Contracting out of maximum costs

By Phillipa Alexander

Section 149(2) of the *Motor Accidents Compensation Act* 1999 (NSW) (MACA) provides that an Australian legal practitioner is not entitled to be paid or recover for a legal service or other matter an amount that exceeds any maximum costs fixed for that service or matter by the regulations under that section.

The maximum costs for legal services provided for a motor vehicle accidents matter are prescribed by Schedule 1 to the *Motor Accidents Compensation Regulation* 2005 (MACR). While the costs are calculated according to the value of the settlement amount or damages awarded, they are generally much less than those that would be regarded as fair and reasonable on a deregulated basis. For example, costs including counsel's fees for a matter involving court-awarded damages of $300,000, where the insurer denied liability for up to 25 per cent of the claim, would be approximately $33,000.

Matters that are exempt from assessment under s92 of the MACA are excluded from the maximum costs provisions.[1] This exclusion extends to any costs incurred before the matter became exempt.

Where the matter is not exempt, clause 11 of the MACR provides that practitioners may contract out of the maximum costs in Schedule 1 for solicitor:client costs, provided that a certain procedure is followed. While most practitioners would be familiar with the above provisions, we are regularly presented with matters in which a practitioner considers s/he has contracted out of the maximum costs and may have undertaken several years' work in this belief, while in fact there has been a failure to comply with clause 11 in one respect or another. In such cases, the practitioner may well be limited to the maximum costs.

Clause 11 requires a legal practitioner to take steps as set out below.

1. DISCLOSURE

Make a disclosure under Division 2 of Part 11 of the Legal Profession Act 1987 *(ss180 and 181 excepted).*

By virtue of s68(3)(a) of the *Interpretation Act* 1987 (NSW), the reference to Division 2 of Part 11 of the *Legal Profession Act* 1987 extends to Division 3 of Part 3.2 of the *Legal Profession Act* 2004 (NSW) (LPA) (s312 excepted).

Disclosure of the matters set out at s309 of the LPA is required. However, it is not merely the information contained in s309 that must be disclosed. The clause requires the disclosure to be made under Division 3 of Part 3.2. Division 3 includes s311, which requires disclosure to be made in writing before, or as soon as practicable after, the law practice is retained in the matter. Where a practitioner does not make disclosure at the outset of the retainer as required by s311, disclosure has not been made under Division 3. No provision in the LPA or the MACR enables a failure in this regard to be rectified during the course of the retainer.

Division 3 of Part 3.2 also includes the requirement under s316 to update anything included in a disclosure already made. This is particularly relevant to the estimate of costs (and disbursements). If this is not done, it could be argued by a client that the disclosure was invalidated for the purposes of clause 11.

2. COSTS AGREEMENT

Enter into a costs agreement (other than a conditional costs agreement, within the meaning of that Part, that provides for the payment of a premium on the successful outcome of the matter concerned) with that party as to those costs in accordance with Division 3 of that Part.[2]

The costs agreement must comply with s322 of the LPA. If a conditional costs agreement is entered into, the requirements of s323 must also be met – in particular, the costs agreement must set out the circumstances that constitute the successful outcome of the matter to which it relates,[3] must be signed by the client,[4] must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering the agreement[5] and must contain a cooling-off period of not less than five clear business days.[6]

In relation to the definition of a successful outcome, it is noted that in *Legal Services Board v DF*[7] the words *'if you recover any money from your case'* were held to be a sufficient definition for this purpose. However, it is recommended that the definition should not be restricted to where money is recovered, but should include the making of any orders for damages or costs in the client's favour.

Any conditional costs agreement must not include a premium or uplift fee, which is also prohibited by s324 of the LPA in respect of all claims for damages.

3. PRIOR WRITTEN ADVICE

Before entering into the costs agreement, advise the party (in a separate written document) that, even if costs are awarded in favour of the party, the party will be liable to pay such amount of the costs provided for in the costs agreement as exceeds the amount that would be payable under the Act in the absence of a costs agreement.

As stated by clause 11, this advice must be given by way of a 'separate' document and must be given before the costs agreement is entered into. It is also important to ensure that the wording of this advice does not deviate to such an extent >>

from the wording of the clause so as to make the advice effectively non-compliant.

Issues encountered in relation to contracting out include:

1. Failing to make disclosure before, or as soon as practicable after, the law practice is retained in the matter.
2. Failing to disclose all the information required by s309 of the LPA – in particular relating to an estimate of the total legal costs payable by the client. The definition of 'costs' in s302 includes 'fees, charges, disbursements, expenses and remuneration'. Disclosure of professional fees alone does not satisfy the estimate requirement.
3. Failing to update an estimate.
4. Failing to define adequately a 'successful outcome' in a conditional costs agreement.
5. Failing to obtain the client's signature on a conditional costs agreement.
6. Including a premium in a conditional costs agreement.
7. Failing to provide any advice under clause 11(c).
8. Providing advice under clause 11(c) that was arguably obscure to the point of not disclosing the required information.
9. Providing advice under clause 11(c) which is incorporated into the costs agreement rather than in a separate document.
10. Failing to establish that the advice under clause 11(c) was provided prior to the client entering into the costs agreement.

While some of the requirements may be seen as technical rather than substantive, in the writer's experience once there is a non-compliance with any of the requirements under clause 11, a practitioner is likely to be regarded by a costs assessor as not having contracted out of the maximum costs provided by Schedule 1 to the MACR. This can result in substantial non-recovery of costs that would otherwise be regarded as fair and reasonable. ■

Notes: **1** See Clause 10, *Motor Accidents Compensation Regulation* 2005. **2** The reference to Division 3 of Part 11 in the LPA 1987 is a reference to Division 5 of Part 3.2 in the LPA 2004. **3** Section 323(3)(a) of the LPA. **4** Section 323(3)(c)(iii) of the LPA. **5** Section 323(3)(d) of the LPA. **6** Section 323(3)(e) of the LPA. **7** [2011] VSC 292.

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Please explain: what constitutes sufficient reasons?

CIC Allianz Australia Ltd v Daniel Luke McDonald & Ors [2012] NSWSC 887

By Brendan Jones

This case involves a successful claim by an insurer for administrative relief on the basis that a Claims Assessment and Resolution Service (CARS) assessment did not contain sufficient reasons for the award of damages. The insurer's application was heard by Hidden J of the NSW Supreme Court, who set aside the CARS assessor's certificate and remitted the matter to be re-determined by another assessor.

On 1 May 2007, Daniel McDonald (the claimant) was injured in a motor vehicle accident. Liability was admitted by the insurer and a claim was made in the CARS. On 1 December 2010, the CARS assessor issued an award of damages in the amount of $535,000. The insurer sought judicial review in the NSW Supreme Court on the basis that the assessor erred in a number of respects in arriving at that assessment.

Section 94 of the *Motor Accidents Compensation Act* 1999 (NSW) (the MACA) states that a claims assessor must attach a brief statement to the Certificate of Assessment setting out the reasons relevant to the award of damages.

The insurer's principal argument was that the assessor's reasons were inadequate for the purposes of s94, and submitted four grounds for relief:

1. Treatment of the insurer's forensic accountant's report;
2. Evaluation of the medical evidence;
3. The future economic loss award; and
4. The future commercial care award.

Addressing the forensic accountant's report first, Hidden J concluded that the assessor dismissed the report without providing adequate reasons for doing so. For example, the assessor stated that the author of the report *'made some erroneous assumptions'*, but did not disclose what those