

# LEGAL COSTS CONSIDERATIONS IN PUBLIC INTEREST CLIMATE CHANGE LITIGATION<sup>1</sup>

Justice Pepper and Justice Pain

## Are Legal Costs a Barrier to Climate Change Litigation?

Legal costs in adversarial litigation are often substantial and, especially from the perspective of publicly motivated litigation, prohibitive. Costs therefore function as a significant barrier to access to justice in public litigation. In Commonwealth countries based on the British common law system the usual rule is that legal costs follow the event.<sup>2</sup> This means that the unsuccessful party pays not only their own legal costs, but also those of the successful party.<sup>3</sup> Their magnitude means that the possibility of an adverse costs order can significantly deter the bringing of litigation.<sup>4</sup> As Justice Toohey of the High Court of Australia said extrajudicially, “[t]here is little point in opening the doors to the courts if litigants cannot afford to come in.”<sup>5</sup> These costs can be especially sizable in climate change litigation, which is often novel, and where the competing legal issues typically involve complex scientific questions necessitating the provision of costly expert evidence.

This is particularly problematic given that no legal aid is available for civil environmental cases,<sup>6</sup> however laudable, and, while it is conceivable that public interest climate change cases will be resourced by litigation funders (especially having regard to the nature of climate change litigation, which often has a wide class of litigants), to date this has not been readily embraced in Australia.

In this article, observations are made about the conventional costs regimes in Australia, focussing specifically on the State of New South Wales (NSW), and the jurisdiction of the specialist superior environmental court in that State, the Land and Environment Court of NSW (LEC). Limited examination of the costs regime in the United Kingdom (UK) is made where appropriate. Consideration is then given to mechanisms designed to improve costs outcomes in public interest litigation which may be applied to climate change litigation. In writing this article, the authors draw on their experience as judges of the LEC.

## Costs Usually Follow the Event

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<sup>1</sup> The authors would like to thank Ms Georgia Pick and Mr Dominic Smith, tipstaves and researchers at the Land and Environment Court of NSW, for their considerable assistance in the preparation of this article. All mistakes are, however, those of the authors.

<sup>2</sup> Costs, that is, legal costs, as referred to in this article, are compensatory and not punitive in nature: *Latoudis v Casey* (1990) 170 CLR 534.

<sup>3</sup> Narelle Bedford, “The Winner Takes It All: Legal Costs as a Mechanism of Control in Public Law” (2018) 30 *Bond Law Review* 119, 120.

<sup>4</sup> R Pepper and R Chick, “Ms Onus and Mr Neal: Agitators in an Age of ‘Green Lawfare’” (2018) 25(2) *EPLJ* 177, 186.

<sup>5</sup> Quoted in *Oshlack v Richmond River Council* (1994) 82 LGERA 236, 238 and see also Australian Law Reform Commission, *Costs-shifting – Who Pays For Litigation?*, Report No 75 (1995), [13.9].

<sup>6</sup> Christine Trenorden, “Environmental Legal Aid Slashed When Australia Needs it Most” *The Conversation* (12 March 2014) <<http://theconversation.com/environmental-legal-aid-slashed-when-australia-needs-it-most-23988>>.

As a federation of states and territories, each jurisdiction in Australia has its own rules of court concerning costs. There is, however, considerable uniformity between the costs regimes of the different jurisdictions. Relevantly, the common law rule that costs follow the event, which is of central importance, exists in all Australian jurisdictions. For this reason, it is convenient to focus on the costs rules applicable to NSW.

In short, courts in NSW have power to award costs under s 98 of the *Civil Procedure Act 2005* (NSW). The *Uniform Civil Procedure Rules 2005* (NSW) (UCPR NSW) apply in all NSW courts. The general rule under the UCPR is that costs follow the event.<sup>7</sup> That is, a successful party has a 'reasonable expectation' of being awarded costs against the unsuccessful party.<sup>8</sup> Costs are usually assessed on the ordinary basis, that is, on a party-party basis (which includes a large proportion of but not all professional legal fees and most disbursements incurred during the litigation, for example, photocopying costs and/or experts' fees).<sup>9</sup>

The usual costs rules in the UK (noting there are special public interest and Aarhus Convention claim costs rules discussions below) are not dissimilar and are found in Part 44 of the *Civil Procedure Rules 1998* (CPR UK). These rules apply to all matters in county courts, the High Court and the Civil Division of the Court of Appeal, with the exception of rules for certain kinds of proceedings, such as public interest litigation.<sup>10</sup> Thus, for example, r 44.2(1) states that the court has a discretion as to whether one party must pay costs to another, the amount of those costs, and when they are to be paid. Comparable to Australia, the general rule is that costs follow the event.<sup>11</sup> However, the court may make a different order, having regard to such matters as the parties' conduct and their success on particular issues in the proceedings.<sup>12</sup>

In the court's assessment of the amount of costs payable, the court must not allow costs which have been unreasonably incurred or are unreasonable in quantum.<sup>13</sup> Where the amount of costs is to be assessed on an ordinary (party-party) basis (as opposed to on an indemnity basis), the court must only allow costs which are proportionate to the matters in issue.<sup>14</sup> Costs incurred are proportionate if they bear a reasonable relationship to, amongst other things, any wider factors involved in the proceedings, such as reputation or the public importance of the subject matter of the litigation.<sup>15</sup>

Similar considerations to those described above in the UK are applicable in Australia with respect to any exercise of a court's discretion to award costs.<sup>16</sup> To reiterate, such costs rules (the usual costs rules) are common to all jurisdictions in Australia.

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<sup>7</sup> Uniform Civil Procedure Rules 2005 r 42.1.

<sup>8</sup> *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] and [134].

<sup>9</sup> Uniform Civil Procedure Rules 2005 r 42.2.

<sup>10</sup> Civil Procedure Rules 1998 r 2.1.

<sup>11</sup> *Ibid* r 44.2(2)(a).

<sup>12</sup> *Ibid* r 44.2(2)(b),(4)(a)-(b).

<sup>13</sup> *Ibid* r 44.3(1).

<sup>14</sup> *Ibid* r 44.3(2)(a).

<sup>15</sup> *Ibid* r 44.3(5)(e).

<sup>16</sup> See, for example, s 60 of the *Civil Procedure Act 2005* dealing with the proportionality of costs.

## **The Rise of Public Interest Climate Change Litigation**

As a greater number of people gain knowledge of, and become concerned by, the potentially catastrophic effects of climate change, the volume of climate change litigation has concomitantly increased.<sup>17</sup> Climate change litigation includes cases brought before judicial bodies that raise issues of law or fact regarding the science of climate change, the consequences of climate change, and the enforcement of measures directed to the mitigation and minimisation of climate change.<sup>18</sup> Almost always climate change cases are brought as public interest litigation. According to the Columbia Law School Sabin Centre for Climate Change Law, at the date of this article 1,257 climate change cases had been filed with 982 cases filed in the USA and over 275 cases filed in all other countries combined.<sup>19</sup> As at March 2017, according to the United Nations Environment Programme (UNEP), 80 climate change cases had been filed in Australia, approximately 90 cases in the UK and the Court of Justice of the EU, and 16 cases in New Zealand.<sup>20</sup>

The chilling effect of the potential of an adverse costs order is all the more acute in public interest climate change litigation, where an applicant before the court – typically a not-for-profit community group or an individual – advocates on behalf of the environment, not himself or herself, and gains no direct personal benefit from the litigation.<sup>21</sup> It is particularly problematic in climate change litigation which tends to be almost wholly public interest litigation. Climate change litigation is litigation directed to the minimisation and mitigation of climate change impacts and is crucial in encouraging policymakers and market participants to implement effective climate change policies and mechanisms.<sup>22</sup> However, such litigation often requires the preparation of complex scientific expert evidence which is likely to be expensive to adduce before a court.

## **Modifying the Usual Costs Rules to Facilitate Climate Change Litigation**

In the absence of political will to effect meaningful climate action, climate change litigation is an alternative. In order to facilitate such litigation, the usual costs orders regimes in Australia (and, as it transpires, the UK) have required modification, or at the very least, supplementation. In doing so, both the legislature and the courts have recognised, either expressly or implicitly, that variation of the normal costs rules in civil litigation is necessary to accommodate the particular nature of climate change litigation (as described immediately above) in order to ensure access to environmental justice. The mechanisms are discussed below.

### **Capping Costs by Protective Costs Orders**

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<sup>17</sup> See, for example, the various articles contained in (2018) 92(10) *The Australian Law Journal* 821, 821-879.

<sup>18</sup> United Nations Environment, “The Status of Climate Change Litigation: A global review” (May 2017) p 10.

<sup>19</sup> Sabin Centre for Climate Change Law, ‘About’ (2019) <http://climatecasechart.com/about/>.

<sup>20</sup> United Nations Environment Programme, “The Status of Climate Change Litigation: A global review” (May 2017) p 11.

<sup>21</sup> *Ibid*; R Pepper and R Chick, “Ms Onus and Mr Neal: Agitators in an Age of ‘Green Lawfare’ (2018) 35(2) *EPLJ* 177, 186.

<sup>22</sup> United Nations Environment Programme, “The Status of Climate Change Litigation: A Global Review” (May 2017) p 8.

In the context of climate change litigation, civil procedure rules provide for the making of protective costs orders (PCOs), also known in Australia as ‘maximum costs orders’. This is an order that caps the quantum of costs that may be recovered by a successful party to litigation. Conversely, the order limits the amount of costs that are payable by an unsuccessful party to litigation.

Prior to the enactment of s 88 of the *Criminal Justice and Courts Act 2015* (UK), there were no specific statutory rules in the UK that governed the making of PCOs. In the seminal case of *R (on the application of Corner House Research) v Secretary for State and Industry*<sup>23</sup> (*Corner House*), the Court of Appeal held that a PCO could be made at any stage of the proceedings on such conditions as the court thinks fit, provided that the court is satisfied that: the issues raised were of general public importance; the public interest required that those issues be resolved; the applicant had no private interest in the outcome of the case; having regard to the financial resources of the applicant and respondent(s) and the amount of costs that are likely to be involved, it is fair and just to make the order; and that if the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.<sup>24</sup>

The enactment of the *Criminal Justice and Courts Act 2015* removed the ability of the High Court and the Court of Appeal to make costs capping orders in judicial review proceedings raising public interest matters unless specified criteria were met. Crucially, s 88(6) provides that the court may make a costs capping order only if it is satisfied that the proceedings are public interest proceedings; that in the absence of the order the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings; and that it would be reasonable for the applicant for judicial review to do so.

Section 88(7) defines ‘public interest proceedings’ and s 88(8) states the factors the court must consider when determining whether proceedings are public interest proceedings. Section 88(8)(a), for example, requires the court to consider the number of people likely to be directly affected if relief is granted to the applicant for judicial review. However, the court is not precluded from taking into account the interests of those who are indirectly affected.<sup>25</sup>

Section 89 details the factors that the court must consider when deciding whether to make a cost-capping order. These include the financial resources of the parties to the proceedings, including the financial resources of any person who provides or may provide financial support to the parties; the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review; the extent to which any person who has provided or may provide the applicant with financial support is likely to benefit if relief is granted; whether the legal representatives for the applicant for the order are acting free of charge; and whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally. Justice Ouseley has observed that, ‘except where specific changes have been made, the language of the statute is couched in terms quite similar to those found in the previous case law and where the case law can continue to provide guidance.’<sup>26</sup>

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<sup>23</sup> [2005] 1 WLR 2600.

<sup>24</sup> *Ibid* at [74].

<sup>25</sup> See *R (on the application of Beety) v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin) at [19].

<sup>26</sup> *R (on the application of Beety) v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin) at [6].

The above provisions of the *Criminal Justice and Courts Act* do not apply to judicial review proceedings involving an Aarhus Convention<sup>27</sup> claim or an appeal against a decision made in such a claim.<sup>28</sup> Article 9(4) of the Aarhus Convention (to which the UK is a signatory) states that environmental judicial review proceedings must not be ‘prohibitively expensive.’ The Aarhus Convention is an unincorporated treaty which has no direct effect in domestic law.<sup>29</sup> Article 9(4) of the Convention has been given legal effect through similar provisions in European Union environmental legislation like the EU Directive 2011/92/EU (the EIA directive) and the Industrial Emissions Directive 2010/75/EU.<sup>30</sup>

The CPR UK make specific provision for costs in ‘Aarhus Convention claims’. Rule 45.43 of the CPR provides that:

- (1) Subject to rr 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with r 45.44.
- (2) For a claimant the amount is—
  - (a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;
  - (b) £10,000 in all other cases.
- (3) For a defendant the amount is £35,000.

Under r 45.44 a court may vary the limits outlined in r 45.43 if it is satisfied that to do so would not make the costs of the proceedings prohibitively expensive for the claimant, and in the case of a variation which would reduce a claimant’s maximum costs liability or increase that of a defendant, if without the variation the costs of the proceedings would be prohibitively expensive for the claimant. Under r 45.44(3) proceedings are to be considered ‘prohibitively expensive’ if their likely costs either exceed the financial resources of the claimant or are objectively unreasonable having regard to, amongst other things, whether the claimant has a reasonable prospect of success and the importance of the subject matter for the environment. Orders under r 45.43 have been made in various cases.<sup>31</sup> The High Court has also applied r 45.44 to vary the cost limits on occasion.<sup>32</sup>

Some Australian jurisdictions expressly provide for the making of PCOs. In NSW, under r 42.4(1) of the UCPR, a court can make an order specifying the maximum amount of costs that one party can recover from another, whether requested by a party, or of its own motion. A court can indicate which party will benefit from the order; the order does not have to apply

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<sup>27</sup> 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

<sup>28</sup> Criminal Justice and Courts Act 2015 (Disapplication of Sections 88 and 89) Regulations 2017.

<sup>29</sup> *R (on the application of Royal Society for the Protection of Birds) v Secretary of State for Justice* [2017] EWHC 2309 (Admin) at [8].

<sup>30</sup> *Ibid.*

<sup>31</sup> See, for example, *R (on the application of Botley Parish Action Group) v Eastleigh Borough Council v MA Botley Limited, Southern & Regional Developments Limited, Macdonald Botley Park Limited* [2014] EWHC 1982 (Admin); *Woolverstone Parish Council and Babergh District Council v Haylink Limited* [2016] EWHC 2574 (Admin); *R (on the application of Crantock Parish Council) v Cornwall County Council* [2018] EWHC 3635 (Admin); *Rainbird v London Borough of Tower Hamlets* [2017] EWHC 2453 (Admin).

<sup>32</sup> See, for example, *Howard & Bennett v Wigan Council* [2015] EWHC 3643 (Admin); *CPRE Surrey, Powcampaign Ltd v Waverley Borough Council, Secretary of State for Housing, Communities and Local Government, Dunsfold Airport Ltd* [2018] EWHC 2969 (Admin).

equally to all parties.<sup>33</sup> Such costs orders can therefore be unidirectional (for the benefit of one party) or multidirectional or reciprocal (applying to all parties). Because the power in r 42.4 of the UCPR is unconfined, the court can make a costs order in varying circumstances within the proper exercise of its judicial discretion. The relevant factors will depend on the circumstances of the case.<sup>34</sup> PCOs made have generally been multidirectional.

The following cases in the LEC illustrate their application. First, in *Blue Mountains Conservation Society Inc v Delta Electricity (Blue Mountains)*,<sup>35</sup> the LEC considered for the first time the making of a PCO. Justice Pain held that a maximum costs order ought be made to the effect that each party could only recover up to \$20,000. *Blue Mountains* was a complex civil enforcement proceeding in which a community group alleged that a quasi-government electricity generator had breached the conditions of its environmental protection licence by polluting a river in the Blue Mountains an important natural area west of Sydney in NSW. The costs were likely to be considerable. In light of the considerations identified in *Corner House*<sup>36</sup> and the Australian Federal Court case of *Corcoran v Virgin Blue Airlines Pty Ltd*,<sup>37</sup> the following factors were considered relevant to determining whether a PCO should be awarded:<sup>38</sup> The timing of the application; whether the claim appears arguable; whether the matter constitutes public interest litigation; whether the plaintiff has a private interest; whether the proceedings will continue if the protective costs order is not made; are counsel for the applicant acting pro bono; the parties' financial means; and whether the making of such an order is rewarding inefficient litigation.

Justice Pain found the proceedings were in the public interest and would not proceed if a PCO was not made.

The NSW Court of Appeal dismissed the appeal against her decision by the electricity generator accepting the proceedings could be characterised as being in the public interest at an early stage and that protection from large costs bills was necessary to enable action to remedy or restrain a breach of environmental laws.<sup>39</sup>

In *Nerringillah Community Association Inc v Laundry Number Pty Ltd*,<sup>40</sup> the LEC unusually made a unidirectional PCO whereby if the applicant was unsuccessful in the proceedings the respondent could only recover a maximum amount of \$40,000 in costs. Because the PCO was unidirectional and the applicant's fees were only payable on a contingency basis, the PCO was increased from \$20,000 (as sought by the applicant) to \$40,000. Justice Pepper added the proportionality of the maximum costs order sought and the reasonableness of the estimate of the applicant's costs to the factors identified in *Blue Mountains*. Further, her

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<sup>33</sup> *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (2009) 170 LGERA 22 at [27]; *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424 at [187], [189] per Basten JA (Macfarlan JA agreeing). Conversely, Beazley JA in *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424 at [68] and [83] (in dissent) opined that r 42.4 applies for the benefit of all parties, citing Federal Court of Australia cases, but accepted that this may be open for argument.

<sup>34</sup> *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424 at [186].

<sup>35</sup> (2009) 170 LGERA 1.

<sup>36</sup> [2005] 1 WLR 2600.

<sup>37</sup> [2008] FCA 864.

<sup>38</sup> (2009) 170 LGERA 1 at [56]-[68].

<sup>39</sup> *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424.

<sup>40</sup> [2018] NSWLEC 157.

Honour noted that the factors identified in the authorities were not exhaustive and that their application would vary depending on the circumstances of each case.<sup>41</sup>

Although neither case was a climate change decision, they nevertheless demonstrate a willingness on the part of the LEC to make PCOs provided the factors referred to above indicate that it is appropriate to do so. Having said this, not all applications for PCOs in the LEC have been successful.<sup>42</sup>

But there is no reason why it is not appropriate to seek a PCO in public interest climate change cases. For example, in *McVeigh v Retail Employees Superannuation Pty Ltd*, an application for a PCO in the Federal Court of Australia was sought by an applicant in a public interest case regarding alleged breaches of statutory and equitable duties by a superannuation trustee regarding climate change risks.<sup>43</sup> The applicant had obtained indemnification from a third party up to a certain amount in the event of an adverse costs order. Although not against the making of such an order in principle<sup>44</sup>, the application failed on the evidence before the Federal Court. First, the applicant could not say that absent a PCO he would abandon the proceedings. Second, the applicant's financial position was not known. And third, it was unclear whether or not the third party indemnifier could raise additional funds.<sup>45</sup>

Other jurisdictions in Australia have made PCOs, albeit in areas of law not concerning the environment.<sup>46</sup>

### **Apportionment of Costs**

In Australia, in some instances at least, an unsuccessful applicant may not be required to pay all of the costs of a successful respondent. In other words, the costs may be apportioned based on the success or otherwise of specific facts litigated in the matter resulting in only partial indemnification of the respondent for the costs incurred. Costs may be apportioned where there are multiple issues involved and the successful applicant fails on a particular issue or group of issues which is or are clearly dominant or separable.<sup>47</sup> When considering apportionment of costs, a balance must be maintained between not discouraging litigants from canvassing all material issues and not rewarding them for unreasonable conduct in the pursuit of issues.<sup>48</sup>

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<sup>41</sup> *Nerringillah Community Association Inc v Laundry Number Pty Ltd* [2018] NSWLEC 157 at [69], [70]; *Caroona* at [31] per Preston J; *Blue Mountains* (on appeal) at [85]-[86] per Beazley P.

<sup>42</sup> See, for example, *Friends of Malua Bay Inc v Perkins (No 2)* [2014] NSWLEC 172; *Hoxton Park Residents Action Group Inc (No 3) v Liverpool City Council* [2015] NSWLEC 198; *Scevola v Minister Administering National Parks and Wildlife (No 2)* [2017] NSWLEC 139.

<sup>43</sup> *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14.

<sup>44</sup> *Ibid* at [14] per Perram J.

<sup>45</sup> *Ibid* at [14]-[17] per Perram J.

<sup>46</sup> The Hon Justice Nicola Pain, "Protective costs orders in Australia: Increasing access to courts by capping costs" (2014) 31 EPLJ 450 at 454-57.

<sup>47</sup> *F & D Bonaccorso Pty Ltd v City of Canada Bay Council (No 3)* [2007] NSWLEC 569 at [15], cited in *F & D Bonaccorso Pty Ltd v City of Canada Bay Council (No 5)* [2008] NSWLEC 235 at [8].

<sup>48</sup> *James v Surf Road Nominees Pty Ltd [No 2]* [2005] NSWCA 296 at [36], citing *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 174, 178 [9].

An example of partial indemnification of costs is the Full Federal Court of Australia decision *Wilderness Society Inc v Minister for Environment and Water Resources*.<sup>49</sup> The Wilderness Society (the unsuccessful appellant) submitted that the Minister (the first respondent) was entitled to less than all his costs on a party-party basis to reflect the public interest nature of the litigation. It also submitted that Gunns (the second respondent, which proposed to construct and operate a pulp mill that was the subject of the decisions of the Minister challenged by the appellant) was entitled to at most a small proportion of its costs to prevent the unfair imposition of two sets of costs, to recognise that the decision of the Minister was impugned in the litigation and no relief was sought against Gunns. The Full Court of the Federal Court held that the appellant was concerned to avoid harm to the Australian environment and was not seeking financial gain from the litigation. It was therefore appropriate to limit the costs to be recovered by the Minister. The Full Court also limited the costs to be recovered by Gunns because no conduct of Gunns was challenged by the appellant and the more appropriate contradictor on the appeal was the Minister. The Wilderness Society was ordered to pay 70% of the Minister's costs and 40% of Gunns' costs.

Similar principles may well be applied in climate change litigation raising important legal issues which are ultimately argued unsuccessfully.

### **No Costs Orders in Unsuccessful Meritorious Public Interest Litigation**

In the landmark decision of *Oshlack v Richmond River Council (Oshlack)*,<sup>50</sup> a majority of the High Court of Australia declined to overturn a costs order made in the LEC that each party bear their own costs. An individual brought proceedings in the LEC against a local council and a land developer seeking to impugn the consent granted by the council for a proposed development. The applicant had no personal interest in the outcome of the proceedings but was motivated by a desire to preserve the habitat of endangered fauna on and around the development site. The proceedings were dismissed. The trial judge Justice Stein held that there should be no order as to costs. The decision was overturned by the Court of Appeal of NSW.<sup>51</sup>

At first instance, Stein J took into account the fact that the proceedings had been motivated by a desire to ensure obedience to environmental law and to preserve the habitat of an endangered native animal on and around the site; that a significant number of members of the public shared that stance so that there was public interest in the outcome of the proceedings; that the basis of challenge was arguable; and that it had raised and resolved significant issues about the interpretation and future administration of provisions relating to the protection of endangered fauna and to the ambit and future administration of the development consent which had implications for the council, the developer, and the public.<sup>52</sup> A majority of the High Court of Australia upheld Stein J's costs order.<sup>53</sup> The High Court agreed with Stein J's finding that something more than the categorisation of proceedings as public interest litigation was needed before a successful defendant should be denied costs.<sup>54</sup>

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<sup>49</sup> [2008] FCAFC 19.

<sup>50</sup> (1998) 193 CLR 72.

<sup>51</sup> See *Richmond River Council v Oshlack* (1996) 39 NSWLR 622.

<sup>52</sup> *Oshlack v Richmond River Council* (1994) 82 LGERA 236 at 244-46.

<sup>53</sup> *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 91 (Gaudron and Gummow JJ), 120 (Kirby J).

<sup>54</sup> *Ibid* 91 at [49] (Gaudron and Gummow JJ).

*Oshlack* has been followed in a plethora of cases in different Australian jurisdictions.<sup>55</sup> For example, the Federal Court of Australia declined to make a costs order in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts*<sup>56</sup> and *Buzzacott v Minister for Sustainability Environment, Water, Population & Communities (No 3)*<sup>57</sup>. In both decisions the ‘issues at stake were found to be novel and raised questions of general importance, such that a departure from the general rule on costs was warranted in the circumstances.’<sup>58</sup>

Chief Judge Preston of the LEC identified a three-step approach in determining whether to depart from the usual costs rule in cases claimed to be in the public interest in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3) (Caroona)*:<sup>59</sup>

- (a) can the litigation be characterised as having been brought in the public interest?;
- (b) if so, is there “something more” than the mere characterisation of the litigation as being brought in the public interest?; and
- (c) are there any countervailing circumstances, including relating to the conduct of the applicant, which speak against departure from the usual costs rule?

Citing numerous decisions, the Chief Judge identified five categories of circumstances as constituting ‘something more’, namely:

- (a) the litigation raises one or more novel issues of general importance;
- (b) the litigation has contributed in a material way to the proper understanding, development or administration of the law;
- (c) the litigation was brought to protect the environment, or some component of it, and the environment, or particular component of it, is of significant value and importance;
- (d) the litigation affects a significant section of the public; or
- (e) there was no financial gain to the applicant in bringing the proceedings.

His Honour listed six countervailing considerations referable to the existing authorities:<sup>60</sup>

- (a) the applicant is seeking to vindicate rights of a commercial character and stands to benefit from the litigation;

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<sup>55</sup> See, for example, *Bat Advocacy New South Wales Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* [2011] FCAFC 84 at [10]; *Davis v Gosford City Council* (2012) 188 LGERA 314 at [39]-[40]; *Channel Nine SA Pty Ltd v Police (No 2)* [2014] SASCFC 119 at [33]-[34]; *Geeveekay Pty Ltd, Keogh v Director of Consumer Affairs Victoria* [2008] VSC 152.

<sup>56</sup> (2008) 165 FCR 211

<sup>57</sup> [2012] FCA 744

<sup>58</sup> Narelle Bedford, “The Winner Takes It All: Legal Costs as a Mechanism of Control in Public Law” (2018) 30 *Bond Law Review* 119, 124.

<sup>59</sup> (2010) 173 LGERA 280 at [13].

<sup>60</sup> *Ibid* at [61].

- (b) where the applicant is an incorporated association, that the private interests of members of the association would be affected, legally or financially, by the outcome of the litigation or the group is a “façade” or vehicle for persons wishing to protect their own commercial interests;
- (c) the applicant is supported financially by persons or bodies who would benefit from, or would have their legal or financial interests affected by, the outcome of the litigation;
- (d) the narrowness of the question of public interest raised, such as only involving a discrete point of interpretation without broad ramifications;
- (e) that the applicant ‘unreasonably pursues or persists with points which have no merit’ or with issues that were not ‘eminently arguable;’ and
- (f) there is disentitling conduct of the applicant, such as impropriety or unreasonableness in the conduct of the litigation.

There are express provisions for costs in public interest cases governing litigation in the LEC. For example, r 4.2(1) of the Land and Environment Court Rules 2007 (NSW) (LEC Rules) introduced in 2008 states:

- (1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.

Rule 4.2 only applies to proceedings in the LEC’s Class 4 (judicial review and civil enforcement) jurisdiction.<sup>61</sup> There are numerous cases in the LEC where r 4.2 of the LEC Rules has been considered. In applying r 4.2, the LEC has adopted the approach outlined above by *Caroona*.<sup>62</sup> In the last five years, r 4.2(1) was invoked in six cases.<sup>63</sup> Of those six cases, the LEC determined that three were cases of genuine public interest litigation and held that the usual rule that costs follow the event did not apply and that each party bore their own costs.<sup>64</sup>

Again, there is no impediment to the application of r 4.2 of the LEC Rules to climate change cases. On the contrary, given the often novel issues raised by such litigation, the application of this rule, or a similar exercise of discretion at common law, ought to be apposite.

## Security for Costs in Cases of Public Interest Litigation

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<sup>61</sup> Land and Environment Court Rules 2007 (NSW) r 4.1.

<sup>62</sup> *Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 3)* [2013] NSWLEC 152 at [26]. See also *Ocean Shores Community Association Inc v Byron Shire Council (No 5)* [2016] NSWLEC 8 at [4]-[6]; *Friends of Malua Bay Inc v Perkins (No 2)* [2014] NSWLEC 172 at [6] and [18]-[19].

<sup>63</sup> *Friends of Malua Bay Inc v Perkins (No 2)* [2014] NSWLEC 172; *Ocean Shores Community Association Inc v Byron Shire Council (No 5)* [2016] NSWLEC 8; *Hoxton Park Residents Group Inc (No 3) v Liverpool City Council* [2015] NSWLEC 198; *Millers Point Fund Inc v Lendlease (Millers Point) Pty Ltd (No 2)* [2017] NSWLEC 29; *Scevola v Minister Administering National Parks and Wildlife (No 2)* [2017] NSWLEC 139; *Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 3)* [2013] NSWLEC 152.

<sup>64</sup> *Ocean Shores Community Association Inc v Byron Shire Council (No 5)* [2016] NSWLEC 8; *Millers Point Fund Inc v Lendlease (Millers Point) Pty Ltd (No 2)* [2017] NSWLEC 29; *Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 3)* [2013] NSWLEC 152.

Under r 4.2(2) of the LEC Rules, the LEC may exercise its discretion not to make an order requiring an applicant in any proceedings to give security for a respondent's costs if it is satisfied that the proceedings have been brought in the public interest. Security for costs orders are made by a court on the application of a respondent who is concerned that an applicant will be unable to pay a costs order in the respondent's favour at the completion of proceedings. The making of substantial security for costs orders early in proceedings can prevent entirely meritorious climate change litigation from proceeding.

The LEC has exercised its discretion under r 4.2(2) not to make a security for costs order against an applicant in various cases.<sup>65</sup> A case where the LEC decided to exercise its discretion to make a security for costs order is *Illawarra Residents for Responsible Mining Inc v Gujarat NRE Coking Coal Limited*.<sup>66</sup> The applicant was seeking an order restraining the respondent from carrying out mining at an area until specific approval was granted under the *Environment Planning and Assessment Act 1979* (NSW) and relied on r 4.2(2). The applicant was an association of residents of the Illawarra area who advocated for mining that prioritised the health of people and the environment but whose members had private interests in the proceedings which could not therefore be characterised as in the public interest.

### **Ensuring Access to Environmental Justice Through the Use of Varied Costs Regimes**

In Australia and the UK mechanisms are available to vary conventional costs orders for meritorious public interest climate change cases. In particular, where a broad costs discretion is conferred upon a court, judges can, where appropriate, make a PCO, not apply the usual rule as to costs with the result that irrespective of the outcome of the litigation each party bears their own costs, or apportion costs, to limit the exposure of a failed applicant to an adverse costs order. Specifically legislated civil procedure rules, such as r 4.2 of the LEC Rules, can further assist in facilitating, or at the very least, not impeding, the commencement of genuine climate change cases in order to promote access to justice, and critically in an age of anthropogenic climate change, access to environmental justice.

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<sup>65</sup> See, for example, *Sales-Cini v Wyong City Council* [2009] NSWLEC 1388; *Kennedy v Stockland Development Pty Ltd (No 2)* [2011] NSWLEC 10; *Friends of King Edward Park Inc v Newcastle City Council* (2012) 194 LGERA 226; *Save Little Beach Manly Foreshore Inc v Manly Council* (2013) 198 LGERA 304; *Boronia Park Preservation Group v MSMG Developments Pty Ltd* (2015) 209 LGERA 259.

<sup>66</sup> [2012] NSWLEC 259.