TRANSCRIPT

ROAD SAFETY COMMITTEE

Inquiry into serious injury

Melbourne — 10 September 2013

Members

Mr A. Elsbury
Mr T. Languiller
Mr J. Perera
Mr M. Thompson
Mr B. Tilley

Chair: Mr M. Thompson
Deputy Chair: Mr T. Languiller

Staff

Executive Officer: Ms Y. Simmonds
Research Officer: Mr J. Aliferis

Witnesses

Mr M. Cumming, principal, and

Mr A. Kostick, national business development manager, Maurice Blackburn Lawyers.

The DEPUTY CHAIR — First of all I apologise on behalf of Murray Thompson, who is the chair of the Road Safety Committee. He is unable to attend because of illness, and he requested of me that I extend his apologies to you. We welcome you to the public hearing of the committee's inquiry into serious injury. The evidence given is protected by parliamentary privilege; however, any comments made outside this hearing are not afforded such privilege. The transcript will become a matter of public record. For the benefit of the transcript I invite you both to introduce yourselves and name the organisation you represent. We welcome your contribution, which will be followed by a range of questions from us.

Mr CUMMING — Malcolm Cumming, principal, Maurice Blackburn Lawyers.

Mr KOSTICK — Adam Kostick, national business development manager, Maurice Blackburn Lawyers.

Mr CUMMING — We thank the committee for the opportunity to appear and participate in this inquiry. It resonates with us particularly well, being an inquiry with terms of reference around serious injury, given that we in our working lives on a daily basis interact with, appear on behalf of and represent people who have been injured in those accidents. We assist them with navigating through the TAC compensation scheme. In our written submission we cover a number of areas relevant to the terms of reference. There were some submissions we made around the definition of 'serious injury', and we also made some submissions in relation to the costs of serious injury, measuring the costs of serious injury and the ways in which some people who have suffered what ordinarily would be considered to be a serious injury may fall through some definitions based on a certain set of criteria.

However, the area we want to focus on today is not in those areas. We want to use our allotted time to discuss some measures that we advocate for which we submit are, firstly, readily available to be adopted and implemented and, secondly, would improve — we say — access to treatment of choice in a timely manner for those people who have been injured and seriously injured. All of that goes to reducing the severity of the injury and the outcomes from the injury, particularly in the long term — so picking up on those criteria around measures to reduce and mitigate against injuries being severe injuries.

The measures that we want to speak to and advocate for are measures across two categories. Firstly, there are some measures that are improvements we say are available in relation to the administration of the Transport Accident Act, and we also want to speak to some relatively minor amendments to the act — some possible legislative amendments. In saying that we advocate for some relatively minor amendments to the act, we say that in the context of the Transport Accident Act and the transport accident compensation scheme in Victoria being a very good one and a comprehensive one by any comparison with other jurisdictions. But having said that, we say that there are some minor amendments, some tweaks that could be made, which would, amongst other things, improve access to care but also tie into the possibility to better measure and record serious injury, and I will come to that a little bit later on.

Firstly, in relation to improvements around the administration of the act, I want to focus — again being conscious of the time that we have allotted to us — on two areas in particular: firstly, costs, fees and scheduled fees that are implemented by the TAC; and, secondly, information, or what we refer to as misinformation, provided by the TAC in relation to TAC claimants with respect to the nature of their entitlements.

I refer you firstly to paragraph 4.1.1 on page 15 of the Maurice Blackburn submission to this inquiry. The heading is 'Unreasonably low TAC schedule of fees for medical services'. The background to this submission is that the Transport Accident Act provides that the TAC has certain obligations. Pursuant to section 60, one of those obligations or liabilities is a liability to pay to a person who is injured as the result of a transport accident the reasonable costs of medical services. Purely and simply that is the beginning and end of the obligation; it is as simple as that, and there are no caveats or riders put on that. It is just that the TAC has the obligation to pay the reasonable costs of medical services.

Given the number of people who are covered by the scheme and the number of claims that are being made for reimbursement for various kinds of treatment, we say that it is undoubtedly the case to allow for the efficient administration of the scheme that there should be some schedule fees put in place for standard types of treatment. If someone is making a claim for reimbursement for a standard physiotherapy consultation to treat their transport accident-related injuries pursuant to section 60 of the act, it makes sense that the TAC might want to have a schedule rate or a typical rate that it will pay for a physiotherapy consultation without needing to make

a separate inquiry with respect to every invoice that comes in as to the nature and appropriateness of the fee that they are being asked to meet. But the problem that arises, we say, is where the TAC set that schedule rate arbitrarily at a rate which is not in accordance with market rates and which we say therefore is not a reasonable rate. In our view, and in our submission, the practice of the TAC in this regard represents an ongoing, continual, systematic breach of the TAC's obligation pursuant to section 60 of the Transport Accident Act. We do not say that lightly.

There is some information in relation to the fees, to put some figures around that in terms of the mechanics of how this works. We are using the example here of physiotherapy treatment, but the issue is broader than physiotherapy treatment. It is one of the standard types of treatment that comes up, so we are making particular reference to that, but the same applies to any type, whether it is a general practitioner or a medical specialist or any other type of medical treatment that might be required to treat injuries under the act and indeed serious injuries. The TAC have come up with a schedule rate they will pay, and the schedule rate currently — indexed recently — is $49.52 for a standard physiotherapy consultation, to use the physiotherapy example.

The APA, the Australian Physiotherapy Association, whom I note have made a separate submission to this inquiry and done some very extensive surveying — or had what has been some very extensive surveying done on their behalf, I should say — in relation to mean or average fees for standard physiotherapy consultations in Victoria. That figure in Victoria is $64. That is an average figure. I should take a step back and say as an aside that the Victorian fees are actually modest compared with other jurisdictions. Western Australia, South Australia and Tasmania all have subsidiary amounts relating to motor vehicle accident treatment, and at a very close approximation the figures that are allowed in those other jurisdictions are 25 per cent higher on average than the Victorian average.

The figure allowed as a schedule fee, for want of a better term, by the TAC being so far below the market rates has various implications, some of which we have set out in our submission. They include that some physiotherapy clinics will not take on patients who are TAC funded. At some physiotherapy clinics which do treat TAC patients the work tends to be allocated to the more junior practitioners. Physiotherapy clinics are increasingly introducing what are commonly known as gap payments, representing the difference between the TAC scheduled rates and the standard private practice rates that are charged to patients. Many TAC claimants, especially with their reduced earnings benefits when they are away from work, cannot afford to pay the gap fee. Whilst we recognise the necessity for a scheduled rate which would apply in ordinary circumstances, we would submit that the TAC need to adjust the rates and that for there to be a reasonable fee it needs to be brought in line with market rates.

Next I would like to speak briefly, at 4.1.3 on page 18 of our submission, to what was referred to as a systematic provision of misinformation in relation to the extent of entitlements. The issue here, to lay the framework, is that the TAC statutory liability in relation to paying the reasonable cost of medical services is a continuing obligation; it is a continuing obligation to consider requests to meet the cost of treatment from time to time as the need for treatment may arise. There is no end point in terms of time frames; once someone has suffered injury in a transport accident the TAC are liable to pay the reasonable cost of the treatment, as I have just spoken to, and then they have ongoing obligations to meet treatment costs from time to time as they arise, without any end point in terms of time frames. The TAC, however, has developed a routine practice of communicating to TAC claimants that once decisions are made to finalise TAC liability for particular types of treatment, those decisions stand once and for all. This is a practice which is a representation of their position, which is contrary to the reality of what their continuing obligations at law are.

We have set out in the submission a case study to provide a real-life example of how these sorts of decisions affect the injured and the seriously injured — people who are under the TAC system. If I could quickly run through some of the more pertinent points of that — I will summarise it rather than running through the points. To illustrate the case, someone is injured at point X and has treatment for a particular point in time funded by the TAC. Again, to use the physiotherapy treatment example, after a period of time — it might be 12 months or two years — the TAC says, 'We do not think you need to have this treatment anymore. It is not a reasonable medical expense anymore. We are not going to fund it'. A person who receives a decision of that type has the option of seeking a review of the decision, either by internal review or ultimately by review of VCAT — a tribunal review — within 12 months of the date of becoming aware of the determination.

In the example referred to in the case study — and it is a real-life example — the TAC made a relevant determination. The person was faced with the prospect of litigating the point and trying to fight for their right to ongoing funding of treatment but chose not to do so. They were unrepresented at the time, so the 12 months since the determination was made passed by. This person had suffered a significant spinal injury, and their symptoms waxed and waned over a long period of time — over a period of years in fact — but ultimately deteriorated. This person was referred by their general practitioner, in fact, given that the extent of their symptoms was so severe, for a surgical consultation.

This is now a few years after the date of the accident, and the surgeon thought long and hard about the benefits of surgery — or something that was on the cards as a possibility — but ultimately recommended against a surgical option. The orthopaedic surgeon did recommend, given the nature and extent of the ongoing symptoms, that the injured person should have a course of physiotherapy treatment to stabilise the situation. This was a few years after the decision was made to finalise liability for the physiotherapy treatment. So the request for treatment was made. The TAC said, 'We are not going to consider what your current needs are, because we told you three years earlier that we were cutting off final physiotherapy treatment and your review rights expired and you did not exercise those rights, so we are not even going to look at this. We have made that decision; it is once and for all', at which point the injured person came to see Maurice Blackburn.

We pointed out to the TAC by various correspondence that that is actually a misrepresentation of their position at law and that what was being asked of the TAC was not in any way, shape or form to make or undertake a review of the initial position made a few years ago. The point is not whether the person needed physiotherapy back then; the TAC were being asked to make a decision as to whether, at the current time, physiotherapy treatment was reasonably required and was a reasonable medical expense. The TAC continued to refuse the merits of the request, relying on a determination made some time previously. Ultimately we had to take the step of behalf of the injured person to issue a writ in the Supreme Court, seeking an order of the Supreme Court purely to order the TAC to exercise a statutory function and make a decision as to whether it had an obligation to pay these costs where they were reasonable medical costs. Once we did that, the TAC quickly changed its position, decided to fund the treatment and has been funding it since.

Despite us having taken that step and gone to that length, these sorts of pro forma decisions saying, 'We are not going to consider whether you have a current need for treatment and whether we have a current responsibility for it because we told you two or three or four years ago that we were not going to pay for that kind of treatment' — again, relying upon the old decision, which in effect has got nothing to do with the point — are still being regularly made, and countless numbers of TAC claimants have received these decisions, which are in strong terms, by a government monopoly statutory authority, saying, 'We are unable to consider this entitlement. This is finished. We cannot and will not pay it'. So people have the understanding that there is nothing they can do. This is a significant issue. It particularly affects the seriously injured — it is the seriously injured who have the long-track injuries, who have to come back and have treatment on an ongoing basis or over an extended period of time and ask the TAC to fund treatments. It is a particular issue that goes to the heart of seriously injured claimants. A lot of people have been given this misinformation, as I say.

In our submission there are steps that the TAC should be taking or should be directed to take when they are making these decisions. Whenever they are making the initial decision to cut off treatment we say the TAC, in these letters — a very simple measure — should have a paragraph in there saying, 'This decision stands for the current time based on your current circumstances, but if your needs change in the future, come back, which you are entitled to do'. It is very simple — no more than explaining what their obligations at law are anyway. But they do not do it; they do the contrary, and they frame their letters giving the opposite apparent meaning to their obligations.

Secondly, we say that where people have received the second type of decision — so the letter saying, 'No, we are not even going to consider your entitlement. We have looked at this some years ago and we are not going to go there again. We do not need to even consider your current entitlement', which is absolutely wrong at law — everyone who has got one of those types of decisions, that needs to be rectified, that misinformation. We say the TAC should be actively going to those people, writing to them, communicating with them, explaining that if they have current treatment needs or in the future should they have treatment needs, they should be requesting the TAC to consider those needs on their merits at the time the requests are made. Again, it is no more than asking the TAC to explain to people what the position at law is. It runs absolutely contrary to the impression

that people are being given at the current time. I am conscious of the fact that we are running over time. Could I make one more point?

The DEPUTY CHAIR — Absolutely.

Mr PERERA — So you are suggesting legislative change in that area?

Mr CUMMING — No, I am not suggesting legislative change. What I am suggesting is that the TAC correct misinformation that has been provided about what the current position at law actually is. Those two points do not involve any legislative change at all.

If I may, there is just one point in relation to a proposed legislative change that I would like to speak to. I will take you to the reference in the submission. It is at paragraph 4.2.3. It is in relation to the medical excess that applies. Currently under the TAC scheme if you are injured in a transport accident, the TAC does not become responsible for the cost of medical services until there has been an amount paid with respect to those services by persons other than TAC — an excess amount, if you like. The current amount is $584. The excess does not apply if the injured person has been admitted to hospital for one day. It is not always absolutely clear where there has been a hospital admission as such, but that is how the Transport Accident Act provisions work.

In our submission there should be a cost-benefit analysis taken in relation to whether that medical excess should be retained or otherwise. We say that there are powerful arguments for the abolition of the excess. There is no really apparent logical reason for its existence. The operation of the excess tends to shift costs arbitrarily onto the public health system or elsewhere. The excess impacts most severely the most vulnerable people who are not in a position to finance treatment on a private basis. In our experience, once people who are injured, and particularly the more vulnerable people — and you can think of people who have sustained significant psychological or psychiatric injuries in particular — are pushed away from the TAC system and are encouraged and directed and told they have to go elsewhere to have their treatment funded, there is a grave risk that they are not going to make it back into the TAC-funded system once the excess is actually met. Also there is a tendency for people who are not having their treatment funded by the TAC to not have their treatment funded at all.

The DEPUTY CHAIR — If I may, just to be clear: the initial $584 must be paid? There is not a method of the injured person using Medicare, for example, and transferring costs to other jurisdictions and translating that into $584? Effectively the person has to spend that amount of money?

Mr CUMMING — No, not the latter. It can be put through Medicare or private health or funded by any means, the point being that the TAC will not pay the first $584. You have to go through the process of having treatment funded through Medicare or privately, or on whatever other basis, and then TAC needs to be provided with the evidence of those amounts having been paid and that threshold having been met before the TAC becomes responsible to pay. Apart from anything else, going through that process there is some — not a trivial — administrative burden on the TAC, liaising with the person and then reviewing the material and making a decision that the threshold has been met in the first place, which tends to offset some of the costs in terms of abolishing that excess amount.

There is another issue surrounding that excess. One of the terms of reference of this inquiry is around measuring the cost of serious injury. If people are being taken out of the TAC system — one of the obvious ways of measuring serious injury is by reference to TAC claim data and expenses being paid by TAC — and if people are being pushed out of the TAC system because of this excess, then it mitigates against a comprehensive measurement of the cost of serious injury. Again, being conscious of the time, I will leave it at that in terms of the initial submission that I would like to make and hand it over, if you have any questions.

Mr PERERA — Thank you.

The DEPUTY CHAIR — I invite my colleagues, as per arrangements, to pursue the questions.

Mr TILLEY — Thanks for that. I will have to go back and read that submission again in better detail than I already have.

Mr CUMMING — Sure.

Mr TILLEY — Firstly, you did offer some commentary in relation to the definition, so I want to drill down on the definition, getting down to the basics. Based on the current Victorian definition of serious injury, it could be argued that it comprises a low threshold for an injury to be classified as a serious injury — that is, admission to hospital. In contrast, the TAC's definition of serious injury under the Transport Accident Act comprises a much higher threshold where a person must be determined to have a degree of impairment of at least 30 per cent to be considered seriously injured. Can you make some comment in relation to your view on this discrepancy between the two definitions and the impact this may have on how Victorian road safety agencies respond to serious injury?

Mr CUMMING — Yes, I have had the opportunity of having a quick read of not only some of the submissions that have been made by other parties but also some of the transcripts of some of the hearings to date, which has been useful from my point of view. There has been a lot of information and detail around criteria and modelling in relation to serious injury, which has been interesting. Our point of view comes from looking at the TAC definition of serious injury and how that applies. You made reference correctly to the 30 per cent or higher whole person impairment threshold of serious injury. But it is important to keep in mind that there are other alternative limbs or alternative ways of proving serious injury under the Transport Accident Act.

Mr TILLEY — Could you expand on some of that?

Mr CUMMING — Sure. So taking a step back, the relevance of the serious injury threshold for the purposes of the Transport Accident Act is that it is the gateway to be able to pursue common-law damages. As you say, the first port of call, or the first limb of the serious injury definition, is that you are automatically deemed to have suffered a serious injury if your level of whole person impairment, when all of your injuries are aggregated and assessed under the relevant edition of the American Medication Association guidelines for the evaluation of permanent impairment — it is a long mouthful, the fourth edition — is 30 per cent or higher; then you are automatically deemed to be serious. But for every person who gets through that serious injury gateway, through that 30 per cent threshold — I am not sure what the statistics are, the TAC would be able to tell you, but from my experience as a lawyer I would say that for everyone who gets through the 30 per cent gateway around eight or nine get through the alternative definition of serious injury.

The primary alternative definition of serious injury is proving that you have suffered a serious long-term impairment or loss of a body function. But more importantly it is what the courts have considered that definition to mean over a long course of decided decisions around the interpretation of that statutory definition. The judicial consideration of that test looks at the consequences of an injury for a person. So it looks at that individual's circumstances and the consequences of an injury for that person.

An injury to a limb — a knee injury which might impact someone's ability to do heavy or significant physical work — may not constitute a serious injury for you or me, but if you are a tradesman with a significant physical component, then that same industry injury for a different person might be a serious injury. That test of looking at the consequences of an injury for a particular person is the gateway to serious injury, which is more often navigated than the impairment threshold.

The other parts of the definition are that you qualify to have a severe long-term mental or behavioural disorder, and there is a definition around scarring as well. By far the most significant part of the definition is the long-term impairment or loss of a body function, which focuses on the consequences for the individual. As you say, that definition is a very high definition. It is set up as a gateway or a threshold to access common law, so it has a particular purpose. In our submission is a working definition of 'serious injury', which is designed to capture all of the costs of serious injury, and we say that that definition of 'serious injury' which operates as the common-law gateway is not an appropriate one and that the bar is too high and would exclude a lot of people who, in any ordinary parlance or already in common experience, have actually suffered a serious injury.

Mr TILLEY — And that is reflected in your submission under the first paragraph of your executive summary at 1.3 — the inadequacies.

Mr CUMMING — Yes.

Mr ELSBURY — Thank you very much. The TAC submission to the inquiry proposes that long-term opportunities should be explored to develop a road safety measure of impairment, pain and suffering and quality

of life lost to measure the severity of crash-related serious injury. What is your view on using pain and suffering damages to measure injury severity?

Mr CUMMING — Pain and suffering damages? If the criterion is pain and suffering damages of itself, there are some practical difficulties around that, because pain and suffering damages only come into the equation where someone has already navigated that serious injury threshold that we have already canvassed. That only applies to a certain proportion of people who are injured in transport accidents or who suffer serious injuries in transport accidents — that is, whereby there is a negligent party who is being sued or applications are being made to sue that person — so it does not even come on the radar for a situation where the person injured may have caused the accident themselves or indeed there is no negligent party.

The DEPUTY CHAIR — So there has to be that negligence component?

Mr CUMMING — To have that common-law claim, yes, to trigger the relevance of the serious injury threshold in the first place.

Mr PERERA — Can you outline for the committee what factors are taken into account by the courts when determining the quantum for pain and suffering damages for individuals seriously injured in road crashes? To what extent do the final pain and suffering estimates accurately reflect an individual's lifetime needs and the overall impact of injuries on their lives?

Mr CUMMING — I will take that in two parts. Firstly, was the question referring to pain and suffering damages in particular?

Mr PERERA — Yes.

Mr CUMMING — If there is a common-law claim — so if there was a circumstance where someone has been injured in circumstances where another party has been negligent so they are accessing common law and they have been through the serious injury threshold — that is when the damages question becomes relevant. At that point in time potentially there can be two separate types of damages claim: one for the pain and suffering and loss of enjoyment of life that you have referred to, so general damages, and the other limb there is economic loss damages. In terms of assessing it, first of all it is only going to be a measure for people who have been through that threshold, and it is only going to be for a certain proportion of people. But to the extent that those people have gone through all of those prerequisites and gone through the threshold to have a claim, it is a measure which would be a reasonable measure in the sense that it assesses their pain and suffering and loss of enjoyment of life, so the qualitative aspect of their life.

To the extent there has been a relevant financial loss that can be sued for, we would also make an assessment of the financial loss as well, although under the common-law provisions there are a couple of limitations around being able to recover for loss of earnings and loss of earning capacity by virtue of a claim having to reach a certain threshold level of approximately $50 000 to go the claims route at all. Secondly, there is an upper limit on it, a cap on it, at about $500 000. Within those confines it is a measure, but it is not a measure for the reasons around thresholds and relevance that would be applied to everybody.

The DEPUTY CHAIR — In your submission you referred to the problem of self-employed persons who are seriously injured in road crashes but are only eligible through the TAC compensation scheme to receive income support benefits at the rate of 80 per cent of the pre-average weekly earnings. It is noted that this income support benefit does not take into account fixed costs of operating a business and a likely reduction in revenue. On the basis of your experience, how big an issue is this and what is an appropriate response to address this issue?

Mr CUMMING — Thank you for the questions. The 80 per cent applies to the self-employed and the employed, being the amount that the TAC will pay by way of a loss of earning or loss of earning capacity benefit, whether it is an employed person or a self-employed person. I should also say that that is up to a statutory maximum as well. There are submissions in relation to the appropriateness of that maximum amount as well, because if you are on average weekly earnings, then you are going to be hitting that threshold amount effectively currently.

Putting that issue to one side, for self-employed people the particular issue is that the way the rate of loss of earnings and loss of earning capacity benefits are calculated is by reference to pre-accident weekly earnings. Pre-accident weekly earnings for a self-employed person is calculated by reference to — not a straight average of but by reference to — a self-employed person's earnings within the three years leading up to the date of the accident. That is the test. In calculating the pre-average weekly earnings for the self-employed person who is running a business, essentially it is a profit calculation. It is looking at what the revenues are, taking away the expenses of the business and essentially the figure is based on the profit calculation. All of the expenses of the business — the recurring costs and also the fixed costs of the business — are deducted from the revenue figure to give a profit figure upon which the 80 per cent is then applied.

The issue then is that after the accident when the injured person becomes entitled to a benefit they are receiving a benefit which is calculated on that profit figure, which has already taken into account the fixed costs, but then from that benefit they are receiving, by definition of a fixed cost to the business, they still have to keep paying the fixed cost, whether they are receiving some limited revenue because they can partially return to work or whether they are receiving no revenue because they cannot return to work at all. In other words, those fixed costs are being factored in twice; they are being double counted. That is an anomaly in the act and something that we say needs to be fixed by legislative amendment.

Mr PERERA — When you say 'fixed costs', that is the depreciation of capital; is that it?

Mr CUMMING — It can be things such as rent. I had a recent situation of a client who had a significant franchise fee — he had a franchise operation. That was a classic example. Before the accident he paid a set fee for his franchise on a recurring basis. It was fixed, was not dependent on and did not fluctuate with the amount of work that he did or with his level of activity or with his level or revenue; he just had to pay it. It was taken into account in reaching his profit figure upon which his benefit is paid, but then from that benefit, which has already taken it into account, he then has to keep paying that ongoing fixed franchise fee at the same rate, so he is in a very significantly worse financial position than he would be if he was an employed person.

In fact on one view, depending on the circumstances of how long lived the injury was going to be, he may be better off actually ceasing to operate, because he is not paying a franchise fee, there is no ongoing business, he puts it to one side and gets his full benefit. There are obvious implications for him, his business, his family, his suppliers, his customers and the economy as a whole because of this anomaly that exists in the act.

The DEPUTY CHAIR — Just by way of supplementary question, I am thinking about a person who I know in those circumstances. He is a painter, and he needed to employ somebody else to replace him for a period of about six or eight months because he did not wish to lose the business. If you are out of the market, sometimes you are just out of the market. Would he have been able to factor in the employment of a replacement person?

Mr CUMMING — Up to an extent he could, yes. There is capacity for a replacement labour cost to be taken into account, yes. So it is a different issue. It is not a fixed cost. It is a different issue.

The DEPUTY CHAIR — Sure.

Mr PERERA — Does depreciation fall into that for plant and machinery?

Mr CUMMING — I think it is a relevant fixed cost, yes.

Mr PERERA — You take it out.

Mr CUMMING — We take it out, exactly. All of those fixed costs you would think of operate the same way; they have the same detrimental effect.

The DEPUTY CHAIR — Are you able to comment on any scenarios to do with truck drivers, for example?

Mr CUMMING — Any particular issues around truck drivers?

Mr ALIFERIS — Just in terms of what you just discussed — self-employed truckies or others who use the road network for work.

Mr CUMMING — Sure. Ordinarily if you are in the course of your employment when the road accident happens, notwithstanding that it is a transport accident, so you would otherwise be covered by the Transport Accident Act, if you are in the course of business or in the course of your employment, your statutory entitlements actually fall under the Accident Compensation Act, so it would be payable by WorkCover or one of the WorkCover insurers. It is a different scheme, different legislation.

Mr ELSBURY — How does that compare?

Mr ALIFERIS — Through the Deputy Chair, if I may, that is fine if you are an employer. If you are not an employer — —

Mr CUMMING — So you are saying if you do not have any relevant WorkCover insurance coverage?

Mr ALIFERIS — If you are self-employed, you are not covered by the occupational health and safety legislation and so naturally you would be under the TAC. In that scenario how are you affected?

Mr CUMMING — If the scenario is that WorkCover is not applicable, for whatever reason, and it is a transport accident situation and you are covered by the Transport Accident Act, then to the extent that you are running a business and you have fixed costs associated with the business and variable costs associated with the business, then you would be confronted by the same problem in terms of having the fixed costs flowing through to the calculation of your benefits.

Mr PERERA — Your submission proposes a number of changes to the administration of the Transport Accident Act 1986 as well as legislating changes to the act. How will these proposed changes work towards addressing crash-related serious injuries in Victoria at both an individual level and a broader community level?

Mr CUMMING — Firstly, I will just work through them quickly one by one as they appear. The first one is in relation to the unreasonably low schedule of fees. If TAC is not properly funding or is not funding according to law and not paying a reasonable cost of treatment services, then at page 16 of our submission we have set out the implications that we say will flow through in terms of the quality and the timeliness of the treatment that injured people are receiving, with obvious flow-on consequences for the long-term severity of their injuries. So if you are not getting access to treatment, whether it is to physiotherapy treatment or whether it is to an appropriate medical specialist who is an expert in the field who will take on the work — access to appropriate, timely, properly funded medical care — it will have direct flow-on implications for the long-term severity of the injury as opposed to the immediate severity of the injury.

Mr KOSTICK — An expansion of that would be that we have spoken to some 600 to 700 private practising physiotherapy clinics or sole practitioners, and anecdotally the overriding feedback is if a patient was to apply for treatment as a TAC patient, they would be put in the too-hard basket. Junior practitioners would perhaps treat them or maybe newly qualified physiotherapists seeking new business, but anecdotally I can report that anecdotally the most established, the most proficient and perhaps the most likely to facilitate rehabilitation for some of the most seriously injured on the roads do not want a bone of it. That cannot be a good outcome from an otherwise compassionate organisation.

The DEPUTY CHAIR — Beyond the provision of services such as physiotherapy, do you have any general observations in relation to the TAC's case management? I will give you an example which is close to home. A person ends up at the TAC and it takes about six months for the TAC to contact the employer to start doing the ergonomic stuff at the office, plan for a return to work, identify duties that that person might well have been able to carry out or actually encourage the person to re-engage with that person's coworkers and not distance them from the staff. Twelve months later they are still arguing about some services.

In the meantime the employer has to make a decision. This is a very small business, with two staff in the office, and the employer has to make decisions about the replacement of staff. There are a whole bunch of issues that in my observation could have been addressed by having good case management. If I were to base my judgement on the TAC's case management on the basis of that example, to be perfectly honest I would give them less than 1 out of 10. I would have thought that that added to the cost of injury enormously. Do you have any general experience in relation to case management?

Mr CUMMING — Yes, we do because we are working on a daily basis with people who are going through this business of dealing with the TAC. I would say that the experience in relation to management of claims is widely variable within the TAC. Unfortunately to a large extent it depends on who has your claim. Experiences can differ from person to person. But it is fair to say that we are of the view that the TAC is oftentimes largely reactive and not proactive in terms of the provision of information, the provision of support services and the provision of the sorts of help and assistance that can help people get access to medical care early, get access to rehabilitation and return to work — and funded return to work. That is available. It is available for TAC to step in and fund return to work, to pay the WorkCover insurance and to facilitate an early return to work that might otherwise not have been possible or feasible from the point of view of the employing business. But oftentimes that does not happen.

As I say, oftentimes the TAC is reactive and not proactive. At 4.1.2 of our submission on page 17 we set out some examples of situations where outcomes are not what they could have been because of the failure of the TAC to be proactive and provide information about the obligations it has and the services that it is obliged to provide. People just do not know about them. They do not know to ask for them, and therefore they do not get them.

Mr KOSTICK — In compiling our submission to this inquiry Maurice Blackburn lawyers undertook to consult with approximately a dozen to 15 serious injury peak organisations, among them the like of BrainLink, which is the peak body for acquired injury carers, as well as Limbs 4 Life, which looks after and supports the needs of those who suffer an amputation. Certainly if you were to relate it back in terms of the inquiry, opportunities are being missed to reduce the burden on those with a serious injury and their carers. By extension, some of the stories we have heard have ranged from people not understanding that a mild acquired brain injury does not necessarily mean it is not having a severe impact on someone's life.

If you are a high-functioning individual, it can be hugely detrimental. Other anecdotal feedback we had when consulting with these peak groups that really spanned the nature of the injuries that you might incur in a road accident was a deteriorating sense of compassion from the Transport Accident Commission. Some noted since the commission moved to Geelong perhaps people who might man the phones needed to be recruited from people who had more of an insurance background than people who had less of, shall we say, an allied health background. Opportunities were being missed to inform people of their entitlements.

There was a case recently where a man who had assisted the commission over a number of years in public service announcements on road safety was not informed of his rights for reimbursement of counselling fees that he and his family had incurred for the death of his son. For three years he worked hand in glove with the TAC to help it, but the commission did not find the time to let him know how it might be able to alleviate his suffering.

It was clear to us in those consultations that getting the right information at the right time to the right people is not a strength of the Transport Accident Commission. Some might say, 'You could expect that from an insurer, but from a state-sponsored one?'. That left a bad taste in the mouths of some members of the group that we discussed it with.

The DEPUTY CHAIR — Are there any additional comments or questions?

Mr TILLEY — Just that, being perfectly frank, we are going to have some difficulties with regard to where exactly the submission in its entirety fits in the terms of reference. But certainly I thank you for your submission and the evidence you have given today. That is my view. I am just trying to work out where in the terms of reference all of it is going to fit.

Mr CUMMING — Look, I think the main thrust is that the issues around information and access to medical services, expert medical services and properly funded medical services, flows directly into the outcomes that people have in relation to the treatment of the injuries. So it goes directly to and is directly on point in relation to reducing the severity of the injuries, which is one of the terms of reference. That is what I would say in relation to that.

If I could, I would like to leave you with some material in relation to making the point about the TAC giving misinformation about what its obligations are. I just extracted material this morning from the TAC website which says the TAC can only fund medical services in accordance with the TAC reimbursement rates of

medical services and the fees listed in the TAC fees schedule. So you have a statutory authority saying, 'We can only do this'. That is a pretty clear statement that it is able to do only that. If somebody gets that information from the TAC website and they are getting it from it as a statutory authority in a letter, it is something that they will believe and take on trust. But as I have tried to articulate, it is a misrepresentation of what its obligations are at law. That just emphasises that point. I will leave copies of that material for you.

Mr PERERA — I have a quick question. The average person cannot fight the TAC. They do not have the knowledge, so they have to come to a legal firm. So there will be a cost.

Mr CUMMING — All the work that we — that is, we as in Maurice Blackburn — do in relation to TAC matters is on a no-win, no-charge basis, so it is accessible for that reason. Particularly when the TAC is making these decisions to fund treatment at an inappropriately low rate, and at a rate which has it breaching its own statutory obligations, then every time that happens to one of our clients, we proceed with a challenge under the TAC no-fault dispute resolution protocols. It is a litigation-free process but a formal process.

Every time this gap issue has come up for one of our clients, we have challenged it through the protocols, and we have been successful every time. There is no prospect or possibility of a legal cost payable by our client or even an out-of-pocket expense. So it is a good point, but because of the way the system is set up and the way we operate, we can get it sorted for our clients. But this threshold of people being aware that they can do this and understanding that they can do it without any legal cost consequences is a big issue.

The DEPUTY CHAIR — Thank you. We thank you for the energy and effort you have put into making a submission to this inquiry. You will receive a copy of the transcript in about a fortnight. Should you wish to make factual or typographical errors, you are welcome to do that. Thank you for your time.

Mr CUMMING — Thank you for your time, and thank you for the opportunity.

Mr KOSTICK — Thank you.

Witnesses withdrew.