



## Transport Accident Act Common Law Protocols – 1 July 2016

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## **1. INTRODUCTION**

- 1.1 The Transport Accident Commission (TAC) is a statutory authority established by the *Transport Accident Act 1986 (Vic)* (TAA). The TAC manages a statutory compensation scheme in respect of people who sustain injury or die as a consequence of a transport accident (claimant/s). The interests of claimants are the foremost consideration of all parties to these protocols.
- 1.2 Consistent with its mission and vision statement, *Client Service Charter* and public commitment to *Model Litigant Guidelines*, the TAC strives to assess and deliver appropriate common law damages and entitlements as expeditiously as possible.
- 1.3 The TAC recognises the role played by claimants' lawyers in the serious injury/common law process, including initiating the process, proactively arranging and initiating medical examinations, obtaining and collating documentation, and engaging with the TAC to facilitate the most appropriate outcome for claimants in accordance with the provisions of the TAA.
- 1.4 These protocols have been agreed between the TAC, Law Institute of Victoria (LIV) and Australian Lawyers Alliance (ALA) who agree that they and their membership will comply with them, and promote their use as the preferred method for delivering common law damages and entitlements to claimants.
- 1.5 In recognition of the *Civil Procedure Act 2010 (Vic)* (Civil Procedure Act), the TAC, the claimant and the claimant's lawyer will endeavor to facilitate resolution of a serious injury application and/or common law claim by utilising the alternative dispute resolution processes in these protocols before resorting to contested legal proceedings in the Courts.

## **2. OBJECTIVES**

- 2.1 The objectives of these protocols are to ensure:
  - 2.1.1 Processes and procedures contemplated in Sections 93 and 94 of the TAA provide an efficient, expeditious and transparent process to deliver appropriate common law damages and entitlements to claimants;
  - 2.1.2 Consistent management of serious injury requests and common law damages claims through meaningful dialogue between the parties;
  - 2.1.3 Timely benefit delivery to claimants;
  - 2.1.4 The processes giving rise to the assessment and delivery of common law damages and entitlements are, by the mutual and early exchange of relevant and reasonable information, productive of quality decision making by the TAC. Claimants' lawyers will use their best endeavours to facilitate this by providing relevant information to the TAC at the earliest opportunity in the serious injury/common law process; and
  - 2.1.5 The TAC, the claimant and their lawyer endeavour to resolve serious injury /common law claims early and appropriately before resorting to contested legal proceedings, resulting in decreased court proceedings.

### **3. OPERATION**

- 3.1 These protocols apply to all applications made on or after 1 July 2016 for the following procedures and proceedings under Sections 93 and 94 of the TAA for:
- 3.1.1 Requests to the TAC for a serious injury certificate; or
  - 3.1.2 Applications to a Court for leave to bring an action for damages; or
  - 3.1.3 Actions for damages where the TAC is on risk, including damages claims pursuant to Part III of the *Wrongs Act 1958* (Wrongs Act) and “arising out of the use of” common law claims pursuant to Section 94(1) of the TAA.

#### **DEFENDANT/S NOT INDEMNIFIED BY THE TAC**

- 3.2 A claimant who sustains injury as a consequence of a transport accident must satisfy the requirements of Section 93 of the TAA to proceed with a common law action for damages.
- 3.3 In recognition of the Civil Procedure Act and in order to achieve the objectives of these protocols, where one or more of the defendants in an action for damages are not indemnified by the TAC, a claimant's lawyer should still utilise the serious injury processes outlined in these protocols, including lodgement of a Serious Injury Application form in accordance with Chapter 6, prior to issuing an Originating Motion.
- 3.4 Proceeding through these protocols and lodgement of a Serious Injury Application form are reasonable requirements of pursuing a claimant's common law damages action.
- 3.5 Where there are multiple defendants in an action for damages and the TAC indemnifies one or more of the defendant/s, the TAC and the claimant's lawyer should have a preliminary discussion regarding the appropriateness of participating in a common law conference. The purpose of the discussion is to determine how to make a conference beneficial, and whether other relevant defendants/insurers should be invited to participate. Following these discussions, the parties can then elect whether to proceed with a common law conference pursuant to these protocols.
- 3.6 Where TAC indemnifies one or more of the defendants and the matter successfully resolves at a common law conference in accordance with these protocols, the TAC (or as otherwise agreed between the defendants) will pay legal costs and disbursements in accordance with Chapter 21.
- 3.7 Where a matter does not successfully resolve at a common law conference in accordance with these protocols, the claimant's lawyer is entitled to seek legal costs and disbursements for any work performed under these protocols from the defendant/s upon successful resolution of a claimant's common law action by reference to the appropriate Court scale.
- 3.8 Legal costs in respect of an Originating Motion or for proceedings for the recovery of damages from the defendant/s will not be regulated by these Common Law Protocols but will be determined by reference to the appropriate Court scale.

### **4. GUIDING PRINCIPLES FOR SERIOUS INJURY APPLICATIONS**

- 4.1 Claimants and their lawyers will ensure that any application made to TAC for a serious injury certificate will be in the approved form (Serious Injury Application form) and will be a complete application with all relevant information.
- 4.2 Upon receipt of the Serious Injury Application form, the TAC will undertake a thorough review of the application to ensure that all reasonable requests for additional information and any required Independent Medical Examinations (IMEs) are made with the initial request pursuant to Clause 8.2.
- 4.3 In consideration of the application, the TAC is able to arrange IMEs.

- 4.4 If the TAC requires additional information (other than an IME), an explanation why the information is considered reasonable or necessary and the extent to which the information will be utilised will be provided.
- 4.5 The parties agree to only collect relevant information to facilitate resolution of a serious injury application and/or common law claim.
- 4.6 Where the claimant's authority is used to obtain information the TAC must comply with the Protocols for Authority Use by the TAC agreed between the TAC, LIV and ALA.
- 4.7 In accordance with the TAC's *Privacy Policy*, where the TAC requires information about a claimant from a claimant's treating practitioner in order to facilitate resolution of a serious injury application or common law claim, the TAC agrees to request a report from the claimant's treating practitioner at first instance, and only request clinical notes where:
  - 4.7.1 the report is insufficient; and
  - 4.7.2 it is necessary to establish liability for a known pre-existing injury or condition that is affecting the transport accident injuries; or
  - 4.7.3 it is required to distinguish transport accident injuries and their consequences from pre-existing injuries and their consequences; or
  - 4.7.4 it is necessary to establish liability with respect to the claim.

Where the TAC seeks to obtain clinical notes, the TAC will write to the claimant's lawyer setting out why a request for clinical notes (rather than a treating practitioner report) is appropriate.

- 4.8 If there is disagreement regarding the reasonableness or extent of additional information requested by the TAC, or a delay in obtaining any requested information, the parties should make reasonable efforts to resolve the issue prior to finalising the application under these protocols and issuing an Originating Motion (refer to Chapter 9).
- 4.9 It is agreed that Joint Medical Examinations (JMEs) can be utilised in the Common Law Protocols. JMEs are governed by the Joint Medical Examination Protocols which are to be read in conjunction with these protocols.

## **5. BYPASS OF IMPAIRMENT PROCESS**

- 5.1 Where practical and in the interests of the claimant, an impairment assessment pursuant to Section 46A of the TAA may be bypassed to allow a claimant to fast-track a serious injury application/common law claim.
- 5.2 A claimant's lawyer will notify TAC that the claimant intends to bypass the impairment process by indicating this on the Serious Injury Application form as described in Chapter 6.
- 5.3 Where a claimant elects to bypass the impairment process, the TAC will make an impairment determination pursuant to Section 47(7) of the TAA at the same time the serious injury decision is made.

## **6. LODGEMENT OF SERIOUS INJURY APPLICATION**

- 6.1 The application in the prescribed form (Serious Injury Application form) and all supporting material must be served on the Manager, Serious Injury, Transport Accident Commission, 60 Brougham Street, Geelong 3220.
- 6.2 Within 14 days of receipt of the Serious Injury Application form, the TAC must acknowledge receipt of the application. The acknowledgement may be in writing or by email and must include the date on which the application was received.
- 6.3 A Serious Injury Application form must include all relevant information, and:
- 6.3.1 Specify the injury or injuries relied on by the claimant; and
  - 6.3.2 Specify the sub-paragraphs of the definition of serious injury in Section 93(17) of the TAA relied upon by the claimant to constitute a serious injury; and
  - 6.3.3 Attach copies of all medical reports regarding the injury and relevant pre-existing conditions to be relied upon and which have not been previously provided to the TAC; and
  - 6.3.4 Where scarring is relied upon, attach colour photographs or a digital image of the affected body part or parts; and
  - 6.3.5 Specify JMEs that have been conducted and to be relied upon. JME reports do not require attachment to the application; and
  - 6.3.6 Attach copies of any information or documents relating to liability, including expert and other witness opinions, already obtained by the claimant's lawyer and to be relied upon; and
  - 6.3.7 Specify registration details of all vehicles involved (where known); and
  - 6.3.8 Specify details of the insurer where a proposed defendant is not indemnified by the TAC (where known); and
  - 6.3.9 Where loss of earning capacity/pecuniary loss consequences are claimed, attach or exhibit any relevant supporting evidence not previously provided to the TAC for the assessment of loss of earnings or loss of earning capacity entitlements under Part 3 of the TAA. Where available, full and complete financial information for a period not less than 3 years prior to the accident up until the time of the application should be provided.
  - 6.3.10 Must attach an affidavit detailing:
    - 6.3.10.1 All proposed defendant/s, a summary of the accident circumstances and the allegations of negligence;
    - 6.3.10.2 If the claimant has been known by a previous surname;
    - 6.3.10.3 Any body function or body functions said to be impaired and on which reliance is placed;
    - 6.3.10.4 The nature and extent of the pain and suffering relied on including details of any restriction in domestic, recreational or sporting activities undertaken before the accident;

6.3.10.5 The effect of the injury or injuries on the claimant's past and future employment and earning capacity;

6.3.10.6 The nature of any work (paid or unpaid) that has been undertaken subsequent to the transport accident including the periods during which it was undertaken, and attempts by the claimant to obtain alternative duties or return to work.

6.3.11 Where a claimant has an administrator/guardian the application may be supported by an affidavit or a summary addressing the issues in Clause 6.3.10.

## **7. PRELIMINARY VIEW ON LIABILITY AND INFORMATION EXCHANGE**

7.1 To enable a claimant to make an informed decision regarding the most timely and efficient path through the impairment and serious injury/common law process, the TAC will provide a preliminary view on liability.

7.2 Within 28 days of receipt of a Serious Injury Application form, the TAC will:

7.2.1 Exchange any information or documents relating to liability, including expert and other witness opinions, already obtained; and

7.2.2 Advise the claimant's lawyer whether the TAC indemnifies the proposed defendant; and:

7.2.2.1 Indicate that further time is required to conduct additional investigations prior to providing a preliminary view on liability. Where additional investigations are required, the TAC will provide an expected date of exchange; or

7.2.2.2 Admit negligence unconditionally; or

7.2.2.3 Admit negligence, but raise the issue of contributory negligence and indicate the likely range of proposed reduction for contributory negligence; or

7.2.2.4 Deny negligence and provide a list of likely defences.

7.3 The TAC's preliminary view on liability and any additional liability material obtained and to which Clause 7.2.2.1 applies will be provided by the TAC within a reasonable timeframe upon receipt of the material.

7.4 The TAC's preliminary view on liability pursuant to this Chapter is provided on a "without prejudice" basis.

## **8. SERIOUS INJURY DECISION MAKING PROCESS**

8.1 The TAC will, within 28 days of receiving the Serious Injury Application form, provide the claimant's lawyer with a list and copy of all medical reports or other relevant information not previously provided.

8.2 The TAC must within 45 days of receiving the Serious Injury Application form either:

8.2.1 Provide a serious injury certificate where consent is given; or

- 8.2.2 Provide notice to the claimant's lawyer of the intention to deny the application (see Clause 11.3); or
- 8.2.3 Contact the claimant's lawyer to arrange a serious injury conference (see Clause 11.2); or
- 8.2.4 Provide notice to the claimant's lawyer that the TAC reasonably requires:
  - 8.2.4.1 Additional relevant information about any matter contained in the application and supporting material;
  - 8.2.4.2 An authority signed by the claimant for the purpose of obtaining additional information (the authority will be specific to the information being sought) or agreement from the claimant's lawyer that they will obtain the required additional information;
  - 8.2.4.3 Additional medical material of a fundamental nature as a consequence of an issue in a medical report attached to the application;
  - 8.2.4.4 The claimant to undergo an IME (an examination should take place within 6 months from the date the Serious Injury Application form was lodged);
  - 8.2.4.5 Additional relevant information or to conduct enquiries with a third party.
- 8.3 The TAC must make a request for additional information from the claimant or inform the claimant's lawyer of the IME within 45 days after receiving the Serious Injury Application form.
- 8.4 A claimant and their lawyer must take reasonable steps to comply with the TAC's request for additional information and within 21 days of receiving any request for information the claimant's lawyer must:
  - 8.4.1 Confirm with the TAC that the information has been sought and provide an outline of the steps that have been taken to obtain the information; or
  - 8.4.2 Provide a signed authority (if required) and advise the TAC to obtain the information directly; or
  - 8.4.3 Provide an explanation of why the request for additional information is considered to be unreasonable or unnecessary and where appropriate suggest an alternative or modified request.
- 8.5 Within 28 days of receipt of the additional information requested or the IME report/s, whichever is the latter, the TAC must:
  - 8.5.1 Provide a serious injury certificate where consent is given; or
  - 8.5.2 Request further additional information pursuant to Clause 8.2.4; or
  - 8.5.3 Provide notice to the claimant's lawyer of the intention to deny the application (see Clause 11.3); or
  - 8.5.4 Contact the claimant's lawyer to arrange a serious injury conference (see Clause 11.2).
- 8.6 The TAC will only request further additional information pursuant to Clause 8.5.2 if a new and relevant issue is raised by the additional material obtained or IME report/s received. Examples of a new and relevant issue include an undisclosed pre-existing condition, co-existing condition or work capacity. If further additional information is reasonably required, the TAC will provide reasons in accordance with the Guiding Principles in Chapter 4.

- 8.7 A claimant's lawyer must respond to the TAC's request for further additional material (pursuant to Clause 8.5.2) in accordance with the requirements outlined in Clause 8.4.
- 8.8 Information and/or documents not exchanged between the claimant and the TAC in a serious injury application which were in the possession of the party seeking to rely on the information or documents and which could have been provided to the other party in accordance these protocols, cannot later be relied on by that party except by consent or by leave of the Court.

## **9. DISPUTE REGARDING RELEVANCE OF INFORMATION**

- 9.1 Within 21 days of receipt of an explanation from the claimant's lawyer pursuant to Clause 8.4.3 the TAC will either:
- 9.1.1 make a proposal to modify the request for additional information; or
  - 9.1.2 maintain its original request for information. If the TAC maintains its original request, further reasons may be provided as to why the additional material is required.
- 9.2 Following receipt of the TAC's response, the claimant's lawyer must either provide the requested information or refer the issue to the appropriate TAC Serious Injury Manager who will attempt to resolve or refine the issues in dispute between the parties. The Manager will produce a response within 14 days of receipt of the referral.
- 9.3 If the dispute regarding the relevance and provision of information is unable to be resolved, the claimant may instruct their lawyer to finalise the application under these protocols and issue an Originating Motion. Prior to adopting this course of action, the claimant and their lawyer should have regard to the Guiding Principles outlined in Chapter 4 and make reasonable efforts to resolve the issue in dispute, including by agreeing to participate in a serious injury conference, prior to finalising the application and issuing an Originating Motion.
- 9.4 Where a claimant elects to finalise their application under these protocols, the TAC will subsequently confirm in writing that the application has been finalised and advise whether a serious injury certificate has been denied or granted. Where a claimant has elected to finalise their application, the TAC is not obliged to give reasons for denying the application.
- 9.5 If the requested material, which was the subject of the dispute between the parties, is later obtained or provided by the claimant's lawyer for the purpose of an Originating Motion, the TAC can rely upon any correspondence or notes of conversations with the claimant's lawyer in relation to any costs that may be applicable.

## **10. DEEMED SERIOUS INJURY DENIAL**

If the TAC does not make a decision within 45 days of receipt of the Serious Injury Application form or receipt of the additional information or IME report/s requested under Clauses 8.2.4 and 8.5.2 or Chapter 12, whichever is the latter, the TAC will be deemed to have denied the serious injury application.

## **11. SERIOUS INJURY CONFERENCE PILOT**

*Consistent with the objectives of these protocols, including to facilitate quality decision making by the TAC, to narrow the issues in dispute between the parties and to resolve serious injury applications/common law claims early and appropriately before resorting to contested legal proceedings, the parties have agreed to pilot a pre-litigation serious injury conference, commencing 1 July 2016. A review of the success of this pilot will be concluded on or before 30 June 2018.*

- 11.1 To assist in the application and decision making process the parties may participate in a serious injury conference.
- 11.2 If the TAC considers that a conference would assist in the determination of the serious injury application it should contact the claimant's lawyer to arrange a serious injury conference.
- 11.3 If the TAC is intending to deny the application and does not consider a conference would assist in the decision making process, the TAC will write to the claimant's lawyer explaining the reasons for the proposed denial and the intention not to proceed with a serious injury conference. The TAC will exchange all relevant information (including any potential credit material) that it has considered in forming this view.
- 11.4 Within 28 days of receiving the TAC's correspondence pursuant to Clause 11.3 the claimant's lawyer will:
  - 11.4.1 Agree not to participate in a serious injury conference and request the TAC make a determination; or
  - 11.4.2 Request the TAC participate in a serious injury conference; or
  - 11.4.3 Indicate the intention to obtain additional supporting material in response to the TAC's proposed denial and provide a timeframe for the exchange of this information.

The claimant's lawyer can respond in writing or by telephone. If there is no response from the claimant's lawyer within 28 days of the TAC's correspondence, then the TAC will proceed to make a serious injury decision.
- 11.5 If additional information is provided by the claimant's lawyer pursuant to Clause 11.4.3 and a new and relevant issue is raised in this material, the TAC may arrange IMEs or make additional requests for information pursuant to Clause 8.2.4 if clarification of this issue would assist in the decision making process. In this situation, the requirements outlined in Clauses 8.6 and 8.7 apply to the parties.
- 11.6 A serious injury conference should occur within 60 days of either party requesting the conference.
- 11.7 The purpose of the conference is to attempt to resolve the serious injury question and the parties will enter into a bona fide discussion of all relevant issues.
- 11.8 The claimant must be present at the conference and may be represented by counsel. It is anticipated that there is meaningful dialogue directly with the claimant about their transport accident related injuries and the effects of those injuries.
- 11.9 It is mandatory that the claimant attends the conference in person and meets with the TAC representatives for the purpose of the dialogue. The TAC accepts that this may be a stressful event for the claimant and agrees that the dialogue should be part of a non-threatening and participative discussion between the claimant, his or her legal representative and the TAC. If the claimant is a minor or a person under a disability, then their guardian/administrator may elect to be part of the conferencing process or not at their discretion.
- 11.10 The TAC will ensure that a representative who has the appropriate authority and delegation will be present at the conference.
- 11.11 The conference will ordinarily be conducted in the Melbourne central business district at a mutually agreed time and place. The TAC is committed to ensuring regional clients have complete access to the protocols and will endeavour to work with a claimant's lawyer to ensure other appropriate arrangements are made where reasonable and practicable. The TAC agrees to pay the expense of hiring any conference or mediation rooms required.

- 11.12 If it appears credit may become an issue, the TAC's representative will outline the potential credit issues at the conference and provide the credit material to the claimant's representative at the conference.
- 11.13 The parties agree that anything said at the conference is "without prejudice" and cannot be discussed or referred to in a subsequent court hearing (except where Clause 9.5 applies).
- 11.14 If during the conference the TAC agrees to grant a serious injury certificate to the claimant, the parties may discuss the claimant's common law claim in accordance with Chapter 16.

## **12. FURTHER REQUESTS FOR INFORMATION POST SERIOUS INJURY CONFERENCE**

By agreement between the parties, within 7 days of a serious injury conference being held the TAC may arrange IMEs or make an additional request for information pursuant to Clause 8.2.4 if the additional material will assist in the decision making process.

## **13. SERIOUS INJURY DECISION**

- 13.1 The TAC's serious injury decision letter will be forwarded to the claimant's lawyer and:
  - 13.1.1 Provide a serious injury certificate where consent is given;
  - 13.1.2 Where a serious injury certificate is denied, give the reasons for refusing to grant the serious injury certificate unless previously provided pursuant to Clause 11.3;
  - 13.1.3 Attach the information and documents used to make the decision where this has not been previously provided.
  - 13.1.4 Confirm whether or not the TAC indemnifies the proposed defendant if this is known.

## **14. COMMON LAW**

- 14.1 A claimant must engage in a common law conference prior to the issuing of proceedings for damages where they become entitled to commence an action for common law damages after:
  - 14.1.1 A TAC impairment decision of 30% or more; or
  - 14.1.2 A VCAT review determination or resolution producing an impairment of 30% or more; or
  - 14.1.3 Consent by the TAC in accordance with Section 93(4)(c) of the TAA; or
  - 14.1.4 Leave of the Court after a serious injury application (Section 93(4)(d) of the TAA); or
  - 14.1.5 Confirmation that the TAC indemnifies the proposed defendant in a common law claim pursuant to Part III of the Wrongs Act; or
  - 14.1.6 Confirmation that the TAC indemnifies the defendant in an "arising out of the use of" common law claim pursuant to Section 94(1) of the TAA.

## **15. EXCHANGE OF INFORMATION IN SECTION 93 DAMAGES CLAIMS**

- 15.1 The TAC must within 10 days of the claimant's entitlement to bring proceedings advise the claimant's lawyer of the name of the TAC person responsible for the conduct of the common law protocol conference.
- 15.2 The claimant's lawyer must within 30 days of the claimant's entitlement to bring proceedings:
  - 15.2.1 Provide the TAC with information and documents relating to liability where this is in issue, including expert or other witness opinions to be relied upon; and
  - 15.2.2 Make contact with the allocated TAC representative to organise a mutually convenient time and place for a common law conference to take place within a further 60 days, or, discuss an appropriate time for the matter to be held in abeyance subject to a claimant's individual circumstances; and
  - 15.2.3 Provide the TAC with any claimant information, medical reports, or pecuniary loss documentation as described in Chapter 6, including updated information, unless already provided; and
  - 15.2.4 Provide Particulars of Pecuniary Loss where the loss claimed is greater than \$125,000. Such particulars are intended to promote appropriate preparation and settlement discussions between the parties and are provided on a "without prejudice" basis.
- 15.3 The TAC must provide to the claimant's lawyer within 30 days of receiving the request for a common law conference any additional information and documents, including:
  - 15.3.1 All investigations reports, including all witness statements;
  - 15.3.2 Police reports and statements;
  - 15.3.3 Medical reports not previously provided or exchanged;
  - 15.3.4 An indication whether liability is admitted and, if not, a list of defences which the TAC will rely on including any additions or retractions to the "preliminary view on liability" provided by the TAC in accordance with Chapter 7;
  - 15.3.5 Expert witness opinions and reports;
  - 15.3.6 Any relevant documents not otherwise relied upon;
  - 15.3.7 The identity of any other parties responsible for the damage including their insurers, where this is known.
- 15.4 Information and/or documents not exchanged between the claimant and the TAC in support or defence of the common law claim which were in the possession of the party seeking to rely on the information or documents and which could have been provided to the other party in accordance with these protocols, cannot later be relied on by that party except by consent or by leave of the Court.
- 15.5 The TAC's position on liability pursuant to this Chapter is provided on a "without prejudice" basis.

## **16. COMMON LAW DAMAGES CONFERENCE**

- 16.1 The TAC and the claimant shall participate in a common law conference.

- 16.2 The claimant, their lawyer and a representative of the TAC with appropriate financial delegation must attend a common law conference.
- 16.3 Either party may elect for a common law conference to be mediated, in which case:
- 16.3.1 The mediator shall be accredited and suitable to both parties;
- 16.3.2 The TAC will pay the mediator's reasonable fee; and
- 16.3.3 By agreement between the parties, the mediator may adjourn the mediation for a further period to a date and place to be agreed for the resumption of the mediation.
- 16.4 A common law conference will conclude when the issues in dispute have resolved and a release has been signed by the TAC and the claimant, or, when resolution cannot reasonably be achieved as part of the common law conference process.
- 16.5 If at the conference, reasonable settlement discussions are unable to be held due to for example, stability, uncertainty of injuries, lack of documentation on pecuniary loss or the like, the parties should agree on an appropriate timeframe for resumption of a secondary in-person conference.
- 16.5.1 A secondary conference should be held with further exchange of material pursuant to the relevant information exchange clauses. Certification pursuant to Clause 16.6 should not occur and proceedings are unable to be issued until such time as the secondary conference has occurred.
- 16.6 At the conclusion of a common law conference where a claim is not resolved the parties must certify in writing that the conference has concluded without resolution. The certification may identify key issues that have been agreed or admitted. Certification must not be unreasonably withheld.
- 16.7 Anything said or done in the course of a common law conference may not later be disclosed in any subsequent proceeding before the Court unless the claimant's lawyer and the TAC agree that the disclosure may be made or unless required by law.
- 16.8 Where a common law conference or mediation does not result in resolution, the TAC reserves the right to serve an offer of settlement, in 'Calderbank' form except where the claimant requires a litigation guardian/administrator.
- 16.9 The provisions and obligations in relation to exchange of information do not apply once proceedings have been issued following the conclusion of a common law protocol conference and certification pursuant to Clause 16.6.

## **17. MATTERS REQUIRING COURT APPROVAL**

- 17.1 The parties agree that claims involving persons under a disability and matters requiring court approval should have access to the alternative dispute resolution and preliminary liability and information exchange processes afforded by these protocols.
- 17.2 Where a matter requires court approval, the parties will hold a conference pursuant to Chapter 16 and attempt to resolve the matter in principle prior to any formal proceedings being issued.
- 17.3 Upon reaching in principle agreement at conference, the TAC will send a letter to the claimant's lawyer consenting to the settlement terms and specifying the applicable protocol costs.

- 17.4 If in principle agreement is reached at a protocol conference, the claimant's lawyer shall issue a Generally Endorsed Writ (naming the TAC) for the purposes of seeking court approval and provide a copy of TAC's letter of consent to the Court when making the application. An application for court approval must be sought within 28 days of the settlement date.

## **18. ADDITIONAL PROVISIONS FOR TRANSPORT ACCIDENTS ARISING IN THE COURSE OF EMPLOYMENT**

- 18.1 In order for the TAC to raise a TAC reference number and file, prior to submitting an application the claimant's lawyer will write to the TAC noting the intention to lodge a Serious Injury Application form.
- 18.2 The letter must be titled "Request to obtain a TAC claim number to lodge a Serious Injury Application for a transport accident arising in the course of employment" and be addressed to the Manager, Serious Injury, Transport Accident Commission, 60 Brougham Street, Geelong 3220.
- 18.3 The letter will include the following information:
- 18.3.1 Claimant's full name, address and date of birth;
  - 18.3.2 Date and location of accident;
  - 18.3.3 The name of proposed defendant/s;
  - 18.3.4 The worker's compensation claim number (and claim form where available);
  - 18.3.5 Details of the insurer for the worker's compensation claim.
- 18.4 Within 14 days of receipt of the letter, the TAC will:
- 18.4.1 provide the claimant's lawyer with a TAC claim number to allow a Serious Injury Application form to be lodged; and
  - 18.4.2 obtain a copy of the worker's compensation file; and
  - 18.4.3 undertake any other enquiries that may be required.
- 18.5 When lodging a Serious Injury Application form, in addition to the material required in Chapter 6, the following information must be provided:
- 18.5.1 The worker's compensation claim number;
  - 18.5.2 Reasons the subject accident meets the definition of a transport accident, referencing any investigation report or other material that supports this view;
  - 18.5.3 Details of the registration, make, model and any other identifying features of the claimed negligent vehicle/s;
  - 18.5.4 Indication if a Serious Injury Application has been lodged or is intended to be lodged under Section 134AB of the *Accident Compensation Act 1985 (as amended)*.
- 18.6 The TAC will not provide a preliminary view on liability in accordance with Chapter 7 for transport accidents arising in the course of employment.
- 18.7 Upon receipt of the worker's compensation file, and after undertaking any enquiries that are required, the TAC will advise the claimant's lawyer whether it is accepted that the injuries arose as a result of a transport accident.

- 18.8 The time frames in Chapter 8 for the serious injury decision making process do not commence for transport accidents arising in the course of employment until a decision pursuant to Clause 18.7 has been communicated to the claimant's lawyer.

**19. DAMAGES CLAIMS “ARISING OUT OF THE USE OF” PURSUANT TO SECTION 94(1) OF THE TAA.**

- 19.1 Prior to the issuing of any proceedings, if a claimant intends to make a damages claim pursuant to Section 94(1) of the TAA a letter of notification to the TAC must be provided.
- 19.2 The letter should be titled “Damages claim – arising out of the use of” and be addressed to the Manager, Common Law, Transport Accident Commission, 60 Brougham Street, Geelong 3220 and must include:
- 19.2.1 A request for the damages claim to be considered pursuant to these protocols;
- 19.2.2 A list of injuries claimed;
- 19.2.3 The proposed defendant/s and the registration details of the alleged vehicle involved;
- 19.2.4 A summary of the accident circumstances and the allegations of negligence.
- 19.3 The TAC must acknowledge receipt of the request within 14 days and provide a claim reference number and the details of the TAC person responsible for the conduct of the damages claim.
- 19.4 Within a further 14 days of the TAC's acknowledgement in Clause 19.3, the TAC will provide an additional response to the request advising:
- 19.4.1 Whether it indemnifies the proposed defendant/s;
- 19.4.2 Whether it accepts the injuries arose out of the use of a vehicle; and
- 19.4.3 Whether further enquiries or information is required to confirm indemnity and an expected timeframe to complete these enquiries.
- 19.5 When the TAC is in a position to confirm indemnity, a letter will be sent to the claimant's lawyer confirming that the claim can proceed pursuant to these protocols and requesting any additional information in support of the claim.
- 19.6 Within 60 days of the TAC's written confirmation of indemnity in Clause 19.5, the claimant's lawyer will contact the TAC person with conduct of the matter to arrange a common law conference and provide supporting information (where not previously provided), including:
- 19.6.1 A summary of the accident circumstances and the allegations of negligence;
- 19.6.2 Particulars of damage quantifying the claim for each head of damage;
- 19.6.3 Copies of all medical reports to be relied upon;
- 19.6.4 Copies of any information or documents relating to liability, including expert and other witness opinions, already obtained and to be relied upon; and
- 19.6.5 Where pecuniary loss will be claimed, any relevant supporting financial documentation. Where available, full and complete financial information for a period not less than 3 years prior to the accident up until the time of application should be provided.

- 19.7 A conference will be scheduled unless the TAC reasonably requires additional information (e.g. medical reports) or for the claimant to attend IMEs.
- 19.8 Within 28 days of receiving the claimant's material in Clause 19.6 or information requested pursuant to Clause 19.7, whichever is the latter, the TAC must provide to the claimant's lawyer any relevant information or liability documents that the TAC has in its possession including:
- 19.8.1 An indication whether liability is admitted and, if not, a list of defences which the TAC will rely on;
  - 19.8.2 All investigations reports including all witness statements obtained;
  - 19.8.3 Police reports and statements (if relevant);
  - 19.8.4 Expert witness opinions and reports;
  - 19.8.5 Medical reports not previously provided or exchanged;
  - 19.8.6 Any relevant documents not otherwise relied upon; and
  - 19.8.7 The identity of any other parties responsible for the damage including their insurers, where this is known.
- 19.9 Following the above exchange of material, the parties will participate in a common law conference pursuant to Chapter 16 of these protocols.

## **20. DAMAGES CLAIMS PURSUANT TO PART III OF THE WRONGS ACT AND SECTIONS 93(8) AND (9) OF THE TRANSPORT ACCIDENT ACT.**

- 20.1 If a claimant intends to make a damages claim pursuant to Part III of the Wrongs Act a letter of notification to the TAC must be provided prior to the issuing of any proceedings.
- 20.2 The letter should be titled "Damages claim – pursuant to Part III of the Wrongs Act 1958" and be addressed to the Manager, Common Law, Transport Accident Commission, 60 Brougham Street, Geelong 3220 and must include:
- 20.2.1 A request for the damages claim to be considered pursuant to these protocols;
  - 20.2.2 The proposed defendant/s and the registration details of the alleged vehicle involved;
  - 20.2.3 A summary of the accident circumstances and the allegations of negligence;
  - 20.2.4 The TAC claim reference number if the TAC has already paid benefits pursuant to Sections 57 and/or 58 of the TAA; and
  - 20.2.5 The names of all dependents for whom the lawyer (or their firm) is acting and where a claim for damages pursuant to the Part III of the Wrongs Act will be made.
- 20.3 The TAC must acknowledge receipt of the request within 14 days and provide the details of the TAC person responsible for the conduct of the damages claim.
- 20.4 Within a further 14 days of the TAC's acknowledgement in Clause 20.3, the TAC will provide an additional response to the request advising:
- 20.4.1 Whether it indemnifies the proposed defendant;

- 20.4.2 Whether benefits pursuant to Sections 57 and/or 58 of the TAA have been paid to any party other than as listed in the request letter;
- 20.4.3 Whether further enquiries or information is required to confirm indemnity and an expected timeframe to complete these enquiries.
- 20.5 When the TAC is in a position to confirm indemnity, a letter will be sent to the claimant's lawyer confirming that the claim can proceed pursuant to these protocols and requesting any additional information in support of the claim.
- 20.6 Within 60 days of the TAC's written confirmation of indemnity in Clause 20.5, the claimant's lawyer will contact the TAC person with conduct of the matter to arrange a common law conference and provide supporting information (where not previously provided), including:
  - 20.6.1 A summary of the accident circumstances and the allegations of negligence;
  - 20.6.2 Particulars of damage quantifying the claim for each head of damage;
  - 20.6.3 Copies of any information or documents relating to liability, including expert and other witness opinions, already obtained and to be relied upon;
  - 20.6.4 Relevant supporting financial documentation. Where available, full and complete information for a period not less than 3 years prior to the accident should be provided; and
  - 20.6.5 Names and full details of all dependents for whom a claim will be made.
- 20.7 A conference will be scheduled unless the TAC reasonably requires additional information.
- 20.8 Within 28 days of receiving the claimant's material in Clause 20.6 or information requested pursuant to Clause 20.7, whichever is the latter, the TAC must provide to the claimant's lawyer any relevant information or liability documents that the TAC has in its possession including:
  - 20.8.1 An indication whether liability is admitted and, if not, a list of defences which the TAC will rely on;
  - 20.8.2 All investigations reports including all witness statements obtained;
  - 20.8.3 Police reports and statements;
  - 20.8.4 Expert witness opinions and reports;
  - 20.8.5 Any relevant documents not otherwise relied upon; and
  - 20.8.6 The identity of any other parties responsible for the damage including their insurers, where this is known.
- 20.9 Following the above exchange of material, the parties will participate in a common law conference pursuant to Chapter 16 of these protocols.

## **21. LEGAL COSTS AND DISBURSEMENTS**

### **GENERAL**

- 21.1 In recognition of the value added by a claimant's lawyer during the serious injury and common law processes the TAC will pay to a claimant's lawyer legal costs and disbursements upon settlement of the common law claim according to these protocols.

- 21.2 Legal costs and disbursements not specifically regulated in this Chapter are to be determined by reference to the appropriate Court scale.
- 21.3 Where a dollar amount is specified in these protocols, that amount will be indexed on the first anniversary of the commencement of these protocols and on each anniversary thereafter in accordance with the Consumer Price Index for Melbourne as published by the Australian Statistician for the preceding period immediately prior to the indexation date.
- 21.4 The TAC will update and publish a schedule (“Common Law Protocol price point schedule”) annually from 1 July. The applicable price point and counsel’s fees payable will be as per the date of common law settlement.
- 21.5 The claimant’s lawyer must write to the TAC outlining the claimed legal costs and attach invoices and documentation for any disbursements claimed in accordance with Chapter 21. The TAC will pay the agreed legal costs and disbursements to the claimant’s lawyer within 14 days of receiving the letter and invoices.
- 21.6 Where more than one lawyer has acted for a claimant in the course of a common law claim legal costs and disbursements payable by the TAC will be paid to the lawyer acting for the claimant at the time of the settlement.
- 21.7 If the claim does not resolve at the common law conference and a Writ for damages is issued, upon finalisation of the Writ, the TAC will pay legal costs as agreed between the parties or ordered by the Court on the appropriate Court scale.
- 21.8 Where a claimant’s lawyer issues proceedings to protect the legal interests of the claimant in respect of the *Limitation of Actions Act (Vic) 1958* and the proceedings are held in abeyance in order for the parties to proceed with an application under these protocols the TAC agrees to pay the filing fee for the issued proceedings upon settlement of a common law claim under these protocols.

## **PRICEPOINTS TO BE PAID AT COMMON LAW RESOLUTION**

### **IMPAIRMENT 30% GATEWAY**

- 21.8 Where a common law action is resolved in circumstances where a claimant’s injury was deemed to be a serious injury pursuant to Section 93(3) of the TAA the TAC will pay legal costs limited to \$15,500 exclusive of disbursements.

### **NARRATIVE GATEWAY**

- 21.9 Where a common law action is resolved in circumstances where the TAC is satisfied a claimant’s injury is a serious injury and has issued a certificate consenting to the bringing of common law proceedings, the TAC will pay legal costs limited to \$18,750 exclusive of disbursements.

### **ORIGINATING MOTION**

- 21.10 Where a serious injury request is denied and the claimant issues an Originating Motion, the TAC agrees to pay legal costs calculated on the appropriate Court scale.

If a serious injury is granted by the TAC or allowed by the Court following the issue of an Originating Motion, the claimant must engage in a common law conference pursuant to Chapter 16 and where that common law action is resolved, the TAC, in addition to the court costs associated with the Originating Motion, will pay legal costs limited to \$15,500 exclusive of disbursements.

## **ARISING OUT OF THE USE OF**

- 21.11 Where a claimant's common law claim arising out of the use of a vehicle pursuant to Section 94(1) of the TAA is resolved the TAC will pay legal costs limited to \$15,500 exclusive of disbursements.

## **WRONGS ACT**

- 21.12 Where a claimant's common law claim pursuant to Part III of the Wrongs Act and Sections 93(8) and (9) of the TAA is resolved the TAC will pay legal costs limited to \$15,500 exclusive of disbursements.

## **GENERAL UPLIFTS**

- 21.14 The TAC will, in addition to the costs payable in accordance with previous clauses in this Chapter, pay an uplift fee in the following circumstances:

21.14.1 \$3,750 where the TAC has not admitted liability prior to the conference pursuant to Chapter 7 and/or Clauses 15.3, 19.8 or 20.8;

21.14.2 \$2,970 where the past and future pecuniary loss damages claim has been supported by the full and complete provision of information and documentation contemplated in Clause 6.3.9 if the person is not self employed;

21.14.3 \$5,500 where the past and future pecuniary loss damages claim has been supported by the full and complete provision of information and documentation contemplated in Clause 6.3.9 if the person is self employed;

21.14.4 \$2,540 where a solicitor attends the common law conference without counsel;

21.14.5 \$5,150 where the resolution of a common law action has required and has received Court approval.

## **SERIOUS INJURY CONFERENCE UPLIFT**

- 21.15 Where a common law damages action is resolved in circumstances where the serious injury certificate is granted at a Serious Injury conference pursuant to Chapter 11, an uplift of \$5,500 will be paid. The TAC will also pay Counsel's fees associated with the conference at \$3,300 unless otherwise agreed between the parties prior to the conference.

## **IMPAIRMENT BYPASS UPLIFT**

- 21.16 The TAC will pay an uplift of \$3,300 in circumstances where a claimant has not commenced an impairment application at the time their common law claim is resolved:

21.16.1 For the purpose of Clause 21.16 'not commenced an impairment application' means;

21.16.1.1 An Impairment Application Form in accordance with Chapter 7 of the Impairment Assessment Protocols has not been lodged with TAC; and

21.16.1.2 An impairment determination has not been made pursuant to Section 46A of the TAA (excluding any interim impairment decisions and payments).

## **DISBURSEMENTS**

- 21.17 The TAC will reimburse the reasonable cost of medico-legal reports (including supplementary reports) not obtained on a joint basis if the report was reasonably required.

- 21.18 The TAC will reimburse the reasonable cost of medical reports from a claimant's treating doctors and practitioners.
- 21.19 The TAC will reimburse the application fees and associated charges for requests made for a claimant's hospital and ambulance records pursuant to the *Freedom of Information Act 1982* and requests made for medical records pursuant to the *Health Records Act 2001* where these requests are made for the purpose of a serious injury application/ common law claim.
- 21.20 The TAC will meet the reasonable travel and accommodation costs associated with a claimant (and/or their administrator/guardian) attending a conference or mediation for the purpose of these protocols, where the claimant resides in rural Victoria or interstate. These costs will be met in accordance with the TAC's 'Travel and Accommodation Expenses' policy.
- 21.21 The TAC will reimburse the reasonable professional interpreter fees incurred in a claimant attending medical examinations and providing instructions to their lawyer with respect to their serious injury application/common law claim.
- 21.22 Where a claimant's lawyer intends to use Senior Counsel for a serious injury conference or a common law conference, the claimant's lawyer must seek prior approval from the TAC.
- 21.23 Actuarial or Forensic Accountant reports may not be claimed as a disbursement unless prior approval has been obtained by the TAC and it is agreed as an appropriate expense.

#### **CONCURRENT APPLICATIONS**

- 21.24 The following clauses deal with points of overlap and what price points will be paid and in what circumstances, where there are concurrent applications under the Impairment Assessment, No Fault Dispute Resolution and Common Law Protocols.
- 21.25 Where there are concurrent applications under the Impairment Assessment and Common Law Protocols, an impairment price point with release (Clause 11.1.1 of the Impairment Assessment Protocols) will be paid if the common law claim resolves prior to an impairment determination being made if:
- 21.25.1 A completed Impairment Application form has been lodged; and
- 21.25.2 The medical material provided supports a whole person impairment determination of more than 10%.
- 21.26 Where there are concurrent applications under the No Fault Dispute Resolution and Common Law Protocols, a Dispute Resolution (DR) (impairment) price point (Clause 16.1.6 of the No Fault Dispute Resolution Protocols) will be paid if the common law claim resolves prior to the impairment dispute being resolved if:
- 21.26.1 A completed DR Application form has been lodged; and
- 21.26.2 The material provided supports an impairment percentage figure greater than the TAC's impairment determination and an entitlement to an impairment benefit.
- 21.27 Where an application has been made pursuant to the Impairment Assessment Protocols or the No Fault Dispute Resolution Protocols on the basis that the claimant has a 30% whole person impairment or more, and a compliant Serious Injury Application form has been lodged, TAC will pay legal costs pursuant to Clause 21.9 of the Common Law Protocols (narrative gateway) regardless of whether a 30% (or more) whole person impairment determination was made or a serious injury certificate was granted.

## **DISPUTE REGARDING LEGAL COSTS AND DISBURSEMENTS**

- 21.28 Where agreement cannot be reached on legal costs or pre-issue disbursements pursuant to these protocols, the dispute will be referred by the parties to the CEO of the LIV for resolution by the CEO or their delegate.