Submission to the TAC on the Cost Recovery Guidelines

Submitted by the Australian Lawyers Alliance
June 2022

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Dear Ms McKirdy,

ALA's Submission to the Transport Accident Commission in response to the TAC Costs Recovery Guidelines – Issues Paper

ALA thanks the Transport Accident Commission (the 'TAC') for the opportunity to provide submissions in respect of the TAC Costs Recovery Guidelines – Issues Paper ('Issues Paper').

The below is ALA's submissions to the TAC's issues paper and the TAC's Legal Costs Recovery Guidelines amended as of 10 November 2016 ('TAC Costs Recovery Policy').

While there are several specific questions to be addressed, ALA submits that the current TAC costs recovery policy is unclear and lacks consistency in enforcement. We are also of the opinion that the issues paper provided by the TAC does not directly address these concerns.

We believe that the TAC policy should be more closely aligned with the WorkCover Guidelines for Costs Orders and Costs Recovery ('WorkSafe Costs Recovery Policy'), specifically sections four and five (discussed below).

In these submissions, we intend to outline a brief history of the TAC Costs Recovery Policy and provide relevant sections of the WorkSafe Costs Recovery Policy before supporting submissions on the questions listed in the issues paper.

Historical Context

By way of background, the current TAC Costs Recovery Policy originates from the case of *Appelbee v Transport Accident Commission*.[1]

In short, prior to *Appelbee*, the TAC would generally only pursue an order for costs if:

- *There had been material witting misrepresentation on the part of the person against whom the costs order was made.*
- *There was another exceptionally good reason why the TAC should give effect to an order for costs.*

In *Appelbee*,[2] the Plaintiff succeeded in her Serious Injury Application in front of Her Honour Judge Millane. As a result, and in a separate proceeding, the Plaintiff sought a costs order on an indemnity basis because she believed the conduct of the TAC during the life of the matter was improper in the circumstances. The Plaintiff argued that the TAC was in breach of the Model Litigant Guidelines and the TAC Costs Recovery Policy. Part of the Plaintiff's submissions seeking an order for indemnity costs was that her claim was *not* an "another exceptionally good reason" for the TAC to threaten and potentially seek a costs order because the TAC did not communicate that her claim was 'without merit' or state other reasons why her matter was "another exceptionally good reason" for costs to be pursued by the TAC.

The TAC accepted that its usual procedure for seeking costs orders was reserved for cases of misrepresentation or fraud (among other similar reasons) and agreed it had put the Plaintiff on notice on several occasions that if she were to be unsuccessful in her Serious Injury Application that it would seek an order for its costs. However, it rejected assertions of intimidation and bullying, and submitted that its conduct did not breach the Model Litigant Guidelines or the TAC Costs Recovery Policy in the circumstances. The TAC submitted that in its view the Plaintiff's application did not justify the granting of a serious injury certificate and her claim was effectively without merit. The TAC found this to be within the definition of "another exceptionally good reason," which is why they put the Plaintiff on notice of a potential costs order.

Her Honour noted that on her interpretation, the phrase "another exceptionally good reason" would appear to mean more than an unsuccessful application,[3] and if the TAC consistently applied its logic, then every case it did not grant a Serious Injury Certificate would constitute an "exceptionally good reason" to pursue a cost order.[4]

Ultimately, the Court denied the application for costs on an indemnity basis against the TAC because it was held that the TAC Costs Recovery Policy was ambiguous in this regard and thus the conduct by the TAC could not be said to be improper in the circumstances.

The Court encouraged the TAC to review its policy to bring more uniformity and clarity as to when it would seek a costs order.

After review of the TAC Costs Recovery Policy post *Appelbee*, the 2012 TAC Costs Recovery Policy was drafted and came into force in its original format on 3 September 2012.

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[1] [2012] VCC 54.
[2] *Appelbee v Transport Accident Commission* [2012] VCC 9.
[3] Ibid [22].
[4] Ibid [47].

Current Position

We submit that unfortunately, the 2012 Costs Recovery Policy is still ambiguous and vague despite the comments in *Appelbee* regarding the need for change to the policy. The TAC's costs recovery policy gives little certainty to Plaintiffs around when the TAC will seek costs. This then instils a significant amount of anxiety and stress for Plaintiffs, when considering litigation in their matter, in particular Plaintiffs with severe psychological or psychiatrist conditions. Pausing here, we would like to note that a serious transport accident is considered a traumatic event in the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders), the handbook used by health care professionals in Australia and much of the world as the authoritative guide to the diagnosis of mental disorders. This means that depending on the circumstances, following a transport accident, an individual is at risk of developing Post Traumatic Stress Disorder (PTSD). PTSD is a serious mental illness that causes significant distress and impairment to functioning. In addition to PTSD, people may experience disabling mood disorders, such as depression and anxiety, following a transport accident. Chronic pain following a physical injury from a transport accident is also a common experience. Chronic pain has a significant mental health component with regard to its treatment and management.

Studies[5] have shown that psychological distress (PTSD in particular) mediates the relationship between trauma exposure and poor health and leads to adverse health outcomes via multiple pathways – physical, behavioural and attentional. Other studies[6] indicate that individuals with psychological trauma symptoms report much higher pain severity and higher impairment of functioning in their family, occupational and other social roles, than those with only physical symptoms. In short, psychological injuries arising from a traumatic event such as a transport accident are not only extremely disabling in and of themselves, but they can also lead to increased pain and more significant restriction of activities of daily living.

Arguably, the unclear TAC cost recovery policy can exacerbate a Plaintiff's psychological state. We advocate for a change in policy to protect our most vulnerable Plaintiffs. Moreover, the current criteria used by the TAC costs recovery panel on the face of it, seems to allow the TAC to seek to enforce a costs order in any circumstances that it sees fit.

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[5] Schnurr P.P and Green B.L (Eds)(2004) *Trauma and health Physical health consequences of exposure to extreme stress.* Washington D.C American Psychological Association.

[6] Geisser, M.E., Roth, R.S., Bachman, J.E & Eckert, T.A. (1996) The relationship between symptoms of PTSD and pain, affective disturbance and disability among patients with accident and non-accident-related pain, *Pain*, 66, 207 -2014

WorkSafe Guidelines for Costs Orders and Costs Recovery

We refer to and submit that the WorkSafe Costs Recovery Policy effective as of 1 July 2014 is a suitable example of a fairer cost recovery process.

Specifically, we refer to sections four to five which cover the circumstances in which the Victorian WorkCover Authority (VWA) will pursue a costs recovery as follows:

4. Costs Recovery – General

4.1 The VWA will generally seek to recover costs from an unsuccessful party where there is evidence of fraud or material witting misrepresentation.

4.2 The VWA may also pursue recovery where it appears there is an “exceptionally good reason” as to why it should recover costs in a matter notwithstanding that the party’s credit has not been impugned and where the VWA or its insured employer has been successful.

4.3 Without limiting the scope of the definition of “exceptionally good reason”, the VWA considers that “exceptionally good reason” includes cases where the VWA has determined that the party liable to pay costs was unlikely to succeed and matters where a worker or other party appeals a decision and the VWA determines that the appeal was unlikely to succeed.

4.4 In considering whether a party was unlikely to succeed, the VWA will take into account objective criteria including the type of injury, the amount of statutory compensation paid, the level of any impairment assessment, the type and frequency of treatment received, the currency and appropriateness of opinions available to the worker’s representatives and any findings or comments of a court.

4.5 Where a worker or other party has insufficient financial resources to meet an order, the VWA may decide not to institute or pursue recovery proceedings.

5. Costs recovery - Serious Injury Applications

5.1 For serious injury applications in the County Court, (and appeals from the determination of such applications) the VWA will consider recovering costs where the VWA considers there was a strong likelihood that the workers application (or appeal) would fail.

5.2 Where a common law application is discontinued before commencement of an Originating Motion, no costs are payable to the VWA.

5.3 Where multiple Originating Motions are issued by a worker, the VWA will seek costs for any unsuccessful application.

In our view, the WorkSafe Costs Recovery Policy provides a much clearer and fairer representation in comparison to the TAC’s current Cost Recovery Policy which fails to provide clarity for situations in which costs will be sought. In particular, we draw your attention to sections 4.4 and 4.5 of the WorkSafe Cost Recovery Policy.

We now turn to the specific questions raised in the TAC's issues paper.

1. **In what circumstances could the TAC exercise its discretion to not seek an order for costs where it would otherwise be entitled to do so?**

As mentioned previously, arguably the TAC Costs Recovery Policy currently provides the TAC with authority to enforce a costs order in any circumstances that it sees fit. We submit that the TAC should use its discretion to not seek an order for costs in cases where there have been no credit findings and/or dishonest behaviour by the Plaintiff. Additionally, matters considered to be serious injury 'range' cases should not be pursued unless it is plainly clear that the matter is unmeritorious. To this point, we draw the TAC's attention to sections 4.4 and 4.5 of the WorkSafe Costs Recovery Policy, in order to frame a process around 'range' cases in particular.

Moreover, discretion should be used by the TAC in cases where it is open to the Court to find negligence on the facts as presented at trial despite the TAC running the trial as a 'no negligence' matter. Plaintiffs should not be deterred to run matters in this category in fear of an enforcement of costs if it is made clear by the outcome that it was open for a Court to find negligence on the facts.

Matters heard at VCAT involving statutory interpretation on developing legal concepts should also be highly considered by the TAC to be excluded from any ramifications of a costs order.

Finally, discretion should be sought where a costs order will financially disadvantage the Plaintiff or the Plaintiff has insufficient financial means to comply with a costs order. This extends to matters that are brought by way of Litigation Guardian.

2. **How can the process be improved to ensure that legal representatives, in a timely manner, provide information to support the TAC's discretion to not pursue?**

Currently, clause 2.10 of the TAC Costs Recovery Policy provides that any submission regarding the enforcement of a cost order must be completed within 21 days of the Order being made.

A clearer understanding of when the TAC will seek an order for costs will ultimately ensure practitioners provide submissions in a timely manner. The current criteria is ambiguous and TAC's approach to enforcing a cost order appears to be inconsistent, therefore practitioners do not have any clarity when looking to prepare submissions.

In any event, an extension of the timeframe to more than 21 days is required. Currently this timeframe is too restrictive. Further, ALA submits that transparency needs to be provided to the common law jurisdiction regarding the composition of any TAC cost recovery 'committee' and the internal process of review that the TAC wishes to take (including articulating an internal appeal process for Plaintiffs). Currently, no information is provided and there is no internal appeals process for a Plaintiff to consider.

3. **Are there additional or different factors that the TAC should consider in support of discretion to not pursue?**

The TAC costs policy presently outlines twelve different criteria which are at the TAC's discretion when considering the recovery of costs. Further, the Issues Paper states that there may also be additional criteria which should be specified and considered in addition.

These criteria are unduly broad and fail to create certainty or consistency when considering the question of costs recovery.

The WorkSafe Costs Recovery Policy is clear and fair in defining the circumstances where the recovery of costs would potentially occur. The WorkSafe Costs Recovery Policy explicitly refers to a general position where costs are recovered from an unsuccessful party where "there is evidence of fraud or material witting representation". Further the Policy outlines that the VWA has

a discretion to consider recovery where there is an “exceptionally good reason”, which encompasses some further scenarios which may be considered. This second limb of the Policy allows a discretion to recover to apply in scenarios where a Plaintiff would be “unlikely to succeed” or in a scenario where a Plaintiff lodges an appeal which was “unlikely to succeed,” with a number of factors asked to be considered in sections 4.4 and 4.5.

It is submitted that the TAC should instead primarily consider a more targeted and clear set of factors when *prima facie* considering an exercise of its discretion, namely:

- Evidence of fraud, material dishonesty or wilful material misrepresentation on the part of the Plaintiff;
- Significant credit issues on the part of the Plaintiff; and
- Applications which are plainly unmeritorious in nature and unlikely to succeed, and are not simply “range” cases or complex cases on liability with arguable prospects of success for the Plaintiff.

4. Should the TAC introduce a formal process of exchange of costs information? If so, when should such information be exchanged and how?

The TAC’s Issues Paper traverses on the issue of advising clients about the risk of costs. It states that the *Legal Profession Uniform Law* (‘LPUL’) does not contain a requirement for a solicitor to advise a client of their possible exposure to adverse costs, and the likely level of those costs. We submit that this is an incorrect assertion. Pursuant to LPUL, legal practitioners are required to advise clients of their possible exposure to adverse costs at several stages of a litigated matter when explaining the ‘total costs’ of the matter to a client. In the TAC jurisdiction, this namely occurs prior to a pre-hearing conference, mediation and hearing/trial before Judge and/or Jury. It is submitted however, that the information provided to clients can be difficult and a ‘guestimate’ given no costs information is provided by the TAC at any stage of the proceeding.

The Issues Paper asks whether the TAC should introduce a formal process of exchange of costs information, and if so, when should such information be exchanged and through what process. ALA endorses the exchange of costs information by the TAC as it will provide transparency on the part of the TAC and clarity for clients involved in TAC litigated proceedings at important junctures of their claim to convey costs risks. Costs information of fees and disbursements should be provided only in the event of fraud or clear misrepresentation occurring at any of the following events:

- at a pre-hearing conference and mediation; and
- at least 14 days before a hearing/trial.

The Issues Paper states *one option is to introduce an agreed process for early exchange of costs information, such as is required in the Testators’ Family Maintenance List in the Supreme Court.* ALA notes the disclosure of costs in the Testators’ Family Maintenance List occurs because the parties are litigating over estate monies thus the Court is keen to ensure that the estate money is available for distribution amongst the beneficiaries and not dissipated by litigation costs. Hence, the tight control over legal costs via the cost budget process particularly where the estates involve modest sums of money. The Court oversees this process and it is integral to note that the disputes occur between individuals (we wish to make this distinction, given in our TAC jurisdiction the cost dispute involves an individual versus a government body). ALA does not agree it is necessary for early exchange of costs information, similar to that of the Testators’ Family Maintenance List. We would however, advocate for information to be provided by the TAC only in cases of fraud or clear misrepresentation at the earliest stages possible.

5. In the case of an appeal, when should the TAC make and communicate a decision about costs recovery

As soon as a judgment or decision is handed down, the TAC should advise in full detail of their intention to pursue costs, along with reasons as to why the TAC is of the view that it is appropriate for costs to be recovered.

However, we make the obvious point that costs should not be pursued while a matter is on appeal.

Should an appeal be unsuccessful, the TAC should only seek to recover costs from an unsuccessful party where there is evidence of fraud or material witting misrepresentation. If the unsuccessful party's credit has not been impugned but there is an alternative "exceptionally good reason" as to why the TAC should recover costs, ALA may accept that recovery may be pursued if there were clear guidelines as outlined above in the WorkSafe Costs Recovery Policy.

Final Thoughts

In addition to the submissions outlined above, ALA is of the view that the TAC should only seek to recover costs in circumstances where a written offer was made by the TAC to the unsuccessful party prior to a Court hearing date, for them to withdraw their claim and bear their own legal costs, noting reasons as to why the TAC would pursue a cost order and that offer was rejected by the unsuccessful party.

ALA members have noticed the relatively recent use of withdraw and bear own offers by TAC in a *Calderbank* letter, which seems to be an attempt to intimidate Plaintiffs into withdrawing from their claims even in circumstances where there is significant merit to the litigation. Again, we refer to the case of *Appelbee*. The use of withdraw and bear own offers by the TAC in most pieces of litigation would seem to reduce the utility of the offers and contravene a clear cost policy.

Conclusion

As initially indicated, we believe that the terms of reference of the issues paper may not be broad enough to adequately address the issues we have outlined regarding the current form of the TAC costs policy. We urge the TAC to consider the opportunity to specifically explore these issues in more detail in the future. ALA would welcome the opportunity to expand on our observations on request from the TAC.