CHAPTER 2 GENERAL LEGAL ISSUES

2.1 Sources of law for CARS Assessors

2.1.1 The “tool kit”

The CARS Assessors’ legal tool kit comprises the following sources of law:

1. Legislation:

   a. Statutes – the *Motor Accidents Compensation Act* 1999 (as amended) and some sections of the *Civil Liability Act* 2002 (as amended).


2. Case Law:

   a. Decided cases on MAC Act and relevant areas such as the assessment of damages by the courts – these may or may not be binding depending on the court.

   b. Decisions of CARS Assessors – these are not binding but may be persuasive (and to promote consistency should be considered).

For a CARS Assessor to act lawfully, the Assessor must use the tools in the toolkit and be familiar with them.

CARS Assessors will find assistance in material issued by CARS – the Practice Notes, Guidance material, e-news articles authored by CARS and the MAA, as well as material issued by external authors – loose leaf services and text books.
## 2.2 Legislation

### 2.2.1 The Motor Accidents Compensation Act 1999

The primary statute that governs CARS Assessors is the *Motor Accidents Compensation Act* 1999. The MAC Act came into force and governs all accidents occurring on or after 5 October 1999.

Parts of the *Motor Accidents Compensation Act* NSW 1999 (MAC Act) most relevant to the CARS Assessor include the objects clauses in Chapter 1, one part of Chapter 2 and the whole of Chapters 3, 4, 5 and 6.

### 2.2.2 Objects of the Act

The objects and purpose of the Act are found in Sections 5 and 6 in Chapter 1. These clearly set out parliament’s intention for the scheme and how the Act should be interpreted by decision makers in the discharge of their duty.

- Section 5 provides assistance when reading and interpreting the Act, stipulating:

  *that the law (both the enacted law and the common law) relating to the assessment of damages in claims made under this Act should be interpreted and applied in a way that acknowledges the clear legislative intention to restrict the level of non-economic loss compensation in cases of minor injuries;*

- Sections 6(1) and (2) of the Act provide that:

  *in the interpretation of a provision of this Act or the regulations, a construction that would promote the objects of this Act or the provision is to be preferred to a construction that would not promote those objects*

and
In the exercise of a discretion conferred by a provision of this Act or the regulations, the person exercising the discretion must do so in the way that would best promote the objects of this Act or of the provision concerned.'

Whilst there is no express reference to CARS or any of the dispute resolution services offered by the MAA in the objects, sections 5(1)(a), (b) and (d) are particularly relevant..

(a) to encourage early resolution 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,

(b) to provide compensation for compensable injuries sustained in motor accidents, and to encourage the early resolution of compensation claims,

(c) …

(d) to keep premiums affordable, recognising that third-party bodily insurance is compulsory for all owners of motor vehicles registered in New South Wales,

### 2.2.3 Chapter 2 Third party insurance

A claim cannot be made against the Nominal Defendant under this section unless due inquiry and search has been made to establish the identity of the motor vehicle concerned. Section 34A provides that, for claims against the Nominal Defendant made on or after 1 October 2008 disputes about whether due inquiry and search has been established may be referred to CARS.

### 2.2.4 Chapter 3 Motor accident injuries

Chapter 3 provides a system of early notification of injury (the ANF form section 49), limitations to treatment or out of pocket expenses (sections 54 to 56) and provides for the Medical Assessment Service and the accessible means of getting early, quick and independent decisions on treatment, rehabilitation and care outside of the court
system (sections 57 to 65). Of particular relevance to CARS are the following sections:

56 a claims Assessor can only assess hospital and medical expenses in accordance with the fees provided for in the regulations;

58(2) a claims Assessor can refer an issue arising about a medical dispute to MAS;

60(1) a claims Assessor can refer a medical dispute to MAS;

61 the status of MAS assessments at CARS was altered by amendments to the MAC Act which came into force on 1 October 2008. All certificates arising from referrals to MAS after 1 October 2008 will be ‘conclusive evidence’;

62(1)(b) a claims Assessor can refer a dispute to MAS for further assessment without the restrictions affecting the parties.

2.2.4 Chapter 4 Motor accident claims
Chapter 4 provides the mechanism for making claims (part 4.2), the duties facing Claimants and Insurers with respect to claims (part 4.3), the mechanism for the resolution of disputes outside the court system at CARS (part 4.4) and provisions relevant to court proceedings (part 4.5).

Of particular relevance to CARS are the following sections:

66(2) the definition of 'full and satisfactory explanation' is provided. This definition is relevant to many other sections;

70 disputes about reports to the police can be assessed by CARS. A claim (made on or after 1 October 2008) cannot be referred for assessment if a claims Assessor has found against the Claimant unless the claim is only being referred for exemption;
disputes about late claims can be assessed by CARS. A claim (made on or after 1 October 2008) cannot be referred for assessment if a claims Assessor has found against the Claimant unless the claim is only being referred for exemption;

disputes about the claim form can be assessed by CARS. A claim (made on or after 1 October 2008) cannot be referred for assessment if a claims Assessor has found against the Claimant unless the claim is only being referred for exemption;

the Insurer has a duty to admit liability within three months of receipt of claim;

the Insurer has a duty to make an offer;

the Insurer has a duty to make payments for reasonable, necessary and properly verified hospital, medical, rehabilitation etc. Disputes about whether such payments have to be made can be referred to CARS.

the Insurer has, for claims made in respect of accidents occurring on or after 1 October 2008, a duty to make payments to a Claimant (against economic loss) to alleviate financial hardship.

the Claimant has a duty to co-operate with the Insurer until legal proceedings are commenced;

the Claimant has, in respect of claims made on or after 1 October 2008, a duty to provide relevant particulars of the claim to the Insurer;

the Claimant must provide those particulars within 2 years and 6 months of the motor accident. If the Claimant does not, the Insurer can issue a notice directing him or her to do so. If the Claimant does not do so within 3 months, the claim is taken to have been withdrawn. A withdrawn claim
may be reinstated. Disputes about notices and reinstatement can be referred to CARS.

86 the Claimant must undergo reasonable medical examinations requested by the Insurer or MAS. If the Claimant fails without reasonable excuse to attend the claim may not be referred to the Authority for assessment and the assessment cannot continue;

88 contains definitions including ‘party’ to an assessment and ‘specify an amount of damages’;

89A for claims made on or after 1 October 2008, the parties must participate in a settlement conference;

89B for claims made on or after 1 October 2008, the parties must exchange all documentation upon which they intend to rely before the settlement conference;

89C for claims made on or after 1 October 2008, the parties must make settlement offers to each other within 14 days of the settlement conference;

89D non-compliant parties may have adverse costs orders made against them by the claims Assessor;

89E exempt claims, death claims, claims where liability is wholly denied, claims where the Insurer is under a duty to make an offer and has not and claims where the Claimant has not sufficiently recovered in 3 years, do not have to comply with sections 89A – D;

90 either party may refer a claim to CARS;

91 sets out the time limits on bringing applications to CARS – applications made in contravention of this section are arguably not valid applications;
provides for the exemption of claims from CARS;

the PCA makes arrangements for the assessment of claims;

claims Assessors can assess liability and quantum and can proceed in the absence of co-operation of a party or parties. An Assessor must issue a certificate with brief reasons. Obvious errors can be corrected by the PCA or with the approval of the PCA;

claims Assessors may assess costs (this power was previously in the regulations);

the status of assessments and the requirement to pay interest if assessments are not paid by the insurer;

special assessments – for claims made before 1 October 2008 only 5 special assessment dispute types are available. For claims made on or after 1 October 2008, 5 additional dispute types are available;

power of CARS Assessors to require information from parties to the assessment and for accidents occurring after the date of commencement third parties;

the power to issue a summons to appear – is limited to the PCA and a summons may only be issued to parties to the assessment;

protection of CARS Assessors;

proceedings before CARS Assessors;

control and direction of CARS Assessors;

remission of matter for further assessment;
2.2.5 Chapter 5 Award of damages
Chapter 5 of the MAC Act deals with Awards of Damages and provides certain restrictions and limitations to damages for economic loss (part 5.2), non-economic loss (part 5.3) and other matters. Chapter 5 has a strong emphasis upon ensuring that compensation is directed primarily to those who have suffered permanent and severe injuries. Of particular relevance to CARS are the following sections:

122 CARS must assess damages in accordance with this chapter (this provision applies to all claims not yet assessed as at 1 October 2008);

124 no economic loss may be awarded for the first five days (note this section was repealed by the 2007 amendments and does not apply to accidents occurring on or after 1 October 2008);

125 the maximum amount for loss of earnings is indexed every year.

The maximum amount for weekly loss of earnings can be located on the MAA website by navigating the following tabs:

>> About the MAA >> Legislation >> Indexation of damages >> section 79 and 79A schedule of damages

126 sets out the approach to the assessment of future economic loss (see Guidance Material);

127 the discount rate for future economic loss is set at 5%;

128 provisions relating to award for gratuitous domestic assistance limitations and restrictions (see Guidance Material);

129 respite care is allowed;

130 damages are to be reduced for Victim's Compensation payments or other amounts paid by an Insurer;
an Assessor cannot award damages for non-economic loss if there is a dispute about the entitlement to non-economic loss;

the maximum amount for non-economic loss indexed every year.

The maximum amount for non-economic loss damages can be located on the MAA website by navigating the following tabs:

   >>About the MAA >> Legislation >> Indexation of damages >> section 79 and 79A schedule of damages

the MAA is authorised to publish information to assist Assessors in determining NEL payments (see Guidance material and regular MAAS Bulletin NEL case studies);

the Claimant has a duty to mitigate his or her damages;

interest (see 'Practice note');

in certain circumstances contributory negligence must be found and damages reduced accordingly;

voluntary assumption of risk is no longer a complete defence to a claim but damages may be reduced;

damages for loss of services are not available subject to provisions in the Civil Liability Act and services in respect of a Compensation to Relatives action.

2.2.6  Chapter 6 Costs

Chapter 6 of the MAC Act deals with costs and fees. Of particular relevance to CARS are the following sections:

the regulations may fix maximum costs recoverable by legal practitioners;
the regulations may fix maximum fees recoverable by medical practitioners for medico-legal services;

costs provisions in respect of legal proceedings where there has been a claims assessment.

2.2.7 Motor Accidents Compensation Act Amendments 2006
Amending legislation was passed in 2006 providing the following major amendments:

- Section 3A and 3B inserted into the Act – (a) the Act applies to a motor accident causing death or injury during driving/collision/running out of control of motor vehicle does not apply to injury occurring from a series of incidents. (b) Limits the Act to on-road motor accidents, off-road motor accidents where vehicle is registered and off-road motor accidents that give rise to workers compensation claims (except coal miners).

- Section 14 – extended the category of incidents for suspending and cancelling registration/payment of premiums.

- Section 22 – introduced protection against personal liability for medical Assessors in respect of the exercise in good faith of their functions under the Act and provides Medical Assessors are competent but not compellable in legal proceedings.

- Section 30 – amendment to maximum commission payable to Insurer’s agent.

- Sections 33 and 34 – removes the existing right of action against the Nominal Defendant in respect of motor accidents occurring on land that constitutes a road because it is a road related area where the injured person is a trespasser.
• Section 33(5) – revised the definition dealing with claims against the Nominal Defendant for motor accidents involving uninsured vehicles that are registrable.

• Section 54 – bulk billing arrangements with the minister for health and service providers to provide for payment of treatment and related expenses of injured persons by the authority, rather than by licensed insurers.

• Section 212(3)(c1) – bulk billing expenses incurred by authority to be paid out of Motor Accidents Authority Fund.

• Sections 211, 212, 213, 213(d) and (e), 214 and 214(e) – made amendments to the provisions that establish and fund the Motor Accidents Authority Fund.

2.2.8 Motor Accidents Compensation Act Amendments 2007

Following extensive consultation, a number of important amendments were made to the MAC scheme in particular affecting dispute resolution at CARS. Details of the amendments are contained within the description of the Act in paragraphs 2.2.4, 2.2.5 and 2.2.6 above. There are a variety of commencement dates and Assessors should consult the Commencement Timing Table in Appendix A at the conclusion of this chapter to ensure they apply the correct law to the claim that is before them.

2.2.9 Civil Liability Act 2002

Section 3B(2) of the Civil Liability Act states that the following provisions of that Act apply to motor accidents:

Part 1A Divisions 1 to 4 and 8 – Negligence.

Section 15B Damages for loss of capacity to provide domestic services (note this section and the corresponding section 128 in the MAC Act were amended in late 2008).
Section 15C  Damages for loss of superannuation entitlements.

Section 17A  Tariffs for damages for non-economic loss.

Section 18(1)  Interest on damages for loss of services.

Division 7  Mental harm.

Section 49  Effect of intoxication.

Part 7  Self defence.

Part 8  Good samaritans.
2.3 Delegated Legislation

2.3.1 Motor Accident Compensation Regulation 2005

The Regulations contain six parts:

1. Part 1 – preliminary matters including definitions.

2. Part 2 – this part of the regulations relates back to sections 54 – 56 of the Act. Together they provide that an Insurer is only liable to pay for treatment listed in the AMA list at the AMA listed fee and that claims Assessors must assess treatment expenses or out of pocket expenses in accordance with the AMA listed fees.

3. Part 3 – the cost and fee regulations see 2.3.2 below.

4. Part 3A – provisions consequent on enactment of the Motor Accidents Compensation Amendment Act 2006 (these are not relevant to CARS Assessors)

5. Part 3B - provisions consequent on enactment of the Motor Accidents Compensation Amendment Act (Claims and Dispute Resolution) Act 2007. These provisions clarify the commencement timing of some of the amendments as well as ensuring the PCA at the time of the commencement of the provisions shall be the PCA until the Minister appoints someone else.

6. Part 4 – provisions relevant to policies, unregistered vehicle permits and on the time for payment by insurers of assessed amounts of damages (Clause 17A – 20 business days).

2.3.2 Costs

This part of the regulations relates back to sections 149 and 150 of the MAC Act which provide for the fixing of maximum costs recoverable by legal and medical practitioners.
The Motor Accidents Compensation Regulation 2005 replaced the *Motor Accidents Compensation Regulation (No 2) 1999* which was repealed on 1 September 2005 by section 10(2) of the *Subordinate Legislation Act 1989*. The regulations can be located on the MAA website by navigating the following links >> About the MAA >> Legislation >> Motor Accidents Compensation Regulation 2005.

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

CI 7 certain fees are unregulated e.g. accident investigation reports, court fees, witnesses expenses;

CI 9 fixes the maximum costs recoverable by legal practitioners listed at schedule 1;

CI 10 excludes matters exempted from the maximum costs set out in schedule 1 (but schedule 2 applies);

CI 11 the maximum costs recoverable do not apply to solicitor/client costs;

CI 12 maximum fees recoverable by medical practitioners for medical reports and appearances as witnesses;

CI 14 limits the costs of expert witnesses recoverable by medical practitioners for medical reports and appearances as witnesses;

CI 15 contains the power for a CARS Assessor to assess costs and is reproduced in full below.

(1) In making an assessment and specifying damages under section 94 of the Act in respect of a claim, a claims Assessor may include in the assessment an assessment of the Claimant’s costs (including costs for legal services referred to in schedule 1 and fees for medico-legal services referred to in schedule 2) in the matter.
(2) An assessment of those costs may also be made (whether or not an assessment has been made under sub-clause (1)) if a court does not determine a matter after the issue of a certificate under section 94 but remits the matter to the Motor Accidents Claims Assessment and Resolution Service for further assessment.

(3) In making an assessment under this clause, a claims Assessor:

(a) may have regard to the amount of any written offer of settlement made by either party to the matter, and

(b) must give effect to:

(i) any requirement of a court under section 151(3) of the Act, and

(ii) division 4 of this part, and

(c) must have regard to the matters set out in sections 208A(1) and 208B of the Legal Profession Act 1987.

(4) The amount of any assessment under this clause must not exceed the relevant amounts set out in schedules 1 and 2.

(5) A Claimant or an Insurer (or a legal practitioner retained by a Claimant or an Insurer in respect of the relevant claim) has the same right of appeal against an assessment made under this clause as the Claimant, Insurer or legal practitioner would have under section 208L or 208M of the Legal Profession Act 1987 if the assessment were a determination made by a costs Assessor under part 11 of that Act in respect of a bill of costs.

Clause 16    GST may be added.
Schedule 1 the maximum costs for legal services to be determined by reference to
certain stages depending on whether the lawyer was retained before
the assessment was conducted (Table A) or after the assessment was
finalised (Table B) and provides for country and interstate loadings.

Schedule 2 the maximum fees for medico-legal services.

Claims Assessors should refer to the Guidance material on interpreting the costs
regulations.
2.4 Guidelines

2.4.1 Claims Assessment Guidelines

Section 69 provides that 'the Authority may issue guidelines for or with respect to procedures for the assessment of claims under part 4.4 and associated matters (MAA Claims Assessment Guidelines)'.

Section 106(1) provides that 'Claims Assessments under this part are subject to relevant provisions of MAA Claims Assessment Guidelines relating to those assessments'. The effect of section 106(1) is that the Guidelines have the force of law as if they were delegated legislation. Delegated legislation is effectively part of the statute which authorised it. Therefore the Claims Assessment Guidelines (the Guidelines) cannot be ignored when assessing a claim.

Justice Johnson in Allianz Australia Insurance Limited v Crazzi and Others [2006] NSWSC 1090 (18 October 2006) said this about the Guidelines at paragraph 17:

By section 106(1), claims assessments under part 4.4 MAC Act (sections 88-106) are 'subject to relevant provisions of MAA Claims Assessment Guidelines relating to those assessments'. Under section 69(1) MAC Act, the MAA may issue guidelines 'with respect to procedures for the assessment of claims under part 4.4 and associated matters'. Guidelines establishing procedures for assessing claims were promulgated in June 2002 and are styled 'Claims Assessment Guidelines'. These Guidelines may be characterised as delegated legislation, in the same way as the MAA Medical Guidelines under section 44 MAC Act: NRMA Insurance Limited v Motor Accidents Authority of NSW [2004] NSWSC 567; (2004) 61 NSWLR 264 at 267 [10]-[14], 269-270 [26]-[28]. As delegated legislation, the Claims Assessment Guidelines cannot affect the proper construction of the MAC Act or limit rights conferred by the Act; they exist to indicate how relevant assessments are generally carried out: NRMA Insurance Limited at 270 [28]; Pearce and Geddes, Statutory Interpretation in Australia, 6th edn, 2006, at [3.41]; and are subordinate legislation in the nature of regulations: Zurich Australian Insurance Ltd v Motor Accidents Authority of NSW at paragraph...

2.4.2 Medical Guidelines

Section 44(1) of the Act provides that:

the authority may issue guidelines (MAA Medical Guidelines) with respect to the following:

1. the appropriate treatment of injured persons;

2. the appropriate procedures with respect to the provisions of rehabilitation services or attendant care services for injured persons (including the circumstances in which rehabilitation services or attendant care services are required to be provided);

3. the assessment of the degree of permanent impairment of an injured person as a result of an injury cause by a motor accident;

4. the procedures for the referral of disputes for assessment or review of assessments, and the procedure for assessment, under part 3.4.

The authority may amend, revoke or replace its Medical Guidelines at any time (section 44(2)). Medical Guidelines may adopt the provisions of other publications
MAA Medical Guidelines are not to be construed as requiring medical treatment to be carried out in accordance with the Guidelines and are to be consistent with a high standard of medical care as exists in the community at that time (section 44(5)). This seems to suggest that some Medical Guidelines are “guidelines (guidance only). The MAA Medical Guidelines must be developed in consultation with relevant medical colleges (section 44(6)).

The MAA has developed a number of Guidelines in accordance with the power provided in section 44(1)(a)(b) which are not relevant to CARS Assessors but these include, Whiplash Guidelines, Treatment and Attendant Care Services (TRAC) Guidelines.

Copies of these guidelines can be located on the MAA website by navigating the following tabs:
>>Injury Management – the MAA’s role >> Guides for Professionals

2.4.3 Impairment Assessment Guidelines
The American Medical Association’s Guides to the Evaluation of Permanent Impairment fourth edition, third printing, 1995 (AMA 4 Guides) is an American publication developed to bring greater objectivity to the assessment of permanent impairment. The MAA has issued Permanent Impairment Guidelines (currently 1 October 2007) which adopt and adapt the American Guidelines generally to the Australian situation and in particular to the motor accident injury scheme.

Claims Assessors are required to have a good working knowledge of these Guidelines for case management purposes.

Each Assessor has been issued with a copy of the AMA 4 Guides. This remains the property of the MAA and must be returned to the MAA upon cessation of the Assessor’s appointment.

Copies of the MAA’s Permanent Impairment Guidelines can be located on the MAA website by navigating the following tabs:
>>Publications & Reports >> MAA Guidelines
2.4.4 Medical Assessment Guidelines
These Guidelines are the equivalent of the Claims Assessment Guidelines in that they guide the parties, MAA staff and medical Assessors in referring and conducting medical assessments. They have a number of provisions that are identical to those in CARS (chapters 1–6).

A copy of these guidelines can be located on the MAA website by navigating the following tabs:
>>Publications & Reports >> MAA Guidelines

2.4.5 Claims Handling Guidelines
Section 68(1) provides that ‘the Authority may issue to licensed insurers guidelines with respect to the manner in which insurers and those acting on their behalf are to deal with claims’. Licensed insurers are required to comply with the guidelines as a condition of a licence granted under part 7.1 of the Act (68(5)).

The Compliance Section of the Authority monitors and regulates insurer behaviour in accordance with these guidelines by an audit of files and in its handling of complaints against insurers.

A copy of the Claims Handling Guidelines can be located on the MAA website by navigating the following tabs:
>>Publications & Reports >> MAA Guidelines

2.4.6 Other Guidelines
Section 24 enables the MAA to issue guidelines with respect to the determination of insurance premiums (MAA Premiums Determination Guidelines) and section 171 enables the MAA to issue guidelines with respect to the issue of third-party policies (market practice guidelines).

Copies of all MAA guidelines can be downloaded from the MAA’s website (go to maa.nsw.gov.au >> publications & reports >> guidelines).
A copy of the Claims Handling Guidelines can be located on the MAA website by navigating the following tabs:
>>Publications & Reports >> MAA Guidelines
2.5 Case Law

2.5.1 Binding precedents

CARS is bound by decisions of:

- A court which is empowered to review decisions of the tribunal in accordance with the common law process of judicial review (the Supreme Court); and

- Any court which stands above those courts in the judicial hierarchy (therefore the Court of Appeal and the High Court).

2.5.2 Non binding but persuasive precedent

In deciding the persuasiveness of a decision the CARS Assessor should consider the following elements:

1. the quality of the reasoning and the analysis in the reasoning;

2. the extent to which it takes into account relevant precedents and related principles of law;

3. the standing of the court or tribunal which handed down the decision;

4. whether other courts or tribunals have applied the decision;

5. where the precedent is in the interpretation of a different statute, how similar is that statute to the statute being interpreted (MAC Act) – in its subject matter, purpose and language.

In relation to MAC Act cases, many of these are heard and determined in the District Court of New South Wales. Whilst a District Court Judge’s reasons are not binding they are considered persuasive. For the sake of consistency it is also suggested that District Court judgments should be followed. However it should be remembered that there may be other interpretations by other judges of similar provisions and therefore
CARS Assessors should ensure that both parties have the opportunity to provide cases, submissions and a response to matters raised by the other side. Similarly if an Assessor proposes to depart from a decision of a District Court judge, the parties should be given the opportunity to be heard and make submissions.

Case notes on most cases relevant to the application of the law to CARS Assessments are published in the MAAS bulletin. If Assessors become aware of cases that are relevant to CARS in the course of managing their own practice please notify the PCA so that the material can be shared with the other Assessors.

2.5.3 Decisions of CARS Assessors

What one CARS Assessor decides cannot bind another CARS Assessor, however, it would be desirable that there be a consistent approach to the determination of common issues.

If a CARS Assessor is going to decide a similar matter in a different way to an assessment that has been decided by another Assessor, in accordance with the rules of procedural fairness the parties should be alerted to this and given the opportunity to make appropriate submissions.

Section 105(4) provides that 'claims Assessors [can] obtain advice, to ensure consistently correct application of the provisions of this Act and the regulations and of other relevant matters'. Claims Assessors may wish to obtain advice from the PCA or his or her fellow Assessors.
2.6 **Secondary Law**

Secondary law provides the Assessors with additional information to assist in assessing claims at CARS. Secondary law relevant to the Assessors, in addition to the external publications mentioned at Case law above, comprises the practice directions, practice notes, guidance material and the MAAS Bulletin.

2.6.1 **Practice directions**

At present there is one practice direction. It deals with the issue of the waiver of Clause 3.20 of the Guidelines. The Practice direction stipulated that in respect of applications lodged before 1 May 2006 the parties did not have to comply with clause 3.20 of the Guidelines. Due to the adoption of the 2008 Guidelines this practice direction is no longer relevant.

2.6.2 **Practice notes**

There are several practice notes in circulation and available for viewing on the MAA’s website. All the practice notes are drafted and settled by the Assessors as a group. They are circulated to the MAAS Reference Group for comment and are published to the world at large on the MAA’s internet.

The practice notes are designed to provide guidance and agreed considerations to consider when dealing with various issues that arise in the assessment process. The practice notes help to promote consistency among the Assessors.

Assessors should be familiar with the practice notes.

2.6.3 **Guidance material**

CARS is in the process of developing Guidance Material on the assessment of damages.

2.6.4 **Other**

The MAAS Bulletin is another source of secondary law. The MAAS Bulletin keeps Assessors and parties updated and informed about other MAA issues involving Case Management Services, CARS, Reviews and MAS.
2.7 Procedural Fairness

The two rules of procedural fairness are:

1. The hearing rule – that is everyone has the right to a fair hearing. The decision making body must allow the affected person/s to be heard; and

2. The bias rule – the decision maker must be impartial; there can be no bias either actual or perceived (also known as apprehended bias). The decision maker can have no interest in the matter that is being heard (for more information on the procedure for Assessors to follow when Assessors are confronted with a matter where there may be a conflict please refer to chapter 5 (5.1.1) and where there is a disqualification application please refer to chapter 3 (3.4.6) of this manual).

2.7.1 The hearing rule

CARS Assessors should remember the following in applying the hearing rule:

1. If the Assessor is going to make adverse findings of credit the Assessor must allow the party who the adverse findings are to be made against the chance to respond to those findings.

2. An AC is not necessary to comply with the hearing rule. The parties can be ‘heard’ by presenting oral or written evidence or by making oral or written submissions.

3. Cross examination is not necessary to comply with the hearing rule. The examination of parties and witnesses is usually conducted by the Assessor and questions to other parties or witnesses may only be put as directed by the Assessor (clause 13.4.2 of the Claims Assessment Guidelines). The Assessor may, at the request of a party allow the questioning of a witness or a party, by either party’s legal representative or agent, subject to any limitations as determined by the Assessor (clause 13.4.3 of the Claims Assessment Guidelines).
Whilst a Workers Compensation Case, the decision of the Court of Appeal in *Aluminium Louvres & Ceilings Pty Limited v Xue Qin Zheng* [2006] NSWCA 34 (2 March 2006) is relevant. In that case the WCC arbitrator had restricted the cross examination of a witness and that was one of the grounds of appeal to the Presidential member and then a ground of judicial review.

Justice Bryson at paragraph 37 said:

An assessment of whether the Arbitrator’s decision should be set aside for want of procedural fairness is no simple matter and could not be disposed of by applying any legal tests susceptible of clear statement relating to entitlement to cross-examine an applicant, or a witness. There is no legal right to cross-examine an applicant or other witness in the Workers Compensation Commission, and decisions whether to allow cross-examination or to limit it are discretionary decisions which must be made in a context of the legislation and practices which the Commission follows, and, at least as importantly, in the context of the facts and circumstances of the case under consideration.

Many CARS Assessors have adopted the practice of asking questions of the witness first and when finished the parties are provided an opportunity to ask anything further. This is an effective method of conducting the assessment as;

1. The Assessor can conduct the assessment in a more timely fashion by asking the questions,

2. The Assessor maintains control of the assessment; and

3. The Assessor affords the parties an opportunity to be heard.

### 2.7.2 Bias

Two salient points can be extracted from the case law:
1. Actual bias can be inferred from statement or conduct, and need not be deliberate, conscious or malicious [emphasis added].

2. The test for apprehended bias is whether the fair-minded lay observer might reasonably apprehend that the decision-maker would not bring an impartial and unprejudiced mind to the resolution of issues.

CARS Assessors must be conscious at all times of the fact that in addition to being practitioners they are also CARS Assessors. As stated above bias can be inferred from statements or conduct and need not be deliberate. Bias can be inferred from statements or conduct made outside the context of a CARS Assessment which is why the CARS Assessors code of conduct stipulates that an Assessor will uphold the scheme in their private and professional life.

In addition CARS Assessors should note the following:

1. The MAC Act does not expressly or impliedly authorise an Assessor to assess a matter despite circumstances that may lead to an apprehension of bias.

2. If a CARS Assessor discloses the interest he/she has that may potentially be viewed as bias and the parties agree that the Assessor can continue with the assessment there is no need for disqualification. However, the fact that the parties agree that the Assessor can proceed does not mean that the Assessor must proceed. It is a matter for the Assessor as to whether to disqualify him/herself if the Assessor does not think he or she can bring an impartial mind to the assessment of the claim or dispute.

3. If a CARS Assessor discloses an interest and the parties agree that the Assessor should disqualify him/herself this does not mean the Assessor must automatically disqualify him/herself. Again this is a matter for the Assessor to decide that he or she cannot bring an impartial mind to the assessment of the claim or dispute.
4. If the Assessor is unsure about whether a disclosure should be made it is safest to disclose the interest. If the Assessor is in doubt as to whether there is an interest or not discuss the matter with the PCA.

5. If the parties submit that the Assessor is biased the Assessor does not need to necessarily disqualify him/herself. The test is whether the fair-minded lay person would have the same suspicion.

(For more information on potential conflicts of interest by association please refer to chapter 3 of this manual.)
## Annexure A

### Motor Accidents Compensation (Claims and Dispute Resolution) Act 2007

#### MACA (1999) Commencement Timing Table

<table>
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