6 months following the accident.

A person may lodge a claim for compensation under the motor accidents scheme if he or she is injured in a motor vehicle accident as a driver, passenger, pedestrian, cyclist or motorbike rider, so long as the driver or owner of another vehicle was partially or completely at fault (in cases of children under 16, a no-fault medical treatment benefit applies, regardless of whether any driver was at fault). Compensation may be reduced in cases where the injured person is partly to blame for his or her injuries.

Compensation payments made under the motor accidents scheme are fully funded from CTP insurance policies or Green Slips. It is compulsory for all vehicle owners in New South Wales to purchase a Green Slip from a licensed CTP insurer before registering their vehicle.

The motor accidents scheme also incorporates a Nominal Defendant arrangement which provides compensation for injuries that result from motor vehicle accidents caused by the fault of an owner or driver of a vehicle that is unregistered/ and/or uninsured or is unidentified.

2.2 Motor Accidents Compensation Act 1999

The *Motor Accidents Compensation Act 1999* (MAC Act) commenced on 5 October 1999 and applies to all motor accidents that occur in New South Wales on or after that date. The *Motor Accidents Act 1988* applies to claims outstanding from accidents occurring between 1 July 1989 and 5 October 1999.

The objectives of the MAC Act are to:

- encourage early and appropriate treatment and rehabilitation to achieve optimum recovery from injuries sustained in motor accidents, and to provide appropriately for the future needs of those with ongoing disabilities;
- provide compensation for people with compensable injuries sustained in motor accidents, and to encourage the early resolution of compensation claims;
- promote competition in the setting of premiums for third-party policies, and to provide the Authority with a prudential role to ensure against market failure;
- keep premiums affordable, recognising that third-party bodily insurance is compulsory for all owners of motor vehicles registered in New South Wales;
- keep premiums affordable, in particular, by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities;
- ensure that insurers charge premiums that fully fund their anticipated liability;
- deter fraud in connection with compulsory third-party insurance.

The 1999 reforms were introduced in response to high levels of community concern about the CTP scheme operating under the *Motor Accidents Act 1988*. The major concerns included the high cost of CTP premiums and the complex, lengthy and expensive claims process.

The key features of the MAC Act are:

Early Access to Treatment

The MAC Act introduced the Accident Notification Form (ANF) to enable a person injured in a motor vehicle accident to access immediate treatment for their injuries. . An injured person can notify a CTP insurer of a claim when they first seek treatment for their accident injury, by completing an ANF. Insurers must advise whether provisional liability for the claim is accepted within 10 days of receipt of the ANF.

Once provisional liability is accepted, the insurer is required to make payment for the injured person's medical expenses and lost wages/ income up to $5,000 incurred during the first 6 months post accident. From April 2010 the ANF benefit was extended to cover all persons injured as a result of a motor vehicle accident, regardless of fault, for up to $5,000 in medical costs and lost wages incurred during the first 6 months following the motor accident.

The MAC Act also provides for the making of statutory guidelines to encourage the early and appropriate treatment and rehabilitation of people injured in motor vehicle accidents. The *Treatment, Rehabilitation and Attendant Care Guidelines* are issued by the MAA and require CTP insurers to facilitate an injured person's access to reasonable and necessary treatment, rehabilitation and attendant care throughout the life of a claim.

Early Resolution of Claims

Under the MAC Act, an insurer must make a decision on liability within three months of receiving a notice of claim. The insurer must also make an offer of settlement to an injured person within one month after the injury is sufficiently recovered to enable the claim to be quantified, or within two months after the claimant has provided to the insurer all relevant particulars about the claim, whichever is the later.

On 1 October 2008 the MAC Act was amended to require insurers and claimants to exchange documents concerning the claim at an earlier point in time than was previously the case, participate in settlement conferences and exchange offers of settlement on the claim before the claim can be referred for dispute resolution. The aim of the reforms was to promote greater efficiency in the claims resolution process by encouraging the early settlement of motor accident claims.

Provision is made under the MAC Act for the making of statutory guidelines to encourage the early resolution of compensation claims by insurers. The *Claims Handling Guidelines*, issued by the MAA, outline the manner in which CTP insurers are to deal with motor accident claims. It is a condition of an insurer's license that it complies with the Guidelines.

Alternative Dispute Resolution

The MAC Act established two alternative dispute resolution bodies, the Medical Assessment Service (MAS) and Claims Assessment and Resolution Service (CARS).

MAS provides an independent forum for the assessment of medical disputes between insurers and injured people concerning an injured person's reasonable and necessary medical treatment, and concerning the degree of permanent impairment caused by the injury. Assessment is by way of referral to expert medical assessors (specialists and other health professionals who have been appointed by the MAA). MAS decisions concerning treatment and permanent impairment are binding on the parties, CARS and the courts.

CARS is a less adversarial forum for resolving motor accident claims early and outside of the court system. All disputed motor accident claims must be referred to CARS for certification as a precondition to the commencement of court proceedings. A CARS assessment of liability is binding on an insurer where liability is not disputed and an assessment of the amount of compensation due is accepted by the claimant within a specified period time.

Regulation of Fees and Costs

The MAC Act provides for the making of regulations about the costs payable to legal, medico-legal and medical treatment services. The rationale for regulating the cost of these services is to ensure that transaction costs relating to motor accident claims do not unreasonably contribute to the cost of Green Slips payable by New South Wales motorists.

2.3 Motor Accidents Compensation Regulation 2005

The *Motor Accidents Compensation Regulation 2005* makes provision with respect to:

- the maximum costs for legal services provided in relation to motor accident claims;
- the maximum costs for medico-legal services and expert evidence provided in relation to motor accident claims;
- the maximum amounts payable by insurers for certain medical treatments provided in relation to motor accident claims;
- other matters relating to costs including fees for non-attendance or cancellation of medical assessment appointments; the rate of certain travel expenses and the assessment of costs by claims assessors;
- the time limits for the payment of an assessed amount of damages by a CTP insurer
- the classes of motor vehicles that are taken to be subject to unregistered vehicle permits;
- the authorities to which protected information may be divulged;
- and
- costs that are unregulated in respect of motor accident matters.

The *Motor Accidents Compensation Regulation 2005* commenced on 26 August 2005 and remade, with minor changes only, the *Motor Accidents Compensation Regulation (No 2) 1999*.

The key elements of the *Motor Accidents Compensation Regulation 2005* include:

Legal costs

Legal costs comprise the professional fees, expenses and disbursements charged by a legal practitioner. The existing Regulation sets out the maximum fees that a legal practitioner can charge a claimant or CTP insurer for legal services provided in relation to a motor accident claim.

The maximum fees for legal services are contained in Schedule 1 of the existing Regulation. An event-based ad valorem scale is adopted for party/ party and practitioner/ client legal costs excluding medico-legal costs, investigation costs and advocate fees. Additional allowances are provided for treatment/ impairment disputes, special assessments and proceedings before CARS assessors. The amounts specified under Schedule 1 of the Regulation were revised and increased in line with the consumer price index (CPI) on 16 May 2008 and 26 March 2010.

The Regulation provides that a legal practitioner can 'contract out' of the regulated fees and charge more than the fixed maximum costs by entering into a costs agreement with the client. In accordance with the *Legal Profession Act 2004*, a legal practitioner who 'contracts out' must:

- enter into a costs agreement with the claimant;
- make a disclosure to the claimant in writing as to the basis of their costs (either a fixed amount or a method of calculating costs);
- advise the claimant in a separate written document that the client will have to pay the difference between the fixed maximum costs that the legal practitioner can recover from the other party as set out in the Regulation and the amount the claimant has to pay under the costs agreement.

All disputed motor accident claims must be referred to CARS for certification as a precondition to the commencement of court proceedings. Certain claims, however, are exempt from assessment and must go directly to court – e.g. where the insurer denies liability or breach of duty of care for the claim or where an insurer makes an allegation that a claim is fraudulent. These claims are not subject to the regulated costs set out in the existing Regulation. A legal practitioner must, however, disclose to the client the basis of the costs and must enter into a written costs agreement with the client.

In the event that an insurer or claimant brings a claim directly to court without a claims assessment or because a CARS award has been rejected, the court can award costs on an indemnity basis. This means that the court may award a party their legal costs without reference to the fixed maximum costs specified in the existing Regulation. In most circumstances there will still be a gap between what the court awards and what the client has to pay the legal practitioner under the costs agreement.

Medico-legal costs

Medico-legal costs include the fees charged by medical practitioners for preparing medical reports and appearing as a witness in court and other proceedings. The existing Regulation limits the costs of medico-legal services provided to a claimant in relation to motor accident claims including the preparation of medical reports for proceedings before a court or CARS and appearing as a witness in motor vehicle

accident matters. The maximum fees recoverable by medical practitioners for medico-legal services are contained in Schedule 2.

The items specified under Schedule 2 of the existing Regulation are largely based on the Schedule to the *Medico-Legal Relations Restatement* between the Law Society of New South Wales and the Australian Medical Association (NSW Branch). The *Restatement* outlines the reciprocal obligations of solicitors and the medical profession when undertaking court-related work and includes a schedule of suggested fees that are to apply in respect of allowances to witnesses and medical examinations and reports. The most recent *Restatement* is dated 1 November 2014 and is available at https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/910444.pdf

Medical treatment costs

The existing Regulation limits the maximum amounts that insurers are required to pay for certain treatments provided to claimants in relation to motor accident matters. The Regulation adopts the amounts listed under the AMA *List of Medical Services and Fees* as the maximum fees payable by insurers for medical treatments provided to injured people in motor accident matters. The AMA *List of Medical Services and Fees* covers most medical interventions, including surgery, and is reviewed, updated and reissued by the AMA annually. The MAA gazettes recognition of the new list each year. The most recent version of the *AMA List of Medical Services and Fees* is dated 1 November 2014. The List sets out the fees which the AMA considers are "fair and reasonable and appropriate for medical practitioners to charge in relation to a range of services". The AMA List can be obtained from the AMA for a fee. (Refer https://ama.com.au/ama-list-medical-services-and-fees-price-list-and-order-forms).

Costs in relation to expert witnesses

The existing Regulation limits costs in relation to expert witnesses by providing that only one medical expert in any specialty and two experts of any other kind can be included in an assessment or award of damages made by CARS or a court. The exception to this is when there is disagreement between a claimant and insurer about the degree of permanent impairment of an injured person. In these cases, costs are payable in respect of two medical experts in any specialty relevant to the injury concerned. The rationale for limiting costs in relation to expert witnesses is to minimise inconvenience to the claimant associated with attending multiple assessments, reduce unnecessary expenses and facilitate the faster resolution of claims.

Assessment of costs by claims assessors

The existing Regulation empowers a claims assessor, in making an assessment and specifying damages under section 94 of the MAC Act, to include an assessment of the claimant's recoverable costs (including costs for legal services and medico-legal fees). A claims assessor may also make an assessment of costs if a court does not determine a matter but remits the matter to CARS for further assessment.

Non-attendance or cancellation of medical assessment appointment

Since 1 October 2008, the existing Regulation details the circumstances in which fees may be recovered by the Authority where an injured person fails without reasonable excuse to attend a medical assessment or give notice of an impending non-attendance within 72 hours of the assessment. The ability of MAS to recoup cancellation costs ensures that medical assessments are administered efficiently and at a lower cost to the scheme.

Private motor vehicle travel expenses incurred by injured persons

Since 1 October 2008, the existing Regulation sets a maximum rate of $0.55 per kilometre for reimbursement of private motor vehicle travel expenses incurred by injured people in the course of accessing treatment and rehabilitation and attending medical assessments. Providing a single rate for reimbursement of travel expenses has increased certainty and reduced the potential for disputation and any associated costs between insurers and injured persons as to the appropriate rate for reimbursement.

The rate of $0.55 per kilometre is consistent with the New South Wales workers compensation scheme (refer *Workers compensation benefits guide: October 2014* at www.workcover.nsw.gov.au/formspublications/ publications/pages/benefits-guide.aspx).

Time limits for payment of damages

From 1 October 2008, the existing Regulation has set the time limit by which an insurer must pay an assessment of damages made by a CARS assessor and accepted by the injured person after which time any amount outstanding attracts interest. The provision of a time period for payment of damages, which is consistent with the approach taken by the courts, ensures that all CTP insurers make timely compensation payments to injured people.

Motor vehicles taken to be subject to unregistered vehicle permits

Roads and Maritime Services (RMS) operates a conditional registration scheme for vehicles that do not comply with New South Wales vehicle standards and Australian Design Rules but require limited access to roads and road-related areas. Examples include vehicles used in road construction or grass cutting, golf buggies, and certain mobility scooters for people with disabilities. Such vehicles can obtain an unregistered vehicle permit (UVP) from RMS, and at the same time a Green Slip is issued by the RMS on behalf of the CTP insurer. The existing Regulation prescribes the classes of non-standard vehicles that are to be subject to UVPs for the purposes of the MAC Act. This ensures that UVPs and conditionally registered vehicles have the same CTP coverage.

Prescribed authority for access to protected information

The MAC Act enables protected information acquired in the exercise of the functions of the Act to be divulged to a prescribed person or authority. The existing Regulation provides that, for the purposes of the MAC Act, the Australian Prudential Regulation Authority (APRA) is a prescribed authority.

Unregulated costs

The existing Regulation excludes certain disbursements from the regulated fee provisions including:

- fees for accident investigator' reports or accident reconstruction reports;
- fees for accountants' reports;
- fees for reports from health practitioners other than medical practitioners;
- fees for other professional reports relating to treatment or rehabilitation (for example, architects' reports concerning home modifications);
- fees for interpreter or translation services;
- court fees;
- travel costs and expenses of the claimant in the matter for attendance at CARS or a court; and
- witness expenses at CARS or a court of persons other than medical practitioners.

2.4 Consultation

In accordance with section 5(2) of the *Subordinate Legislation Act 1989*, an advertisement will appear in the Government Gazette and in a daily newspaper circulating throughout New South Wales announcing the intention to remake the proposed Regulation. The Regulatory Impact Statement and proposed Regulation will also be circulated to a number of organisations that have an identifiable interest in the proposed Regulation listed in Appendix 1.

3. OPTIONS TO ACHIEVE OBJECTIVES

3.1 Options for remaking the Motor Accidents Compensation Regulation 2005

There are three options for the remaking of the *Motor Accidents Compensation Regulation 2005*:

i) Take No Action - Allow the existing Regulation to lapse

ii) Maintain the Status Quo – Remake the existing Regulation without amendment

iii) Improve the Regulation – Remake the existing Regulation with amendment

These options are discussed in detail below.

3.1.1 Option 1: Take No Action – Allow the existing Regulation to lapse

This option would mean that the Government does not take any action with regard to the automatic repeal of the existing Regulation. That is, the Regulation would be allowed to lapse and its provisions would no longer have any operational effect.

The existing Regulation reinforces and supports the key objects of the MAC Act and helps ensure that Green Slip premiums remain affordable for vehicle owners. Deregulation of legal, medico-legal and medical treatment costs would return the motor accidents scheme to the pre-1999 position. Under this regime transaction costs eroded the amount of compensation that could be returned to the injured person and contributed to the upward movement of premium prices, causing considerable community concern.

Prior to the commencement of the MAC Act and the existing Regulation, legal and investigation costs represented 20.7 percent of claim payments while medical and rehabilitation costs comprised 11.1 percent of claim payments. As at 30 September 2014, legal and investigation costs represented 17.4 per cent of finalised claim payments while medical, hospital and rehabilitation costs comprised 15.8 per cent of finalised claim payments. Consequently the motor accidents scheme is now funding higher levels of medical treatment and rehabilitation costs for persons injured in motor vehicle accidents while legal and investigation costs in the scheme have reduced.

The New South Wales motor accidents scheme is fully funded from Green Slip premiums and therefore any increases in transaction costs will necessarily be passed on to the vehicle owners of New South Wales in the form of increased CTP premiums. This would be contrary to the objects of the MAC Act.

There are no identifiable benefits to people injured in motor vehicle accidents in New South Wales or to vehicle owners who pay CTP premiums if the existing Regulation is not remade. On the contrary, if costs to the scheme are not regulated, the

experience of the motor accidents scheme operating under the *Motor Accidents Act 1988* indicates that transaction costs associated with motor accident claims will increase rapidly and Green Slip premiums will increase beyond acceptable levels.

3.1.2 Option 2: Maintain the Status Quo – Remake the existing Regulation without amendment

Remaking the existing Regulation without amendment would maintain the current regulatory framework for the regulation of costs in the motor accidents scheme. This option would allow all the provisions in the current regulation to continue for another five-year period.

The existing legal costs structure has been subject to ongoing review and discussion with insurers and the legal profession since 2010. The MAA has held more recent discussions with insurers and legal professionals about options for remaking the existing Regulation over the course of the year.

Remaking the existing Regulation without amendment would mean that the improvements and clarifications that have been identified as necessary during the review process would not be included in the new Regulation. Remaking the existing Regulation without amendment would also mean that the maximum recoverable stage-based legal fees and medico-legal fees set out in Schedules 1 and 2 would remain the same and not be increased in line with the CPI. In other words, the new Regulation would be out of date.

3.1.3 Option 3: Improve the Regulation – Remake the existing Regulation with amendment

This option involves remaking the existing Regulation with amendment as the Motor *Accidents Compensation Regulation 2015*. The proposed Regulation will maintain the existing regulatory framework and processes as well as updating maximum recoverable fees and introducing a number of amendments to improve and reinforce the objects of the MAC Act.

The proposed Regulation would make provision for the following key amendments:

2015 provision	Proposed amendment	Rationale for amendment
New clause 3(1) – Definitions	To introduce a definition of 'costs breakdown'.	To provide that 'costs breakdown' means a document, approved by the MAA by publication in the Gazette, which sets out the total amount paid by an insurer in finalising a motor accidents claim; a breakdown of all deductions including all legal costs and disbursements; and the final amount paid to the claimant.
New clause 8(d) – Contracting out –	To provide that a claimant's legal practitioner must provide a costs breakdown to	To provide the MAA with more information about the legal costs actually paid in motor accident

practitioner and client costs	the MAA as soon as practicable after a claim is finalised. A legal practitioner cannot contract out of the regulated fees without making such a disclosure.	matters and to enable the MAA to properly assess the efficiency and effectiveness of the motor accidents scheme. See further discussion below.
New clause 10(3) – Maximum fees recoverable by medical practitioner	To provide that a claimant may not claim an amount set out in item 5 or 6 of Schedule 2 (relating to reports by medical practitioners) where this is the first report provided by that practitioner unless the claimant has requested in writing that the insurer provide the report and the insurer has failed to do so within a reasonable time.	To prevent double recovery of fees by treating practitioners. This can occur if an initial medical report has been requested both by the insurer and the claimant. Insurers are required to obtain initial reports from attending medical practitioners and provide a copy to the claimant. The Regulation therefore allows a claimant to recover the costs of such a report only if they have first asked the insurer to provide them with a copy, and the insurer fails to do so. The claimant will still be able to recover costs from treating medical practitioners for follow-up reports that provide updates, subsequent to an initial report – see further discussion below.
New clause 13 – Assessment of costs to produce information	To provide that a claims assessor may assess the reasonable costs of complying with a direction under section 100 of the Act.	To enable a Claims Assessor to assess the amount of reasonable costs incurred by a party in complying with a direction to produce documents under section 100 of the MAC Act. Under section 100, a claims assessor may give a direction in writing to a party to an assessment requiring that party to produce specified documents or information considered to be relevant to the assessment of the claim.
Amended clause 14 – Appeals against assessment	To provide that parties have the same right of appeal against an assessment of costs by a Claims Assessor as they would have under the *Legal Profession Act 2004*.	The *Legal Profession Act 2004* replaced the *Legal Profession Act 1987* (referred to in 2005 Regulation).
New clause 15(2) – Costs where an insurer does not	To provide that an insurer is liable to pay costs on an indemnity basis if the insurer does not accept liability to	To ensure that the existing penalties applying to claimants who reject a CARS assessment of damages and do not do better in

accept liability to pay the amount of damages specified in the certificate of assessment	pay the amount of damages specified in a CARS certificate of assessment, and the amount of damages specified in the certificate of assessment does not exceed the amount of court awarded damages or settlement amount.	court under section 151 of the MAC Act also apply to insurers. See further discussion below.
New clause 23(1) – Determining efficiency of scheme	To provide that the object of the clause is to enable the MAA to obtain information about costs in order to provide advice to the Minister as to the efficiency and effectiveness of the motor accidents scheme.	To ensure that the MAA is able to carry out its statutory function of monitoring the operation of the motor accidents scheme and its efficiency and effectiveness under section 206(2) of the MAC Act. See further discussion below.
New clause 23(2) – Determining efficiency of scheme	To require the legal practitioner who is instructed by a claimant at the time a claim is finalised to provide the MAA, in the manner and form approved by the Authority, a costs breakdown in relation to the matter as soon as practicable after an amount of damages in finalisation of the claim is paid to the claimant. A legal practitioner who fails to do so may be fined up to 5 penalty units (currently equivalent to $550).	To provide greater transparency in relation to solicitor-client costs in motor accident matters and to enable the MAA to properly monitor the operation of the motor accidents scheme. See further discussion below.
New clause 23(3) – Determining efficiency of scheme	To enable the MAA to provide any information contained in a costs breakdown to the Minister and, if directed to do so by the Minister, publicise statistics produced from any such information.	To provide better information in relation to solicitor-client costs in motor accident matters and to enable the MAA to properly monitor the operation of the motor accidents scheme. See further discussion below.
New clause 23(4) – Determining efficiency of scheme	To provide that the MAA may forward to the Legal Services Commissioner any information obtained under the clause which it reasonably believes demonstrates overcharging.	To ensure that instances of potentially excessive fees being charged by legal practitioners are detected and reported to the appropriate authority for investigation as the whether the fee constitutes “gross overcharging”.
New clause 24 – Referral fees	To provide that a legal practitioner must not receive	To provide for the prohibition of referral fees to or from legal

	or pay a fee for referring a claimant to a service provider. A legal practitioner who does so may be fined up to 5 penalty units (currently equivalent to $550).	practitioners in motor accident matters, an issue that was not previously included in the Regulation.
Amended Schedule 1 – Maximum costs for legal services	Increase the maximum recoverable legal fees. Stage-based fees outlined in Tables A and B of Schedule 1 have been increased by 8% to take account of increases in the Consumer Price Index since the fees were last updated in 2010, and fees for certain other legal services have been by a greater amount.	To increase the amount of damages available to the claimant by requiring insurers to pay costs that better reflect current market rates, based on those recommended by the Law Society of NSW, in the provision of legal services. The proposed rates have been developed in consultation with the legal profession.
Amended Schedule 1 – Maximum costs for legal services – Table A	Remove the words "up to 25%" at stage 4 of Table A.	To reflect changes to the MAA *Claims Assessment Guidelines* in May 2014 which now require all cases involving allegations of contributory negligence to be assessed by CARS, consequent upon the Court of Appeal's decision in *Smalley v Motor Accidents Authority of New South Wales* [2013] NSWCA 318.
Amended Schedule 2 – Maximum fees for medico-legal services	Increase the maximum recoverable fees for medico-legal services to better reflect current values, and to provide a higher recoverable fee if both parties have jointly agreed on the appointment of a medical specialist for the purposes of providing a medico-legal report.	To increase the amount of damages available to the claimant by requiring insurers to pay medico-legal costs that better reflect current market rates in the provision of medico-legal services, and to provide higher recoverable fees to encourage the parties to jointly agree to the appointment of a medico-legal specialist. See further discussion below.

Most of the amendments proposed above are designed to ensure that the Regulation remains up-to-date with current laws and market forces in the provision of legal, medico-legal and medical services. The proposed new provisions in the Regulation will ensure that:

- legal practitioners provide a full breakdown of all costs and disbursements incurred in motor accident matters to the MAA;
- an insurer who does not accept a CARS assessment of damages pays costs if the amount of damages awarded by the court or upon settlement does not exceed the amount of damages specified by the CARS assessor;

- there is explicit provision for the joint appointment of a medico-legal specialist by the parties, and provision to prevent fees for an initial report from a treating medical practitioner to be paid twice.

These changes will assist the MAA and Government to ensure that the CTP scheme delivers effective, fair and efficient outcomes for claimants and insurers involved in motor accident claims. Further policy analysis relating to the three proposals is set out below.

Mandatory Disclosure of Solicitor-Client Costs

The existing Regulation sets the maximum fees for legal services that lawyers can charge motor accident claimants in handling their motor accident claim. However the Regulation also provides that a legal practitioner can 'contract out' of the regulated fees by signing a costs agreement with a claimant. This means that the claimant has to pay the difference between the maximum costs fixed by the Regulation and the amount charged by the solicitor directly under the costs agreement.

The MAA collects from insurers details of damages and costs in relation to all claims. To date legal practitioners have not been required to disclose details of their costs to the MAA. As a result, the information available to the MAA relating to legal costs in the scheme is incomplete as it relates only to regulated fees paid by the insurer and does not include information on contracted out fees. Consequently, although the MAA has data on the amounts paid by insurers to finalise claims, there is no information on the amount that is actually received by the claimant after all costs and disbursements are deducted. The MAA is therefore unable to properly carry out its statutory function of monitoring the operation of the motor accidents scheme and its efficiency and effectiveness, as required by section 206(2) of the MAC Act.

It is noted that the eleventh report on the *Review of the Exercise of the Functions of the Motor Accidents Authority and Motor Accidents Council* by the Standing Committee on Law and Justice in 2011 recommended that the New South Wales Government pursue amendments to the MAC Act to provide the MAA with the authority to collect and disclose data on the amount of compensation a claimant receives once legal costs have been deducted (recommendation 7). The Government response to the Standing Committee's report noted that the Government was committed to ensuring greater transparency regarding the amount of compensation claimants receive in their hand when legal costs and other deductions are made and that the MAA would consider this issue in the development of the Green Slip pricing strategy.

The proposed Regulation contains a proposal which would require the legal practitioner who is instructed by the claimant at the time the claim is finalised to provide to the MAA a costs breakdown in relation to the matter as soon as practicable after an amount of damages is paid to the claimant in finalisation of the claim. A legal practitioner who fails to do so may be fined up to 5 penalty units (currently equivalent to $550).

The proposed Regulation would enable the MAA to provide information contained in a costs breakdown to the Minister and have the ability to forward to the Legal

Services Commissioner any information obtained from a costs breakdown which it reasonably believes demonstrates overcharging. Information relating to individual claim details may not otherwise be disclosed by the MAA. All claims information held by the MAA is subject to privacy provisions and cannot be disclosed except as provided under the Act or Regulation or NSW privacy and access to information laws.

The proposed Regulation will allow the MAA to provide the information to the Minister and to make statistics produced from such information public if directed to do so by the Minister. The information provided to the MAA by legal practitioners on individual claims will not be available to insurers or disclosed to any third party, unless MAA is legally compelled to do so.

Following consultation with legal professionals, the MAA understands that contracting out of the regulated fees is very prevalent in motor accident matters, and that the gap between the regulated fees and those contained in a costs agreement can often be significant.

The MAA believes that most legal practitioners who practice in the area of personal injury law provide appropriate advice to their clients and ensure that the costs recovered from claimants are not an unreasonable proportion of the final settlement. However there have been documented examples of overcharging by lawyers in motor accident matters, including some high profile and egregious examples, which suggest that self regulation by the legal profession is not always reliable. The disclosure and publication of data on practitioner-client costs in motor accident matters, if directed to do so by the Minister, would help ensure that claimants are aware of lawyers' charging practices as well as promote self regulation by the legal profession in relation to legal costs.

The MAA currently receives complaints from claimants in relation to various aspects of the Scheme. Where the complaint relates to the practices or fees of a legal practitioner, the MAA currently refers all such complainants to the Legal Services Commissioner.
The Legal Services Commissioner can only take action against gross overcharging. While the MAA is not in a position to determine gross overcharging, the explicit provision in the proposed Regulation enabling the MAA to report any instances of excessive fees to the Legal Services Commissioner will clarify its power to do so and assist in ensuring that instances of overcharging are investigated by the appropriate authority.

If the MAA were to form a view, based on the information provided to it under the proposed Regulation, that legal costs in a particular matter may demonstrate overcharging, the MAA would first seek any additional relevant information from the practitioner before considering whether to refer the matter to the Legal Services Commissioner.

Costs where an insurer does not accept liability to pay the amount of damages specified in the certificate of assessment

A party to a motor accident compensation matter cannot commence proceedings in court unless the claim has been exempted or assessed by CARS. Section 151(2) of the MAC Act sets out which party to a motor accident claim (claimant or insurer) is liable to pay costs where a claimant does not accept the amount of damages specified in a CARS assessment. The MAC Act does not, however, make provision for which party is liable to pay costs where an insurer does not accept liability to pay the amount of damages specified in the CARS assessment of damages.

This omission was raised as a concern by the Standing Committee on Law and Justice during their ninth review of the exercise of the functions of the Motor Accidents Authority and Motor Accidents Council in 2008. In their ninth report, the Standing Committee recommended that the MAA consider provisions for costs in insurer-initiated court proceedings so that claimants are not unfairly penalised for having to participate in such proceedings (recommendation 10). The Government response to the Standing Committee's report noted that the MAA would consider the issue of costs in insurer-initiated court proceedings as part of the next statutory review of the *Motor Accidents Compensation Regulation 2005*.

The proposed Regulation includes a new provision to provide that where an insurer does not accept liability to pay the amount of damages assessed by CARS within 21 days after the certificate of assessment is issued, the insurer is liable to pay costs on an indemnity basis unless the court awarded damages or settlement amount is:

- if the assessed damages are $10,000 or less – at least $2,000 less than the amount of those assessed damages;
- if the assessed damages are more than $10,000 and less than $1,000,000 – at least 20 per cent less than the amount of those assessed damages; or
- if the assessed damages are $1,000,000 or more – at least $200,000 less than the amount of those assessed damages.

This provision will ensure that the existing penalties that apply to claimants under section 151(2) of the MAC Act also apply to insurers.

Medical reports

Insurers are required to obtain reports from treating medical practitioners on receipt of a claim, and provide a copy to the claimant. The proposed regulation includes a new provision to ensure that a claimant cannot recover costs for such a report, unless the insurer has failed to provide it to the claimant. Claimants may still recover costs under Schedule 1 for follow-up reports and updates by treating medical practitioners.

In respect of medico-legal opinions from medical specialists who have not previously treated the claimant, these are typically obtained by claimants and insurers as part of their investigation of or particularisation of the claim In many cases one party will obtain another medico-legal report in response to one served by the other party.

This can develop into a situation of "dueling doctors" which adds costs to the scheme and can be a burden on the claimant who is required to attend numerous medical appointments, with no guarantee that the reports arising from appointments arranged by the insurer will be made available to them. Feedback to the MAA by claimants

has indicated that this aspect of the claiming process is perceived as particularly distressing by many.

The proposed Regulation proposes a recoverable fee that is higher for a jointly arranged medico-legal assessment than the fee for one that is not jointly arranged. This proposal, developed in consultation with insurers and the legal profession, aims to encourage the use of jointly appointed medico-legal specialists to assist the early resolution of claims.

The use of jointly appointed medico-legal specialists would have the added benefit of reducing the number of specialist assessments that a claimant is required to attend. The MAA proposes to develop guidelines, in consultation with stakeholders, to assist parties to jointly appoint medical specialists in motor accident injury claims.

3.2 The Preferred Option: Remake the *Motor Accidents Compensation Regulation 2005* with amendments

The preferred option is to remake the 2005 Regulation with amendments. If the *Motor Accidents Compensation Regulation 2005* is permitted to lapse (Option 1), the motor accidents scheme would return to the pre-1999 position. As noted above, under this regime transaction costs eroded the amount of compensation that could be returned to the injured person and contributed to the upward movement of premium prices causing considerable concern amongst motorists. This would be undesirable and contrary to the intent of the MAC Act.

Remaking the existing Regulation without amendment (Option 2), would maintain the current regulatory framework for the regulation of costs in the motor accidents scheme but would not take account of the improvements and clarifications that have been identified during the review process. This option would also mean that the amounts specified under Schedule 1 (Maximum costs for legal services) and Schedule 2 (Maximum fees for medico-legal services) would remain the same and not be increased in line with inflation.

The proposal to remake the existing Regulation with amendments to take account of the improvements and clarifications that have been identified during the review of the Regulation is the preferred option (Option 3). This option will maintain the existing regulatory framework and processes as well as improve and reinforce the objects of the MAC Act. In particular, the mandatory disclosure of legal costs will provide greater transparency in relation to legal costs in motor accident matters and enable the MAA to better monitor the operation of the scheme.

An estimate by the CTP scheme actuary indicates that the proposed Regulation will increase the cost of a Green Slip by approximately $1.50 per policy.

It is noted that in any compulsory third party insurance scheme, there is a need to balance the cost of the scheme with the benefits available to injured people. The *Motor Accidents Compensation Regulation 2015* will establish an appropriate balance between reducing the cost of Green Slips for motorists and ensuring that the greater proportion of insurer payments are going directly to injured people.

These benefits outweigh any costs of remaking the Regulation and justify preferring Option 3 over Options 1 or 2.

APPENDIX 1

The following organisations have been invited to comment on the proposed Regulation and this Regulatory Impact Statement:

- AAMI
- Allianz Australia Insurance Group
- Australian Lawyers Alliance (NSW)
- Australian Medical Association (NSW)
- Claims Assessors (CARS)
- Insurance Council of Australia Limited
- Insurance Australia Group Limited (NRMA Insurance)
- Law Society of New South Wales
- Medical Assessors (MAS)
- Motor Accidents Assessment Service Reference Group (MRG) members
- New South Wales Bar Association
- QBE Insurance (Australia) Limited
- Suncorp Metway Insurance/ GIO
- Zurich Financial Services Australia Limited