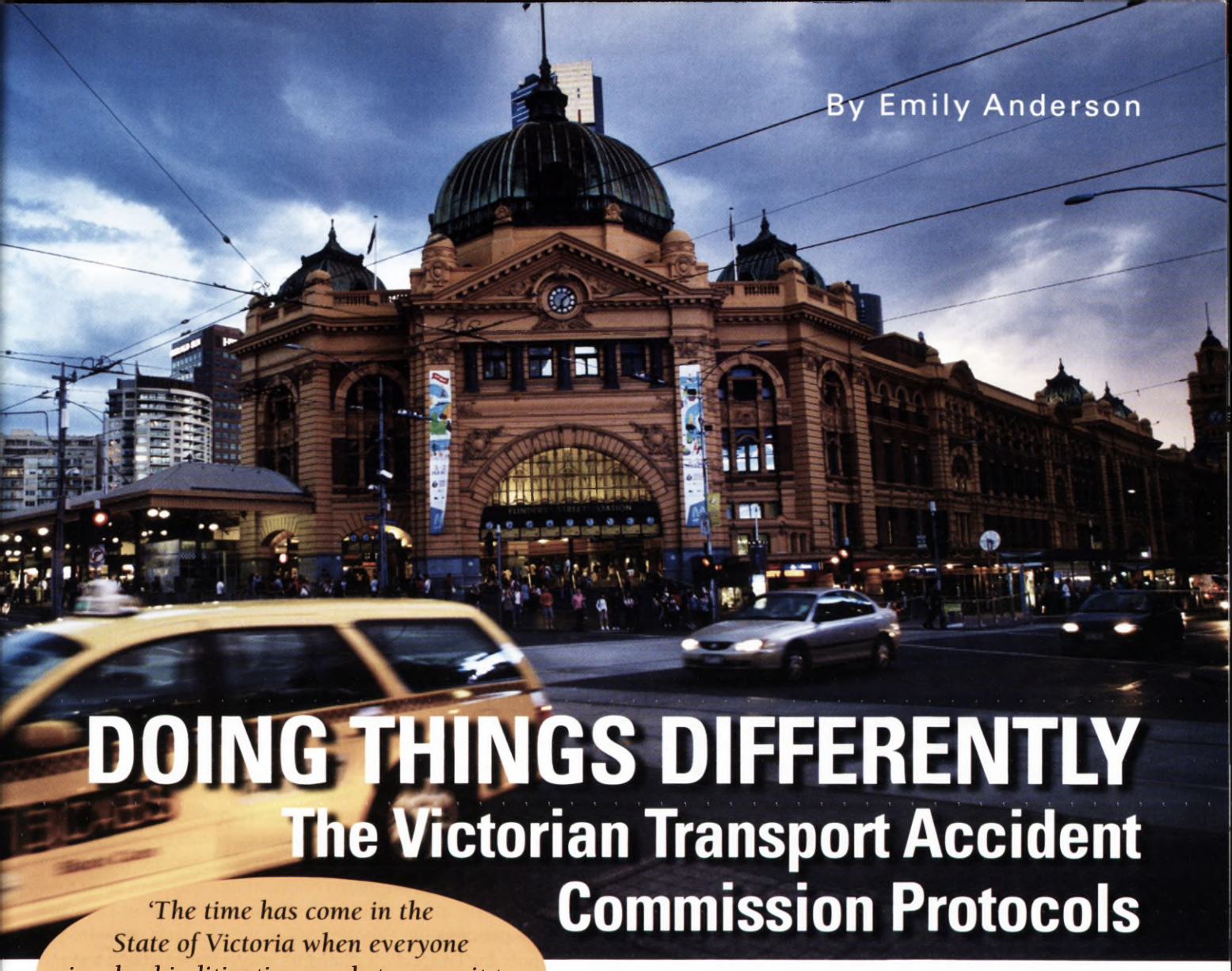

By Emily Anderson

DOING THINGS DIFFERENTLY

The Victorian Transport Accident Commission Protocols

'The time has come in the State of Victoria when everyone involved in litigation needs to commit to doing things differently'
– Chief Justice Warren[1]

Once completely absent from our adversarial system, alternative dispute resolution (ADR) has over the past 25 years become an increasingly prominent feature of Australian civil justice. The rise of ADR has been driven by a desire to manage disputes more efficiently and expeditiously than is typically the case with traditional litigation. These aims are particularly important in the context of personal injury claims.

Tort law is constantly under economic scrutiny from governments and insurers. The highly publicised 'insurance crisis' of 1999 to 2002 heralded a wave of tort reform across the country whereby state governments legislated to introduce various caps, thresholds and restrictions on common law damages.[2] Statutory no-fault transport accident schemes are regularly reviewed in terms of their economic viability.

When assessing the economics of common law and no-fault compensation, it is clear that the higher the transaction cost of delivering benefits to the injured, the greater the likelihood that those benefits will ultimately be reduced. It has been noted that, historically, major tort reforms have been driven by what was 'regarded as an unacceptable proportion of compensation awards being taken up by the decision-making process'.[3] For this reason, identifying ways to ensure that personal injury compensation is delivered, and disputes resolved, as efficiently as possible, is of vital importance not just to individual claimants, but to the future protection of compensation entitlements for personal injury.

This article provides an overview of the Transport Accident Commission (TAC) Protocols: the pre-litigation ADR procedure for transport accident injury claims, which has operated in Victoria since 2005. Although the Protocols are not legally binding, participation (or at least giving consideration to participation) may now form part of a plaintiff practitioner's overarching obligations under the *Civil Procedure Act* 2010 (Vic).

In the author's opinion, the Protocols demonstrate how good faith stakeholder consultation can benefit both injured claimants and the viability of a personal injury scheme. However, continued vigilance is required to ensure that pre-action procedures such as the Protocols are not counter-productive; and are not making disputes more protracted and costly than otherwise would be the case, or artificially deflating the quantum of common law damages. >>

COMPENSATION FOR INJURY SUSTAINED IN TRANSPORT ACCIDENTS IN VICTORIA

In a not-unfamiliar scenario, Victoria has a hybrid compensation system, which combines limited statutory no-fault benefits with access to common law restricted by thresholds and caps. Broadly speaking, people injured in transport accidents are eligible for income support, medical and like expenses and impairment benefits (where impairment exceeds 10 per cent under AMA4[4]) under the no-fault statutory scheme.[5] If injury was caused by the negligence of another party, common law damages can be recovered if the injured party has suffered a 'serious injury' (impairment of 30 per cent or more, or consequences which are at least 'very considerable' and certainly more than 'significant' or 'marked'[6]).

In the life of one claim, there are often multiple disputes that can give rise to litigation. For example, a claimant may end up in the Victorian Civil and Administrative Tribunal (VCAT) arguing for income support; the County Court for a 'serious injury' certificate; and the Supreme Court for common law damages. When all of these matters are resolved by way of a full hearing and judicial determination, the claims process is protracted and costly for all involved, and particularly arduous for the claimant already suffering the trauma of injury and incapacity. It has been argued that the 'anti-therapeutic effects of this system' can outweigh any sense of having obtained justice from the courts.[7]

THE PROTOCOLS

Given the propensity for disputes, procedures have been introduced at each stage of a claim to attempt to resolve matters via ADR.[8] Pre-litigation, parties are encouraged to attempt to resolve disputes by utilising the TAC Protocols. This ADR mechanism differs significantly from those in place in relation to workplace accidents. The TAC Protocols are voluntary and do not carry the harsh costs penalties and strict deadlines entrenched in the Victorian WorkCover scheme. One could say that while the WorkCover scheme contains many 'sticks', the TAC scheme provides more 'carrots'. It rewards parties and their legal representatives for achieving early resolution rather than threatening penalties in the event that a matter proceeds to court.

Background and philosophy

On 1 March 2005, the TAC, Law Institute of Victoria (LIV) and Australian Lawyers Alliance (ALA) entered into three separate agreements as to how their members would attempt to resolve disputes relating to no-fault benefits, impairment assessment and common law damages prior to issuing court proceedings. Each agreement consists of a series of Protocols stipulating the steps that must be taken by the TAC and claimant's lawyer before litigation is commenced, timeframes and legal costs payable in the event of pre-issue resolution. The Protocols are not legally binding. They are not enshrined in legislation and claimants are not prohibited from bypassing the processes set out therein and proceeding directly to the courts. However, the Protocols state, and it is generally agreed, that where a claimant retains a solicitor who is a member of the LIV or ALA (the two peak professional bodies of legal practitioners in Victoria), the parties will in the first instance attempt to resolve the dispute or claim in accordance with the Protocols.

The introductory section of each of the three agreements states that the Protocols 'recognise that appropriate mechanisms to resolve disputes are important for ensuring that claimants' legal rights and obligations are being observed and are not abandoned for the lack of opportunity to enforce them'.[9] This draws upon the language of the Justice Statement released by the state government in 2004, which set out a 10-year plan to improve and modernise the Victorian justice system.[10]

Before the Protocols were introduced, there was little structure in place as to how parties could go about resolving a claim under the *Transport Accident Act* without resorting to a tribunal or the courts. A claimant could request that the TAC conduct an informal review of its decision to cease income support or refuse funding of medical treatment. However, such a request rarely yielded a resolution and the claimant would then be forced to issue proceedings in the VCAT. Legal practitioners could approach the TAC with a lump sum claim for impairment benefits or common law damages with a view to resolving the matter informally. However, there was a lack of guidance as to the process to be followed and the timeframe, and no provision for the claimant to recover any of their legal costs from the insurer. As a result, a claimant's lawyer would generally issue court proceedings directly and it was not uncommon for proceedings to be vigorously, even aggressively, defended by the TAC. Happily, the impact of the Protocols has been that many transport accident claims (particularly claims for common law damages) are now resolved without litigation.

The process

Under the Protocols, a claimant's lawyer must initially serve on the TAC an application with prescribed material. A no-fault dispute application must include a statement from the claimant explaining the reasons why they object to the decision, as well as supporting material (such as medical reports). The TAC must then commence a pre-issue review and within 90 days of receiving the application, participate in a conference with the claimant and his or her lawyer. Only if the decision is affirmed or not varied to the claimant's satisfaction may an Application for Review be issued at VCAT. Similarly, in relation to an application for an impairment benefit, serious injury certificate or common law damages, a claimant must firstly provide a complete application setting out what is being sought and on what basis. There are prescribed timelines during which the TAC may consider the application, request further information or arrange medico-legal examinations, before making its determination. In relation to common law damages claims, the parties must also convene a conference to attempt to resolve issues of liability and quantum.

In relation to both no-fault disputes and common law claims, the Protocols make provision for the appointment of a mediator, facilitator or independent expert to assist the parties in reaching resolution. However, in practice this rarely occurs and negotiations tend to be conducted directly between the

TAC's and the claimant's respective legal representatives.

The TAC Protocols are generally considered to have proven effective. Their success has been noted in both the Productivity Commission's report into the proposed Disability Care and Support Scheme and the Victorian Law Reform Commission Civil Justice Review. In 2008, it was reported that in the first three years of the Protocols, there had been a 27 per cent decline in VCAT applications for review, a reduction in common law litigation and a decrease in the time taken to resolve serious injury disputes.[11] However, in more recent years, there has been concern over the blowing out of timelines due to decreased compliance with the Protocols.

Stakeholder consultation

Under the Protocols, representatives from the TAC, LIV and ALA attend a forum every six months at which consideration is given to statistical data, issues relating to the interpretation and implementation of the Protocols, and proposed amendments. Given that parties are not legally compelled to participate in the Protocol processes, it is important from the perspective of participation and compliance that stakeholders continue to have input into the workings of the agreements.

At a Protocols Forum convened in 2011, the LIV and ALA representatives made a submission to the TAC detailing concerns about increasing delays and excessive requests for information.[12] The submission noted that if the agreed Protocol timelines are not met, the pre-litigation dispute process becomes elongated and can result in delays in benefit delivery: the opposite of what ADR aims to achieve. This is particularly the case where a claim or dispute does not resolve within the Protocols and litigation ensues. It is clear that in order to contribute positively to the overall claims process, the pre-litigation stages set out in the Protocols must be carried out in a timely manner.

Currently, representatives of the TAC, LIV and ALA are meeting regularly to conduct a detailed review of the operation of the Protocols since their inception almost eight years ago. The Review is scheduled to conclude at the end of 2013. Pursuant to the Terms of Reference, matters to be examined include the original objectives of the Protocols and the extent to which these have been achieved; proposed amendments to the agreements; and whether there are opportunities to improve the timelines and compliance obligations required in the Protocols. By and large, it is the view of the LIV and ALA representatives, and the stated view of the TAC, that the Protocol agreements remain sound and that better outcomes are more likely to be achieved by greater adherence to the existing processes rather than any large-scale amendment.

THE PROTOCOLS IN THE CONTEXT OF THE *CIVIL PROCEDURE ACT* 2010

In 2008, the Victorian Law Reform Commission, headed by Dr Peter Cashman, was commissioned by the Department of Justice to publish an extensive and detailed Report ('the Report') on the operation of the civil justice system in Victoria. In assessing the performance of the system, Dr Cashman found that criticisms 'almost invariably focus on the problems of delay, inefficiency and the excessive or disproportionate expense of legal costs to the litigants'.[13] Many of the Report's proposals to address these issues were directed at greater and earlier use of ADR, including prior to the commencement of litigation.

In relation to personal injury claims, in particular, the Report quoted Lord Justice Brooke who stated of pre-action protocols in the United Kingdom that 'any practitioner or judge with significant experience of personal injuries litigation will have been very familiar with the mischiefs they seek to remedy… In many disputed cases, nothing very effective seemed to happen until a writ was issued close to the expiry of the primary limitation period'.[14] The Report considered the TAC Protocols favourably and in fact recommended that pre-action protocols be introduced in relation to all civil disputes in Victoria 'for the purpose of setting out codes of "sensible conduct" which persons in dispute are expected to follow when there is the prospect of litigation'.[15] This recommendation was ultimately not taken up by the Baillieu government when it came to power in December 2010.

However, the *Civil Procedure Act* 2010 does impose obligations on parties and legal practitioners to use reasonable endeavours to resolve disputes without judicial determination. Section 22 states that such endeavours should include utilisation of appropriate dispute resolution, unless this is not in the interests of justice or the dispute is of such a nature that only judicial determination is appropriate. >>

There is increasing awareness among the Victorian judiciary of the TAC Protocols. Although the Protocols remain non-binding, it would seem that the courts are viewing participation in the Protocols (or at least, giving consideration to whether a particular case is suitable for resolution under the Protocols) as part of the discharge of a practitioner's duties under the *Civil Procedure Act*. In fact, the County Court has on occasion directed parties to complete the Protocols process prior to proceeding with litigation. This is significant, given that the Act stipulates that the courts may consider whether parties have complied with their obligations to consider ADR options during and prior to litigation when making orders as to costs.

CONCLUSION

ADR is now an important feature of personal injury litigation in Victoria. A claim does not proceed to trial without having been the subject of at least one process to attempt to resolve the dispute without judicial determination and it would be difficult if not impossible to find a stakeholder who would argue that this should not be the case.

Some argue that pre-litigation dispute resolution is not helpful in many cases, as requiring parties to undertake additional procedures before all interlocutory steps are completed is futile. It is argued that if resolution cannot be achieved, the process serves only to increase cost and delay. However, from a practical perspective, it is rare for parties who are forced to exchange information and discuss a matter not to come away with some greater understanding of their opponent's argument, the matters in dispute and the way forward to resolution, whether that is ultimately by agreement or judicial determination.

The TAC Protocols are an example of a non-binding dispute resolution process which, despite not being enforced by legislation, have seen a high level of participation, good faith negotiation and resolution. They promote behaviour far removed from that associated with adversarial litigation and, in the main, this has benefitted many injured claimants.

However, despite the many advantages in terms of minimising time, cost, risk and stress, not all matters can or should be resolved via ADR. Justice Hayne has stated that 'if cases are settled because the prospect of trial is too horrid for parties to contemplate, settlement may mark the failure of the system, not its success'.[16] There is danger in too many personal injury claims being determined privately by agreement rather than by public judicial determination.[17] If disputes rarely proceed to judicial determination, there is a risk that damages settlements may become artificially low. This is because in the absence of recent precedent to provide guidance, the rate of common law damages paid out by insurers can become fixed and out of step with factors such as inflation and changing community perceptions as to the appropriate quantum of a claim. While an injured claimant may choose to resolve their claim prior to trial to avoid risks of litigation, they also risk under-settling their claim and accepting less than a court may find is their lawful entitlement. This is particularly so as 'personal injury litigation is characterised by a peculiar imbalance between the opposing sides'.[18] Individual claimants tend to have little experience or knowledge of the value of claims, whereas defendant insurers – particularly those in a monopoly situation, such as the TAC – have 'endless experience of personal injury litigation and clear expectations of the outcomes of claims'.[19] It is therefore important that legal practitioners provide accurate advice as to the prospects of obtaining a better result at trial, and that factors such as cost, stress and delay do not prevent a claimant from proceeding to judicial determination when it is necessary to do so to obtain a just outcome.

It has been argued that 'legislatures that adopt ADR programs by statute rarely engage in a close comparison of their features, uses or consequences'.[20] To work effectively, ADR procedures must be the subject of continual review, research and modification. All stakeholders in the scheme, from government to the judiciary, insurers to the legal profession, must commit to working together to ensure that ADR is prioritised. In this regard, initiatives such as the TAC Protocols and the Civil Justice Review are commendable examples of stakeholders collaborating to try to do things more effectively and efficiently. The challenge is to continually monitor our system to ensure that any modification to existing procedures such as the Protocols serve to improve benefit delivery and dispute resolution, and are not counterproductive to the goals of ADR. In doing so, we will hopefully improve the experience of injured claimants.

Ultimately, when reviewing the recent history of Australian tort reform, one thing is clear: if things can't be done more efficiently, sooner or later government will decree that they cannot be done at all. ■

Notes: **1** The Honourable M Warren, 'Remarks Upon the Launch of the VLRC Report on Civil Justice' (delivered 28 May 2008 at Parliament House, Victoria). **2** See Rob Davis, 'The Tort Reform Crisis' (2003) 25 *University of New South Wales Law Journal* 865. **3** The Honourable J Spigelman, 'Access to Justice and Access to Lawyers' (2007) 29 *Australian Bar Review* 136, 140. **4** American Medical Association, *Guides to the Evaluation of Permanent Impairment 4th Edition* (1993). **5** The Transport Accident Commission (TAC) scheme is administered in accordance with the *Transport Accident Act* 1986 (Vic). **6** *Humphries & Anor v Poljak* [1992] 2 VR 129, 140. **7** Robert Guthrie & Stephen Monterosso, 'Legislating to Prevent Further Harm to the Harmed' (2010) 21 *Insurance Law Journal* 179, 179. **8** After litigation has commenced in any court or tribunal, parties must engage in a conference or mediation prior to hearing. **9** *Transport Accident Act Common Law Protocols* (1 April 2005) 1.1. **10** Department of Justice, Victoria, *New Directions for the Victorian Justice System 2004-2014: Attorney-General's Justice Statement* (2004). **11** Victorian Law Reform Commission, *Civil Justice Review Report* (2008), 132. **12** Australian Lawyers Alliance, *Submission to the Protocols Forum* (2011). **13** Victorian Law Reform Commission, see above note 11, 98. **14** *Ibid*, 114. **15** *Ibid*, 142. **16** *Ibid*, 100. **17** Deborah R Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System* (2004) 187. **18** Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (1987) 8. **19** *Ibid*. **20** Hensler, see above note 17, 187.

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