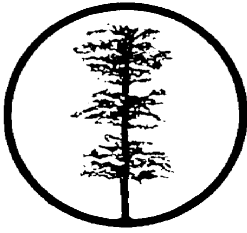


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ENVIRONMENTAL DEFENDER'S OFFICE OF NORTHERN QUEENSLAND INC.**

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28th February 2006

**The Honourable Justice Lander**  
Judge of the Federal Court of Australia  
Federal Court Adelaide  
Level 5, Commonwealth Law Courts  
3 Angas Street  
Adelaide SA 5000

Dear Justice Lander,

### **Revision of the Federal Court Rules**

We refer to the above matter and welcome the opportunity to make a submission in regards to the review currently being undertaken by the Federal Court.

The Environmental Defenders Office (Qld) Inc. (EDO Qld) and Environmental Defender's Office of Northern Queensland Inc. (EDO-NQ) (the EDO) are community legal centres which specialise in public interest environmental law in Queensland. Over the past few years, the EDO has conducted a number of public interest environmental law cases in the Federal Court in Queensland.

We note that the objects of the revision of the Federal Court Rules ("the Rules") include to ensure that the Federal Court has Rules which 'facilitate access to justice'. The EDO submission concentrates on the costs provisions in the Rules as one area which we believe is in need of revision to facilitate access to justice for public interest litigants.

### **Existing Rules regarding costs**

At present, Order 62 of the Federal Court Rules provide the Court with a discretion in relation to ordering costs at any stage of the proceedings. However such discretion has been used sparingly in public interest environmental litigation as set out below.

In the *Friends of Hinchinbrook Society Inc v Minister for Environment* [1998] 432 FCA, the Full Court considered the issue of costs and ordered the Society to pay all the costs of the appeal and at first instance. In *Yvonne Margarula v Minister for Resources and Energy* [1998] 48 FCA, the Court ordered the Applicant to pay 75% of the respondent's costs, and costs were also ordered in full on appeal. In *Save the Ridge Inc v The Commonwealth & Ors* [2005] FCA 157 the Court ordered costs

against the Applicant and refused to exercise its discretion in their favour and suggested the usual practice should apply.

*Mees v Kemp* (No 2) [2004] FCA 549, His Honour Justice Weinberg discussed judgments on costs and the decision of the High Court in *Oshlack v Richmond River Council* (1998) 193 CLR 72 in saying that something more is required than public interest to depart from the usual rules on costs. His Honour proffered several examples of the "something more" that could justify departure from the usual rule. These include cases where the litigation raises and resolves significant issues as to the interpretation, and future administration, of statutory provisions: see *Oshlack* at [49] per Gaudron and Gummow JJ. He also includes cases raising questions involving the liberty of individuals unable to take action on their own behalf to determine their rights. His Honour went onto to state:

“The award of costs need not be an "all or nothing" proposition. Costs are discretionary, and although the discretion to award costs must be exercised judicially, reasonable minds can differ as to what would be appropriate in any given case.

In the present case, bearing in mind the various factors to which I have referred, justice will be done if the applicant is required to pay some, but not all, of the first respondent's costs. In my view, the applicant should be required to pay fifty per cent of the first respondent's costs, such costs to be taxed in default of agreement.

I propose to exclude from that order the costs involved in the preparation of the written contentions regarding costs, given that each party has had a measure of success on that issue.” [24/25]

It is therefore very unusual for Applicant's bringing public interest litigation to succeed in not having costs awarded against them in full. This places obvious restrictions on the ability of parties to litigate in the public interest.

### **Public Interest Litigation and Costs Considerations**

The Australian Law Reform Commission (ALRC) in *ALRC Report No 75 – Costs Shifting: Who pays for litigation* (1995) outlined that the general approach of the courts in determining public interest litigation is to see whether the case affects the community or a significant sector of the community, or involves an important question of law. The ALRC also identified that such litigation is an important mechanism for clarifying legal issues and is of significant benefit to the community, and therefore should not be impeded by costs allocations rules (Part 4 Chapter 13 – *Public Interest Costs Orders*).

The experience of the EDO supports the ALRC observations that cost is a critical element in access to justice, and often a fundamental barrier to using litigation. The EDO is able to conduct litigation on a pro bono basis if the characteristics of the case satisfy established our casework guidelines. Those guidelines require the case to be in the public interest, to set a useful precedent and be of environmental significance. Our casework guidelines also assess the financial resources of the clients to ensure that only environmental and community groups, or other concerned individuals who have limited financial resources will benefit from the EDOs assistance. We in turn rely on Barristers and other experts to conduct work on a pro bono or reduced fee basis, and our clients to meet those disbursements costs, usually by fundraising activities. Even if the EDO can provide assistance for some legal costs, the risk of potentially having to pay costs is a significant deterrent for any established environmental or community group. Most of these groups exist only because of the significant contribution of their volunteers, and fundraising efforts to ensure their continued

existence as limited government funding is available for environmental organisations. Many such organisations are unlikely to risk being wound up on the basis of an adverse costs decision.

To reduce the barrier posed by costs allocation rules to public interest litigation, the ALRC recommended providing courts or tribunals the ability to make a public interest costs order for proceedings satisfying certain criteria. In these circumstances, the order may provide that:

- ?? each party bears their own costs of the proceedings; or
- ?? the party applying for the public cost order is not liable or only for a specified proportion of the other party's costs; or
- ?? the party applying for the public cost order is able to recover costs from the other party.

These provisions are similar to reforms in Queensland to the *Judicial Review Act 1991*..

### **Section 49 - *Judicial Review Act (Qld) 1991***

Provision for the making of public interest costs orders has been introduced in Queensland for judicial review actions by section 49 of the *Judicial Review Act 1991* ("JRA"). Section 49 allows a party to the proceedings to apply to the court for an order, either that indemnify it for its costs, or that each party is to bear its own costs regardless of the outcome.

Section 49 (2) sets out the matters which the court has regard to in considering the costs application. These are:

- "a) the financial resources of--
  - (i) the relevant applicant; or
  - (ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
- (b) 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
- (c) if the relevant applicant is a person mentioned in subsection (1)(a)--whether the proceeding discloses a reasonable basis for the review application; and
- (d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c)--whether the case in the review application of the relevant applicant can be supported on a reasonable basis."

The recent Supreme Court decision in *Alliance to Save Hinchinbrook v Cook & Ors* [2005] QSC 355 provides an example of the application of s 49 of the JRA. EDO-NQ represented the Applicant – Alliance to Save Hinchinbrook ("ASH") in the proceedings and sought at the outset an order that ASH only bear its own costs of the proceedings. In the proceedings, ASH sought to review of the decisions of the Environmental Protection Agency to approve the construction of breakwaters into the Hinchinbrook Channel at Oyster Point at Cardwell, to facilitate the use of the marina at the Port Hinchinbrook development site. ASH is an organisation incorporated since 1997 whose focus is the protection and conservation of the Hinchinbrook/Cardwell environment.

Justice Jones granted the order pursuant to s 49 (1) (e) of the JRA, that ASH bear only their own costs of the application for statutory review, regardless of the outcome of those proceedings. In making his decision, Justice Jones was satisfied that ASH's financial resources were limited, and also that the application involved public interest issues. He stated that "the decision to approve the breakwaters may have drastic impacts upon the natural environment of the area, if the submissions of the applicant are taken at their highest" [at paragraph 10]. Justice Jones recognised that ASH did not stand to gain materially, and such impacts would reach beyond the members and supporters of ASH. He referred to the views of Stein J in *Oshlack v Richmond River Council* (1994) 82 LGERA

236 at 246 that litigation “which had nothing to gain...other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna” amounted to “public interest litigation”, and that the litigation sought to clarify the application of environmental laws. Finally, Justice Jones was satisfied that the proceedings had disclosed a reasonable basis for the review application.

The EDO would encourage the Federal Court to consider reviewing the Federal Court Rules to include a similar provision to s.49 of the *Judicial Review Act* to enable the development of public interest environmental law.

Should you have any further queries please do not hesitate to contact us on the numbers listed above.

Yours faithfully,



Jo-Anne Bragg  
Principal Solicitor  
EDO Qld



Kirsty Ruddock  
Principal Solicitor  
EDO-NQ