Proposed updates to the Accident Compensation (Review Costs and Appeals) Regulations 2002

Introduction

Thank you for allowing us the opportunity make submissions on the proposed updates to the Proposed updates to the Accident Compensation (Review Costs and Appeals) Regulations 2002 (the **Cost Regulations**).

The Independent Complaint and Review Authority (**ICRA**) is a highly respected and experienced provider of independent reviews and appeals relating to decisions and determinations made by public and private bodies. We are an independent provider of review and mediation services for ACC decisions.

ICRA welcomes the opportunity to share our experience and observations for this very timely proposal.

Overview

We have responded to each of the questions posed by MBIE in the attached submissions form. Our submissions can be summarised as follows:

1. ICRA welcomes both the simplification of the cost types and the increase in the maximum sums.

2. ICRA particularly endorses these changes as a good opportunity to improve access to justice. In addition to these changes, we have also touched on some other key areas in which access to justice can be improved – particularly in terms of wayfinding ADR, and support to the ACC review service.

3. ICRA has some concerns around how the simplified cost categories will work, and in particular how categories 1 (application costs) and 4 (other expenses) are intended to function. If the intention is to only provide for reimbursement of costs incurred, ICRA would recommend that category 1 be removed entirely.

Submitter Information

This submission is made by ICRA

Submitter	ICRA - by its Director, John Green
Email	Privacy of natural persons
Phone	

Proposed updates to the Accident Compensation (Review Costs and Appeals) Regulations 2002

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Proposed updates to the Accident Compensation (Review Costs and Appeals) Regulations 2002

Questions on the proposed objectives

1. *Do you agree with the presented objectives?*

☒ Yes ☐ No ☐ Not Sure

2. *Are there alternative objectives that should be considered to help shape the discussion? (please provide detail on any alternative objectives you consider relevant)*

We agree with the presented objectives, particularly the objective of improving access to justice.

ICRA endorses MBIE's comment that "access to justice" is not limited to the legal concept. ICRA would emphasise that "access to justice" in the ACC context particularly means the ability to obtain appropriate medical reports. In most cases, the burden of proof sits with the claimant, and decisions are made based on medical evidence. So it is crucial that claimants understand what evidence may be required to support their claim, and be able to obtain advice from an appropriate specialist. The increase in the amount of costs recoverable will go some way to assisting claimants. However, we have also set out some additional recommendations that we think will go further to assist with access to justice in this respect – for example, with earlier intervention or improving the process for reimbursement.

ICRA agrees that the ability to access representation, including legal representation, can also improve access to justice. In this respect, the proposal to increase the costs recoverable for representation is a welcome addition. However, ICRA has some concerns around possible unintended consequences, which we have elaborated on below.

We do not think that changes to the Cost Regulation will have a material impact either way on "frivolous and excessive litigation", and instead recommend that changes outside the scope of the Cost Regulations be addressed – including wayfinding, the use of ADR, and assistance to the ACC review functions. We have elaborated on these themes below.

Questions on the proposed cost categories

3. What do you think about the proposed cost categories?

In principle, we support MBIE's proposal to simplify the cost categories and to decouple the application costs from the need for representation.

As explained below, we have some reservations about how these categories might overlap (or not) with each other, some concerns around the intention behind the "application for review" category, and some reservations around the sliding scale proposed for representation costs.

4. Do you agree with the proposed categories?

☐ Yes ☐ No ☒ Not Sure

Why/ why not?

ICRA supports the proposal to simplify the costs into the categories proposed. We particularly support the simplification of representation costs and report costs (categories 2 and 3). However, if the overall focus of the Cost Regulations is to allow for the reimbursement of expenses incurred, then we recommend that category 1 be removed. We also recommend that MBIE clarify how the categories relate to each other, and in particular whether costs can be captured under multiple categories. Our advice on these matters is elaborated on below.

5. Are there any other alternative options for grouping the cost categories that could be used? Please provide supporting information.

If the Cost Regulations are only intended to allow for reimbursement of expenses, then we recommend that category 1 be removed. This is because expenses incurred for application can already be recovered under two of the other categories:

- If a representative makes the application, those costs are recoverable under category 2.
- If the claimant or a support person makes the application, those costs are recoverable under category 4.

However, if the Cost Regulations are intended to allow for a wider form of recovery (essentially, a small fee for a self-represented claimant) then category 1 is a sensible inclusion – although we would recommend it is expanded beyond just "application costs". See our comments in the questions that follow.

Questions on Category 1 – Application costs

6. *Should Application Costs (Category 1) remain separate from Representation Costs (Category 2)?*

☐ Yes ☐ No ☒ Not sure

Why/ why not?

There is no cost to lodge an application for review, and the form is relatively straightforward to complete. It is difficult to identify an *expense* that would be incurred in the application process that isn't already covered in another category (eg, printing costs or an interpreter's fee would be recoverable under category 4, and a representative's time and expenses to fill in the form would be recoverable under category 2).

If this category is intended to only reimburse for expenses incurred, then we recommend this category is dispensed with, as it only introduces uncertainty about which category can be used for which expenses.

However, if this category is intended to apply more widely, we recommend it remains a separate category. For example, it could allow a reviewer to award a one-off payment for the claimant's time and effort in attending to the review, or compensate for the time and effort provided by friends, family members or volunteers. If this is the intention, we strongly recommend that the category be decoupled from the application form (which incurs few, if any, expenses and very little time). Instead, we recommend that this category allow for a claim for any attendances related to the hearing. It should also emphasise that, unlike category 4, it is not a reimbursement for an expense incurred but is wider (costs, compensation, or the like).

If this category is kept, we agree with the increase in the maximum.

7. Do you agree with the proposed increase in maximum costs awardable for Application Costs? (please circle or highlight your response)

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

Questions on Category 2 – Representation costs

8. Based on the options provided in this document, what is your preferred option? (please circle or highlight your response)

2.1 One maximum limit for all representatives

OR

2.2 Sliding scale based on complexity and/or time and, qualification of the representative.

Please provide the reasons for your view

ICRA has some reservations about the sliding scale approach, both in terms of complexity and the likely disconnect between what a "complex" case actually is.

On balance, ICRA would tend to prefer the simpler option of one maximum limit. This allows individual reviewers to consider the matter before them, request clarification of invoiced costs if necessary, and exercise their discretion to award less than the maximum in appropriate cases.

We have some reservations about the sliding scale, and in particular whether the proposed "simple" versus "complex" categorisation will achieve the desired results. We have provided additional comment and suggestion on this matter at question 9, below.

ICRA can see some merit in providing a higher maximum for lawyers, but notes that other methods to secure good quality representation (and, therefore, access to justice) may be preferable. We have provided additional comments on these matters at question 10, below.

9. Do you have any other suggested options or groupings to categorise Representation Costs (Category 2)?

ICRA is very familiar with the "complex" versus "standard" review categories. These categories are based either on the "issues code" assigned by ACC or where cases involve "multiple reviews".

In general, we would say that the "complex" category has very little connection to the actual time and effort expended by the parties and their representatives. As a result, it is an imperfect measurement.

For example, a claim for cover for an injury caused by an accident or its consequential injures (code X2) may involve medical records dating back 30 years and claims for multiple accidents that occurred under the currency of various Acts. These can be very difficult to untangle and review. By contrast, a vocational rehabilitation decision (code X16) may involve an ACC decision based on appropriate VIMA/VIOA reports and a simple assertion by the claimant on the other hand that the reports are incorrect. As a result, issues codes have very little power to predict how complex or time-consuming a matter will be. We do agree, however, that some issues codes will always be 'complex' – 1982 Act matters and (most) LOPE or treatment injury claims.

We also suggest that the "number of reviews" element of the sliding scale is based on a misconception of how costs are awarded. Currently, costs are awarded *per review*. We see no reason why this wouldn't continue going forward. This means that if there are two review numbers, two lots of category 2 costs can be claimed. Therefore there is no need to increase the amount of costs under category 2 for multi-review cases.

In light of the above, ICRA queries whether there might be another way to limit costs for straightforward cases or increase costs for complex cases (if this is MBIE's intention). The issue here will no doubt be one of predictability versus flexibility.

ICRA recommends a flexible approach. We suggest that no sliding scale is necessary, and that a single maximum (the higher amount) would be sufficient – reviewers can exercise their discretion.

If there is some concern around this encouraging unwanted behaviour, or allowing recovery of costs where a case has been particularly complex, ICRA would endorse the creation of an additional cost category that could be claimed if an advocate considered the case to be *significantly* complex (say, an additional uplift of $500). Such an additional fee

could be claimed if the advocate considered that the case involved a significantly large file to review, complex submissions to make, or multiple case management conferences and hearings to address the issues; and the reviewer could award it if they considered such a claim was justified. ICRA would recommend that the Cost Regulations make it clear that this additional cost category was not available to be claimed "as of right" but was intended as a kind of "exceptional case fee".

10. Is there any information to support or reject the distinction that is made between lawyers and advocates (Option 2.2)?

ICRA would make the following observations:

- As it stands, both lawyers and lay representatives invoice a similar quantum of costs. The trend is to always claim the maximum.
- What distinguishes a "good" submission or representation is not the qualification of the representative, but their ability to engage with the law and how that law applies to the medical evidence or facts of the claimant's case.

We also acknowledge that:

- All parties to a review (the claimant, ACC representative, and the reviewer) benefit when a representative is able to provide advice/submissions that are legally informed.
- The quality of a lawyer's advice and the quantum of costs charged have the protection of oversight from the Law Society, and lawyers typically have increased operating costs due to Law Society and legislative regulation.

As a result, ICRA would accept a decision by MBIE to allow for a higher maximum sum for legally qualified representatives in order to encourage the use of legal assistance and/or to reflect the higher fees that can be demanded by those who are legally qualified.

ICRA would strongly recommend that MBIE adopt a definition of "lawyer" that is ascertainable – there are representatives currently working in the ACC space who have a legal qualification (eg, an LLB) or who have at one point worked as a lawyer, but are not registered as such.

We would like to recommend that MBIE considers other methods for improving access to justice. ICRA suggests that support or improvement in these areas may have more far-

reaching impact on a claimant's access to justice than providing for an increased maximum fee for legally qualified representatives. The areas are:

- Wayfinding services

  A claimant should not be required to engage external representation in order to have access to justice. We acknowledge that the review process is quasi-judicial. But the process sits outside the court system and is intended to be a more accessible second decision-making process: It should be navigable without the need to engage a third party.

  Wayfinding services that are fit for purpose and provide solid advice to a wide range of claimants are essential to ensure that all claimants have access to justice. This includes providing advice that helps claimants understand what the burden of proof is in an ACC case and what that means for them, so that they are aware of the need to obtain medical evidence and can make plans to obtain that evidence. A fit for purpose wayfinding service will also help applicants understand why a specialist report may be preferable in some cases, and/or find ways to have medical reports funded up front rather than wait for a review decision to award reimbursement of those costs. We elaborate on these themes later on in our submissions.

- ADR support and engagement

  The phrase "alternative dispute resolution" is really a misnomer, as it implies that mediation is an alternative to the review process. In reality, ADR is better seen as an integral part of the review. ADR allows the parties an opportunity to reach resolution through a form of mediated negotiation, and is not restricted by some of the formal jurisdictional rules that a reviewer and a review hearing are bound by. It allows the parties to come to a practical resolution, and their participation in the process often ensures a more lasting and satisfactory outcome for all involved. Even if no formal resolution is reached and the matter proceeds to a review hearing, the mediation ensures that the parties have a better assessment of the issues at hand – a "failed" mediation results in a significantly more efficient and effective review hearing.

  At the moment, ADR is only sparsely used: the uptake by both ACC, applicants and their representatives is patchy at best. This is no doubt driven by a number of factors, including but not limited to: the perceived "inability" to recover costs for

ADR; the need for a hearing to be set down to avoid a deemed review decision; and a perception on all sides that mediation is inappropriate if the review involves "only legal issues" or "only medical evidence".

We comment in more detail on these issues at questions 25-28 of this submission.

In general, more support and advocacy to ensure better uptake of ADR services would greatly improve access to justice.

- ACC review support

Improving the conditions under which claimants can access their own representation is a good method of improving access to justice. However, supporting ACC's ability to be a model litigant will also assist with this aim.

In an ideal review, ACC is able to provide an explanation of its decision that is robust and digestible to the claimant. If the matter proceeds to a hearing, the case file is provided in a clear and searchable order. Submissions articulate both the legal principles in play and how they affect the decision that ACC made. By supporting ACC to be a model litigant, this will have beneficial flow-on effects for claimants, who will be able to understand their own position and what is needed of them more clearly.

11. Do the proposed new rates reflected in Option 2.2 reflect appropriate market rates for lawyers and advocates?

☐ Yes ☐ No ☒ Not sure

If not, is there any information that can be shared to inform this discussion?

ICRA supports an increase to the maximum sum. We have no insight into how the proposed rates reflect market rates, other than to observe that both lay and legal representatives usually invoice for the entirety of the maximum sums, indicating the current sums are below market.

12. Do you agree with the proposed new maximum costs awardable for Representation costs (both options)? (please circle or highlight your response)

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

We support an increase to the category 2 costs.

ICRA would tend to recommend the simpler option. We have no clear indication that the higher maximum for legal representation will encourage the use of lawyers over lay representatives or that, in and of itself, the use of lawyers will have a significant positive effect on access to justice. As discussed above, we also have concerns around the measure for a complex case, and would recommend that MBIE consider a fifth category to compensate for complex cases.

13. Do you think the proposed changes will increase access to justice (and therefore improve outcomes) for claimants?

☐ Yes ☐ No ☒ Not sure

If not, why not?

We agree that the use of a representative can assist with access to justice. And we also agree that the current maximum is too low.

However, for the reasons expressed above we suggest there are better approaches to ensure access to justice (including wayfinding, support for ADR, and review process support).

14. Is there any evidence/data or precedence that could be used to determine the complexity of a review (i.e. which cases should sit in which categories (ie A or B)?

Please refer to our advice above.

Questions on Category 3 – Medical and Other Report costs

15. Currently, the medical reports categories can be used for multiple reports. Is there any information to suggest the capped approach is inappropriate? Please provide supporting information.

We see no reason why a cap should not continue to be used, provided that the cap is increased.

However, we would observe that medical reports tend to be invoiced at the actual time in attendance/cost incurred (indicating that claims are not simply made for the maximum, no matter what that maximum is). Our preliminary suggestion, therefore, is that removing the cap would not be a concern.

16. Do you think the proposed new rates will increase access to medical reports (and therefore access to justice) for claimants?

☒ Yes ☐ No ☐ Not sure

Please explain your view.

Increasing the cap on medical reports is one of the key elements to increasing access to justice. Some medical experts have found work-arounds to the cap (for example, by issuing reports in two separate phases, thereby allowing the cap to be claimed for each individual report), while others who are not familiar with the scheme are not able to recover their full costs.

Claimants most commonly obtain a report from one specialist, although two specialists is also not uncommon. A cap of $4,150 will allow for appropriate medical evidence (or other specialist advice) to be obtained.

17. Do you agree with the proposed new maximum costs awardable for Medical and Other Report Costs? (please circle or highlight your response)

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

18. Do you think removing the distinction between registered specialist reports and other reports will improve claimant's access to reports?

☒ Yes ☐ No ☐ Not sure

Please explain your view.

We do not think that removing the distinction will improve a claimant's "access to reports", per se. But we do think that removing the distinction will improve a claimant's access to justice.

A claimant should be able to obtain a report from an appropriately qualified expert, whether or not they are a "registered specialist" within the strict terms of the current Cost Regulations. By removing the distinction between types of reports, a wider pool of experts may become available for claimants to choose from.

We do agree that it is important for medical evidence to be obtained from an appropriate source, and that in many cases a specialist report is to be preferred. However, we would recommend that this advice is communicated to claimants via Wayfinding services, mediation, their representatives and the like, rather than restricting the expenses that can be incurred if an applicant chooses to use a non-registered specialist.

Questions on Category 4 – Other expenses

19. Do you think the new rates will increase access to in-person reviews for rural communities?

☐ Yes ☐ No ☒ Not sure

Why/ why not?

The ability to recover a higher amount for expenses may have some benefits for access to reviews.

However, we would observe the following:

- During the Covid-19 pandemic, review hearings have moved to being almost entirely online. This has been a good litmus test of whether the remote hearing model will work, and in general we would say it has been very successful. It is fair to say that remote hearings are likely to become the default, unless a claimant requests an in person hearing.

- A remote hearing has a number of benefits, including the ability for a claimant to join from the comfort and safety of their own home (rather than travelling to an

unknown and clinical location), and reduce travel time and interruption to their business.

ICRA suggests that other initiatives, including the wayfinding support and support to ADR that we have mentioned above, would have a greater impact for the rural community.

20. *How can 'Other Expenses' (Category 4) be improved to enhance support for rural communities?*

Please provide supporting information.

We have no comment to add on this.

21. *Do you agree with the proposed new maximum costs awardable for Other Expenses? (please circle or highlight your response)*

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

MBIE's questions about category 4 costs are focussed on support to rural communities, but we would like to take this opportunity to address the category more widely.

As currently used, category 4 (other expenses) are claimed almost exclusively by lawyers or lay advocates to charge a flat "disbursements fee" (charges ranging from $60 - $200 are invoiced and are rarely, if ever, itemised).

It is unclear from the proposal whether MBIE intends that representative's costs can be claimed under category 4 or would be limited to category 2. Either way, this category does not need an increase to allow for those disbursement costs. The increase would be more appropriate to reflect costs incurred by claimants.

ICRA would observe that claimants are generally not well educated about their ability to claim and recover expenses, so this category rarely gets used. There is also an

expectation that invoices will be provided to justify the expense claimed, which creates an additional barrier for some. We would encourage MBIE to investigate other options to assist and support claimants, over and above the increase of the maximum sum for this category.

Questions on the overall proposed changes to the Regulations

22. Are there any other costs, benefits, or unintended consequences of the proposed changes that have not been considered in this document?

Costs associated with mediation and/or other alternative dispute resolution processes should be considered.

We also strongly recommend that provision is made to allow for some costs to be funded upfront by ACC – please see our comments below in relation to ADR.

23. Do you think MBIE should conduct regular reviews of the maximum cost caps in the regulations?

☒ Yes ☐ No ☐ Not sure

24. Do you have any comments on the alternative approaches considered?

Option 1 (allowing limited reallocation across sub-categories at the discretion of the reviewer) will occur unless the Regulations expressly prohibit it.

We agree with MBIE that option 2 is too open-ended (although, as indicated in our earlier submissions, we do think there is some scope for allowing additional discretion to reviewers.

We think option 3 would have a chilling effect – there are already concerns with the reimbursement nature of the costs regime (see our comments below).

Option 4 is unnecessary. It is uncommon for a reviewer to determine that the claimant *acted unreasonably in applying for the review*. This is because there is usually some expert (even if just their GP) who has suggested they apply, or a representative who has taken their case. Even if not, the review process is also often a claimant's best option to get ACC to sit and meet with them to discuss why a decision was made.

Questions on Alternative Dispute Resolution (ADR)

Before we respond to MBIE's specific questions, ICRA would like to address some preliminary points.

First, on terminology: We are aware that, historically, "mediation", "facilitation" or "conciliation" may have been offered as independent options to ACC claimants. However, the skills and approaches employed by the practitioner are the same: they are all a form of managed negotiation, where an independent third party helps the parties to a dispute identify and solve problems and come to an agreed outcome of their own. We suggest that it is unhelpful to refer to these as three different processes. It is unnecessarily complex, suggests that the services can be stepped through progressively, can create confusion amongst claimants, and does not accurately reflect how dispute resolution practitioners would refer to these services. For ease of reference, ICRA will use the umbrella term "ADR" to refer to all forms of managed negotiation. However, our recommendation would be for MBIE to adopt the terminology "mediation".

Second, as mentioned above, it is a misnomer to focus on the "alternative" part of ADR. In fact, managed negotiation (eg, mediation) is an incredibly powerful part of the review process. If the parties can reach a mediated outcome, this is an excellent outcome for all involved. We find that, of those disputes that are referred to mediation, over 90% result in a settlement. However, even when disputes are not resolved at mediation there are significant flow-on benefits for the review hearing. There are very few disputes that are not suitable for mediation (an example of a non-suitable dispute might be a sensitive claim where the mediation runs the risk of retraumatising the claimant). As a result, we would urge MBIE to think of ADR not as an alternative process but as a critical part of the review itself.

Third, when we talk of ADR we are referring to processes that involve an independent third party. However, it is worth noting that, in many cases, ACC also engages in direct negotiation with a claimant to try and resolve the dispute – both before an application for review is filed and after. When we refer to "ADR" we are not referring to these direct conversations between ACC and the claimant. However, these direct conversations are still a useful step in resolving a dispute. For example, in many cases it will be a good opportunity for ACC to explain the basis for a decision in more detail, or help the claimant identify alternative pathways for cover, entitlements, or other assistance.

Fourth, in terms of how the processes interact: ICRA would agree that, in circumstances where a separate review provider and mediation provider are used, there is great potential for claimant confusion and an additional administrative burden on ACC. However, we do not consider this to be the case where a joint review/mediation provider is used. To illustrate, here is a typical dispute resolution process through ICRA:

- Before and immediately after an application for review is filed: ACC might engage in direct dispute resolution with the claimant.

- After application for review is filed: The review service is instructed (per section 137 of the Act) and a reviewer is appointed.

- Case management conference (**CMC**): The reviewer meets with the parties to discuss the case, and identify evidence or legal points that will need to be addressed in the dispute. The possibility of mediation is discussed, with the reviewer being able to explain its merits. This might be the first time an independent person has been able to advise a claimant about what a review process is, what evidence might be required, and how mediation might benefit. It might also be the first time an independent person has been able to help the parties articulate the issues in the dispute (eg, to articulate the pathway for cover that was claimed, or identify that it is a different entitlement that is a concern; and so review of another decision is not going to be a suitable process to resolve that).

- If the parties agree to mediation (and we note that both parties must agree – ACC is not currently obliged to mediate even if the claimant requests it), mediation proceeds. To avoid a deemed review decision, a review hearing date is set down in the event the parties do not reach resolution at mediation.

- If the parties do not agree to mediate, a timetable for evidence and submissions is set down, and the matter proceeds to review. (Note that the parties can agree to mediate at any time before the hearing finishes, but that it is uncommon for the parties to do so if they have already declined at the CMC).

From a claimant's point of view, their case is managed by an ICRA case manager (ensuring consistency in service provision) and they have the opportunity of speaking with an independent third person to help make an informed decision about whether to use mediation or not.

Fifth, in relation to the current interaction between ADR and costs: As we have highlighted earlier, it is important to keep in mind that (i) the Cost Regulations are a reimbursement regime, and (ii) that many claimants are not aware of the pivotal role that medical evidence can play in a review. This has a significant impact on access to justice. The CMC is an important touch point at which these issues can be raised by an independent person and addressed by the parties. For example, at a CMC a reviewer might invite ACC to explain what evidence they wanted to see to be able to process a claim properly, and suggest mediation if the matter needs additional exploration. If the claimant is having trouble funding the medical report they need, the reviewer might suggest mediation as a way in which the parties can agree who will obtain the report. What is important to note here is that, as it currently stands, these conversations are not always happening before the review process is commenced.

Finally, in relation to the interaction between ADR and the Act: The ADR processes (and ACC direct negotiation) are essentially "invisible" to the Act. The Act allows for regulations to be made, but none have been promulgated. While this doesn't affect how ADR works in practice (a very successful mediation can still be run), it does make certain decisions much harder. For example, there is currently no requirement that ACC engage in mediation if the claimant requests it and no advice on whether ACC can choose to fund medical investigation that might be useful to resolving the dispute in question.

With this context in mind, we now turn to answering the questions you have raised.

25. *If the regulated timeframes are extended while clients are engaged in ADR, what effect do you think it will have on claimant's decisions to use ADR and the external review process? Please provide supporting information.*

ICRA would support an extension to the "set by" date in section 146 to allow more room for ADR and, if appropriate, direct dispute resolution by ACC.

We do not consider that this extension would have a direct effect on a claimant's decision to use ADR: a choice to use ADR is rarely if ever affected by these timeframes, and the ability to speak to a reviewer and have the review process and mediation options explained to them is an invaluable opportunity. However, we think that an extension to the timeframes will reduce the pressure and administrative burden on ACC and review services alike.

26. Have you incurred costs as a result of undertaking ADR? What are these and did it impact on decisions to proceed with an external review?

We would note that:

- Mediation can be very successful with and without representation.
- If a claimant uses a representative to help guide them through the ADR process we can see no credible explanation for why those costs should not be recoverable.
- Those costs can currently be negotiated as part of the mediation settlement outcome; but there is no prompt for the parties to raise or agree this, nor is there any option for costs if the matter proceeds to a review.

27. If a level of reimbursement for costs was to be included for ADR in the Regulations, what should be taken into consideration?

MBIE should carefully consider who has the ability to award those costs and in what circumstances. Our initial views are:

- It would be inappropriate to allow a mediator to award costs, and this places them into a position of having to pass judgement, which is the antithesis of their role.
- It would be inappropriate to have costs awarded on the basis of whether an applicant was “successful” or not. For the reasons outlined above, even an “unsuccessful” mediation has a beneficial effect on the review process.

28. Would the inclusion of a level of reimbursement for ADR costs change your position on undertaking ADR in comparison to an external review?

ICRA has no comment on the substance of this question.

For completeness, we would emphasise that ADR is also “external” by its nature, as an essential element is having an independent third party help parties manage and negotiate their dispute.