

LEGAL COSTS RECOVERY GUIDELINES

Effective 1 October 2023

**Transport Accident Commission
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1. Plain English Summary

The TAC has agreements with the Australian Lawyers Alliance and Law Institute of Victoria about ways we can work together to settle most issues without going to court. These are called the TAC Protocols and they help to resolve about 2,000 issues each year.

In some cases though, the Protocols may not resolve the issue and a person can ask the court to make a judgement.

If the court makes a judgement in favour of the person, the judge will make an order for the TAC to pay for some of that person's legal costs.

But, if the court makes a judgement in favour of the TAC, they can order the person to pay the TAC's legal costs. When this happens, the TAC will choose what to do with the costs order.

The TAC can seek payment of the full amount, or consider whether there are reasons to waive some, or all, of the costs. To help in making this choice the TAC looks at a long list of possible reasons. This list includes things like how strong their evidence was, how truthful the person was, what they can afford to pay, and what impact paying would have on their standard of living.

It's important for the person (or someone on their behalf, such as their lawyer) to provide all the information the TAC needs to inform this choice. If nothing is provided, the TAC will assume they can pay the full amount.

The TAC will tell the person what they plan to do with the costs order, and if the person doesn't agree with the reasons given they can ask for another opinion. If the TAC doesn't waive the costs, they can arrange a payment plan. More information will be provided about the payment process at that stage.

In summary:

- If a person is ordered by the court to pay legal costs to the TAC, they shouldn't assume the TAC will waive the costs.
- The person, or someone on their behalf such as their lawyer, should provide the TAC with any information that might reduce or waive the amount owed, as soon as possible.
- If the TAC doesn't waive the costs and the person can't afford to pay immediately, they can request a payment plan.

2. PREAMBLE

- 2.1 The Transport Accident Commission (“TAC”) aims to provide predictability, transparency, and consistency in the management of its legal costs recovery rights. The purpose of these Legal Costs Recovery Guidelines (“the Guidelines”) is to outline the approach to be taken by the TAC in relation to:
- a) The **seeking of an order** for costs.
 - b) The factors taken into account in determining **whether to waive the payment of costs** upon such an order.
- 2.2 The **Prima Facie position** is that the TAC has a public policy right to seek costs orders in appropriate circumstances. If the court awards such orders, the TAC will reconcile public spending in a way that is fair and responsible. This includes supporting the overarching purpose of the Civil Procedure Act 2010 of just, efficient, timely and cost-effective resolution of disputes, and discouraging unmeritorious litigation.
- 2.3 For the sake of clarity, it should be assumed the TAC will seek recovery of all, or some, costs unless good reasons are identified to waive them (see factors at paragraph 4.2).
- 2.4 The TAC may prospectively consider agreeing to waive costs where a question of law which in the TAC’s opinion affects the administration of the scheme or the rights of a category of TAC clients is to be considered. Refer to the [Guidelines for TAC funding of TAC scheme test cases](#) for more information.
- 2.5 The Guidelines are not a legal document and they do not extinguish, extend, or give additional legal rights to the TAC, any person/s or organisation/s.

3. COSTS ORDER

- 3.1 The TAC will seek an order for costs¹:
- 3.1.1 Following the dismissal of a person’s application by the court pursuant to s.93(4)(d) of the Transport Accident Act 1986 (Vic) (“the Act”), or the withdrawal of that application by the person after the hearing of the proceeding has commenced.
 - 3.1.2 Following the dismissal of a person’s action for damages pursuant to s.93 or s.94 of the Act or Part III of Wrongs Act 1958 (Vic) (“the Wrongs Act”), or the withdrawal of that action by the person after the hearing of the proceeding has commenced.
 - 3.1.3 Following an Appeal determined in favour of the TAC by the Court of Appeal, or the withdrawal of that Appeal by the person after the hearing of the proceeding has commenced.

¹ 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 resolve to recover upon an order obtained.

- 3.1.4 Following an affirmation of the TAC's decision or dismissal of a person's application for review at the Victorian Civil and Administrative Tribunal ("VCAT") pursuant to section 77 of the Act, or the withdrawal of that application by the person after the hearing of the proceeding has commenced.
- 3.2 The TAC may seek an order for costs should a person withdraw their application, action, or appeal prior to commencement of the hearing of the proceeding.
- 3.3 The Court and VCAT retains the discretion as to whether to make the order(s) referred to in paragraphs 3.1 and 3.2 above.
- 3.4 If the TAC receives an order for costs in its favour at an interlocutory stage or in consequence of the adjournment of the proceeding, the TAC will typically stay recovery of those costs until the Court or VCAT has made final orders in the proceeding.
- 3.5 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 interlocutory cost orders obtained in its favour.
- 3.6 In any action for damages to be awarded pursuant to s.93 and s.94 of the Act or Part III of the Wrongs 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.
- 3.7 The TAC will not seek an order for costs where the person has proceeded through the TAC Protocols and a litigation guardian has been appointed prior to the hearing:
- 3.7.1 of a person's serious injury application by the court pursuant to s.93(4)(d) of the Act
- 3.7.2 of a person's action for damages pursuant to s.93 or s.94 of the Act or Part III of the Wrongs Act
- 3.7.3 of a person's VCAT application pursuant to section 77 of the Act.
- 3.8 Notwithstanding paragraph 3.7, 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.
- 3.9 Notwithstanding paragraph 3.7, the TAC will continue to seek an order for costs where the orders made by VCAT 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.
- 3.10 For the avoidance of doubt, the reference to "hearing" in paragraphs 3.1, 3.2, and 3.7 is to the trial stage of the proceedings.
- 3.11 The TAC will monitor the number of actions falling within the scope of paragraph 3.7, including the timing of the appointment of the litigation guardian, and reserves the right to review its approach to matters involving litigation guardians.

4. RECOVERY

- 4.1 The TAC will make available a prescribed format for a person, or their representative, to present information for its review.
- 4.2 The TAC Relevant Manager (nominated at paragraph 6.3), on behalf of the TAC, will resolve whether to waive all or some costs after an order is made. In making this resolution the TAC Relevant Manager will consider factors including but not limited to:
- a) The Prima Facie position on costs (see paragraph 2.2).
 - b) The making of any offers.
 - c) The presence of evidence or reasoning that indicates the consequences of an injury or injuries were unrelated to the transport accident.
 - d) Whether the claim was unmeritorious, being not well-grounded in fact, or not based on the existing law or on a good faith argument for the extension, modification or reversal of the existing law.
 - e) Whether there is evidence of fraud, defined as acting deceptively and dishonestly or concealment or fabrication.
 - f) Whether there is evidence of witting misrepresentation, defined as a false or misleading statement, ambiguity, or a material omission (including a failure to disclose information which renders other statements misleading), made:
 - (i) knowingly, or
 - (ii) without belief in its truth, or
 - (iii) recklessly, careless as to whether it be true or false.
 - g) When any evidence of e) and f) was available.
 - h) Whether there are findings on credit, honesty, or reliability.
 - i) Whether the person or their legal representative complied with relevant provisions and court orders during the pre-trial and trial stage of the proceedings.
 - j) Whether the person is represented by a litigation guardian (see paragraph 3.7).
 - k) Whether the consequences of seeking to recover all, some, or none of the costs order would be unduly harsh or oppressive such as to cause substantial hardship, where the person liable to pay costs will as a result of being required to pay the amount:
 - (i) lose, or be forced to vacate, their home.
 - (ii) lose a motor vehicle, or the use of a motor vehicle, reasonably necessary for domestic, employment or business purposes.
 - (iii) lose their employment or livelihood.
 - (iv) be unable to provide food, accommodation, clothing, medical treatment, education and other basic necessities for themselves and dependents; or,

(v) be made bankrupt.

l) In considering whether the person liable to pay costs will suffer substantial hardship, TAC will take into account:

- (i) all assets and other financial resources of the person.
- (ii) the age of the person.
- (iii) the physical and mental health of the person; and,
- (iv) any other special infirmity of the person.

m) Any written submissions made by or on behalf of the person which address the factors referred to in sub-paragraphs (a) to (l) above.

n) Any information sought or provided by TAC employees or sub-contractors, including those involved in the person's claim (noting some may be subject to legal privilege).

o) Whether, if it is resolved that costs ought to be recovered, those costs should include both professional costs *and* disbursements, or only the latter.

4.3 The applicability of and weight to be given to any factors will depend on the particular circumstances of each case.

4.4 Any written submissions referred to in paragraph 4.2 (m) must be in the prescribed TAC format and received within 28 days of the expiry of any applicable appeal period regarding the costs order obtained pursuant to paragraph 3.1 or 3.2. Written submissions should be emailed to recoveries@tac.vic.gov.au.

4.5 Should an appeal be issued in relation to the subject proceedings prior to the question of recovery being resolved in accordance with paragraph 4.6, the TAC Relevant Manager will defer consideration until the outcome of the appeal is known. At the outcome of the appeal, the TAC Relevant Manager will then make any necessary resolutions in relation to both the original and appeal proceedings.

4.6 Subject to paragraphs 4.4 and 4.5, within ninety (90) days from the date of the order the TAC Relevant Manager will resolve whether or not to waive some or all costs, and provide the person, and their representative, with notice of this resolution and information about the rationale.

5. OBJECTIONS

5.1 Where a person materially objects to the rationale provided for a resolution to not waive costs after an order, an objection may be lodged.

5.2 An objection must be received within 28 days of the date of the resolution notice and emailed to recoveries@tac.vic.gov.au. It should clearly state the reason/s for the objection based on the rationale provided in the resolution and any other relevant factors within paragraph 4.2. Any new information that could reasonably have been provided in the submission at paragraph 4.2 (m) will not be considered.

5.3 The TAC may engage an Independent Reviewer as needed to review objections to any resolutions made under paragraph 4.6, selected from a Panel of persons not previously or currently employed by the TAC, who is:

- a. Appointed by the Chief Executive Officer of the TAC to be an Independent Reviewer on such terms and conditions as agreed by the parties; and,
 - b. Current or retired Australian lawyers (as defined in the *Legal Profession Uniform Law Application Act 2014 [Vic]*) of not less than ten (10) years standing.
- 5.4 The role of the Independent Reviewer is to provide an impartial and objective evaluation of the resolution. They are engaged to provide an unbiased and informed opinion and make a recommendation about whether the resolution should be upheld.
- 5.5 In forming this recommendation, the Independent Reviewer will consider the rationale for the TAC Relevant Manager's resolution and the reason/s provided for the objection. The Independent Reviewer will only reconsider factors within paragraph 4.2 that have attracted an objection.
- 5.6 The Independent Reviewer may contact TAC employees and sub-contractors, including those involved in the person's claim, to provide information to help with their evaluation (noting some may be subject to legal privilege).
- 5.7 The Independent Reviewer will provide their recommendation within an agreed timeframe to the relevant Executive leader, who will consider the recommendation and ultimately resolve whether some or all costs are to be waived. An outcome will be communicated within 45 days of the objection being received.

6. APPLICATION

- 6.1 These Guidelines take effect on 1 October 2023, superseding version 2.1 of the 2012 Guidelines last published on 10 November 2016.
- 6.2 The Guidelines will be reviewed at or around 12 months from that date, to determine the impact of administrative and operational changes on relevant stakeholders and the influence of any broader changes to litigated costs in Victoria.
- 6.3 The TAC Relevant Manager is the TAC employee holding the position of Manager Settlements and Recoveries, or their delegate.

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