# Snapshot – appeal costs certificates in criminal proceedings

Relevant legislation – Part 3 of the Appeal Costs Act 1998 (the Act).[[1]](#footnote-1)

Having an appeal costs certificate allows you to apply to the Appeal Costs Board (ACB) to recover costs reasonably incurred because of a proceeding being appealed, adjourned or discontinued. The Act refers to appeal costs certificates as ‘indemnity certificates’.

The final decision about whether to pay the costs or not, is made by the ACB (s. 35; [Van Phuc Diep v Appeal Costs Board [2003] VSC 386](http://www.austlii.edu.au/au/cases/vic/VSC/2003/386.html)).

## General principles

* The Act does not apply to state courts exercising federal jurisdiction.
* You should apply for an appeal costs certificate wherever possible.
* Third parties cannot apply for a certificate.
* There are no appeal rights against a decision to refuse to issue a certificate (s. 37)
* The ACB will only pay the costs that it considers have been reasonably incurred.

## Certificates in criminal appeals and case stated proceedings

An appeal costs certificate can be issued in criminal appeals in the following circumstances.

### Successful appeal against conviction (indictable offences) s. 14

A certificate can be issued if the conviction for a state offence is quashed or set aside. There is not need for a new trial to be ordered.

Conviction includes outcomes under the *Crimes (Mental Impairment Unfitness to be Tried) Act 1997* of:

* a finding at the special hearing that the accused committed the offence
* a verdict of not guilty because of mental impairment
* a finding of unfitness to stand trial (s. 14(4)).

### Crown or DPP appeal against sentence s. 15

The respondent can apply for a certificate for their own costs of an appeal by the Crown or the DPP under the Criminal Procedure Act 2009 (s. 15(1)(a)) and *Children, Youth and Families Act 2005* (s. 15(10(b)). The certificate can be granted regardless of the appeal outcome.

### Interlocutory appeals (ss. 15A and 15B) and case stated proceedings (s. 15C)

An accused can seek a certificate for costs incurred in:

* successful interlocutory appeals by the accused (s. 15A)
* interlocutory appeals by the prosecution (s. 15B)
* case stated proceedings (s. 15C).

### What costs can be claimed in appeals and case stated proceedings?

The costs covered for certificates granted under sections 14, 15, 15A, 15B and 15C, can include:

* the costs of the appeal, interlocutory appeal or case stated
* any additional costs the accused pays, or is ordered to pay, because of the order for a new trial.

## Certificates where proceedings are discontinued or adjourned

An indemnity certificate can be granted by a judge or magistrate provided the adjournment or discontinuance must not be attributable in any way to the act, neglect or fault of the party applying for the certificate or their legal practitioner (s. 16(1)(b), s 17(1)(b)).

A court may order costs against a person or party rather than issue an indemnity certificate.

No costs are paid if proceedings are withdrawn or cases settle before the next hearing.

### Discontinued proceedings (s. 16)

The court can grant a certificate where a proceeding is discontinued, and a new hearing or trial is ordered (s. 16(1)(c)) or deemed to be ordered (s. 16(4)). This may occur where a jury is discharged.

A new hearing or trial must be ordered, and the accused must pay, or be ordered to pay, additional costs because of that new hearing or trial.

The certificate is for the accused’s reasonably incurred costs for the discontinued proceeding that are thrown away and that have not been ordered to be paid by any other party (s. 16(3)).

### Adjourned proceedings (s. 17)

The court can only issue a certificate if it is not appropriate to make an order for costs against a party (s. 17(2)). The application can include the accused’s costs of the day on which the adjournment is granted, and (if appropriate) the next day on which the court sits (s. 17(1)). A proceeding is deemed to be adjourned where the accused is notified of a hearing date and proceeding is not listed on that day.

## DPP application for a continuation of prosecution of an acquitted person

A certificate can be issues where the DPP applies for a continuation of prosecution of a person previously acquitted (s. 17A).

The Court of Appeal may grant a certificate if it is in the interests of justice to do so (see s. 17A(2)). The certificate covers the accused’s costs of the application and the additional costs the accused will pay or be ordered to pay as a result of the continuation (s. 17A(1)).

## Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA)

The following CMIA proceedings are treated as criminal proceedings under Part 3 (s. 18):

* appeals to the Court of Appeal against a finding under (s. 17(1)(c) CMIA that the accused committed the offence
* appeals to the Court of Appeal against a finding of unfitness under s. 14A or not guilty verdict because of mental impairment under s. 24AA CIMA
* investigations under Part 2 CMI Act into the accused’s fitness to stand trial
* special hearings under Part 3 CMIA.

## The maximum costs payable under a certificate

There are maximum amounts that the ACB can pay on each certificate (s. 17(5)). These fees are published in the Government Gazette.

[Fee Schedule 1A](http://handbook.vla.vic.gov.au/handbook/24-payments-to-lawyers-and-service-providers/costs-payable-in-criminal-law-matters/fee-schedule-1a-fees-payable-in-criminal-matters-if-appeal-costs-certificate-has-been-granted) and [Table BBB](http://handbook.vla.vic.gov.au/handbook/24-payments-to-lawyers-and-service-providers/costs-payable-in-criminal-law-matters/fee-schedule-1a-fees-payable-in-criminal-matters-if-appeal-costs-certificate-has-been-granted/table-bbb-fees-for-criminal-matters-if-appeal-costs-certificate-is) of the VLA Handbook for Lawyers set out the fees payable by VLA where a certificate has been granted and which can be claimed from the ACB. These fees are included on VLA’s precedent back sheets for criminal matters. Witness expenses and interpreter’s fees can also be claimed but not loss of wages.

## Applying to the ACB for the payment

All applications to the ACB must be made online via the [ACB Portal](https://justice.service-now.com/acb?id=home). Applications cannot be made by post, fax or email. You can monitor the progress of your application via portal.

For guidance on making an application, read the ‘Online Application Service User Manual’ available on the Department of Justice and Community Safety website: [How to apply to the Appeal Costs Board](https://www.justice.vic.gov.au/justice-system/laws-and-regulation/how-to-apply-to-the-appeal-costs-board).

### Time limits apply

Applications must be made to the ACB within **12 months** of the final determination of the matter, or the certificate will expire. The ACB can extend the time limit if it considers that it is in the interests of justice to do so (s. 35D, 35E).

You must submit the online application as soon as possible after the relevant hearing has occurred. Submit the application for a:

* s. 16 certificate (proceeding discontinued) – after the new trial has taken place
* s. 17 certificate (proceeding adjourned) – after the subsequent hearing has taken place.

### Supporting documents required

Enter the amount claimed from the ACB when completing the online application. For counsel’s fees enter the ACF fee on the back sheet. You must upload the following supporting documents:

* signed certificate or an authenticated court order, provided by the court (all applications)
* statement of exemption regarding client fee agreements and costs disclosure requirements (not required for s. 17 applications)
* For s. 17 (adjournment) certificates, evidence of costs for the day covered by the certificate (back sheet, fee slip, invoice, or VLA claim for lump sum fees). You do not need to provide evidence of fees paid for the subsequent hearing.
* For all other certificates, the accounts or VLA fee forms for **both** the certificate date/s and the re-hearing/re-trial date. The ACB pays for the hearing or trial which incurred the lesser amount.

## If you need help with the application

Contact Chris Carlson, Legal Recovery Officer by email contributions@vla.vic.gov.au or phone (03) 9606 5260.

## Further information

* Judicial College of Victoria, Victorian Criminal Proceedings Manual: [18.4.6 Appeal Costs Act](http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27832.htm)
* Appeals Costs Board website: [How to apply to the Appeal Costs Board](https://www.justice.vic.gov.au/justice-system/laws-and-regulation/how-to-apply-to-the-appeal-costs-board).
* *Appeal Costs Act 1998* Part 3.
1. Section numbers referred to in this document relate to the *Appeal Costs Act 1998*, unless otherwise indicated. [↑](#footnote-ref-1)