

# Costs of Employment Related Legal Proceedings

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## Authority and Application

Clause 21 of the *Victorian Public Service Enterprise Agreement 2020* (the Agreement) applies to Victorian Public Service Departments and Agencies (Employers) and their Employees covered by the Agreement.

## Overview

On occasion, VPS Employees may be required to attend or participate in a proceeding, hearing, examination, inquiry, or investigative process on matters which arise from the performance of their duties. This includes but is not limited to an Employee appearing before a Royal Commission, the Independent Broad-based Anti-Corruption Commission (IBAC), the Victorian Ombudsman, or a Coroner’s inquest.

Clause 21 of the Agreement sets out the circumstances where the Employer will meet an Employee’s reasonable legal cost relating to the Employee’s appearance and legal representation, including but not limited to where the proceedings are initiated against the Employee, in such matters which arise

as a direct consequence of the Employee legitimately and properly performing their duties. For the purposes of this policy, a reference to 'legal proceeding' also includes reference to a hearing, examination, inquiry, witness interview or other relevant step in an investigative process or formal legal proceeding. An Employer is not required to meet any Employee legal costs incurred in response to an employment related act, process or decision by the Employer.

## **Relevant provisions of the VPS Agreement**

### **Clause 21. Costs of Employment Related Legal Proceedings**

#### **Supplementary Guidance Information**

##### **1. Evidence of Required Attendance**

1.1. Required attendance at legal proceedings includes (but is not limited to) circumstances where an employee is:

- 1.1.1. Summoned to appear before a Royal Commission
- 1.1.2. Summoned to appear before IBAC
- 1.1.3. Summoned to appear before the Victorian Ombudsman
- 1.1.4. Summoned to attend and give evidence at a Coroner's inquest.

1.2. To be eligible to have reasonable legal costs met, the Employee must be able to provide sufficient evidence that they have been required to attend or participate in legal proceedings and evidence that they have sought or will be required to seek legal advice. Acceptable evidence of attendance includes:

- 1.2.1. a subpoena
- 1.2.2. a summons
- 1.2.3. a written direction.

1.3. The Employee may be subject to a Confidentiality Order issued by the Ombudsman or IBAC. The order may prohibit the employee from discussing the matter with anyone else, including their employer. In these circumstances approval for legal representation needs to be managed to ensure that the employee does not breach the order. The Employer may exercise their discretion on the evidence the employee is required to provide for the expenditure.

##### **2. Reasonable Legal Costs**

2.1. Reasonable legal costs will be met by the Employer where they are related to attending or participating in a legal proceeding covered by the provision. Legal costs may be from a law firm engaged by the Employer or a legal representative arranged directly by the Employee. Reasonable legal costs may include but is not limited to the following:

- 2.1.1. Initial legal advice about the process of the legal proceedings.
- 2.1.2. Assistance in preparation of materials for the proceedings.

2.2. In considering the reasonableness of any legal costs incurred (or likely to be incurred) the Employer may have regard to any advice issued by a relevant body or court.

- 2.3. If the Employee incurs legal costs which the Employer is of the view are excessive, the Employer may seek additional information before finalising a decision to pay the legal costs.
- 2.4. Where legal costs are beyond what might be considered reasonable in the circumstances, the Employer may meet up to a reasonable amount and the employee will be required to meet any costs above that amount.

### **3. Circumstances where the Employer is not required to meet an Employee's legal costs**

- 3.1. The Employer is not required to meet the legal costs of an Employee, in circumstances where an Employee has not legitimately and properly performed their duty. This includes but is not limited to:
  - 3.1.1. Circumstances where the Employee is subject to a misconduct process relating to matters being considered in the legal proceedings
  - 3.1.2. Circumstances where an Employee has an adverse finding made against them from the legal proceedings which enables the Employer to be satisfied that the Employee did not legitimately and properly perform their duty.
- 3.2. Legal costs will not be paid by the Employer where the costs are incurred because of an employment related act, process or decision of the Employer. This includes but is not limited to where legal proceedings relate to:
  - 3.2.1. a decision to terminate an Employee's employment
  - 3.2.2. a claim of discrimination against the Employer
  - 3.2.3. resolution of a dispute under clause 13 of the Agreement and/or
  - 3.2.4. action taken by the Employer with regard to the performance or conduct of the Employee under clause 24 or 25 of the Agreement.

- 3.3. No costs will be met for work performed by administrative staff, paralegals or non-lawyers.

### **4. Circumstances where the Employer will cease meeting an Employee's legal costs**

- 4.1. If legal costs have been paid to an Employee in legal proceedings and the Employer becomes aware as a result of the proceedings that the Employee has not carried out their duties legitimately and properly, the Employer will cease paying legal payments and not pay any further payments. In addition, in certain circumstances the Employer may also seek reimbursement of legal payments previously made to the Employee as part of the legal proceeding.

### **5. Evidence of reasonable legal costs**

- 5.1. Where an Employee seeks to have the Employer meet their reasonable legal costs, the Employer is entitled to request a detailed itemised invoice from the Employee's legal representative for the purpose of assessing the reasonableness of the costs charged. Failure to comply with requests for evidence may lead to the Employer refusing to meet legal costs incurred.

### **6. Requests for the Employer to meet the Employees reasonable legal costs**

- 6.1. The Employee will make the request for payment of reasonable legal costs in writing.
- 6.2. An Employee's immediate supervisor must ensure that an Employee's application to meet reasonable legal costs is referred to the appropriate person or body to enable the application to be decided expeditiously.

6.3. Where the Employer has determined that legal costs will be paid, the Employer will advise the Employee in writing of the reimbursement process which may include:

6.3.1. The legal representative invoicing the Employer directly

6.3.2. Reimbursement of legal costs where an invoice is provided.

6.4. Where the Employer refuses an application for legal costs, the Employer will provide the Employee with written reasons for refusal.

### **Making decisions under this policy**

Under section 20(1) of the *Public Administration Act 2004*, the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to staff within their Department or Agency. Employers should ensure that any actions under this policy are only taken by an Employee within their Department or Agency with the delegation to do so. Each Department and Agency should give effect to this policy in accordance with its own delegations.

### **Dispute resolution**

An Employee who is directly affected by a decision made or action taken pursuant to clause 21 may apply for a review of actions under the Employer's review of actions policy or seek to resolve a dispute through the Resolution of Disputes procedure at clause 13 of the Agreement.

## **Further Information**

Employees should refer to their Department or Agency's intranet for information on procedural requirements, systems and approval delegations.

For further information and advice please contact your local Human Resources or People and Culture Unit (or equivalent).

## **Related policies or documents**

### **VPS Enterprise Agreement Common Policies**

- Management of Misconduct
- Review of Action

All policies in the VPS Enterprise Agreement common policies collection can be found at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>

Authorised by Industrial Relations Victoria:

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