

# **LEGAL COSTS RECOVERY GUIDELINES**

**Effective 3 September 2012**

Amended as at 10 November  
2016

**Transport Accident Commission  
60 Brougham Street Geelong 3220  
(DX 216079 or PO Box 742, Geelong)**

## **HISTORY**

### **Version 2.1**

Date 10 November 2016

**Status:** Approved

### **Version 2.0**

Date 10 November 2015

**Status:** Approved

### **Version 1.9**

Date 29 May 2015

**Status:** Approved

### **Version 1.8**

Date 4 February 2015

**Status:** Approved

**Version 1** commenced 3 September 2012

## **ANALYSIS OF AMENDMENTS**

**Version 1.1** (1 October 2012) replaced “Compliance” with “Forensics Group” in paragraph 2.2

**Version 1.2** (19 November 2012):

- added “Senior Legal Manager – Interstate and Recoveries” to paragraph 2.2, and
- amended “6” to “7” in line 3 of paragraph 2.4.

**Version 1.3** (13 February 2013):

- removed “Senior Manager – Forensics Group” from paragraph 2.2
- added “Operations Manager – Claims Legal” and “Victorian and Interstate Common Law Manager OR Serious Injury and Impairment Manager” to paragraph 2.2
- replaced “Legal Services and Assurance” with “Legal Assurance” in paragraph 2.2
- amended “four” to “five” in line 2 of paragraph 2.4
- amended “3” to “4” and “7” to “8” in line 3 of paragraph 2.4.

**Version 1.4** (16 July 2013)

- replaced the words “general principles set out in section 2” with “factors referred to in paragraph 2.6 herein” in paragraph 4.2.

**Version 1.5** (1 November 2013)

- added new paragraph 2 to the Preamble on page 3.
- renumbered existing paragraphs 2 and 3, to become paragraphs 3 and 4 in the Preamble on page 3.
- replaced the reference to paragraph 3 with a reference to paragraph 4, under the heading “Notes” at the bottom of page 3.
- added the words “and in paragraph 2 above on or after 1 November 2013” after the words “3 September 2012” under the heading “Notes” at the bottom of page 3.
- added the words “and/or an appeal to the Court of Appeal in relation to the above” at the end of the Part A Heading
- removed the two bullet points in paragraph 1.1 and replaced them with (a) and (b) respectively
- added a new sub-paragraph (c) to paragraph 1.1
- added the words “or appeal” after the word “action” in paragraph 1.2
- replaced the words ss.93(12) of the Act with “(pursuant to ss.93(12) of the Act and in relation to appeal proceedings the relevant Order in the *Supreme Court (General Civil Procedure) Rules 2005* )” in paragraph 1.4.
- added the words “Subject to paragraph 2.8,” at the commencement of paragraph 2.7.
- added a new paragraph 2.8.
- added a new Part C entitled “Amendment to these Guidelines”

**Version 1.6** (14 April 2014)

- added “and 2.9” in paragraph 2.7
- added a new paragraph 2.9

**Version 1.7** (14 August 2014)

- In paragraph 2.2:
  - Removed “Senior Manager – Resolution (also the Convenor)”;
  - Added the words “(also the Convenor)” to the title “Operations Manager – Claims Legal”;

- Replaced “Senior Manager – Policy, Service and Review” with “Senior Manager – Government Relations, Legislation and Policy”;
- Separated the following titles (by removal of the word “or”) into individual bullet points: Senior Manager – Independence; Senior Manager – Recovery; Victorian and Interstate Common Law Manager; Serious Injury and Impairment Manager.
- In paragraph 2.4, replaced “8” with “9” in line 3.

#### **Version 1.8 (4 February 2015)**

- In paragraph 2.2:
  - Removed “Senior Manager – Legal Assurance”
  - Added “Senior Manager – Resolution (also the Convenor)”
  - Altered “Operations Manager – Claims Legal (also the Convenor)” to “Senior Manager – Legal”
- Removed bullet-points and replaced them with alpha sub-paragraph references in paragraph 2.6
- Added another sub-paragraph 2.6(g) commencing with the words “Any written submissions”.
- Removed the sub-paragraph in paragraph 2.6 which stated: “Whether, in relation to an action for damages to be awarded pursuant to s.93 of the Act, any judgment obtained by the person falls below the statutory thresholds for damages”.
- Added the words “Further, the Convenor (or delegate appointed to attend the meeting on his or her behalf) shall ultimately decide the issue should the members of the CRC be unable to reach a consensus” at the end of paragraph 2.6
- Added the words “and 2.10” after the words “2.9” in the first line of paragraph 2.7.
- Added the words “or 1.2” after the words “1.1” in the first line of paragraph 2.9
- Added a new paragraph 2.10.

#### **Version 1.9 (29 May 2015)**

- Inserted sub paragraph 2.6 (e) commencing with the words “Where the judge's reasoning indicates” and consequent amendments necessitated by the addition of this new subparagraph to paragraph 2.6.
- Added to paragraph 2.10 the words “and any related communication to occur”
- Delete under paragraph 2.2 “Senior Legal Manager – Costs and Prosecutions

#### **Version 2.0 (5 November 2015)**

- In paragraph 2.2:
  - Added “Manager – Common Law”;
  - Replaced “Serious Injury and Impairment Manager” with “Manager – Lump Sum”;
  - Replaced “Senior Legal Manager – Interstate and Recoveries” with “Team Manager – Payments and Recoveries”;
  - Replaced “Victorian and Interstate Common Law Manager” with “Team Manager – Victorian Common Law and Serious Injury”.

#### **Version 2.1 (29 August 2016)**

- In paragraph 2.2:
  - Replaced “Senior Manager – Resolution” with “Head of Supported Recovery”
  - Removed “Senior Manager – Recovery”
  - Removed “Senior Manager – Independence”
  - Replaced “Manager – Common Law” with “Senior Manager – Common Law”
  - Replaced “Manager – Lump Sum” with “Senior Manager – Return to Work and Lump Sum”
  - Replaced “Team Manager – Victorian Common Law and Serious Injury” with “Team Manager – Victorian Common Law”
  - Added “Team Manager – Serious Injury”

- Added “Business Operations Manager – Supported Recovery”
- In paragraph 2.3:
  - Replaced the words “*Legal Profession Act 2004 (Vic)*” with “*Legal Profession Uniform Law Application Act 2014 (Vic)*”
- In paragraph 2.4:
  - Replaced the words “A quorum requires at least five members” with “A quorum requires at least four members”
  - Replaced the words “at least 4 of the 9 members” with “at least 3 of the 9 members”
  - Removed the words “- one of whom must be the Convenor”
- Added paragraph 1.5 commencing with the words “The TAC will not seek an order for costs”.
- Added paragraph 1.6 commencing with the words “Notwithstanding paragraph 1.5”.
- Added paragraph 1.7 commencing with the words “The TAC will monitor the number”.

## Preamble

In compliance with the State of Victoria Model Litigant Guidelines and its overarching obligations pursuant to the *Civil Procedure Act 2010*, the TAC seeks to ensure clarity and certainty in the management of its legal costs recovery rights. The TAC promotes consistency, fairness and transparency in its interpretation and application of its legal costs recovery guidelines.

The purpose of these Legal Costs Recovery Guidelines (the ‘Guidelines’) is to outline the approach to be taken by the TAC in relation to:

1. As provided for in section 93(12) of the *Transport Accident Act 1986 (Vic)* (“the Act”), the seeking of an order for costs following:
  - The dismissal of a person’s application for the court to determine that the person has a serious injury pursuant to s.93(4)(d) of the Act, or the withdrawal of that application by the person prior to or after the hearing of the proceeding has commenced;
  - The dismissal of the person’s action for damages to be awarded pursuant to s.93 of the Act, or the withdrawal of that action by the person prior to or after the hearing of the proceeding has commenced.
2. The seeking of an order for costs in the Court of Appeal following an appeal heard and determined in favour of the TAC, in relation to the application and/or action for damages referred to above;
3. The factors taken into account in determining whether to recover upon such an order; and
4. Cost orders arising under sections 79(2) and (3) of the Act in respect of administrative review proceedings at the Victorian Civil and Administrative Tribunal.

### NOTES:

These Guidelines apply to any of the events occurring in paragraph 1 and 4 above on or after 3 September 2012, and in paragraph 2 above on or after 1 November 2013.

In these Guidelines, the TAC client is referred to as the “person”.

**Part A - Application by a person for the court to determine that the person has a serious injury pursuant to s.93(4)(d) of the Act, and/or an action for damages to be awarded pursuant to s.93 of the Act, and/or an appeal to the Court of Appeal in relation to the above**

**1. COSTS ORDER**

1.1 The TAC will seek an order for costs<sup>1</sup> following:

- (a) The dismissal of a person's application for the court to determine that the person has a serious injury pursuant to s.93(4)(d) of the Act, or the withdrawal of that application by the person after the hearing of the proceeding has commenced;
- (b) The dismissal of the person's action for damages to be awarded pursuant to s.93 of the Act, or the withdrawal of that action by the person after the hearing of the proceeding has commenced.
- (c) Judgment entered in favour of the TAC in the Court of Appeal in relation to an appeal against the lower court's determination in an application or action for damages.

1.2 The TAC may seek an order for costs, or a contribution in relation thereto, should a person withdraw their application, action or appeal prior to the commencement of the hearing.

1.3 For the avoidance of doubt, the reference to "hearing" in paragraphs 1.1 and 1.2 is to the trial stage of the proceedings.

1.4 The Court retains the discretion as to whether or not to make the order(s) referred to in paragraphs 1.1 and 1.2 of this Part (pursuant to ss.93(12) of the Act and in relation to appeal proceedings the relevant Order in the *Supreme Court (General Civil Procedure) Rules 2005*).

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<sup>1</sup> The TAC will not seek certification of counsels' fees when applying for a costs order, but will leave this issue to be determined by the Costs Court in default of agreement between the parties, should the TAC subsequently decide to recover upon an order obtained.

- 1.5 The TAC will not seek an order for costs where the person has proceeded through the Transport Accident Act Protocols; and:
- (a) A litigation guardian has been appointed for the person's application for the court to determine that the person has a serious injury pursuant to s.93(4)(d) of the Act; or
  - (b) A litigation guardian has been appointed for the person's action for damages to be awarded pursuant to s.93 of the Act.
- 1.6 Notwithstanding paragraph 1.5, the TAC will continue to seek an order for costs in actions for damages where an Offer of Compromise has been served and damages of a lesser amount are subsequently awarded, and in all actions where judgment has been entered in favour of the TAC in the Court of Appeal. Where damages are awarded at a lesser amount than the TAC Offer of Compromise, the TAC will limit its recovery to the value of the damages awarded.
- 1.7 The TAC will monitor the number of actions falling within the scope of paragraph 1.5, including the timing of the appointment of the litigation guardian, and reserves the right to review its approach to matters involving litigation guardians following consultation.

## **2. RECOVERY**

- 2.1 The TAC's Costs Recovery Committee ("CRC"), on behalf of the TAC, determines the question whether the TAC will seek recovery following the obtaining of a costs order against a person.
- 2.2 The CRC meets on an "as needs" basis and is constituted by people holding the following positions at the TAC:
- Head of Supported Recovery (also the Convenor)
  - Senior Manager – Legal
  - Senior Manager – Government Relations, Legislation and Policy



- Senior Manager – Common Law
- Senior Manager – Return to Work and Lump Sum
- Team Manager – Payments and Recoveries
- Team Manager – Victorian Common Law
- Team Manager – Serious Injury
- Business Operations Manager – Supported Recovery

If any of the above members are unable to attend a CRC meeting, he or she may nominate a delegate to attend.

- 2.3 In addition to the members listed above, an individual, selected from a panel of persons not previously or currently employed by the TAC, is also a member of the CRC. The panel will consist of individuals:
- appointed by the Chief Executive Officer of the TAC to be a member of the CRC on such terms and conditions as are agreed between the parties; and
  - current or retired Australian lawyers (as defined in the *Legal Profession Uniform Law Application Act 2014 (Vic)*) of not less than 10 years standing.
- 2.4 CRC meetings will proceed provided there is a quorum. A quorum requires at least four members to be in attendance at any one time, comprising:
- at least 3 of the 8 members (or their nominated delegates, if any) referred to in paragraph 2.2; and
  - an individual from the panel referred to in paragraph 2.3.
- 2.5 Employees of the TAC including those involved in the person's claim may be invited by the CRC to attend meetings and/or provide information about individual matters the CRC is considering. Such invitees are not members of the CRC.
- 2.6 In determining whether to seek recovery upon a costs order, the CRC will consider a number of factors including but not limited to:
- a) The findings of fact made by the court in the course of the proceedings;
  - b) Whether the person against whom the costs order has been obtained has the

capacity to meet the order;

- c) The youth, age, intelligence, physical health, mental health or any special infirmity of the person, including whether the person is represented by a Litigation Guardian;
- d) Whether the consequences of seeking recovery in relation to the person would be unduly harsh and oppressive;
- e) Where the judge's reasoning indicates, in Originating Motions, that the consequences of an injury or injuries merely and narrowly fell short of being serious (in terms of 93(17(a) or (b) TAA) or severe (in terms of s93(17) (c)/s17A) TAA, when judged in the range of all possible impairments or losses of bodily function or disfigurements as the case may be.
- f) The extent of compliance by the person or the person's legal representative with the provisions of the *Civil Procedure Act 2010 (Vic)* and Rules and Regulations made pursuant to this and other relevant Acts (e.g. *Supreme Court General Civil Procedure Rules*), during the pre-trial and trial stage of the proceedings;
- g) The extent of compliance by the person or the person's legal representative with Court Orders made during the pre-trial and trial stage of the proceedings;
- h) Any written submissions made by or on behalf of the person which address the criteria referred to in sub-paragraphs (a) to (g) above;
- i) The objects of the Act, as outlined in section 8 of the Act;
- j) The need to promote a consistent approach to the recovery of costs;
- k) The requirement to promote clarity and certainty in the management of the TAC's costs recovery rights in accordance with model litigant guidelines; and
- l) Whether, if as a result of the CRC's deliberations it is determined that costs ought to be recovered, those costs should include both professional costs and disbursements, or only the latter.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case. Further, the Convenor (or delegate appointed to attend the meeting on his or her behalf) shall ultimately decide the issue should the members of the CRC be unable to reach a consensus.

2.7 Subject to paragraphs 2.8, 2.9 and 2.10, the CRC will determine whether or not

to seek recovery upon the order no later than a period of ninety (90) days from the date of the order. The period of 90 days specified is to allow sufficient time for:

- a) the expiry of any appeal period in relation to the subject proceedings;
- b) such enquiries to be made as are necessary to enable the CRC to be in a position to properly consider the factors referred to in the previous paragraph;
- c) if deemed necessary by the TAC, an assessment of its costs and disbursements relating to the subject proceedings to be undertaken by an external costs lawyer or consultant; and
- d) subsequent to the occurrence of the factors specified in paras. 2.7(a) to (c)
  - (i) inclusive, the CRC to be convened to determine the issue.

2.8 Should an appeal be issued in relation to the subject proceedings prior to the question of recovery being determined in accordance with paragraph 2.7, the CRC will defer consideration of the question until the outcome of the appeal is known, and (if required) will then make a determination on the question of recovery in relation to both the original and appeal proceedings within a reasonable time thereafter.

2.9 Should a matter described in paragraph 1.1 or 1.2 come to the attention of the CRC within the period of 90 days of the date of the Order, but the next regularly scheduled meeting of the Committee is due to occur outside that 90 day period, the matter may be deferred for consideration until the next regular meeting but it cannot be deferred subsequently.

2.10 Any written submissions referred to in paragraph 2.6(h) herein must be received within 21 days of the date of the order obtained pursuant to paragraph 1.1 or 1.2. To enable proper consideration of those submissions, and any related communication to occur, consideration of the matter by the CRC may be deferred until the next regularly scheduled meeting of the Committee even if that meeting is due to occur outside the 90 day period specified in paragraph 2.7., but it cannot be deferred subsequently. Any written submissions should be sent to: Senior Manager, Legal, Transport Accident Commission, PO Box 742,

Geelong Vic 3220 and/or emailed to [Legal\\_Costs@tac.vic.gov.au](mailto:Legal_Costs@tac.vic.gov.au).

### **3. INTERLOCUTORY, ADJOURNMENT APPLICATIONS AND OFFERS OF COMPROMISE**

- 3.1 The CRC has no involvement in the determination of cost recovery issues in relation to this section of Part A of the Guidelines
- 3.2 The TAC will seek an order for costs arising out of a hearing which occurs during the pre-trial stage of a proceeding (including an interlocutory hearing) which relates to a person's application for the court to grant a serious injury certificate pursuant to s.93(4)(d) of the Act, and/or the person's application for damages to be awarded pursuant to s.93 of the Act where:
- it is necessary to enforce orders of the Court by application; or
  - there has been a material non compliance with the Rules; or
  - a material act or omission by or on behalf of a person contributes to a delay in the disposition of the person's claim; or
  - the proceeding relates to a claim by the TAC for a contribution towards liability or any recovery of statutory benefits paid by the TAC.
- 3.3 If the TAC receives an order for costs in its favour at an interlocutory stage (e.g. pursuant to an order of the Practice Court) or in consequence of the adjournment of the proceeding, the TAC will generally stay recovery of those costs until the Court has made final orders in the proceeding.
- 3.4 If the final orders in a proceeding include an order for costs in favour of a person, then the TAC will seek to offset any orders obtained pursuant to the previous paragraph against costs ordered to be paid by the TAC to the person.
- 3.5 In any an action for damages to be awarded pursuant to s. 93 of the Act where the orders of the Court are not more favourable to a person than the terms of an Offer of Compromise ("OOC") served by the TAC or on behalf of the TAC's indemnified owner or driver, the TAC will give effect to the terms of an OOC by seeking that any costs ordered to be paid by the person to the TAC or the TAC's indemnified owner or driver be offset against any costs owing to the person by the TAC.

## **Part B - Applications governed by sections 79(2) and (3) of the Transport Accident Act 1986**

- 4.1 The CRC has no involvement in the determination of cost recovery issues in relation to this Part of the Guidelines.
- 4.2 Where the orders made by the Tribunal are not more favourable to a party than the terms of a *Calderbank* offer or an offer made by the TAC in accordance with section 112 of the VCAT Act, the TAC will take into account the factors referred to in paragraph 2.6 herein when considering what is “just” within the meaning of section 79(2) of the Act.
- 4.3 If the TAC receives an order for costs in its favour at an interlocutory stage (e.g. Directions Hearing or Compulsory Conference), the TAC will generally stay recovery of those costs until the Tribunal has made final orders in the proceeding. The TAC will generally make application for an interlocutory costs order in any case where the conduct of an applicant falls within the circumstances described in section 78 of the VCAT Act or where a material act or omission by or on behalf of an applicant leads to an unnecessary prolongation of the application. If the final orders made in a proceeding include an order for costs in favour of an Applicant, then the TAC will request that the interlocutory costs ordered in its favour be set off against costs ordered to be paid to an Applicant.
- 4.4 In general the TAC will only seek an order for legal costs to be taxed on County Court scale. Where circumstances permit negotiation to take place prior to order by the Tribunal, the TAC will endeavour to agree to fix costs at a sum certain instead of seeking an order on scale to be taxed in default of agreement.
- 4.5 In every case the TAC will endeavour to agree the reasonable quantum of a costs order in favour of the TAC without resort to taxation.

## **Part C – Amendment to these Guidelines**

- 5.1 The CRC will as and when necessary consider amendments to these Guidelines and if it determines them to be appropriate, approve the said amendments.
  
- 5.2 Details of the amendments made to the Guidelines will be noted in the Guidelines themselves under the heading “History”, and the updated version of the Guidelines will be uploaded to the TAC’s external website as soon as reasonable thereafter.