

**Version No. 013**  
**Appeal Costs Act 1998**  
**No. 87 of 1998**

Version incorporating amendments as at 2 November 2007

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**Version No. 013**  
**Appeal Costs Act 1998**  
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**The Parliament of Victoria enacts as follows:**

**PART 1—PRELIMINARY**

**1 Purpose**

The purpose of this Act is to re-enact, with amendments, the **Appeal Costs Act 1964**.

**2 Commencement**

- (1) Section 1 and this section come into operation on the day on which this Act receives the Royal Assent.
- (2) Subject to subsection (3), the remaining provisions of this Act come into operation on a day or days to be proclaimed.
- (3) If a provision referred to in subsection (2) does not come into operation before 1 April 1999, it comes into operation on that day.

**3 Definitions**

- (1) In this Act—

*appeal* includes an appeal by way of re-hearing, an application for a new trial and any proceeding in the nature of an appeal, but does not include a case stated;

*approved form* means a form approved by the Board;

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**Board** means the Appeal Costs Board under Part 5;

**case stated** means—

- (a) a case stated for the opinion or determination of a superior court on a question of law; or
- (b) a question of law reserved in the form of a special case for the opinion of a superior court;

**costs**, in relation to an appeal or case stated, includes the costs of an application for an indemnity certificate in respect of the appeal or case stated but does not include costs incurred in a court of first instance except where otherwise expressly provided;

**court** includes any tribunal or other body—

- (a) from whose decision there is an appeal to a superior court on a question of law; or
- (b) which may state a case for the opinion or determination of a superior court on a question of law or reserve any question of law in the form of a special case for the opinion of a superior court;

**discontinued**, in relation to a civil or criminal proceeding, includes discontinued because of—

- (a) the death or illness of a judge or magistrate hearing the proceeding; or
- (b) a disagreement on the part of the jury;

**indemnity certificate** means an indemnity certificate granted under Part 2, 3 or 4;

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*insolvent under administration* means—

- (a) a person who is an undischarged bankrupt; or
- (b) a person for whom a debt agreement has been made under Part IX of the Bankruptcy Act 1966 of the Commonwealth (or the corresponding provisions of the law of another jurisdiction) where the debt agreement has not ended or has not been terminated; or
- (c) a person who has executed a deed of arrangement under Part X of the Bankruptcy Act 1966 of the Commonwealth (or the corresponding provisions of the law of another jurisdiction) where the terms of the deed have not been fully complied with; or
- (d) a person whose creditors have accepted a composition under Part X of the Bankruptcy Act 1966 of the Commonwealth (or the corresponding provisions of the law of another jurisdiction) where a final payment has not been made under that composition;

*legal practitioner* means an Australian legal practitioner within the meaning of the **Legal Profession Act 2004**;

S. 3(1) def. of *legal practitioner* inserted by No. 18/2005 s. 18(Sch. 1 item 5).

*member* means chairperson or other member of the Board;

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*sequence of appeals* means a sequence of appeals in which an appeal that follows next after another appeal in the sequence is an appeal against the decision in that other appeal.

- (2) For the purposes of this Act—
- (a) if an appellant is a minor or a person under a disability, a reference to an appellant includes a reference to his or her litigation guardian or a person who is his or her guardian within the meaning of the **Guardianship and Administration Act 1986**;
  - (b) if a respondent is a minor or a person under a disability, a reference to a respondent includes a reference to his or her litigation guardian or a person who is his or her guardian within the meaning of the **Guardianship and Administration Act 1986**.
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**PART 2—ENTITLEMENT TO PAYMENT IN CIVIL  
MATTERS**

**4 Application by respondent for indemnity certificate  
in respect of appeal**

- (1) If an appeal against a decision of a court in a civil proceeding—
- (a) to the Trial Division of the Supreme Court;  
or
  - (b) to the Court of Appeal, including an appeal to the Court of Appeal from a decision of the Trial Division of the Supreme Court; or
  - (c) to the High Court of Australia from a decision of the Supreme Court—

succeeds, a respondent to that appeal may apply to the Supreme Court for, and the court may grant, an indemnity certificate in respect of costs.

- (2) If an appeal to the County Court against a decision of a court in a civil proceeding succeeds, a respondent to that appeal may apply to the County Court for, and the court may grant, an indemnity certificate in respect of costs.

**5 Certificate entitles respondent to payment of costs**

- (1) Subject to subsection (2), a respondent granted an indemnity certificate under section 4 is entitled to be paid by the Board, on an application made to it by the respondent in the approved form—
- (a) an amount equal to the appellant's costs (if any)—
    - (i) of the appeal in respect of which the indemnity certificate was granted; and
    - (ii) if the court makes an order for a new trial—of any new trial that is held as a consequence of that order; and



(iii) if the appeal in respect of which the indemnity certificate was granted is an appeal in a sequence of appeals—of any appeal or appeals in the sequence that preceded that appeal—

that the respondent has been ordered to pay and has actually paid; and

(b) an amount equal to the respondent's own costs—

(i) of the appeal in respect of which the indemnity certificate was granted; and

(ii) if the court makes an order for a new trial—of any new trial that is held as a consequence of that order; and

(iii) if the appeal in respect of which the indemnity certificate was granted is an appeal in a sequence of appeals—of any appeal or appeals in the sequence that preceded that appeal—

that have not been ordered to be paid by any other party, as assessed by the Board on a party and party basis, or as agreed to by the Board and the respondent; and

(c) if the costs referred to in paragraph (b) are assessed, an amount equal to the costs incurred by the respondent in connection with the assessment.

(2) The maximum amount payable to a respondent pursuant to an indemnity certificate granted under section 4 is \$50 000 or any other amount that is prescribed.

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**6 Appellant may request direct payment in certain circumstances**

- (1) An appellant, whose costs referred to in section 5(1)(a) were ordered to be paid by a respondent granted an indemnity certificate under section 4, is entitled to be paid those costs (or any part of them) by the Board, on an application made to it by the appellant in the approved form, if the respondent has not actually paid those costs or that part and the Board is satisfied that—
  - (a) the respondent is refusing, or is unable because of lack of means, to do so; or
  - (b) doing so would cause the respondent undue hardship.
- (2) On the payment to the appellant, the Board is discharged from any liability to the respondent in respect of any costs so paid.
- (3) The maximum amount payable to an appellant under this section is \$50 000 or any other amount that is prescribed.

**7 Application by successful appellant for grant of indemnity certificate in certain circumstances**

- (1) If—
  - (a) there is an appeal against the decision of the Magistrates' Court in a civil proceeding to the Supreme Court on a question of law; and
  - (b) the respondent does not appear either in the proceedings before the Magistrates' Court or on the appeal; and

(c) the appeal succeeds but the Supreme Court refuses to order the respondent to pay the appellant's costs of the appeal—

the appellant may apply to the Supreme Court for, and the court may grant, an indemnity certificate in respect of costs.

- (2) Subject to subsection (3), an appellant granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by the appellant in the approved form—
- (a) an amount equal to the appellant's own costs of the appeal as assessed by the Board on a party and party basis, or as agreed to by the Board and the appellant; and
- (b) if the costs referred to in paragraph (a) are assessed, an amount equal to the costs incurred by the appellant in connection with the assessment.
- (3) The maximum amount payable to an appellant pursuant to an indemnity certificate granted under subsection (1) is \$2000 or any other amount that is prescribed.

**8 Appellant ordered to pay costs of new trial entitled to be indemnified**

- (1) If, on an appeal in a civil proceeding the court orders a new trial, and on the new trial the court orders the appellant to pay the respondent's costs of that new trial, the appellant may apply to the trial court for, and that court may grant, an indemnity certificate in respect of costs.
- (2) Subject to subsection (3), an appellant granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by the appellant in the approved form—

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- (a) an amount equal to the respondent's costs of the new trial that the appellant has been ordered to pay and has actually paid; and
  - (b) an amount equal to the appellant's own costs of the new trial that have not been ordered to be paid by any other party, as assessed by the Board on a party and party basis, or as agreed to by the Board and the appellant; and
  - (c) if the costs referred to in paragraph (b) are assessed, an amount equal to the costs incurred by the appellant in connection with the assessment.
- (3) The maximum amount payable to an appellant pursuant to an indemnity certificate granted under subsection (1) is \$50 000 or any other amount that is prescribed.

**9 Respondent may request direct payment in certain circumstances**

- (1) A respondent, whose costs referred to in section 8(2)(a) were ordered to be paid by an appellant granted an indemnity certificate under section 8(1), is entitled to be paid those costs (or any part of them) by the Board, on an application made to it by the respondent in the approved form, if the appellant has not actually paid those costs or that part and the Board is satisfied that—
- (a) the appellant is refusing, or is unable because of lack of means, to do so; or
  - (b) doing so would cause the appellant undue hardship.
- (2) On the payment to the respondent, the Board is discharged from any liability to the appellant in respect of any costs so paid.

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- (3) The maximum amount payable to a respondent under this section is \$50 000 or any other amount that is prescribed.

**10 Application for indemnity certificate if civil proceeding discontinued**

- (1) If—
- (a) the hearing of any civil proceeding is discontinued; and
  - (b) the reason for the discontinuance was not attributable in any way to the act, neglect or fault of any of the parties to that proceeding or their legal practitioners; and
  - (c) a new trial is ordered—

a party to that proceeding may apply to the court before which the proceeding is discontinued for, and the court may grant, an indemnity certificate in respect of the party's own costs of the discontinued proceeding.

- (2) The court may only grant an indemnity certificate under subsection (1) if it is satisfied that the reason for the discontinuance was as set out in subsection (1)(b).
- (3) A party granted an indemnity certificate under subsection (1) who pays, or is ordered to pay, any additional costs as a consequence of the order for a new trial is entitled to be paid by the Board, on an application made to it by that party in the approved form, an amount equal to that party's own costs of the discontinued proceeding that the Board considers to have been reasonably incurred.

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**11 Plaintiff who is under a disability or is a minor entitled to payment when offer of compromise not approved by court**

If in a proceeding brought by or on behalf of a plaintiff who is under a disability or is a minor—

- (a) an offer of compromise is made by a defendant; and
- (b) the court refuses to approve the acceptance of the offer; and
- (c) the plaintiff obtains a judgment on the claim to which the offer relates that is not more favourable to him or her than the terms of the offer; and
- (d) the plaintiff is ordered by the court to pay the whole or part of the defendant's costs of the proceeding—

the plaintiff may apply to the court for, and the court may grant, an indemnity certificate in respect of costs.

**12 Certificate entitles plaintiff to payment of costs**

- (1) Subject to subsection (2), a plaintiff granted an indemnity certificate under section 11 is entitled to be paid by the Board, on an application made to it by the plaintiff in the approved form—
  - (a) an amount equal to the defendant's costs (if any) of the proceeding that the plaintiff has been ordered to pay and has actually paid; and
  - (b) an amount equal to the plaintiff's own costs of the proceeding incurred after the date on which the court refused to approve the acceptance of the offer, that have not been ordered to be paid by any other party, as assessed by the Board on a party and party

basis, or as agreed to by the Board and the plaintiff; and

(c) if the costs referred to in paragraph (b) are assessed, an amount equal to the costs incurred by the plaintiff in connection with the assessment.

(2) The maximum amount payable to a plaintiff pursuant to an indemnity certificate granted under section 11 is \$50 000 or any other amount that is prescribed.

**13 Defendant may request direct payment in certain circumstances**

(1) A defendant, whose costs referred to in section 12(1)(a) were ordered to be paid by a plaintiff granted an indemnity certificate under section 11, is entitled to be paid those costs (or any part of them) by the Board, on an application made to it by the defendant in the approved form, if the plaintiff has not actually paid those costs or that part and the Board is satisfied that—

(a) the plaintiff is refusing, or is unable because of lack of means, to do so; or

(b) doing so would cause the plaintiff undue hardship.

(2) On the payment to the defendant, the Board is discharged from any liability to the plaintiff in respect of any costs so paid.

(3) The maximum amount payable to a defendant under this section is \$50 000 or any other amount that is prescribed.

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**PART 3—ENTITLEMENT TO PAYMENT IN CRIMINAL  
MATTERS**

**14 Application for indemnity certificate if appeal  
against conviction is successful**

- (1) If an appeal to a superior court against a conviction for an indictable offence succeeds and the court quashes the conviction, the appellant may, whether or not the court orders a new trial, apply to the court for, and the court may grant, an indemnity certificate in respect of costs.
- (2) If, on an appeal referred to in subsection (1), the superior court orders a new trial, the appellant, in their application under that subsection for an indemnity certificate, may apply for the inclusion in that certificate of any additional costs that they will pay, or will be ordered to pay, as a consequence of the order for a new trial.
- (3) An appellant granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by the appellant in the approved form—
  - (a) an amount equal to the appellant's own costs of the appeal; and
  - (b) any additional costs that the appellant pays, or is ordered to pay, as a consequence of the order for a new trial—

that the Board considers to have been reasonably incurred.



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- (4) In this section, *conviction* includes—
- (a) a finding under section 17(1)(c) of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**;
  - (b) a verdict of not guilty because of mental impairment;
  - (c) a finding of unfitness to stand trial.

**15 Application for indemnity certificate by respondent if the Crown or DPP appeals**

- (1) If an appeal is instituted under—
- (a) section 567A of the **Crimes Act 1958**; or
  - (b) section 84 of the **Magistrates' Court Act 1989**; or
  - (c) section 424(3) of the **Children, Youth and Families Act 2005**—

S. 15(1)(c)  
substituted by  
No. 48/2006  
s. 42(Sch.  
item 3).

the respondent to that appeal may apply to the Court of Appeal or the County Court (as the case requires) for, and the court may grant, an indemnity certificate in respect of the respondent's own costs of the appeal.

- (2) A respondent granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by the respondent in the approved form, an amount equal to the respondent's own costs of the appeal that the Board considers to have been reasonably incurred.

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**16 Application for indemnity certificate if criminal proceeding discontinued**

- (1) If—
- (a) the hearing of any criminal proceeding is discontinued; and
  - (b) the reason for the discontinuance was not attributable in any way to the act, neglect or fault of an accused or that accused's legal practitioner; and
  - (c) a new hearing or trial is ordered—
- that accused may apply to the court before which the proceeding is discontinued for, and the court may grant, an indemnity certificate in respect of that accused's own costs of the discontinued proceeding.
- (2) The court may only grant an indemnity certificate under subsection (1) if it is satisfied that the reason for the discontinuance was as set out in subsection (1)(b).
- (3) An accused granted an indemnity certificate under subsection (1) who pays, or is ordered to pay, any additional costs as a consequence of the order for a new hearing or trial is entitled to be paid by the Board, on an application made to it by the accused in the approved form, an amount equal to the accused's own costs of the discontinued proceeding that the Board considers to have been reasonably incurred and that have not been ordered to be paid by any other party.

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- (4) For the purposes of this section, if in a criminal proceeding the presiding judge or magistrate directs that the proceeding be discontinued without ordering a new hearing or trial but with a view to another hearing or trial based on the same facts, or facts of a similar character, being conducted against the accused, a new hearing or trial is deemed to have been ordered.

**17 Application for indemnity certificate if criminal proceeding adjourned**

S. 17(1)  
amended by  
No. 34/2004  
s. 4(1).

- (1) If—

(a) the hearing of any criminal proceeding is adjourned; and

S. 17(1)(b)  
amended by  
No. 35/2002  
s. 26(1)(a).

(b) the reason for the adjournment was not attributable in any way to the act, neglect or fault of a party accused or convicted of an offence to which the proceeding relates (whether that party is a defendant, appellant or respondent in the proceeding), or that party's legal practitioner—

S. 17(1)(c)  
repealed by  
No. 35/2002  
s. 26(1)(b).

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that party may apply to the court for, and the court may grant, an indemnity certificate in respect of that party's own costs of the adjournment for the day on which the adjournment is granted and, if appropriate, the next day on which the court sits.

S. 17(2)  
substituted by  
Nos 35/2002  
s. 26(2),  
34/2004  
s. 4(2).

- (2) The court may only grant an indemnity certificate under subsection (1) if it is satisfied that—

(a) it is inappropriate to make an order for costs against any party or any other person; and

(b) the reason for the adjournment was as set out in subsection (1)(b).

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Part 3—Entitlement to Payment in Criminal Matters

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- (3) A party granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by that party in the approved form and on proof being provided by that party of the costs that have been incurred, an amount equal to that party's own costs of the adjournment, to the maximum, if any, specified under subsection (5), in respect of the day or days referred to in the indemnity certificate, that the Board considers to have been reasonably incurred and that have not been ordered to be paid by any other party.
- S. 17(3)**  
amended by  
Nos 35/2002  
s. 26(3),  
34/2004  
s. 4(3),  
14/2006 s. 3.
- (4) For the purposes of this section, a criminal proceeding is deemed to have been adjourned if the court hearing the proceeding, the informant or the Director of Public Prosecutions (as the case may be) notifies the party accused or convicted of an offence (whether that party is a defendant, appellant or respondent in the proceeding) to which the proceeding relates or their legal practitioner that a date has been fixed for the hearing of the proceeding, and the proceeding is not listed for hearing on that day.
- S. 17(4)**  
amended by  
No. 35/2002  
s. 26(4).
- (5) The Attorney-General may, by order published in the Government Gazette, specify the maximum amount payable by the Board for each day in respect of which an indemnity certificate has been granted under this section.
- S. 17(5)**  
inserted by  
No. 34/2004  
s. 4(4).
- (6) An order made under subsection (5)—
- (a) may be of general or limited application;
- (b) may differ according to differences in time, place or circumstance.
- S. 17(6)**  
inserted by  
No. 34/2004  
s. 4(4).

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**18 Proceedings under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

For the purposes of this Part—

- (a) an appeal to the Court of Appeal—
  - (i) against a finding under section 17(1)(c) of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**; or
  - (ii) under section 570A of the **Crimes Act 1958**; or
  - (iii) under section 570C of the **Crimes Act 1958**; or
- (b) an investigation into a defendant's fitness to stand trial under Part 2 of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**; or
- (c) a special hearing conducted under Part 3 of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**—

is to be taken to be a criminal proceeding.

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**PART 4—INDEMNITY CERTIFICATES IN CASES STATED**

**19 Cases stated and questions of law reserved for opinion**

- (1) If in any proceeding—
- (a) a case is stated for the opinion or determination of a superior court on a question of law; or
  - (b) a question of law is reserved in the form of a special case for the opinion of a superior court—

any party to that proceeding other than a party who is or represents the Crown, may apply to the superior court for, and the court may grant, an indemnity certificate in respect of the costs that the party has incurred in respect of the proceeding on the case stated.

- (2) Subject to subsection (3), a party granted an indemnity certificate under subsection (1) is entitled to be paid by the Board, on an application made to it by the party in the approved form, an amount equal to that party's own costs of the proceeding on the case stated that the Board considers to have been reasonably incurred.
- (3) The maximum amount payable to a party pursuant to an indemnity certificate granted under subsection (1) is \$50 000 or any other amount that is prescribed.

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## **PART 5—APPEAL COSTS BOARD**

### **20 Appeal Costs Board**

There continues to be an Appeal Costs Board.

### **21 Functions of the Board**

The functions of the Board are—

- (a) to assess and determine applications for payment made under this Act; and
- (b) to approve forms for the purposes of this Act; and
- (c) to issue certificates in respect of applications for payment made under this Act; and
- (d) as the Board thinks fit, to conduct proceedings in respect of applications for payment made under this Act; and
- (e) as requested by the Attorney-General, to advise, or submit a report to, him or her on any matter relating to the operation of this Act;
- (f) to exercise and discharge any other powers, authorities, duties, functions or obligations conferred or imposed on it by or under this Act.

### **22 Membership**

- (1) The Board consists of the following members appointed by the Attorney-General—
  - (a) a chairperson; and
  - (b) as many other persons as the Attorney-General thinks fit.

- (2) The **Public Administration Act 2004** (other than Part 3 of that Act) applies to a member in respect of the office of member.

S. 22(2)  
substituted by  
Nos 108/2004  
s. 117(1)  
(Sch. 3  
item 13.1),  
80/2006  
s. 26(Sch.  
item 4).

### **23 Term of appointment and termination**

- (1) A member holds office, subject to this Act, for a term of 3 years from the date of appointment and is eligible for re-appointment.
- (2) The Attorney-General may at any time terminate the appointment of a member.

### **24 Payment of members**

A member or acting member of the Board is entitled to be paid any fees, expenses or allowances that are fixed by the Governor in Council.

### **25 Vacancies and resignations**

- (1) The office of a member becomes vacant if the member—
- (a) becomes an insolvent under administration;  
or
  - (b) is convicted of an indictable offence or an offence that, if committed in Victoria, would be an indictable offence.
- (2) A member may resign by writing delivered to the Attorney-General.

### **26 Acting members**

- (1) If a member is absent or, for any other reason, is unable to perform the duties of office, the Attorney-General may appoint an acting member.



- (2) An acting member is appointed for the term (not exceeding 28 days) specified in the instrument of appointment.
- (3) An acting member has all the powers and must perform all the duties of a member.
- (4) The Attorney-General may at any time terminate an acting member's appointment.

### **27 Proceedings before the Board**

- (1) The Board has the powers conferred by sections 14, 15, 16 and 21(1) of the **Evidence Act 1958** on a board appointed by the Governor in Council.
- (2) The Board may agree to pay to any applicant any amount in respect of the cost of making an application to it that it thinks fit.
- (3) Any amount that the Board agrees to pay to an applicant under subsection (2) must be included in any certificate issued under section 35 to that applicant.

S. 27A  
inserted by  
No. 34/2004  
s. 5.

### **27A Board need not hold hearing**

- (1) The Board may determine an application for payment under this Act without holding a hearing.
- (2) The Board may, in its discretion, give an applicant for payment under this Act an opportunity to appear before the Board to be heard in relation to the application.

### **28 Meetings**

- (1) The chairperson must preside at a meeting of the Board.
- (2) A majority of the members for the time being holding office constitutes a quorum of the Board.

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- (3) If there is a quorum at a meeting of the Board, the Board may act despite any vacancy in its membership.
  - (4) Subject to subsection (5), a matter arising at a meeting of the Board is determined by a majority of votes and the chairperson has a deliberative vote and, in the case of an equality of votes, a second or casting vote.
  - (5) If at any meeting of the Board at which 2 members only are present, those members differ in opinion on a matter, the determination of that matter must be postponed to the next meeting of the Board at which more than 2 members are present.
  - (6) The Board must ensure that accurate minutes are kept of its meetings.
  - (7) Subject to this Part and the regulations, the Board may regulate its own proceedings.

**29 Proceeding or decision of Board not invalid by reason of vacancy etc.**

A proceeding or decision of the Board is not invalid only because of a vacancy in the office of a member or a defect or irregularity relating to the appointment of a member or, in the case of a person appointed as an acting member, on the ground that the occasion for that person so acting had not arisen or had ceased.

**30 Conflicts of interest**

- (1) If—
  - (a) a member has a personal interest (whether pecuniary or otherwise) in a matter being considered or about to be considered by the Board; and

- (b) the interest appears to raise a conflict of interest with the proper performance of the member's duties in relation to the consideration of the matter—

the member, as soon as practicable after becoming aware of the relevant facts, must declare the nature of the interest at a meeting of the Board.

Penalty: 5 penalty units.

- (2) The person presiding at a meeting at which a declaration is made must cause a record of the declaration to be made in the minutes of the meeting.
- (3) After becoming aware of the conflict of interest in a matter—
- (a) unless the Board directs otherwise, the member must not be present during any deliberations on the matter; and
  - (b) the member is not entitled to vote on the matter; and
  - (c) if the member does vote, the vote must be disallowed.

S. 31  
amended by  
No. 108/2004  
s. 117(1)  
(Sch. 3  
item 13.2).

### 31 Staff

A Secretary to the Board may be employed under Part 3 of the **Public Administration Act 2004**.

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**PART 6—MISCELLANEOUS, TRANSITIONALS AND  
REPEAL**

**Division 1—General**

**32 Effect of indemnity certificate in sequence of  
appeals**

- (1) An indemnity certificate granted to a respondent under this Act in respect of an appeal in a sequence of appeals is discharged by force of this subsection and of no effect if—
  - (a) in a later appeal in that sequence, the respondent granted the indemnity certificate is successful; or
  - (b) an indemnity certificate is granted in respect of a later appeal in that sequence and the respondent granted an indemnity certificate in respect of the earlier appeal is a party to the later appeal.
- (2) An indemnity certificate granted to an appellant under this Act in respect of an appeal to the Supreme Court is discharged by force of this subsection and of no effect if the appellant is a party to a successful appeal against the decision of the Supreme Court.
- (3) If an appeal and a later appeal or later appeals form a sequence of appeals, and an indemnity certificate in respect of any of those appeals has not been discharged by force of this section, a reference in section 33 or 34 to—
  - (a) the decision in the appeal is to be construed as including a reference to the decision in the later appeal or any other later appeal (as the case may be); and

(b) the determination of an appeal is to be construed as including a reference to the determination of any later appeal.

(4) The operation of this section is not affected by section 33 or 34.

**33 Effect of indemnity certificate where there is limited period for appealing**

If an appeal lies against a decision in an appeal and there is a limited period for instituting that appeal, the effect of an indemnity certificate granted to a respondent under section 4, or to an appellant under section 7(1), in respect of that appeal is stayed—

- (a) if no appeal is instituted against the decision in that appeal during that period—until the expiry of that period; or
- (b) if an appeal is instituted against the decision in that appeal—until the determination of the appeal.

**34 Effect of indemnity certificate where there is no limited period for appealing**

(1) If an appeal lies against a decision in an appeal and there is not a limited period for instituting that appeal, the effect of an indemnity certificate granted to a respondent under section 4 in respect of that appeal is stayed—

- (a) if an application for leave to appeal against the decision in that appeal is made—until that application is determined and, if leave is granted, until the determination of the appeal; or

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- (b) until the respondent gives an undertaking in writing to the Board that they will not make an application for leave to appeal or appeal against the decision in that appeal—
- whichever happens first.
- (2) If an appeal lies against a decision in an appeal and there is not a limited period for instituting that appeal, the effect of an indemnity certificate granted to an appellant under section 7(1) in respect of that appeal is stayed—
- (a) if an application for leave to appeal against the decision in that appeal is made—until that application is determined and, if leave is granted, until the determination of the appeal; or
- (b) until the expiry of 3 months after the date of the decision in the appeal against which an appeal lies—
- whichever happens first.
- (3) If a respondent breaches an undertaking that they have given to the Board under subsection (1)(b), the respondent must, on demand made by the Board, repay to the Board any amount paid to the respondent pursuant to the indemnity certificate.
- (4) If an appellant granted an indemnity certificate under section 7(1) in respect of an appeal to the Supreme Court is a party to a successful appeal against the decision of the Supreme Court, the appellant must, on demand made by the Board, repay to the Board any amount paid to the appellant pursuant to the indemnity certificate.
- (5) If a person does not repay any amount required to be repaid under subsection (3) or (4), the Board may recover that amount as a debt due to it in a court of competent jurisdiction.
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- (6) Any amount paid to or recovered by the Board under this section must be paid into the Consolidated Fund.

**35 No payments without a certificate of the Board**

- (1) No amount is to be paid under this Act otherwise than in accordance with a certificate of the Board.
- (2) The Board must not issue a certificate for the payment of any amount under this Act unless it is satisfied that the payment is authorised by this Act and that the provisions of this Act and the regulations in relation to a claim for the payment have been complied with.
- (3) Any money that the Board is required to pay under this Act is to be paid out of money made available to the Board for the purpose.

**35A No payments to certain persons or in respect of certain matters**

- (1) Despite any other provision in this Act, no amount is to be paid by the Board under this Act, other than on an application under section 6, 9 or 13—
- (a) to a corporation having paid up share capital of \$200 000 or more or to a subsidiary of such a corporation; or
- (b) to an insurer of a party whose rights under the contract of insurance have been subrogated to the insurer; or
- (c) in respect of costs that are recoverable under an insurance policy or would be recoverable but for any amount payable by way of excess under or in relation to the policy.
- (2) In subsection (1), *corporation* and *subsidiary* have the same meanings as in the Corporations Act.

S. 35A  
inserted by  
No. 34/2004  
s. 6.

**35B Meaning of costs reasonably incurred**

In considering whether costs have been reasonably incurred, the Board must take into account—

- (a) whether the seniority and number of counsel engaged were appropriate for the proceeding; and
- (b) in the case of an adjournment, whether counsel took action to mitigate any loss to them arising from the adjournment, such as undertaking other work or being available for other work during the period of the adjournment; and
- (c) any other matter specified by the Attorney-General by order published in the Government Gazette.

S. 35B  
inserted by  
No. 34/2004  
s. 6.

**35C Board may require costs to be taxed etc.**

- (1) The Board may require that costs the subject of an indemnity certificate be taxed by the taxing officer of the court concerned or by an assessor nominated by the Board.
- (2) The Attorney-General may, by order published in the Government Gazette, direct that all costs—
  - (a) of a specified class; or
  - (b) of an amount exceeding a specified amount—must be taxed by the taxing officer of the court concerned or by an assessor nominated by the Board before the Board determines an application for payment under this Act.
- (3) The Board may require that all or part of the costs of a taxation referred to in subsection (1) or (2) be borne by the applicant for payment under this Act.

S. 35C  
inserted by  
No. 34/2004  
s. 6.



s. 35D

S. 35D  
inserted by  
No. 34/2004  
s. 6.

### **35D Time limits for applications to Board**

An application for payment under this Act must be lodged with the Board not later than 12 months after the final determination of the matter to which the indemnity certificate relates.

S. 35E  
inserted by  
No. 34/2004  
s. 6.

### **35E Expiry of indemnity certificates**

- (1) Subject to subsection (2), if an application for payment under this Act is not lodged with the Board within the time referred to in section 35D, the indemnity certificate expires.
- (2) Despite subsection (1), the Board may determine that an application for payment under this Act may be assessed and determined as if the indemnity certificate had not expired, if it considers that it is in the interests of justice to do so.

### **36 Correction of errors**

The Board, on its own initiative or at the request of the person in respect of whom the Board has issued a certificate, may correct the certificate if it contains—

- (a) a clerical error or accidental slip or omission;  
or
- (b) an evident miscalculation of figures; or
- (c) an evident material mistake in the description of a person or thing.

### **37 No appeal against grant or refusal of indemnity certificate**

- (1) The grant or refusal of an indemnity certificate by a court is in its discretion.
- (2) No appeal lies against a grant or refusal by a court of an indemnity certificate.

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**38 Crown cannot be granted an indemnity certificate**

A court must not grant an indemnity certificate in favour of the Crown or any person representing the Crown.

**39 Payments made or incurred by Victoria Legal Aid**

For the purposes of this Act—

- (a) payments made or expenses incurred by Victoria Legal Aid in respect of the provision of legal assistance to any person in accordance with the **Legal Aid Act 1978** are to be taken to be made or incurred by that person; and
- (b) any amount paid to Victoria Legal Aid under this Act in respect of an assisted person within the meaning of the **Legal Aid Act 1978** is not be taken to be an amount paid to the Crown.

**40 Supreme Court—Limitation of jurisdiction**

It is the intention of section 37(2) to alter or vary section 85 of the **Constitution Act 1975**.

**41 Regulations**

- (1) The Governor in Council may make regulations for or with respect to any matter or thing that is required or permitted to be prescribed or necessary to be prescribed to give effect to this Act.
- (2) Without limiting subsection (1), the Governor in Council may make regulations for or with respect to—
  - (a) the making of payments under this Act;
  - (b) prescribing the maximum amount payable pursuant to an indemnity certificate.

## 42 Board discharged from liability

Any amount payable to a person under this Act may, if the Board thinks fit, be paid to their legal practitioner or to Victoria Legal Aid if the person is an assisted person within the meaning of the **Legal Aid Act 1978** and, on that payment, the Board is discharged from liability to that person in respect of that amount.

### Division 2—Transitionals and repeal

## 43 Transitional—Application of Act

- (1) This Act only applies with respect to new proceedings.
- (2) The **Appeal Costs Act 1964** continues to apply, despite its repeal, to appeals within the meaning of that Act or other proceedings to which it was capable of applying that were instituted or commenced before its repeal.
- (3) For the purposes of this section, a *new proceeding* is—
  - (a) an appeal instituted; or
  - (b) a proceeding commenced; or
  - (c) a case stated brought—on or after the commencement of this section.

## 43A Transitional—2002 amendments

The amendments of section 17 of this Act made by section 26 of the **Criminal Justice Legislation (Miscellaneous Amendments) Act 2002** apply to an application under section 17 made on or after the commencement of section 26 of that Act, irrespective of when the criminal proceeding commenced.

S. 43A  
inserted by  
No. 35/2002  
s. 27.

#### 44 Transitional—Members of the Board

Any person who, immediately before the commencement of section 20 held office as a member of the Appeal Costs Board, continues, on and from the commencement of that section, to hold that office for the balance of his or her term of appointment but may be re-appointed or resign in accordance with this Act.

#### 45 Repeal

The **Appeal Costs Act 1964** is repealed.

#### 46 Transitional—2004 amendments

S. 46  
inserted by  
No. 34/2004  
s. 7.

- (1) Section 17 as amended by section 4 of the **Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004** applies to the grant of an indemnity certificate on or after the commencement of that Act.
- (2) Section 27A as inserted by section 5 of the **Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004** applies to an application to the Board made on or after the commencement of that Act, irrespective of when the indemnity certificate was granted.
- (3) Section 35A as inserted by section 6 of the **Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004** applies to an application to the Board in respect of an indemnity certificate granted on or after the commencement of that Act.
- (4) Sections 35B and 35C as inserted by section 6 of the **Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004** apply to an application to the Board made on or after the commencement of that Act, irrespective of when the indemnity certificate was granted.

Appeal Costs Act 1998  
No. 87 of 1998

Part 6—Miscellaneous, Transitionals and Repeal

s. 46

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- (5) Sections 35D and 35E as inserted by section 6 of the **Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004** apply to indemnity certificates granted on or after the commencement of that Act.
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## ENDNOTES

### 1. General Information

*Minister's second reading speech—*

*Legislative Assembly: 8 October 1998*

*Legislative Council: 10 November 1998*

The long title for the Bill for this Act was "A Bill to re-enact, with amendments, the **Appeal Costs Act 1964** and for other purposes."

#### **Constitution Act 1975:**

*Section 85(5) statement:*

*Legislative Assembly: 8 October 1998*

*Legislative Council: 10 November 1998*

*Absolute majorities:*

*Legislative Assembly: 30 October 1998*

*Legislative Council: 12 November 1998*

The **Appeal Costs Act 1998** was assented to on 24 November 1998 and came into operation as follows:

Sections 1 and 2 on 24 November 1998: section 2(1); rest of Act on 1 April 1999: section 2(3).

## 2. Table of Amendments

This Version incorporates amendments made to the **Appeal Costs Act 1998** by Acts and subordinate instruments.

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### **Criminal Justice Legislation (Miscellaneous Amendments) Act 2002, No. 35/2002**

*Assent Date:* 18.6.02  
*Commencement Date:* Ss 26, 27 on 19.6.02: s. 2(1)  
*Current State:* This information relates only to the provision/s amending the **Appeal Costs Act 1998**

### **Appeal Costs and Penalty Interest Rates Acts (Amendment) Act 2004, No. 34/2004**

*Assent Date:* 8.6.04  
*Commencement Date:* Ss 4–7 on 9.6.04: s. 2  
*Current State:* This information relates only to the provision/s amending the **Appeal Costs Act 1998**

### **Public Administration Act 2004, No. 108/2004**

*Assent Date:* 21.12.04  
*Commencement Date:* S. 117(1)(Sch. 3 item 13) on 5.4.05: Government Gazette 31.3.05 p. 602  
*Current State:* This information relates only to the provision/s amending the **Appeal Costs Act 1998**

### **Legal Profession (Consequential Amendments) Act 2005, No. 18/2005**

*Assent Date:* 24.5.05  
*Commencement Date:* S. 18(Sch. 1 item 5) on 12.12.05: Government Gazette 1.12.05 p. 2781  
*Current State:* This information relates only to the provision/s amending the **Appeal Costs Act 1998**

### **Justice Legislation (Miscellaneous Amendments) Act 2006, No. 14/2006**

*Assent Date:* 11.4.06  
*Commencement Date:* S. 3 on 12.4.06: s. 2(1)  
*Current State:* This information relates only to the provision/s amending the **Appeal Costs Act 1998**

### **Children, Youth and Families (Consequential and Other Amendments) Act 2006, No. 48/2006**

*Assent Date:* 15.8.06  
*Commencement Date:* S. 42(Sch. item 3) on 23.4.07: s. 2(3)  
*Current State:* This information relates only to the provision/s amending the **Appeal Costs Act 1998**

### **Public Sector Acts (Further Workplace Protection and Other Matters) Act 2006, No. 80/2006**

*Assent Date:* 10.10.06  
*Commencement Date:* S. 26(Sch. item 4) on 11.10.06: s. 2(1)  
*Current State:* This information relates only to the provision/s amending the **Appeal Costs Act 1998**

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**3. Explanatory Details**

No entries at date of publication.