



### Costs

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### LEGAL EXPENSES IN GENERAL

#### General principles

- Under current financial arrangements the following principles apply:
  - the CDPP is budget funded and does not charge other agencies for its services;
  - prosecution expenses, including the payment of counsel's fees, witness expenses and any costs awarded to the defendant, are generally borne by the CDPP; and
  - investigation costs are borne by the investigating agency.

2. [The Guidelines for dealings between Investigators and the Commonwealth Director of Public Prosecutions](#) contain financial arrangements for the payment of prosecution and investigation costs. Additional information regarding responsibility for investigation and prosecution costs is set out in Annexure A of the Guidelines. All prosecution costs, including the payment of counsels' fees, witness expenses (other than witnesses who are investigators) are borne by the CDPP. All investigation costs are borne by the partner agency. If there is doubt whether a particular item of expenditure should be regarded as an investigation cost or prosecution cost, the question should be resolved by discussion between the CDPP and the agency concerned.

#### Legal expenses – arrangements agreed to between the agency and the CDPP

3. The CDPP may negotiate and form an agreement with the investigation agency as to who is responsible for paying legal expenses in relation to a prosecution or a class of prosecutions. For example, an agreement was entered into with AFMA concerning the payment of subsistence payments for illegal fisherman in the Southern ocean which resulted in a 50-50 split of those payments.

#### Legal expenses in cases referred by the ACCC

4. The CDPP has arrangements with the ACCC that the CDPP pays all the prosecution legal expenses and then seeks re-imburement from the ACCC. This arrangement includes prosecution of the cartel offence as the funding the CDPP received for the cartels budget measure does not include any prosecution legal expenses.

#### Funding arrangements for Prosecution Legal Expenses

5. The CDPP Financial Delegations Schedule re-issued by the Director on 28 October 2019, under the *Public Governance, Performance and Accountability (PGPA) Act 2013* sets out the financial delegation approval limits in regard to costs. If there are any concerns about the payment of costs, the issue should be raised with the Practice Group Leader or Finance Branch.
6. Particularly, as per the [Witness Expenses NLD](#), the engagement of an expert witness can be directly sourced (without a tender process) and comes within "legal expenses excluding counsel" in the Financial Delegations Matrix. This means that the appropriate financial delegate is the same as those set out in paragraph 33 below. To approve the engagement of an expert witness, the approver needs to comply with the financial delegations for approving proposals to spend money and to enter the Commonwealth into contracts. This approval should be documented before the expert witness is engaged.

### COSTS AWARDED AGAINST THE PROSECUTION

#### Who pays the costs awarded by a Court against the prosecution

7. Generally, the CDPP is responsible for paying costs awarded by a Court against the prosecution. However, investigation agencies will be responsible for costs awarded by a court against the Prosecution where the investigation agency has contributed to the awarding of the costs order. The investigation agency's liability for those costs will be measured according to the extent to which they were responsible for the cost order being made. For example:
  - a. Where costs are ordered after charges are withdrawn, and the charges were initiated by the partner agency without the CDPP considering a brief of evidence and advising on reasonable prospects of conviction;
  - b. Where costs are ordered because of acts, omissions or delays by the partner agency in complying with disclosure obligations;
  - c. Where costs are ordered due to omissions or delays by the partner agency in complying with court orders, for example orders concerning the preparation and /or service of the brief;

- d. Where acts, errors, omissions or delays of the partner agency were the main or significant factors contributing to the costs order.

### Costs in favour of the defendant

8. At common law, a successful defendant in a criminal case is not entitled to costs. The jurisdiction of the court to award costs must be found in statute.
9. In *Latoudis v Casey*<sup>1</sup>, the majority of the High Court held that ordinarily, an order for costs should be made in favour of a successful defendant. However, there is no general rule in summary proceedings that costs follow the event. There will be cases where it is not just and reasonable to order costs against the prosecution or to order payment of all the defendant's costs.
10. Each jurisdiction has its own considerations for the making and assessment of costs. Prosecutors should check the legislative provisions and case law that applies in their jurisdiction. The following is not a complete summary or analysis of the applicable legislation in each region. It is a starting point for prosecutors to turn their minds to the types of considerations that apply in the making of costs orders. Prosecutors should go to and consider the terms of applicable legislative provisions regarding costs in the relevant jurisdiction. The [Cost Resources page on e-hub](#) provides further resources that may assist case officers.

Jurisdiction	Relevant Legislation / Authority
ACT	<ul style="list-style-type: none"> <li>The power to award costs is at the discretion of the court – <i>Magistrates Court Act 1930</i> (ACT) section 244.</li> <li>Quantum of costs: Costs are to be awarded in the way prescribed by the regulations and in accordance with the scale of costs - 244(1)(d)(i) and <i>Magistrates Court Regulation 2009</i> section 4. The amount of costs can also be agreed between the parties.</li> </ul>
New South Wales	<p>A Magistrate may make a costs order under the <i>Criminal Procedure Act 1986</i> (see further below). There is a limit on the circumstances when costs may be awarded – see section 117 and section 214 <i>Criminal Procedure Act 1986</i>. The amount of costs is to be just and reasonable. The order must specify the amount of professional costs payable.</p> <p>If an application for costs is to be made, it needs to be made at the time the defendant is discharged (ie at the conclusion of committal proceedings) or at the time the information is dismissed (in a summary hearing): see <i>Fosse v Director of Public Prosecutions (NSW)</i> (1989) 16 NSWLR 540. After that time, the magistrate has no power to hear a costs application.</p>
	<p>End of Committal</p> <ul style="list-style-type: none"> <li>Chapter 3, Part 2, Division 11 <i>Criminal Procedure Act 1986</i></li> <li>Magistrate can order costs where the defendant is discharged or the matter is withdrawn, or where the defendant is committed for trial/sentence for an indictable matter which is not the same as the offence the subject of the court attendance notice: section 116.</li> <li>Order must specify the amount of professional costs payable or provide for the determination of the amount at the end of the proceedings: section 116(3) and section 119.</li> </ul>

<sup>1</sup> (1990) 170 CLR 534 per Mason CJ, McHugh and Toohey JJ

	At the end of summary proceedings	<ul style="list-style-type: none"> <li>Chapter 4, Part 2, Division 4 <i>Criminal Procedure Act 1986</i>.</li> <li>Magistrate can award costs to the defendant if the matter is dismissed, withdrawn or the proceedings are invalid: section 213.</li> </ul>
	On adjournment	<ul style="list-style-type: none"> <li>If the matter (summary or committal) is adjourned, a Magistrate can award costs against either defendant or prosecutor if they are satisfied the other party has incurred additional costs because of unreasonable conduct/delay of the party against whom the order is made: section 118 (committal), section 216 (summary) <i>Criminal Procedure Act</i>.</li> </ul>
Northern Territory		<ul style="list-style-type: none"> <li>Section 77 of the <i>Local Court (Criminal Procedure) Act 1928</i> (NT) (CPA) and s 5 of the <i>Local Court (Criminal Procedure) Regulations 2016</i> (NT) are the most important provisions.</li> <li>Section 77(1) of the CPA gives the Court the power to award costs where the Defendant is found not guilty of any offence on a complaint, or when a complaint is withdrawn. The Court may order the complainant to pay such costs to the Defendant as it thinks fit.</li> <li>Section 77(2) of the CPA provides that an order for costs shall not be made if: <ul style="list-style-type: none"> <li>(a) The Defendant's actions or omissions in connection with the alleged offence were unreasonable in the circumstances and contributed to the institution or continuation of the proceedings; or</li> <li>(b) The defendant's actions or omissions during the course of the proceedings or in the conduct of the defence were calculated to unnecessarily prolong the proceedings or cause unnecessary expense; or</li> <li>(c) There was sufficient evidence to support a finding of guilt but the defendant was entitled to an acquittal because of a minor procedural irregularity.</li> </ul> </li> <li>Section 77A of the CPA provides that where a Defendant is found guilty of an offence, the Court may order that the Defendant pay costs to the Complainant as it thinks fit.</li> <li>Section 77B of the CPA provides that the Court may make an order for costs against the party which requests an adjournment, regardless of whether the Defendant is subsequently found guilty or not guilty of the offence with which they have been charged.</li> <li>Section 77C of the CPA limits the amount of costs which can be ordered so that they may not exceed an amount prescribed in s 5 of the <i>Local Court (Criminal Procedure) Regulations 2016</i> (NT).</li> <li>Section 5 of the <i>Local Court (Criminal Procedure) Regulations 2016</i> (NT) provides for the calculation of costs, and the matters the Court may have regard to in determining costs. If the Court considers the circumstances of the case, or the legal issues, are of an exceptional nature, the Court may order costs exceeding the prescribed scale.</li> </ul>
Queensland	<u>Costs on Dismissal</u>	<ul style="list-style-type: none"> <li>Part 6, Division 8 <i>Justices Act 1886</i>, in particular sections 158 and s158A. The <i>Justices Act 1886</i> was amended following <i>Latoudis v Casey</i>. Section 158A operates as a limitation on the discretion to order costs in section 158.</li> <li>Quantum is determined by reference to section 158B and to the scale of costs prescribed under Schedule 2 to <i>Justices Regulation 2014</i>. However, under section 158B(2) a magistrate may allow a higher amount for costs if it is just and</li> </ul>

	<p>reasonable having regard to the ‘special difficulty, complexity or importance’ of the case.</p> <ul style="list-style-type: none"> <li>Section 159 requires the sum allowed for costs to be specified in the order.</li> </ul> <p><u>Costs on Appeal</u></p> <ul style="list-style-type: none"> <li>Part 9, Division 1 <i>Justices Act 1886</i>, Section 226 provides that costs can also be awarded on appeals lodged pursuant to section 222. The section 226 power to award costs is broad.</li> <li>Quantum is determined by reference to section 232A and Regulation 4 of Schedule 2 <i>Justices Regulation 2014</i>.</li> <li>Section 232A(2) permits the court to allow a higher amount for costs if the judge is satisfied that the higher amount is just having regard to the ‘special difficulty, complexity or importance’ of the appeal.</li> </ul>
South Australia	<ul style="list-style-type: none"> <li>The court has a wide discretion to order costs as they see fit in summary matters: s 189 of the <i>Criminal Procedure Act 1921</i> (SA). This is subject to some specific exceptions set out in s 189A – s 189D. See also <i>Magistrates Court Criminal Rules 1992</i> r 51, which provides that costs are to be awarded to the successful party unless there is some Act, rule or the court orders to the contrary.</li> <li>Section 189B provides that costs are not awarded in committal matters unless the Magistrates is satisfied that a party has unreasonably obstructed the proceedings</li> <li>Quantum of costs: <i>Magistrates Court Rules 1992 (Criminal)</i> rule 51 and Schedule 1: In the ordinary case, costs will be awarded in accordance with Schedule 1, which provides a scale of costs. The scale of costs does not fetter the general discretion of the court in determining what should be allowed by way of costs.</li> <li>Costs may be ordered in relation to a Magistrates appeal: s 42(5)(c) of the <i>Magistrates Court Act 1991</i> (SA), s 40 of the <i>Supreme Court Act 1935</i> (SA) and r 217.11(1)(e) of the <i>Uniform Civil Rules 2020</i></li> </ul>
Tasmania	<ul style="list-style-type: none"> <li>The court has no power to order costs against the CDPP in Commonwealth matters - <i>Regina v Kinal</i> [1978] Tas SR 91. However, this may be open to challenge.</li> </ul>
Victoria	<ul style="list-style-type: none"> <li>Costs are to be awarded at the discretion of the Court - section 401(1) of the <i>Criminal Procedure Act 2009</i>.</li> <li>A Magistrate has full discretion to determine by whom, to whom and to what extent the costs are to be paid.</li> </ul>
Western Australia	<ul style="list-style-type: none"> <li>Costs can be awarded for matters dealt with summarily. A successful party is entitled to costs – section 67 <i>Criminal Procedure Act 2004</i> (WA)</li> <li>If an indictable charge is discontinued in a Magistrates Court without there having been an election of summary jurisdiction, there is no entitlement to costs – section 4 <i>Official Prosecutions (Accused’s Costs) Act 1973</i> (WA).</li> <li>For matters appealed from a decision of Magistrates Court to the Supreme Court pursuant to section 14 <i>Criminal Appeals Act (2004)</i> – in deciding the appeal, the Supreme Court may make an order as to the costs of the appeal and the costs of the proceedings in the court of summary jurisdiction.</li> </ul>

### Costs Certificates in Commonwealth Matters

- In New South Wales, the *Costs in Criminal Cases Act 1967* empowers a court to grant a costs certificate to a defendant acquitted or discharged of a criminal offence.
- In Victoria, the *Appeal Costs Act 1998* gives a court the power to issue a certificate to a defendant for costs for various circumstances, including a successful appeal against conviction, a prosecution appeal against sentence, a discontinuance or adjournment.

13. These state provisions do not apply to state courts exercising federal jurisdiction. There is no power for a court to grant a cost certificate in respect of proceedings for a Commonwealth offence: see *Solomons v District Court of NSW [2002] HCA 47* and *DPP (Cth) v Hunter & Milner [2003] VSCA 219*.

### Potential costs applications

14. Case officers should anticipate, when preparing a matter for hearing, whether the matter is likely to be subject to an application for costs. This includes being aware of the legislative provisions and case law that provide for the power of a court to make costs orders in their region, and an understanding of the calculation of quantum of costs (for example, is a scale of costs applicable).
15. Prior to hearing, the case officer should consult with their PTL and Branch Head to obtain some general guidance on the appropriateness of an application for costs in that matter and broad instructions on whether to oppose an application for costs if one is made. A court may not necessarily grant an adjournment for instructions or argument.
16. This may also require consultation with the investigating agency. Case officers should also seek guidance from the [Costs Resources page on e-hub](#) and prepare draft submissions in the event an application for costs is made.

### Applications for Costs on notice

17. If a case officer is aware that an application for costs against the CDPP will be made, the case officer should request further information about the proposed quantum of costs sought. This may include requesting an account or summary of costs from defence to support the costs claimed.
18. The case officer should scrutinise the claim, in consultation with their PTL/Branch Head, and seek guidance from the [Costs Resources page on e-hub](#). This may include negotiating with defence. Some discussion before the hearing may result in an agreed quantum that is acceptable to both defence and the CDPP.
19. The case officer should also consult with the investigating agency regarding the appropriateness of the application.
20. Where the Branch Head decision is to **oppose** the application, the case officer should prepare submissions for the prosecutor, seeking guidance from the [Costs Resources page on e-hub](#).
21. Where the Branch Head decision is to **concede** the application:
  - a. The case officer should liaise with defence to determine whether the recipient of any potential costs order is to be the defendant, legal aid, defence counsel or some other third party to ensure that the order is made out to the appropriate recipient.
  - b. When the application for costs against the CDPP is made in court, the prosecutor with conduct should seek an order for costs to be settled by the parties (without quantum being specified unless quantum has been agreed) with leave to bring the matter back before the court in the event that the matter cannot be settled.

### Applications for Costs without notice

22. If an application for costs against the CDPP is made in Court without notice, the prosecutor with the conduct of the matter should request an adjournment to get instructions from their PTL and Branch Head (as well as consult with the investigating partner agency) regarding the appropriateness and quantum of the application.
23. Where an adjournment for instructions is granted and the Branch Head instructs to **concede** the application, the prosecutor should ensure the costs order is made out to the appropriate recipient. Subject to local arrangements, the prosecutor should seek the order for costs to be settled by the

parties (without quantum being specified) with leave to bring the matter back before the court in the event that the matter cannot be settled.

24. Where an adjournment for instructions is granted and the Branch Head instructs to **oppose** the application, the prosecutor should advise the court that the application is opposed and request a further adjournment for argument.
25. Where the court will not grant an adjournment (either for the prosecutor to get instructions or for argument), it is expected that the prosecutor will argue against the application for costs, with reference to the draft submissions they have prepared in advance of the hearing (see paragraphs 15 to 17 above). In the event that a costs order is made, the prosecutor should ensure the costs order is made out to the appropriate recipient. Subject to local arrangements, the prosecutor should seek the order for costs to be settled by the parties (without quantum being specified) with leave to bring the matter back before the court in the event that the matter cannot be settled.
26. If an order is made for costs to be settled by the parties, the case officer should request further information about the proposed quantum of costs sought. This may include requesting an account or summary of costs from defence to support the costs claimed.

### Costs Consultant

27. In some circumstances, such as where the costs sought are significant and are in dispute, it may be necessary to engage a costs consultant to facilitate decision making. A costs consultant can scrutinise and provide advice on costs sought and, in particular, whether the costs claimed by defence in the account or summary of costs are reasonable, whether there is a basis to object to any of the items claimed, the basis for the objections, and a recommendation regarding a counter offer.
28. Further evidence in relation to the costs sought may be required. In some jurisdictions, the prosecutor may need to seek a court order for defence to furnish evidence to support the quantum of costs claimed. This can include seeking a court to order the defence to provide an itemised bill of costs setting out the quantum of costs sought.<sup>2</sup>
29. A costs consultant should be dealt with in the same way as the engagement of any expert witness, and their engagement needs to comply with with CDPD procurement policies. Under the Decision Making Matrices, the decision to retain an expert witness must be made at branch head level or higher before that expert is retained. Case officers should refer to the provisions concerning Expert Witnesses in the *Witness Expenses NLD* for further information.

### When a Costs Order is made

30. The court must issue a formal order for costs even if the parties agree as to the quantum of costs between themselves.
31. If, after a costs order is made, the defendant or a representative (legal aid, counsel, etc.) requests that the costs order should have been payable to a person or entity which is not the recipient named in the order made by the court, then the case officer should either request the defendant or defence representative obtain and forward a signed authorisation from the defendant to pay the costs to that

<sup>2</sup> An itemised bill of costs is a detailed itemisation of work performed and costs charged by lawyers. Sometimes an itemised bill is referred to as a 'bill in taxable form'. An itemised bill is different from a lump sum bill. At a minimum, it should give sufficient information about the costs charged to enable review and assessment. In some jurisdictions, what constitutes an 'itemised bill' is defined by statute. See for example s300 *Legal Profession Act 2007* (QLD) - a bill stating, in detail, how the legal costs are made up in a way that would allow the legal costs to be assessed under division 7; *Uniform Law (r5 Legal Profession Uniform General Rules 2015)* (NSW and VIC) – a bill that specifies in detail how the legal costs are made up in a way so as to allow costs to be assessed; Schedule 3 *Legal Practitioners Act 1981* (SA) - a bill that specifies in detail how the legal costs are made up. Note that a tax invoice can be an itemised bill in some circumstances - *Piper Alderman v Kerry Linda Smoel and Susan Carolyn Wooster (In Their Capacity as The Trustees of The Morris Family Superannuation Fund)* [2017] VSCA 42.

other recipient, or if this cannot readily be obtained, the matter should be called back on before the court so that a variation to the order for costs can be sought.

32. Once the order is made, the case officer must submit an electronic claim for payment, with approval of the relevant delegate below:
  - a. Under \$20,000: Branch Head
  - b. Over \$20,000 and under \$100,000: PGL
  - c. If over \$100,000: Commonwealth Solicitor.

### Costs in indictable matters

33. Costs orders are generally not made in indictable matters.
34. In the event an application for costs is made, the CDPP will oppose an order for costs in favour of a successful defendant:
  - a. in proceedings on indictment; or
  - b. in appeals emanating from trials on indictment.

### Ex gratia payments – Compensation for Detriment caused by Defective Administration Scheme

35. The CDPP will seek a contribution from the investigation agency towards making of any ex gratia payments or compensation payments under the Compensation for Detriment caused by Defective Administration Scheme (CDDA Scheme) if the investigation agency has contributed to the making of those payments. The investigation agency's liability will be to the extent that they are responsible for the making of the payment.
36. Any claim for an ex gratia payment or compensation payment under the CDDA Scheme should be referred to the Practice Group Leader for consideration.

### Costs in private prosecutions

37. Where the power under section 9(5) of the DPP Act is exercised to take over a "private prosecution", the Director will be deemed for all purposes to be the prosecutor, informant or complainant, as the case requires (see section 14(2), DPP Act). If the prosecution is discontinued, the Director may become liable for costs.
38. The CDPP should oppose an application by the defendant for costs in such circumstances, unless local reasons make this impractical or inappropriate. In any submission to the Director recommending that a private prosecution should be taken over with a view to the prosecution being discontinued, the submission should address any potential for costs to be awarded against the Director if the prosecution is taken over and then discontinued.

## COSTS AWARDED TO THE PROSECUTION

### The recovery of investigation costs

39. Investigation costs are not recoverable in successful prosecutions under section 21B of the *Crimes Act 1914* and accordingly, the CDPP does not seek orders in relation to the recovery of investigation costs.

### Costs under Proceeds of Crime Act 2002 and Customs Act 1901 s 243B

40. A Practice Group Leader has the discretion to seek costs in *Proceeds of Crime Act* and *Customs Act* applications if he or she considers it would be appropriate to do so, particularly where the application has been unsuccessfully challenged



### Professional Costs

41. Professional costs may also be sought in summary matters where local law and practice permits. In keeping with accepted practice, the Crown will not seek professional costs when successful in:
- a. proceedings on indictment, including guilty pleas; or
  - b. appeals, whether against conviction or sentence, emanating from trials on indictment, and will oppose an order for costs in favour of a successful defendant:
    - i. in proceedings on indictment; or
    - ii. in appeals emanating from trials on indictment.

### Recipient of Costs Order in favour of the prosecution

42. Any application for costs to be awarded to the prosecution must be sought in favour of the partner referring agency. Since October 2011, the CDPP has not had the means to receive such payments and transmit to Consolidated Revenue. For this reason, any cheques addressed to the CDPP must be returned to the Court with a request to re-address the cheque to the relevant partner agency.<sup>3</sup>
43. While the CDPP cannot ordinarily remit back to our operating budget, there is one instance where costs can be sought in favour of the CDPP. Where the CDPP has engaged external counsel for a summary hearing (or other costs jurisdiction like the Supreme Court) and the costs sought are for a quantifiable invoice from counsel (rather than a notional amount according to a scale), the CDPP can make application for costs to be made out directly to the CDPP as those funds can be returned to our operating budget.

### RELATED RESOURCES

- [Practice Group Instruction - CFC-08 – Recovery of expenses of investigation – s91 ASIC Act 2001](#)

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<sup>3</sup> These payment arrangements also apply to the payment of fines and the payment of pecuniary penalties made as a condition of recognizance release orders. The correct payee for a penalty to be paid by a defendant to the Commonwealth is the relevant partner agency. Case officers should ensure the correct agency name for payment is recorded by court staff.