



**LAW  
INSTITUTE  
VICTORIA**

## **Transport Accident Act**

### **Common Law Protocol**

**30 March 2026**

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## 1. PROCESS MAP

- 1.1. By agreeing to this protocol, a client's lawyer agrees to follow the [common law protocol process map](#) as published on the TAC's website. The process map has been jointly developed and agreed to by the TAC, ALA, and LIV, and will not be modified except by agreement between these parties.

## 2. OPERATION

- 2.1. This protocol applies to all applications made on or after 30 March 2026 for the following procedures and proceedings under Sections 93 and 94 of the TAA for:
  - 2.1.1. Requests to the TAC for a serious injury certificate; or
  - 2.1.2. Applications to a Court for leave to bring an action for damages; or
  - 2.1.3. 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.
- 2.2. Any application described in Chapters 3, 5 and 16 lodged before 30 March 2026 will be determined in accordance with the [Common Law Protocol 2016](#), [Supplementary Common Law Protocol 2016](#) and [Common Law Time Limit Protocol 2022](#).
- 2.3. This protocol should be read in conjunction with the [Protocols Framework Agreement](#), which outlines the overarching principles and terms governing the operation of all protocols between the parties.
- 2.4. To assist in advising a client on the appropriate compensation pathway, the client's lawyer is encouraged to request TAC's view on liability at the earliest possible point. This request should be made in accordance with the process set out in Chapter 8 of the Protocols Framework Agreement. This assists the client in selecting the most timely and efficient pathway through the impairment and serious injury/common law process. Any preliminary view is provided on a "without prejudice" basis.
- 2.5. It is agreed that Joint Medical Examinations (JMEs) can be utilised in the Common Law Protocol. JMEs are governed by the [Joint Medical Examination Protocol](#) which is to be read in conjunction with this protocol.

### DEFENDANT/S NOT INDEMNIFIED BY THE TAC

- 2.6. 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 client'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 5, prior to issuing an Originating Motion.
- 2.7. 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 client'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.
- 2.8. 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 19.
- 2.9. Where a matter does not successfully resolve at a common law conference in accordance with these protocols, the client'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 client's common law action by reference to the appropriate Court scale.

- 3.10. 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.

### 3. SERIOUS INJURY FAST TRACK APPLICATIONS

- 3.1. A 'Serious Injury Fast Track Application' is where a client's legal representative applies to the TAC to expedite the serious injury process on the basis that their client has a clearly demonstrable serious injury.
- 3.2. Serious Injury Fast Track applications must only be used where the serious injury is clearly demonstrable and the TAC indemnifies the defendant pursuant to Section 94 or is the likely defendant pursuant to Section 96 of the TAA. Examples of suitable cases include amputations, joint replacements, significant spinal injuries, severe acquired brain injuries and gross scarring.
- 3.3. A Serious Injury Fast Track application cannot be lodged where there is an existing serious injury application being considered by the TAC for the same transport accident or for accidents arising in the course of employment.
- 3.4. To support client-centred decision-making where new treating practitioner information indicates the application meets the criteria in Clause 3.2, a Fast Track application may proceed even if an Impairment Assessment application form has already been lodged under Chapter 6 of the [Impairment Assessment Protocols 2026](#).
- 3.5. Serious Injury Fast Track applications are not appropriate in cases where:
  - 3.5.1. There is a dispute about liability in respect to the claimed serious injury;
  - 3.5.2. Liability is still under investigation in respect to the claimed serious injury;
  - 3.5.3. There is a history of pre-existing injuries or aggravations in respect to the claimed serious injury; or
  - 3.5.4. Where the TAC does not intend to admit accident liability.
- 3.6. Where accident circumstances appear unclear, consider seeking TAC's view on liability pursuant to Clause 2.4.
- 3.7. To commence the fast track process, a Serious Injury Fast Track application must be lodged using the prescribed form on TAC's website ([Serious Injury Fast Track application](#)).
- 3.8. A Serious Injury Fast Track application form must include sufficient supporting information about the client's injury as outlined in the [Protocols Documentation Standard](#).
- 3.9. Affidavits pursuant to Clause 5.2.8 are not required to be submitted in the fast track process.
- 3.10. Within 14 days of receipt, the TAC will advise the client's lawyer whether:
  - 3.10.1. A serious injury certificate is granted; or
  - 3.10.2. The TAC requires a serious injury application pursuant to Chapter 5 to be lodged.
- 3.11. The TAC's response pursuant to Clause 3.10.2 or failure to meet the timeframe pursuant to Clause 3.10 does not:
  - 3.11.1. Require reasons; and
  - 3.11.2. Does not constitute a decision to deny the client a Serious Injury Certificate.
- 3.12. As the TAC's response or lack of response does not constitute a Serious Injury denial, the parties agree that an Originating Motion will not be issued.
- 3.13. Within 10 days of a determination pursuant to Clause 3.10.1 the TAC must provide:
  - 3.13.1. Details of the TAC person responsible for the conduct of the common law claim; and
  - 3.13.2. All information listed in Clauses 6.1.2 to 6.1.4.

- 3.14. Within 28 days of receipt of the TAC's correspondence in Clause 3.13, a client's lawyer must contact the TAC person responsible for the common law claim to discuss future progress of the claim based on the client's individual circumstances. The discussion should cover the matters outlined in Clause 10.11.

#### 4. BYPASS OF IMPAIRMENT PROCESS

- 4.1. Where practical and in the interests of the client, an impairment assessment pursuant to Section 46A of the TAA may be bypassed to enable earlier progression of a serious injury application and/or common law claim.
- 4.2. A client's lawyer will notify TAC that the client intends to bypass the impairment process by indicating this on the serious injury application form as described in Chapter 5.
- 4.3. Where a client elects to bypass the impairment process, the TAC will make an impairment determination pursuant to Section 47(7) of the TAA prior to the common law settlement being paid.

#### 5. LODGEMENT OF A SERIOUS INJURY APPLICATION

- 5.1. Clients and their lawyers will ensure that any application made to TAC for a serious injury certificate will be lodged using the prescribed form on TAC's website ([Serious Injury Application Form](#)) and will be a meaningful application with all relevant information.
- 5.2. A serious injury application form must include all relevant information as outlined in the [Protocols Documentation Standard](#), and:
- 5.2.1. Specify the injury or injuries relied on by the client; and
- 5.2.2. Specify the sub-paragraphs of the definition of serious injury in Section 93(17) of the TAA relied upon by the client to constitute a serious injury; and
- 5.2.3. Specify medico-legal examinations that have been conducted. JME reports do not require attachment to the application; and
- 5.2.4. Attach copies of any information or documents relating to liability, including expert and other witness opinions, already obtained by the client's lawyer and to be relied upon; and
- 5.2.5. Specify registration details of all vehicles involved (where known); and
- 5.2.6. Specify details of the insurer where a proposed defendant is not indemnified by the TAC (where known); and
- 5.2.7. 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.
- 5.2.8. Must attach an affidavit detailing:
- 5.2.8.1. All proposed defendant/s, a summary of the accident circumstances and the allegations of negligence;
- 5.2.8.2. If the client has been known by a previous surname or any other name;
- 5.2.8.3. Any body function or body functions said to be impaired and on which reliance is placed;
- 5.2.8.4. 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;
- 5.2.8.5. The effect of the injury or injuries on the client's past and future employment and earning capacity;
- 5.2.8.6. Any relevant pre-existing and/or unrelated medical conditions;

5.2.8.7. 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 client to obtain alternative duties or return to work.

5.2.9. Where a client has an administrator/guardian the application may be supported by an affidavit or a summary addressing the issues in Clause 5.2.8.

- 5.3. Within 14 days of receipt of the serious injury application form, the TAC must acknowledge receipt of the application. The acknowledgement must include the date on which the application was received and the contact details of the TAC employee assigned to the case.

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

- 5.4. The TAC will consider any serious injury application on its merits in accordance with section 38A of the TAA which requires the TAC to determine whether it appears that the client is entitled to compensation in relation to the injury under the Accident Compensation Act 1985 or the Workplace Injury Rehabilitation and Compensation Act 2013, even where the client does not have an accepted workers' compensation claim in regards to the alleged injuries.

- 5.5. When lodging a serious injury application form for a transport accident arising in the course of employment, in addition to the material required in Clause 5.2, the following information must be provided:

5.5.1. The worker's compensation claim number, details of the insurer for the worker's compensation claim and a copy of the file;

5.5.2. Date and location of accident;

5.5.3. The name of proposed defendant/s;

5.5.4. A signed [Authority to Release Information \(General\)](#) authority from the client, authorising the TAC to:

- make enquiries with the relevant employer at the time of accident;
- obtain a copy of the worker's compensation claim file where the insurer or agent is not a WorkSafe agent, including interstate insurers, self-insurers, or Comcare; and
- arrange any required Independent Medical Examination/s (IME/s).

5.5.5. Evidence that the subject accident meets the definition of a transport accident, referencing any investigation report or other material that supports this view;

5.5.6. Details of the registration, make, model and any other identifying features of the claimed negligent vehicle/s;

5.5.7. Indication if a serious injury application has been lodged or is intended to be lodged under section 134AB of the Accident Compensation Act 1985 (Vic) or Part 7, Division 2 of the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) (as amended).

- 5.6. The TAC will not provide a preliminary view on liability for transport accidents arising in the course of employment.

- 5.7. Within 14 days of receiving the application under Clause 5.5, the TAC will request the worker's compensation file from WorkSafe and provide the client's lawyer with a TAC claim number.

- 5.8. Within 28 days of receiving the application under Clause 5.5, the TAC will advise the client's lawyer whether it is accepted that the injuries arose as a result of a transport accident or whether investigations are required. If a TA decision is not made within 90 days, the client's lawyer may seek resolution of the matter in accordance with Chapter 9 of the [Protocols Framework Agreement](#). Once acceptance is confirmed, the matter will proceed in accordance with Chapter 6.

- 5.9. The time frames in Chapter 6 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 5.8 has been communicated to the client's lawyer.

- 5.10. Where a client has received an impairment determination 30% or more whole person impairment from a WorkSafe Agent, and the client's lawyer seeks a determination under section 47(7) of the TAA, the client's lawyer must submit a serious injury application to the TAC in accordance with Chapter 5. The application must include all information and evidence relevant to the impairment determination. The TAC will assess the request as part of its overall serious injury assessment process.

## 6. SERIOUS INJURY DECISION MAKING PROCESS

- 6.1. Within 45 days of receipt of a serious injury application form, the TAC will:

- 6.1.1. Review the application to confirm whether it includes the required information in accordance with the [Protocols Documentation Standard](#). Where any information is missing, the TAC will endeavour to notify the client's lawyer following lodgement as soon as is practicable. The timeframes in this Chapter do not commence until all required information has been received;
- 6.1.2. Exchange any information or documents relating to liability, including expert and other witness opinions, already obtained;
- 6.1.3. TAC may provide a preliminary view on liability. This preliminary view on liability is provided on a "without prejudice" basis; and
- 6.1.4. Provide the client's lawyer with a list and copy of all medical reports or other relevant information not previously provided.

- 6.2. Where there has been a genuine effort to include sufficient supporting information in accordance with the [Protocols Documentation Standard](#), the TAC must within 45 days of receipt of a serious injury application form:

- 6.2.1. Provide a serious injury certificate where consent is given; or
- 6.2.2. Provide notice to the client's lawyer of the intention to deny the application (see Clause 6.8); or
- 6.2.3. Contact the client's lawyer to arrange a serious injury conference (see Clause 8.2); or
- 6.2.4. Provide notice to the client's lawyer that the TAC reasonably requires:
  - 6.2.4.1. Additional relevant information relating to matters addressed in the application or its supporting material that goes beyond what is specified in the [Protocols Documentation Standard](#);
  - 6.2.4.2. A signed authority from the client to allow the TAC to obtain specific additional information, or written confirmation from the client's lawyer that they will obtain and provide the required information;
  - 6.2.4.3. Additional medical material of a fundamental nature, where such material is required to clarify an issue raised in a medical report attached to the application;
  - 6.2.4.4. Additional relevant information or to conduct enquiries with a third party;
  - 6.2.4.5. The client to undergo an IME. The IME should be arranged to occur within six months of the serious injury application being lodged. This timeframe can be extended by way of agreement. Where the parties cannot reach agreement, Chapter 7 applies.

- 6.3. A client 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 client's lawyer must:

- 6.3.1. 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
  - 6.3.2. Provide a signed authority (if required) and advise the TAC to obtain the information directly; or
  - 6.3.3. 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.
- 6.4. Once the client's lawyer believes that all information requested by the TAC pursuant to Clause 6.2.4 has been provided, they must advise the TAC and detail the documents or material submitted in response. The correspondence must confirm that no further information is outstanding and that a determination is now expected within 28 days.
- 6.5. Within 28 days of receipt of the client's lawyer notification pursuant to Clause 6.4 or the IME report/s, whichever is the latter, the TAC must:
- 6.5.1. Provide a serious injury certificate where consent is given; or
  - 6.5.2. Request further additional information pursuant to Clause 6.6; or
  - 6.5.3. Provide notice to the client's lawyer of the intention to deny the application (see Clause 6.8); or
  - 6.5.4. Provide notice to the client's lawyer that the TAC reasonably requires the client to attend one or more IME/s; or
  - 6.5.5. Contact the client's lawyer to arrange a serious injury conference (see Clause 8.2).
- 6.6. Should either party consider that further additional information is required, the parties may agree on a process and timeframe in which to obtain and exchange the material. If agreement cannot be reached, refer to Chapter 7.
- 6.7. A client's lawyer must respond to the TAC's request for further additional material (pursuant to Clause 6.5.2) in accordance with the requirements outlined in Clause 6.3.
- 6.8. If the TAC is intending to deny the application pursuant to Clauses 6.2.2 and 6.5.3, the TAC will write to the client's lawyer explaining the reasons for the proposed denial. The TAC will exchange all relevant information (including any potential credit material) that it has considered in forming this view.
- 6.8.1. Upon receiving the TAC's flagged denial letter pursuant to Clause 6.8, the client's lawyer may request an informal online meeting with the TAC to discuss the proposed denial. The TAC must be prepared to discuss the reasons and information relied upon in reaching the decision. If requested, the informal online meeting must occur within 14 days of the date of the TAC's proposed denial correspondence, unless the parties agree otherwise.
  - 6.8.2. The purpose of the informal meeting is to provide a brief opportunity for discussion regarding the proposed denial. This meeting is to occur between the client's lawyer and a TAC person responsible for making the serious injury decision. Barristers are not expected to participate and the parties agree that TAC will not be liable for any barrister disbursements.
  - 6.8.3. The parties may agree to proceed to a serious injury conference for further discussion and/or the client's lawyer may indicate the intention to obtain additional supporting material in response to the TAC's proposed denial.
  - 6.8.4. If the request for the informal meeting is not received within 14 days or if no agreement is reached at the informal meeting, the TAC will proceed to make a serious injury decision.



- 6.9. If additional information is provided by the client's lawyer pursuant to Clause 6.8.3 and a new and relevant issue is raised in this material, the TAC may arrange IME/s or make additional requests for information pursuant to Clause 6.2.4 if clarification of this issue would assist in the decision making process. In this situation, the requirements outlined in Clauses 6.6 and 6.7 apply to the parties.
- 6.10. 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 6.2.4 and 6.5 or 8.11, whichever is the latter, the application may be considered denied. Before taking further steps, the parties are expected to attempt resolution through the process outlined in Chapter 9 of the [Protocols Framework Agreement](#).
- 6.11. Information and/or documents not exchanged between the client 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.

## **7. DISAGREEMENT REGARDING RELEVANCE OF INFORMATION**

- 7.1. 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 must make reasonable efforts to resolve the issue prior to finalising the application under this protocol and issuing an Originating Motion.
- 7.2. Within 21 days of receipt of an explanation from the client's lawyer pursuant to Clause 6.3.3 the TAC will either:
- 7.2.1. Make a proposal to modify the request for additional information; or
  - 7.2.2. 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.
- 7.3. Following receipt of the TAC's response, the client's lawyer must either provide the requested information or, if disagreement remains, refer the matter to Chapter 9 of the [Protocols Framework Agreement](#) to resolve or clarify the issues in dispute.
- 7.4. If the dispute regarding the relevance and provision of information is unable to be resolved, the client may instruct their lawyer to finalise the application under these protocols and issue an Originating Motion. Prior to adopting this course of action, the client and their lawyer should have regard to their obligations under the Civil Procedure Act and Guiding Principles outlined in the [Protocols Framework Agreement](#) 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.
- 7.5. Where a client 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 client has elected to finalise their application, the TAC is not obliged to give reasons for denying the application.
- 7.6. If the requested material, which was the subject of the dispute between the parties, is later obtained or provided by the client's lawyer for the purpose of an Originating Motion, the TAC can rely upon any correspondence or notes of conversations with the client's lawyer in relation to any costs that may be applicable.

## **8. SERIOUS INJURY CONFERENCE**

- 8.1. To assist in the application and decision making process the parties may participate in a serious injury conference.



- 8.2. If the TAC considers that a conference would assist in the determination of the serious injury application it should contact the client's lawyer to arrange a serious injury conference.
- 8.3. 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.
- 8.4. A serious injury conference should occur within 60 days of either party requesting the conference. The client's lawyer is responsible for arranging the logistics of the conference, including scheduling and providing the necessary online platform access details. Active participants must be advised by both parties in advance. Observers attending for training and development purposes may attend with prior notification. Recording of the conference is not permitted unless mutually agreed. Any breach of conduct issues arising during the conference are to be managed in accordance with Chapter 9 of the [Protocols Framework Agreement](#).
- 8.5. The client must be present at the conference and may be represented by counsel. It is anticipated that there is meaningful dialogue directly with the client about their transport accident related injuries and the effects of those injuries.
- 8.6. It is mandatory that the client attends the conference and meets with the TAC representatives for the purpose of the dialogue. The TAC accepts that this may be a stressful event for the client and agrees that the dialogue should be part of a non-threatening and participative discussion between the client, his or her legal representative and the TAC. If the client 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.
- 8.7. The TAC will ensure that a representative who has the appropriate authority and delegation will be present at the conference.
- 8.8. If it appears credit may become an issue, the TAC's representative must outline the potential credit issues and must provide the credit material to the client's representative at the conference. If the TAC holds credit material and determines at the conference that credit is unlikely to be an issue, the TAC's representative will advise the client's lawyer at the conclusion of the conference and provide the credit material to them within an agreed timeframe.
- 8.9. 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 7.6 applies).
- 8.10. If during the conference the TAC agrees to grant a serious injury certificate to the client, the parties are encouraged to discuss the client's common law claim in accordance with Chapter 13.
- 8.11. 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 6.2.4 if the additional material will assist in the decision making process.

## **9. SERIOUS INJURY DECISION**

- 9.1. The TAC's serious injury decision letter will be forwarded to the client's lawyer and:
- 9.1.1. Provide a serious injury certificate where consent is given;
  - 9.1.2. Where a serious injury certificate is denied, give the reasons for refusing to grant the serious injury certificate unless previously provided pursuant to Clause 6.8;
  - 9.1.3. Attach the information and documents used to make the decision where this has not been previously provided;
  - 9.1.4. Confirm whether or not the TAC indemnifies the proposed defendant if this is known.

## **10. PROACTIVE COMMON LAW ELIGIBILITY DECISIONS & PROCESS**

- 10.1. A 'Proactive Common Law Eligibility Decision' is where the TAC identifies that a client (whether legally represented or not) has a serious injury and proactively grants a serious injury certificate or determines their level of impairment at 30% or more.
- 10.2. The parties agree that, subject to a client's instructions, where the TAC has proactively made a decision that a client has a serious injury and admitted liability, the preferred approach is to bypass the impairment process pursuant to Chapter 4 or suspend the impairment process if it has already commenced.

### **CLIENTS WITH LEGAL REPRESENTATION**

- 10.3. The TAC will write to a client's lawyer and provide the serious injury certificate or impairment determination letter where:
  - 10.3.1. the TAC proactively grants a serious injury certificate; or
  - 10.3.2. the TAC determines a client's impairment at 30% or more and the TAC considers there is common law potential.
- 10.4. Within 10 days of above the TAC must also provide:
  - 10.4.1. Details of the TAC person responsible for the conduct of the common law claim; and
  - 10.4.2. A "without prejudice" preliminary view on liability and all information in accordance with Clauses 6.1.2 and 6.1.4;

### **CLIENTS WITHOUT LEGAL REPRESENTATION**

- 10.5. Where a client does not have legal representation and any of the following occur:
  - 10.5.1. the client requests that the TAC assess their common law entitlement; or
  - 10.5.2. the TAC proactively grants a serious injury certificate; or
  - 10.5.3. the TAC determines a client's impairment at 30% or more and the TAC considers that it would admit liability;
- 10.6. The TAC will:
  - 10.6.1. Contact or attempt to contact the client by telephone to explain the TAC's position or decision and the next steps in the common law process. The TAC may offer the client an opportunity for a face-to-face meeting. The content of any conversation will be limited to an overview of the general process. The TAC representative may not discuss any details of liability or quantum specific to the client's circumstances; and/or
  - 10.6.2. Send a letter and where applicable a fact sheet(s) to the client explaining the TAC's decision along with a serious injury certificate (if applicable). The TAC will advise the client that they need to engage a personal injury lawyer to progress their common law entitlement.

### **COMMON LAW REQUESTS BY CLIENTS**

- 10.7. Where a client without legal representation requests that the TAC assess their common law entitlement and the TAC believes that liability or satisfying the serious injury threshold may be in issue, the TAC will recommend that the client obtain legal advice from a personal injury lawyer.
  - 10.7.1. When advising the client to engage a personal injury lawyer, the TAC will recommend and encourage that the client engages a legal firm that participates in the Protocols and has expertise in Plaintiff Personal Injury Law.
  - 10.7.2. If the client subsequently instructs a lawyer to pursue common law compensation a serious injury application must be lodged pursuant to Chapter 5.

### **WHEN AN ELIGIBLE CLIENT SUBSEQUENTLY ENGAGES A LAWYER**

- 10.8. A lawyer engaged by a client who has become eligible to pursue common law damages via a proactive process described in this Chapter should within 14 days of receiving instructions use the [Solicitors Contact Guide](#) to confirm to the TAC that they act on behalf of the client and seek the details of the TAC person responsible for the conduct of the common law claim.
- 10.9. Within 10 days of being contacted by the lawyer the TAC must provide:
  - 10.9.1. Details of the TAC person responsible for the conduct of the common law protocols claim; and
  - 10.9.2. A “without prejudice” preliminary view on liability and all information in accordance with Clauses 6.1.2 and 6.1.4.

## **DISCUSSION TO FACILITATE PROGRESS OF COMMON LAW CLAIM FOLLOWING PROACTIVE**

- 10.10. Within 28 days of receipt of the TAC’s correspondence in Clauses 10.4 or 10.9, a client’s lawyer must contact the TAC person responsible for the common law protocols claim to discuss future progress of the claim based on the client’s individual circumstances.
- 10.11. The topics to discuss may include, but are not limited to:
  - 10.11.1. Whether it is appropriate to schedule a common law conference and the timing of a conference;
  - 10.11.2. Confirmation that the impairment process will be bypassed or suspended;
  - 10.11.3. The need for additional treating practitioner material;
  - 10.11.4. The need for any JME/s or IME/s to assist with the assessment of common law damages;
  - 10.11.5. Whether the client’s claim is limited to pain and suffering damages only or whether a pecuniary loss claim will be pursued. If a pecuniary loss claim will be pursued, the financial documentation required in support;
  - 10.11.6. Whether affidavits (from the client and/or lay affidavits) would assist the parties;
  - 10.11.7. Whether an Interim Common Law Payment or a Partial Common Law Settlement is appropriate in the client’s circumstances;
    - 10.11.7.1. The parties should not need to convene a protocols conference to facilitate an Interim Common Law Payment or a Partial Common Law Settlement;
  - 10.11.8. The expected timeframe for the lodgement of the common law application form as per Clause 10.13.
- 10.12. Alternatively, the client’s lawyer may include a letter to the common law application form outlining the above information.
- 10.13. Prior to scheduling a common law conference, the client’s lawyer must submit a common law application form using the prescribed form on TAC’s website ([Common Law application form](#)) and:
  - 10.13.1. Submit the information listed in the [Protocols Documentation Standard](#), along with any additional information requested during the discussions referred to in Clause 10.11, if applicable.

## **11. COMMON LAW**

- 11.1. A client 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:
  - 11.1.1. A TAC impairment decision of 30% or more; or

- 11.1.2. A VCAT review determination or resolution producing an impairment of 30% or more; or
- 11.1.3. Consent by the TAC in accordance with Section 93(4)(c) of the TAA; or
- 11.1.4. Leave of the Court after a serious injury application (Section 93(4)(d) of the TAA); or
- 11.1.5. Confirmation that the TAC indemnifies the proposed defendant in a common law claim pursuant to Part III of the Wrongs Act; or
- 11.1.6. 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.

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

- 12.1. The TAC must within 10 days of the client’s entitlement to bring proceedings advise the client’s lawyer of the name of the TAC person responsible for the conduct of the common law protocol conference.
- 12.2. The client’s lawyer must within 28 days of the client’s entitlement to bring proceedings:
  - 12.2.1. 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
  - 12.2.2. 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 client’s individual circumstances; and
  - 12.2.3. Provide the TAC with any client information, medical reports, or pecuniary loss documentation as described in Chapter 5, including updated information, unless already provided; and
  - 12.2.4. Provide Particulars of Pecuniary Loss where the loss claimed is greater than \$200,000. Such particulars are intended to promote appropriate preparation and settlement discussions between the parties and are provided on a “without prejudice” basis.
- 12.3. The TAC must provide to the client’s lawyer within 28 days of receiving the request for a common law conference any additional information and documents, including:
  - 12.3.1. All investigations reports, including all witness statements;
  - 12.3.2. Police reports and statements;
  - 12.3.3. Medical reports not previously provided or exchanged;
  - 12.3.4. An indication whether liability is admitted and, if not, a list of defences which the TAC will rely on. The TAC’s position on liability is provided on a “without prejudice” basis.
  - 12.3.5. Expert witness opinions and reports;
  - 12.3.6. Any relevant documents not otherwise relied upon;
  - 12.3.7. The identity of any other parties responsible for the damage including their insurers, where this is known.

- 12.4. Information and/or documents not exchanged between the client 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.

### **13. COMMON LAW DAMAGES CONFERENCE**

- 13.1. The client, their lawyer and a representative of the TAC with appropriate financial delegation must attend a common law conference.
- 13.2. Either party may elect for a common law conference to be mediated, in which case:
- 13.2.1. The mediator shall be accredited and suitable to both parties;
  - 13.2.2. The TAC will pay the mediator's reasonable fee; and
  - 13.2.3. 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.
- 13.3. If pecuniary loss greater than \$200,000 is to be claimed, Particulars of Loss must be provided at least 7 days prior to the conference. Such Particulars of Loss should not be put on an ambit basis, are intended to facilitate settlement discussions between the parties and are provided on a "without prejudice" basis.
- 13.4. A common law conference will conclude when the issues in dispute have resolved and a release has been signed by the TAC and the client, or, when resolution cannot reasonably be achieved as part of the common law conference process.
- 13.5. 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.
- 13.5.1. A secondary conference should be held with further exchange of material pursuant to the relevant information exchange clauses. Certification pursuant to Clause 13.6 should not occur and proceedings are unable to be issued until such time as the secondary conference has occurred.
- 13.6. 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.
- 13.7. 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 client's lawyer and the TAC agree that the disclosure may be made or unless required by law.
- 13.8. 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 client requires a litigation guardian/administrator.
- 13.9. The provisions and obligations in relation to exchange of information do not apply following the conclusion of a common law protocol conference and certification pursuant to Clause 13.6.

### **14. DAMAGES CLAIMS "ARISING OUT OF THE USE OF" PURSUANT TO SECTION 94(1) OF THE TAA**

- 14.1. Prior to the issuing of any proceedings, if a client intends to make a damages claim pursuant to Section 94(1) of the TAA a letter of notification to the TAC must be provided.

- 14.2. The letter should be titled “Damages claim – arising out of the use of” and the Client’s lawyer should follow the process outlined in the [Solicitors Contact Guide](#) to submit it to the TAC. The letter must include:
- 14.2.1. A request for the damages claim to be considered pursuant to these protocols;
  - 14.2.2. A list of injuries claimed;
  - 14.2.3. The proposed defendant/s and the registration details of the alleged vehicle involved;
  - 14.2.4. A summary of the accident circumstances and the allegations of negligence.
- 14.3. 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.
- 14.4. Within a further 14 days of the TAC’s acknowledgement in Clause 14.3, the TAC will provide an additional response to the request advising:
- 14.4.1. Whether it indemnifies the proposed defendant/s;
  - 14.4.2. Whether it accepts the injuries arose out of the use of a vehicle; and
  - 14.4.3. Whether further enquiries or information is required to confirm indemnity and an expected timeframe to complete these enquiries.
- 14.5. When the TAC is in a position to confirm indemnity, a letter will be sent to the client’s lawyer confirming that the claim can proceed pursuant to these protocols and requesting any additional information in support of the claim.
- 14.6. Within 60 days of the TAC’s written confirmation of indemnity in Clause 14.5, the client’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:
- 14.6.1. A summary of the accident circumstances and the allegations of negligence;
  - 14.6.2. Particulars of damage quantifying the claim for each head of damage;
  - 14.6.3. Copies of all medical reports to be relied upon;
  - 14.6.4. Copies of any information or documents relating to liability, including expert and other witness opinions, already obtained and to be relied upon; and
  - 14.6.5. 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.
- 14.7. A conference will be scheduled unless the TAC reasonably requires additional information (e.g. medical reports) or for the client to attend IME/s.
- 14.8. Within 28 days of receiving the client’s material in Clause 14.6 or information requested pursuant to Clause 14.7, whichever is the latter, the TAC must provide to the client’s lawyer any relevant information or liability documents that the TAC has in its possession including:
- 14.8.1. An indication whether liability is admitted and, if not, a list of defences which the TAC will rely on;
  - 14.8.2. All investigations reports including all witness statements obtained;
  - 14.8.3. Police reports and statements (if relevant);

- 14.8.4. Expert witness opinions and reports;
  - 14.8.5. Medical reports not previously provided or exchanged;
  - 14.8.6. Any relevant documents not otherwise relied upon; and
  - 14.8.7. The identity of any other parties responsible for the damage including their insurers, where this is known.
- 14.9. Following the above exchange of material, the parties will participate in a common law conference pursuant to Chapter 13 of these protocols.

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

- 15.1. If a client 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.
- 15.2. The letter should be titled “Damages claim – pursuant to Part III of the Wrongs Act 1958” and the client’s lawyer should follow the process outlined in the [Solicitors Contact Guide](#) to submit it to the TAC. The letter must include:
- 15.2.1. A request for the damages claim to be considered pursuant to these protocols;
  - 15.2.2. The proposed defendant/s and the registration details of the alleged vehicle involved;
  - 15.2.3. A summary of the accident circumstances and the allegations of negligence;
  - 15.2.4. The TAC claim reference number if the TAC has already paid benefits pursuant to Sections 57 and/or 58 of the TAA; and
  - 15.2.5. 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.
- 15.3. 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.
- 15.4. Within a further 14 days of the TAC’s acknowledgement in Clause 15.3, the TAC will provide an additional response to the request advising:
- 15.4.1. Whether it indemnifies the proposed defendant;
  - 15.4.2. 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;
  - 15.4.3. Whether further enquiries or information is required to confirm indemnity and an expected timeframe to complete these enquiries.
- 15.5. When the TAC is in a position to confirm indemnity, a letter will be sent to the client’s lawyer confirming that the claim can proceed pursuant to these protocols and requesting any additional information in support of the claim.
- 15.6. Within 60 days of the TAC’s written confirmation of indemnity in Clause 15.5, the client’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:
- 15.6.1. A summary of the accident circumstances and the allegations of negligence;



- 15.6.2. Particulars of damage quantifying the claim for each head of damage;
- 15.6.3. Copies of any information or documents relating to liability, including expert and other witness opinions, already obtained and to be relied upon;
- 15.6.4. 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
- 15.6.5. Names and full details of all dependents for whom a claim will be made.
- 15.7. A conference will be scheduled unless the TAC reasonably requires additional information.
- 15.8. Within 28 days of receiving the client's material in Clause 15.6 or information requested pursuant to Clause 15.7, whichever is the latter, the TAC must provide to the client's lawyer any relevant information or liability documents that the TAC has in its possession including:
  - 15.8.1. An indication whether liability is admitted and, if not, a list of defences which the TAC will rely on;
  - 15.8.2. All investigations reports including all witness statements obtained;
  - 15.8.3. Police reports and statements;
  - 15.8.4. Expert witness opinions and reports;
  - 15.8.5. Any relevant documents not otherwise relied upon; and
  - 15.8.6. The identity of any other parties responsible for the damage including their insurers, where this is known.
- 15.9. Following the above exchange of material, the parties will participate in a common law conference pursuant to Chapter 13 of these protocols.

## **16. TIME LIMIT PROCEDURES**

- 16.1. According to the *Limitation of Actions Act 1958* an action for damages for personal injury should be brought within 6 years of the date of the injury or within 6 years of a minor turning 18.
- 16.2. The TAC, the client and the client's lawyer endeavour to resolve extension of time applications/serious injury/common law claims including applications lodged outside the 6 year limitation period pursuant to these Protocols before resorting to Originating Motions and/or Writs, resulting in decreased court proceedings.

### **16A) SERIOUS INJURY APPLICATIONS LODGED WITHIN THE 6 YEAR LIMITATION PERIOD**

- 16.3. In circumstances where a compliant application pursuant to Chapter 5 has been received by the TAC within the 6 year limitation period, the TAC undertakes that it will not rely upon any defence pursuant to the Limitation of Actions Act 1958 in any subsequent common law claim provided:
  - 16.3.1. The TAC indemnifies the prospective defendant/s; or
  - 16.3.2. The TAC is the defendant pursuant to s.94(7) or s.96; and
  - 16.3.3. The client files and serves an Originating Motion within 28 days of confirmation of the TAC's denial of serious injury pursuant to Chapter 9; and
  - 16.3.4. The client files and serves a Writ within 28 day of receipt of certification that the Common Law Protocols have concluded pursuant to Clause 13.6.

## **16B) NOTIFICATION WITHIN THE 6 YEAR LIMITATION PERIOD OF INTENTION TO LODGE A SERIOUS INJURY APPLICATION**

- 16.4. The client's lawyer will notify the TAC in the prescribed form on TAC's website ([Common Law Time Limit Application](#)) that the client intends to lodge a serious injury application pursuant to Chapter 5 prior to the expiration of 6 years from the date of the transport accident or prior to a minor turning 24 years of age, but where the serious injury application will be lodged after the expiration of the time limit. The client's lawyer will advise the TAC of an estimated date by which the serious injury application will be lodged but no more than 6 months after notification.
- 16.5. Within 21 days of receipt of the above notification the TAC will either:
- 16.5.1. Confirm in writing that the notification has been accepted and that the TAC will not rely upon any defence pursuant to the Limitation of Actions Act 1958 in any subsequent common law claim provided:
    - 16.5.1.1. The TAC indemnifies the prospective defendant/s; or
    - 16.5.1.2. The TAC is the defendant pursuant to s.94(7) or s.96; and
    - 16.5.1.3. The timelines in 16.10 and 16.14 are complied with; and
    - 16.5.1.4. The client files and serves an Originating Motion within 28 days of confirmation of the TAC's denial of serious injury pursuant to Chapter 9; and
    - 16.5.1.5. The client files and serves a Writ within 28 day of receipt of certification that the Common Law Protocols have concluded pursuant to Clause 13.6.
  - 16.5.2. Advise the client's lawyer that the prescribed form is incomplete and notification cannot be accepted until the prescribed form has been completed in full.
- 16.6. The TAC's failure to meet the timeframe pursuant to Clause 16.11 will result in a deemed undertaking by the TAC that it will not rely upon any defence pursuant to the Limitation of Actions Act (1958) in any subsequent common law claim (subject to 16.14 below) provided the client files and serves a Writ within 28 day of receipt of certification that the Common Law Protocols have concluded pursuant to Clause 13.6.
- 16.7. The parties agree that an Originating Motion will not be issued unless it is done so in accordance with these Protocols.
- 16.8. The client's lawyer is permitted to seek a further 3 month extension of time (or a timeframe agreed to by the TAC) within which to submit the serious injury application.
- 16.8.1. The request for an extension of time must be received by the TAC before the expiry of the estimated date provided pursuant to Clause 16.10;
  - 16.8.2. The request for an extension of time should provide reasons for the delay in making the serious injury application and advise the date by which the serious injury application will be lodged but no more than 9 months after notification.
- 16.9. In the event that a serious injury application is not received within the timeframes specified in Clauses 16.10 and 16.14 the undertaking provided by the TAC pursuant to Clauses 16.11 or 16.12 is revoked.

## **16C) NOTIFICATION OUTSIDE THE 6 YEAR LIMITATION PERIOD OF AN INTENTION TO LODGE A SERIOUS INJURY APPLICATION**

16.10. The client's lawyer will notify the TAC in the prescribed form on TAC's website ([Common Law Time Limit Application](#)) that the client intends to lodge a serious injury application pursuant to Chapter 5 more than 6 years after the date of the transport accident or after a minor has turned 24. The client's lawyer will advise an estimated date by which the serious injury application will be lodged but no more than 6 months after notification.

16.11. Within 21 days of receipt of the above notification the TAC will either:

16.11.1. Confirm in writing that the notification has been accepted and that the TAC will not rely upon any additional prejudice incurred from the date that the notification was received until 28 days after the Common Law Protocols have concluded, in any subsequent legal proceedings provided:

16.11.1.1. The TAC indemnifies the prospective defendant/s; or

16.11.1.2. The TAC is the defendant pursuant to s.94(7) or s.96; and

16.11.1.3. The timelines in 16.16 and 16.20 are complied with; and

16.11.1.4. The client files and serves an Originating Motion within 28 days of confirmation of the TAC's denial of serious injury pursuant to Chapter 9; and/or

16.11.1.5. The client files and serves a Writ within 28 day of receipt of certification that the Common Law Protocols have concluded pursuant to Clause 13.6.

16.11.2. Advise the client's lawyer that the prescribed form is incomplete and notification cannot be accepted until the prescribed form has been completed in full.

16.12. The TAC's failure to meet the timeframe pursuant to Clause 16.17 will result in a deemed undertaking by the TAC that it will not rely upon any additional prejudice incurred from the date that the notification was received until 28 days after the Common Law Protocols have concluded pursuant to Clause 13.6, in any subsequent legal proceedings (subject to 16.20 and 16.21 below).

16.13. The parties agree that an Originating Motion will not be issued unless it is done so in accordance with these Protocols.

16.14. The client's lawyer is permitted to seek a further 3 month extension of time (or a timeframe agreed to by the TAC) within which to submit the serious injury application.

16.14.1. The request for an extension of time must be received by the TAC before the expiry of the estimated date provided pursuant to Clause 16.16.

16.14.2. The request for an extension of time should provide reasons for the delay in making the serious injury application and advise the date by which the serious injury application will be lodged but no more than 9 months after notification.

16.15. In the event that a serious injury application is not received within the timeframes specified in Clauses 16.16 and 16.20 the undertaking provided by the TAC pursuant to Clauses 16.17 or 16.18 is revoked.

#### **16D) SERIOUS INJURY APPLICATION LODGED OUTSIDE THE 6 YEAR LIMITATION PERIOD OPERATION IN ACCORDANCE WITH SECTIONS 16B OR 16C**

16.16. Following lodgement of a notification pursuant to sections 16B or 16C a client's lawyer must submit a serious injury application in accordance with Chapter 5.

16.17. In addition to the serious injury application in accordance with Chapter 5, a client's lawyer must provide the following to the TAC at the time of lodging the application:

- 16.17.1. A list of all proposed Defendants (if not already provided);
  - 16.17.2. A written explanation based on the evidence at hand from the client's lawyer addressing the extent to which, having regard to the delay, there is any prejudice to the Defendant;
  - 16.17.3. A paragraph/s addressing the delay in lodging the serious injury application and providing reasons for the delay within the affidavit provided pursuant to Clause 5.2.8; or
  - 16.17.4. An affidavit sworn by the Plaintiff addressing the delay in lodging the serious injury application and providing reasons for the delay.
- 16.18. The Plaintiff's affidavit should address the relevant factors as outlined in s.23A(3) of the Limitation of Actions Act 1958 as follows:
- 16.18.1. The length of and reasons for the delay on the part of the Plaintiff;
  - 16.18.2. The extent, if any, to which the defendant had taken steps to make available to the Plaintiff means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the Defendant;
  - 16.18.3. The duration and extent of any disability of the Plaintiff arising on or after the date of the accrual of the cause of action (supporting material should be provided to the TAC);
  - 16.18.4. The extent to which the Plaintiff acted promptly and reasonably once they knew that the act or omission of the Defendant, to which the injury of the Plaintiff was attributable, might be capable at that time of giving rise to an action for damages;
  - 16.18.5. The steps, if any, taken by the Plaintiff to obtain medical, legal or other expert advice and the nature of any such advice they may have received.

## **16E) INFORMATION EXCHANGE**

- 16.19. In addition to the exchange of information pursuant to Clause 5.2.4, the client's lawyer must provide any material relevant to the Time Limit.
- 16.20. In addition to the exchange of information pursuant to Clause 6.1.2, the TAC must also exchange any material relevant to the Time Limit including but not limited to file notes and correspondence that notify or contemplate the potential for a common law claim.
- 16.21. In circumstances where liability is not admitted by the TAC in accordance with Clause 6.1.3, the client's lawyer must also provide a draft Statement of Claim within 28 days of receipt of the TAC's response.
- 16.22. When the TAC makes a serious injury decision pursuant to Chapter 9 or Clause 3.10.1, the TAC will also advise the client's lawyer whether the TAC intends to rely upon the limitation defence in any future legal proceedings.
- 16.23. The parties agree that an Originating Motion will not be issued unless the serious injury application has been denied in accordance with this protocol.
- 16.24. In circumstances where the TAC grants a serious injury certificate and advises that the TAC intends to rely upon the limitation defence in any future legal proceedings, the parties agree that in accordance with the Civil Procedure Act there is value in participating in a common law protocols conference. The parties agree that a Writ will not be issued until certification that the conference has concluded without resolution has been issued pursuant to Clause 13.6.

## **17. INTERIM COMMON LAW PAYMENTS**

- 17.1. An 'Interim Common Law Payment' is:

- 17.1.1. Where there is a partial payment of a client's pain and suffering head of damage;
- 17.1.2. Subject to an Agreement (not a Release); and
- 17.1.3. Where the client retains the right to pursue a final settlement of both heads of damage (pain and suffering and pecuniary loss) at a later stage.
- 17.2. An Interim Common Law Payment is potentially available to all clients who are entitled to common law damages.
- 17.3. The TAC may offer a client an Interim Common Law Payment where the parties agree it is appropriate in the client's circumstances.
- 17.4. An Interim Common Law Payment can be requested by the client's lawyer at any time. The parties do not need to convene a protocols conference to initiate or facilitate this payment.
- 17.5. The decision to make an Interim Common Law Payment is at the sole discretion of the TAC, including the amount of the payment.
- 17.6. In determining whether to make an Interim Common Law Payment the TAC will have regard to the Model Litigant Guidelines and the circumstances of the case.
- 17.7. An Interim Common Law Payment will be limited to pain and suffering damages only.
- 17.8. Where an Interim Common Law Payment is offered and accepted, the TAC will forward an Agreement to the client's lawyer for signing by the client.
  - 17.8.1. The TAC's Agreement document will stipulate that where the parties have acted in good faith, and specifically in the absence of fraud or misrepresentation, the TAC will not separately seek to recover any interim payment made or offset an interim payment against any other entitlement the client may have under Part 3 of the Transport Accident Act 1986 with respect to the subject claim or any other claim.
- 17.9. Unless otherwise agreed by the parties, the client's signed Agreement will be returned to the TAC within 28 days. The client's interim payment will then be made to their lawyer in accordance with the terms of the Agreement.

## **18. PARTIAL COMMON LAW SETTLEMENT**

- 18.1. A 'Partial Common Law Settlement' is:
  - 18.1.1. Where there is final settlement of a client's pain and suffering head of damage;
  - 18.1.2. Subject to a Release; and
  - 18.1.3. Where the client retains the right to pursue a pecuniary loss claim at a later stage.
- 18.2. A Partial Common Law Settlement is potentially available to all clients who are entitled to common law damages.
- 18.3. Where it is appropriate, the parties may agree to settle a client's pain and suffering head of damage in full. Where a Partial Common Law Settlement occurs, the client will retain the right to pursue a pecuniary loss claim at a later stage.
- 18.4. A Partial Common Law Settlement can be requested by the client's lawyer at any time. The parties do not need to convene a protocols conference to initiate or facilitate this payment.
- 18.5. In determining whether to agree to a Partial Common Law Settlement the TAC will have regard to the Model Litigant Guidelines and the circumstances of the case.

18.6. Where a Partial Common Law Settlement occurs, the TAC will forward a Release to the client's lawyer for signing by the client.

18.6.1. The TAC's Release document will stipulate that where the parties have acted in good faith, and specifically in the absence of fraud or misrepresentation, the TAC will not separately seek to recover any partial payment made or offset a partial payment against any other entitlement the client may have under Part 3 of the Transport Accident Act 1986 with respect to the subject claim or any other claim.

18.7. Unless otherwise agreed by the parties, the client's signed Release will be returned to the TAC within 28 days. The client's settlement monies will then be paid to their lawyer in accordance with the terms of the Release.

## **19. LEGAL COSTS AND DISBURSEMENTS**

### **PART A - GENERAL PRINCIPLES**

19.1. In recognition of the value added by a client's lawyer during the serious injury and common law processes, legal costs and disbursements will be paid upon final settlement of the common law claim in all circumstances save for matters requiring Court approval in which case Clauses 19.35 to 19.37 apply.

19.2. Legal costs and disbursements not specifically regulated in this Chapter are to be determined by reference to the appropriate Court scale.

19.3. 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 the final common law settlement.

19.4. The client'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 19. The TAC will pay the agreed legal costs and disbursements to the client's lawyer within 14 days of receiving the letter and invoices.

19.5. The client's lawyer must ensure the claimed legal costs are in accordance with the agreed and published [Protocol Legal Costs](#) schedule.

19.6. Where more than one lawyer has acted for a client 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 client at the time of the final settlement.

19.7. 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.

19.8. Where a client's lawyer issues proceedings to protect the legal interests of the client 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.

19.9. After consideration of the Supreme Court Scale Costs, and following consultation with ALA and LIV, the TAC will update and publish the counsel fees and disbursement schedule annually from 1 January.

### **PART B - PRICEPOINTS TO BE PAID AT COMMON LAW RESOLUTION**

IMPAIRMENT 30% GATEWAY

- 19.10. Where a common law action is resolved in circumstances where a client's injury was deemed to be a serious injury pursuant to Section 93(3) of the TAA the TAC will pay legal costs in accordance with the [Protocol Legal Costs](#) schedule exclusive of disbursements.

#### NARRATIVE GATEWAY

- 19.11. Where a common law action is resolved in circumstances where the TAC is satisfied a client'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 in accordance with the [Protocol Legal Costs](#) schedule exclusive of disbursements.

#### ORIGINATING MOTION

- 19.12. If a serious injury is granted by the TAC or allowed by the Court following the issue of an Originating Motion, the client must engage in a common law conference pursuant to Chapter 13 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 in accordance with the [Protocol Legal Costs](#) schedule exclusive of disbursements.

#### ARISING OUT OF THE USE OF A VEHICLE

- 19.13. Where a client'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 in accordance with the [Protocol Legal Costs](#) schedule exclusive of disbursements.

#### WRONGS ACT

- 19.14. Where a client'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 in accordance with the [Protocol Legal Costs](#) schedule exclusive of disbursements.

#### PART C - UPLIFTS

- 19.15. The TAC will, in addition to the legal costs payable in Chapter 19, pay uplift fee/s in accordance with the [Protocol Legal Costs](#) schedule in the following circumstances:

- 19.15.1. Where the TAC has not admitted liability prior to the conference pursuant to clause 12.3.4.
- 19.15.2. Where pecuniary loss damages claim has been paid by the TAC and if the person is not self-employed;
- 19.15.3. Where pecuniary loss damages claim has been paid by the TAC and the person is self-employed;
- 19.15.4. Where a solicitor attends the common law conference without counsel;
- 19.15.5. Where the resolution of a common law action has required and has received Court approval;
- 19.15.6. 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 8, an uplift will be paid. The TAC will also pay Counsel's fees associated with the conference unless otherwise agreed between the parties prior to the conference;
- 19.15.7. Where a client has not commenced an impairment application at the time their common law claim is resolved pursuant to Clause 3.5 in the [Impairment Assessment Protocol](#);
- 19.15.8. Where a serious injury certificate is granted as a result of a [Serious Injury Fast Track Application](#), the impairment process is deemed to be bypassed and an Impairment Bypass Uplift is payable;



19.15.9. Where an Interim Common Law Payment is made;

19.15.10. Where a Partial Common Law Settlement is reached.

19.16. The uplifts under Clauses 19.15.9 and 19.15.10 are payable only once per claim, at the final settlement of the common law claim, regardless of the number of Interim Common Law Payments or Partial Common Law Settlements made.

19.17. No additional protocol legal costs are claimable if a secondary common law conference pursuant to Clause 13.5 is conducted save for the uplift payable pursuant to Clause 19.15.4 where a solicitor attends the common law conference without counsel.

19.17.1. The TAC will pay counsel's fee as a disbursement to attend a second common law conference in accordance with the fee schedule applicable to counsel's fees.

19.18. The Court approval uplift in Clause 19.15.5 is payable each time a matter requires approval of the Court.

19.19. No additional legal costs or uplifts are payable for Time Limit Procedures.

#### **PART D - DISBURSEMENTS**

19.20. 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.

19.21. The TAC will reimburse the reasonable cost of medical reports from a client's treating doctors and practitioners.

19.22. The TAC will reimburse the application fees and associated charges for requests made for a client'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.

19.23. The TAC will meet the reasonable travel and accommodation costs associated with a client (and/or their administrator/guardian) attending a conference or mediation for the purpose of these protocols, where the client resides in rural Victoria or interstate. These costs will be met in accordance with the TAC's '[Travel and Accommodation Expenses](#)' policy.

19.24. The TAC will reimburse the reasonable professional interpreter fees incurred in a client attending medical examinations and providing instructions to their lawyer with respect to their serious injury application/common law claim.

19.25. Where a client's lawyer intends to use Senior Counsel for a serious injury conference or a common law conference, the client's lawyer must seek prior approval from the TAC.

19.26. 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.

#### **PART E - CONCURRENT APPLICATIONS**

19.27. 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.

19.28. Where there are concurrent applications under the Impairment Assessment and Common Law Protocols, an impairment price point with release (Clause 10.1.1 of the Impairment Assessment Protocols) will be paid if the common law claim resolves prior to an impairment determination being made if:

19.28.1. A completed Impairment Application form has been lodged; and

19.28.2. The medical material provided supports a whole person impairment determination of more than 10%.

19.29. Where there are concurrent applications under the No Fault Dispute Resolution and Common Law Protocols, a Dispute Resolution (DR) (impairment) price point (Clause 8.1.6 of the No Fault Dispute Resolution Protocols) will be paid if the common law claim resolves prior to the impairment dispute being resolved if:

19.29.1. A completed DR Application form has been lodged; and

19.29.2. The material provided supports an impairment percentage figure greater than the TAC's impairment determination and an entitlement to an impairment benefit.

19.30. Where an application has been made pursuant to the Impairment Assessment Protocols or the No Fault Dispute Resolution Protocols on the basis that the client 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 19.11 (narrative gateway) regardless of whether a 30% (or more) whole person impairment determination was made or a serious injury certificate was granted.

19.31. The clauses in Part E – Concurrent Applications (Clauses 19.27 to 19.30) apply where the impairment process has commenced but the parties agree to suspend the impairment process due to a Proactive Common Law Eligibility decision.

## **PART F – SENIOR SOLICITOR & SPECIAL COUNSEL FEES**

19.32. The TAC agrees that Senior Solicitor or Special Counsel fees may be claimed under these protocols where such legal practitioners perform work in place of counsel and not have day-to-day conduct of the file.

19.32.1. To be recognised as a Senior Solicitor or Special Counsel, the practitioner must have more than 10 years post admission personal injury law experience.

19.33. Where eligible, these fees may be claimed either:

19.33.1. As an uplift to the relevant Protocol legal cost price point; or

19.33.2. As a disbursement.

19.34. The TAC will maintain and publish the applicable fees for Senior Solicitor / Special Counsel work and update these amounts in line with updates to counsel disbursement fees.

## **PART G - MATTERS REQUIRING COURT APPROVAL**

19.35. Where an Interim Common Law Payment and/or Partial Common Law Settlement requires Court approval the TAC will pay (subject to the approval of the Court):

19.35.1. \$10,000 as partial payment towards any applicable Protocol price points plus;

19.35.2. Disbursements incurred during the Court approval process plus;

19.35.3. The Court approval uplift in Clause 19.15.5.

19.36. The partial payment towards any applicable Protocol price points (i.e. \$10,000) referred to in Clause 19.35 is only payable for the initial Court approval and not any subsequent applications for Court approval.

19.37. Any partial payment of costs and disbursements pursuant to Clause 19.35 will be reconciled at final settlement pursuant to the costs and disbursements payable or deducted from any costs and disbursements ordered in litigation. The date of final common law settlement will determine the applicable price points payable.