

Costs levers under part 4.5 of the Civil Procedure Act (Vic) ('CPA').

Memorandum – Length and costs of trial		
Lever	Relevant matters	Additional guidance
<p>Section 65A</p> <p>Order directing legal practitioner acting for a party to prepare a memorandum regarding the length and costs of trial.¹</p> <p>Section 65D</p> <p>The Court may revoke or vary any order or direction made under this Part.²</p>	<p>When the order may be made</p> <p>At any time in the proceeding.³</p> <p>Contents of the memorandum⁴</p> <ul style="list-style-type: none"> The estimated length of the trial. The estimated costs and disbursements in relation to the trial. The estimated costs that a party would have to pay to any other party if they are unsuccessful at trial. <p>To whom the memorandum may be given</p> <ul style="list-style-type: none"> The court and/or any party.⁵ 	<p>Registrar's use of powers – Magistrates' Court</p> <p>If the proceeding, or part of the proceeding, is referred to a pre-hearing conference in the Magistrates' Court, the Court constituted by a registrar may exercise powers under s 65A.⁶</p> <p>Lower value claims – County Court</p> <p>For lower value claims (<\$150,000) in the County Court's General List and specialist lists, parties will usually be directed to prepare memoranda pursuant to ss 65A and/or 65B.⁷</p>

¹ Civil Procedure Act 2010 (Vic) s 65A(1) ('CPA').

² Ibid s 65D.

³ Ibid s 65A(2).

⁴ Ibid s 65A(1)(a).

⁵ Ibid s 65A(1)(b).

⁶ Magistrates' Court General Civil Procedure Rules 2020 (Vic) r 50.10(1)(o) ('MCGCPR').

⁷ County Court of Victoria, Commercial Division Omnibus Practice Note, 1 August 2022, para 604(2) ('CCV Commercial Div Practice Note').

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Memorandum – Length and costs of proceeding		
Lever	Relevant matters	Additional guidance
<p>Section 65B</p> <p>Order directing legal practitioner acting for a party to prepare a memorandum regarding the length and costs of a proceeding.⁸</p> <p>Section 65D</p> <p>The Court may revoke or vary any order or direction made under this Part.⁹</p>	<p>When the order may be made</p> <p>At any time in the proceeding.¹⁰</p> <p>Contents of the memorandum¹¹</p> <ul style="list-style-type: none"> ▪ The actual costs and disbursements incurred in relation to the proceeding or any part of it. ▪ The estimated costs and disbursements in relation to the proceeding or any part of it. ▪ The estimated costs that a party would have to pay any other party if they are unsuccessful at trial. ▪ The estimated length of the proceeding or any part of it. 	<p>Registrar's use of powers – Magistrates' Court</p> <p>If the proceeding, or part of the proceeding, is referred to a pre-hearing conference in the Magistrates' Court, the Court constituted by a registrar may exercise powers under s 65B.¹³</p> <p>**Other possible recipients of the memorandum</p> <p>Section 65B does not explicitly contemplate the legal practitioner giving the memorandum to the court and/or another party (aside from the party for whom the legal practitioner is acting). However, they might arguably be ordered to do so under the broad case management powers in the CPA.¹⁴</p>

⁸ CPA s 65B(1).

⁹ Ibid s 65D.

¹⁰ Ibid s 65B(2).

¹¹ Ibid s 65B(1).

¹³ MCGCPR r 50.10(1)(o).

¹⁴ CPA ss 47-48.

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	<p>To whom the memorandum may be given</p> <p>**The party for whom the legal practitioner is acting.¹²</p>	<p>Lower value claims – County Court</p> <p>For lower value claims (<\$150,000) in the County Court's General List and specialist lists, parties will usually be directed to prepare memoranda pursuant to ss 65A and/or 65B.¹⁵</p>
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¹² Ibid s 65B(1).

¹⁵ CCV *Commercial Div Practice Note*, para. 604(2).

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Other costs orders		
Lever	Relevant matters	Additional guidance
<p>Section 65C</p> <p>Any order as to costs the court considers appropriate to further the overarching purpose.¹⁶</p> <p>Section 65D</p> <p>The Court may revoke or vary any order or direction made under this Part.¹⁷</p>	<p>When the order may be made</p> <p>At any time in the proceeding, in relation to any aspect of the proceeding, including any interlocutory proceeding.¹⁸</p> <p>Examples of costs orders¹⁹</p> <p>An order may:</p> <ul style="list-style-type: none"> make different awards of costs in relation to different parts of the proceeding or up to or from a specified stage of the proceeding; order that parties bear costs as specified proportions of costs; 	<p>This power is in addition to any other power a court may have in relation to costs,²⁰ and nothing in this Part limits any power a court may have to award costs under a section of a relevant Act, rules of Court, or a Court's inherent, implied, or statutory jurisdiction.²¹</p> <p>Specified sum or amount</p> <p>The Court may award lump sum costs to avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation.²² This involves a 'broad brush' approach, without the precision of taxation.²³ However, the Court should be confident that the estimate of costs is</p>

¹⁶ CPA s 65C(1).

¹⁷ Ibid s 65D.

¹⁸ Ibid s 65C(3).

¹⁹ Ibid s 65C(2). See relevant considerations in s 65C(2A).

²⁰ Ibid s 65C(1). The Court may make any orders or directions it considers appropriate with respect to costs, including the proportions in which the parties are to bear any costs. Ibid s 49(3)(k).

²¹ Ibid ss 65E(1), (2).

²² *Giurina v Greater Geelong City Council* (No 2) [2021] VSCA 341, [16] ('*Giurina*'); *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* (No 3) [2012] VSC 399, [84]; *Seven Network Ltd v News Ltd* [2007] FCA 2059, [25]. See also r 63.07(2)(c) and (d) of the *Supreme Court (General Civil Procedure Rules) 2015* (Vic).

²³ *Giurina* [16].

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Other costs orders		
Lever	Relevant matters	Additional guidance
	<ul style="list-style-type: none"> award a party costs in a specified sum or amount; fix or cap recoverable costs in advance (see 'protective costs orders' next for further information). 	<p>logical, fair, and reasonable.²⁴ Factors weighing in favour of lump sum costs include:</p> <ul style="list-style-type: none"> a relatively modest claim; minor differences in competing costs assessments, with any such differences explained or evident; and the burden on court resources.²⁵

²⁴ *Giurina* [16].

²⁵ *Primebroker Securities Ltd (recs and mgrs apptd) (in liq) v Lomas* [2013] VSC 223, [41].

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	Protective costs orders	
Lever	Relevant matters	Additional guidance
<p>Section 65C(2)(d)</p> <p>An order that fixes or caps recoverable costs in advance.²⁶</p> <ul style="list-style-type: none"> This section has been used to justify a protective costs order ('PCO'),²⁷ although its application is not limited to such situations.²⁸ <p>Section 65D</p> <p>The Court may revoke or vary any order or direction made under this Part.²⁹</p>	<p>When may the order be made?</p> <p>At any time in the proceeding, in relation to any aspect of the proceeding, including any interlocutory proceeding.³⁰</p> <p>Considerations relevant to the making of a PCO³¹</p> <ul style="list-style-type: none"> The timing of the application. The complexity of the factual or legal issues raised in the proceeding. 	<p>Furtherance of the overarching purpose</p> <p>The Court has a discretionary power to fix or cap a party's liability for costs in advance if it considers that such an order is appropriate to further the overarching purpose identified in section 7 of the CPA, namely 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.³²</p> <p>Timing of the application</p> <p>An application for a PCO should be made and determined at an early stage of a proceeding.³³ A favourable decision will enable the beneficiary to proceed with the litigation. An unfavourable</p>

²⁶ CPA s 65C(2)(d).

²⁷ *Bare v Small* (2013) 47 VR 255, [35] ('Bare'). A protective costs order may allow a claimant of limited means to continue to advance their case without fear of a substantial adverse costs order, which may otherwise inhibit the claimant from continuing, by prospectively limiting their prospective costs liability in advance (see *Corner House* [2005] 1 WLR 2600, 2607 [6]; [2005] 4 All ER 1, 5 cited by the Court of Appeal in *Bare* at [23]).

²⁸ For example, an order fixing or capping costs in respect of a particular stage of the proceeding may be appropriate in complex litigation or in matters where proportionality under CPA s 24 is a significant consideration.

²⁹ CPA s 65D.

³⁰ *Ibid* s 65C(3).

³¹ CPA s 65C(2A).

³² *Bare* 264, [35].

³³ *Michos v Eastbrooke Medical Centre Pty Ltd* [2019] VSCA 140, [25].

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	Protective costs orders	
Lever	Relevant matters	Additional guidance
	<ul style="list-style-type: none"> Whether the party seeking the order claims damages or other form of financial compensation. Whether the claim of the party seeking the order has a proper basis and is not frivolous or vexatious. The undesirability of the party seeking the order abandoning the proceeding if the order is not made. Whether there is a public interest element to the proceeding. The costs likely to be incurred by the parties. Whether the other party has been uncooperative or delayed the proceeding. The ability of the party seeking the order to pay costs. 	<p>decision will enable them to make an informed decision whether to proceed, prior to incurring significant legal costs. And deferral of a decision on a PCO can undermine the purpose of such an order.³⁴</p> <p>Public interest element</p> <p>The fact that litigation can be characterised as 'public interest litigation' does not, of itself, mean that the usual order as to costs is not appropriate.³⁵ Public interest in the proceeding must be over and above general inherent public interest in judicial review proceedings.³⁶ For example: a proceeding which clarifies the meaning of a statutory provision with general application beyond the parties might satisfy this element.³⁷</p> <p>The statutory considerations are not decisive, nor are they a test³⁸</p>

³⁴ Ibid.

³⁵ *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [10].

³⁶ *IJW v Swinburne University of Technology* [2021] VSC 846, [69].

³⁷ Ibid. See also *Bare* 264-65, [38], [43].

³⁸ *Michos v Eastbrooke Medical Centre Pty Ltd (No 2)* [2019] VSC 437, [17].

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	Protective costs orders	
Lever	Relevant matters	Additional guidance
	<ul style="list-style-type: none"> Whether a significant number of members of the public may be affected by the outcome of the proceeding. Whether the claim of the party seeking the order raises significant issues as to the interpretation and application of statutory provisions. 	<p>It is a matter of weighing up the considerations and deciding whether a PCO would further the overarching purpose, or would otherwise be an appropriate exercise of the Court's general power in respect of costs.³⁹</p> <p>No 'equality of arms' principle</p> <p>The CPA does not incorporate an 'equality of arms' principle that automatically justifies the making of a PCO.⁴⁰</p> <p>Where the applicant seeks damages or compensation</p> <p>If the applicant for a PCO is seeking damages this is a factor that will 'suggest strongly' against the grant of the order.⁴¹</p> <p>The possibility that a PCO might be made has no effect on power to order security for costs⁴²</p>

³⁹ Ibid. See also *Bare* 267, [37].

⁴⁰ *Khalid v The Queen* [2014] VSCA 115, [30], [32].

⁴¹ Ibid [32].

⁴² *Environment East Gippsland Inc v VicForests (No 3)* [2022] VSC 141, [20].

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	Protective costs orders	
Lever	Relevant matters	Additional guidance
		<p>Should reciprocal PCOs be made?</p> <p>Whether a PCO should be made in reciprocal terms is not settled. The issue ultimately depends on where the financial burden of the litigation should lie.⁴³</p>

⁴³ *Bare* 267, [48].