



Queensland Public Interest Law Clearing House Inc

**A BRIEF GUIDE TO COSTS
IN PUBLIC INTEREST LITIGATION**

January 2005

Preface

In a court proceeding, while orders as to costs are ultimately left to the discretion of the judge or magistrate, it is usually ordered that the unsuccessful party pay the successful party's costs of the proceeding. In other words, costs generally "follow the event". The purpose of this rule is to compensate the winning party for the vindication of its position.

Costs are usually awarded on a standard basis (formerly known as "party and party costs"). This means costs are limited to the costs necessary or proper for achieving justice. Standard costs will therefore only partially indemnify the successful party against their actual costs of paying their solicitor's fees.

Costs may also be awarded on an indemnity basis (formerly known as "solicitor and own client costs"). These costs provide an indemnity for all costs incurred, except costs that were unreasonably incurred or are of an unreasonable amount. There is no need to show that the costs were necessary or proper. Indemnity costs may be ordered where an unsuccessful plaintiff used the court process for an ulterior purpose, brought an impossible case against the defendant, or where some unusual or special feature in the case warrants awarding costs on an indemnity basis.

There are some exceptions to the general rule that costs follow the event. The purpose of this guide is to provide an introduction to these common law and legislative exceptions in public interest matters. It is not intended to be an exhaustive list but rather to provide a starting point for research in this area.



Acknowledgements

We would like to thank **Griffith University** and the following students who participated in the Griffith University "Public Interest Lawyering" course in Semester 1, 2003 who first prepared this guide:

- Carly Macoun
- Jillian Williams

The guide was then updated and edited for QPILCH by Rebekah Leong.

We gratefully acknowledge the support of the **Jupiters Casino Community Benefit Fund** in the editing and publication of this document.

Disclaimer

This document provides general information only. While every effort is made to ensure accuracy and to keep it current, agency details, law and procedure outlined herein can change constantly. No responsibility is accepted for any loss, damage or injury, financial or otherwise, suffered by any person or organisation acting or relying on this information or anything omitted from it.



CONTENTS

COMMON LAW **5**

 Oshlack v Richmond River Council (1998) 193 CLR 72..... 5

 After Oshlack 6

LEGISLATION **9**

 Commonwealth Legislation 9

 Native Title Act 1993 (Cth), s 85A..... 9

 Queensland Legislation 9

 Anti – Discrimination Act 1991 (Qld), s 213..... 9

 Child Protection Act 1999 (Qld), s 11610

 Integrated Planning Act 1997 (Qld) s 4.1.23.....10

 Judicial Review Act 1991, s 49 (Qld).....11

 Mental Health Act 2000 (Qld), s 415.....12

 Workers’ Compensation and Rehabilitation Act 2003 (Qld),.....12



COMMON LAW

There is no general "public interest" exception to the ordinary rule that costs follow the event. However, a court may depart from the ordinary rule and not award costs against an unsuccessful litigant, having regard to all the circumstances of the case.

Oshlack v Richmond River Council (1998) 193 CLR 72

By a 3:2 majority, the High Court of Australia upheld the decision of Stein J of the NSW Land and Environment Court not to award costs against an unsuccessful litigant in an environmental matter. In doing so, Gaudron and Gummow JJ cited the following principles applied by Stein J with approval:

- (i) *The "traditional rule" that, despite the general discretion as to costs being "absolute and unfettered", costs should follow the event of the litigation "grew up in an era of private litigation". There is a need to distinguish applications to enforce "public law obligations" which arise under environmental laws lest the relaxation of standing by s 123 have little significance.*
- (ii) *The characterisation of proceedings as "public interest litigation" with the "prime motivation" being the upholding of "the public interest and the rule of law" may be a factor which contributes to a finding of "special circumstances" but is not, of itself, enough to constitute special circumstances warranting departure from the "usual rule"; something more is required.*
- (iii) *The appellant's pursuit of the litigation was motivated by his desire to ensure obedience to environmental law and to preserve the habitat of the endangered koala on and around the site; he had nothing to gain from the litigation "other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna".*
- (iv) *In the present case, "a significant number of members of the public" shared the stance of the appellant as to the development to take place on the site, the preservation of the natural features and flora of the site, and*



the impact on endangered fauna, especially the koala. In that sense there was a "public interest" in the outcome of the litigation.

- (v) *The basis of the challenge was arguable and had raised and resolved "significant issues" as to the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and relating to the ambit and future administration of the subject development consent; these issues had "implications" for the Council, the developer and the public.*
- (vi) *It followed that there were "sufficient special circumstances to justify a departure from the ordinary rule as to costs".*

After Oshlack

The principles enunciated in *Oshlack* have since been applied narrowly. Decision-makers, since *Oshlack*, have rarely used their discretion to not award costs against the unsuccessful party, rather favouring the traditional view that costs should follow the event. For example:

- In *Friends of Hinchinbrook Society Inc v Minister for Environment & Ors (No. 5)* (1998) 83 FCR 304, in upholding the decision of the trial judge to order costs against a public interest environmental litigant, the Full Court of the Federal Court reasoned:

"...the majority decision of the High Court [in *Oshlack*] does not lay down a rule for application in other cases in the making of costs orders. It affirms the width of the discretion conferred upon a court in relation to costs, with particular reference to the specially wide discretion it held to exist under the legislation with which *Oshlack v Richmond River Council* was concerned.

...

In the present case, both at first instance and on appeal, the broad discretion applies which is conferred on the Federal Court of Australia by s 43 of the *Federal Court of Australia Act 1976*. There is no basis at all upon which we could hold that the trial judge's discretion in relation to costs miscarried. So far as the costs of the appeal are concerned, there is nothing to disentitle the respondents to the compensation of an order for their costs. We are not

persuaded that the appellant, which persisted in insupportable claims, should be relieved at the expense of the respondents. Accordingly we order that the appellant pay the respondents' costs of the appeal."

- In *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815, the applicants were concerned with the effect removing a bridge would have on the access to the central business district for physically disabled people. The Court held that while characterisation of proceedings as public interest litigation is a factor which contributes to finding that there are special circumstances justifying departure from the traditional rule, this alone is not enough to warrant departure. The reasonably perceived strength of the applicant's case, the time of institution of the proceedings and the manner in which the matter proceeds must also be considered. In this case, the Court found that the overall prospects of success were "little better than speculative" and the threshold for displacing the traditional rule had not been reached.
- By majority, the Court in *Ruddock v Vadarlis (No 2) (2001) 115 FCR 229* held that no orders as to costs be made, despite the applicant being unsuccessful. The applicant had sought the release and delivery into Australia of 433 non-citizens then said to be detained by the Commonwealth on the Norwegian vessel, MV Tampa. In coming to their conclusion, the majority said:

"That a proceeding was brought otherwise than for the personal or financial gain of the applicant, and in that sense in the public interest, does not detract from the general proposition that ordinarily costs follow the event and that the primary factor in deciding on the award of costs is the outcome of the litigation. It does not follow that the nature and purpose of the proceedings is irrelevant nor is the history and purpose of the statute conferring the discretion to award costs.

...

The award of costs must remain an exercise of discretion having regard to all the circumstances of the case.

...

This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights. There was substantial public and, indeed, international controversy about the Commonwealth's actions. The proceedings provided a forum in which the legal authority of the

Commonwealth to act as it did with respect to the rescued people was, and was seen to be, fully considered by the Court and ultimately, albeit by majority, found to exist. The case is quite different in character from the predominantly environmental litigation in which many of the previous decisions concerning the impact of public interest considerations on costs awards have been made. Having regard to its character and circumstances the appropriate disposition is that there be no order as to the costs of the appeal or the application before North J.”

From the above cases, as well as from others, the following principles can be distilled:

- The exercise of the Court’s discretion as to costs must be exercised judicially, that is, not arbitrarily and not by reference to irrelevant or extraneous considerations, but upon facts connected with or leading up to the litigation.
- While the principle that costs follow the event is usually followed, this is not fixed or absolute.
- The court must take into account all relevant factors, which may lead to finding that “special circumstances” exist for departing from the general rule. A primary consideration should be the scope, nature and object of the enactment which authorised the litigation. Another consideration may be the applicant’s reasonable prospects of success and its purpose in commencing the litigation.
- Public interest factors are but one consideration. They are not of themselves determinative.
- The factors listed by Stein J in *Oshlack* should not be elevated to a fixed list. Such a mechanically rigid approach is not appropriate.

LEGISLATION

The following Commonwealth and Queensland legislative provisions provide exceptions to or guidelines limiting the general rule that costs follow the event.

Commonwealth Legislation

Native Title Act 1993 (Cth), s 85A

Unless the Federal Court orders otherwise, each party to a proceeding bears its own costs.

However, if the Federal Court is satisfied that a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding, the court *may* order the first-mentioned party to pay some or all of those costs.

Queensland Legislation

Anti – Discrimination Act 1991 (Qld), s 213

The tribunal may order a party to pay such costs as the tribunal considers reasonable.

In deciding whether to order a party to pay costs, the tribunal may have regard to -

- the reasons for enactment of the Act as stated in the preamble (that is, “An Act to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct”), and whether these reasons would be compromised or defeated in ordering the party to pay costs;
- the fairness of a costs order having regard to –
 - whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding, including, for example, by-



- (A) failing to comply with an order or direction of the tribunal without reasonable excuse; or
 - (B) failing to comply with this Act; or
 - (C) asking for an adjournment as a result of sub-paragraph (A) or (B); or
 - (D) causing an adjournment; or
 - (E) attempting to deceive another party or the tribunal; or
 - (F) vexatiously conducting the proceeding;
- o whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
 - o the relative strengths of the claims made by each of the parties;
 - o whether a party reasonably believed there had been a contravention of this Act;
 - o the nature and complexity of the proceeding;
 - o any other matter the tribunal considers relevant.

Child Protection Act 1999 (Qld), s 116

Parties to a proceeding in the Childrens Court for an order pay their own costs of the proceedings.

Integrated Planning Act 1997 (Qld) s 4.1.23

Generally, each party to a proceeding in the Planning and Environment Court must bear their own costs for the proceeding.

However, the Planning and Environment Court may order costs for the proceeding as it considers appropriate in the following circumstances –

- the court considers the proceeding was instituted merely to delay or obstruct;
- the court considers the proceeding (or part of the proceeding) to have been frivolous or vexatious;
- a party has not been given reasonable notice of intention to apply for an adjournment of the proceeding;
- a party has incurred costs because the party is required to apply for an adjournment because of the conduct of another party;



- a party has incurred costs because another party has defaulted in the courts procedural requirements;
- a party has incurred costs because another party has introduced (or sought to introduce) new material;
- if the proceeding is an appeal against a decision on a development application and the applicant did not, in responding to an information request, give all the information reasonably requested before the decision was made;
- the court considers an assessment manager, a referral agency or a local government should have taken an active part in a proceeding and it did not do so;
- an applicant, submitter, referral agency, assessment manager or local government does not properly discharge its responsibilities in the proceedings.

There are further provisions which provide for cost orders in the following circumstances:

- a proceeding for a declaration against an owner who sought the cancellation of a development approval without the consent of the other person under section 3.5.26;
- an appeal under section 4.1.35;
- a proceeding for a declaration requiring a designator to give a notice of intention to resume an interest in land under section 2.6.23;
- a proceeding for a declaration and order requiring an assessment manager to give an acknowledgement notice under section 3.2.3;
- where the court allows an assessment manager to withdraw from an appeal.

Judicial Review Act 1991, s 49 (Old)

Upon a costs application to the Court by a party (the "relevant applicant") to a review application, the Court may order that:

- another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party (standard) basis, from the time the costs application was made; or
- that a party to the review application is to bear only its own costs of the proceeding, regardless of the outcome of the proceeding.



In considering the costs application, the Court must have regard to:

- the financial resources of:
 - the relevant applicant;
 - any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
- whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
- if the relevant applicant made the review application – whether the proceeding discloses a reasonable basis for the review application;
- if the relevant applicant was made a party to the review application under s 28 or is otherwise a party to the review application (but not the person whose decision, conduct or failure is the subject of the review application) – whether the case of the relevant applicant in the review application can be supported on a reasonable basis.

The court may at any time revoke, vary or suspend the operation of its costs order, having regard to the conduct of the relevant applicant or any significant change affecting the matters considered

Mental Health Act 2000 (Qld), s 415

Each party to a proceeding in the Mental Health Court bears its own costs.

Workers' Compensation and Rehabilitation Act 2003 (Qld),

(The provisions regarding costs contained in this Act are very specific and persons should refer to the Act itself)

The principles to be applied as to costs orders depend upon whether the claimant is:

- a worker with a Work Related Injury (WRI) of 20% or more or a dependent;
- or
- a worker with a WRI of less than 20% or no WRI



A worker with a WRI of 20% or more or a dependent

The following principles must be taken into account in determining costs:

- If the claimant makes a final written offer that is not accepted by the insurer and
 - the claimant obtains judgment that is no less favourable to the claimant than the written offer; and
 - the court is satisfied that the claimant was at all material times willing and able to carry out the written offer;

the insurer must pay the claimant's costs on an indemnity basis.

- If the insurer makes a final written offer that is not accepted by the claimant and
 - the claimant obtains judgment that is not more favourable to the claimant than the written offer; and
 - the court is satisfied that the insurer was at all material times willing and able to carry out the written offer;

the insurer must pay the claimant's costs on a standard basis up to the date of service of the written offer and the claimant must pay the insurer's costs on a standard basis from the day after the service of the written offer.

A worker with a WRI of less than 20% or no WRI

The following principles must be taken into account in determining costs:

- If the worker or insurer makes a final written offer that is refused and damages are later awarded to the worker:
 - If the damages are not less than the worker's written offer – the insurer must pay the worker's costs on a standard basis from the day of the written offer;
 - If the damages are not more than the insurer's written offer – the worker must pay the insurer's costs on a standard basis from the day of the written offer.
- If damages are less than the worker's written offer but more than the insurer's written offer, each party bears its own costs.
- Costs for an interlocutory application may only be made if the Court is satisfied that the application has been brought because of unreasonable delay by 1 of the parties.
- If an entity other than the worker's employer or insurer is joined as defendant to the proceedings, the Court may order costs in favour of or against the entity



according to the proportion of liability of the defendants and the justice of the case.

- The court may make an order for costs against the worker's employer or the insurer under the previous section only if—
 - the order is in favour of the entity; and
 - the worker's employer or the insurer joined the entity as a defendant.

