

**To the Hon Rod Welford MLA
Attorney-General and Minister for Justice**

Costs and fees in public interest litigation

Background

- The possibility that a litigant in a public interest case could lose their home if they lose their case is a significant deterrent in prosecuting such cases.
- Undertakings as to damages and security for costs orders can also deter or truncate public interest cases, particularly environmental cases involving large developments.
- Where public interest cases are not litigated because of the potential for an adverse costs order, or are cut short by undertakings as to damages or security for costs orders that cannot be met, the public also loses because issues of broad public importance are not heard and associated legal issues are not resolved.
- Determination of legal issues around a public interest issue can assist government in finding political solutions to problems that affect a number of citizens or impact on a significant issue or problem.
- Political solutions are often preferable in cases that involve multiple claimants, because it relieves the burden on the courts to hear multiple cases and permits examination of the common issues rather than focusing on the facts of an individual case.
- Court fees can also deter potential litigants from taking action. Many litigants have difficulty in finding the money to institute proceedings. Even if they can find a lawyer willing to act for them on a speculative basis, many lawyers require the client to pay filing fees and witness expenses.

Issues

- The general rule on costs is that costs follow the event. The purpose of this rule is to compensate the winning party for the vindication of its position.
- This rule is a strong deterrent to public interest litigants who may potentially be required to pay substantial costs if they lose.
- There are several exceptions to the general rule.
- Courts have a discretion not to award costs against an unsuccessful litigant.
- The High Court has established principles to determine when not to award costs in environmental cases (*Oshlack v Richmond River Council* (1998) 193 CLR 72) in circumstances where:
 - A significant number of people share the concerns of the applicant
 - The case is arguable and raises significant issues as to the interpretation and future administration of statutory provisions relating to protection of the environment and
 - There are sufficient special circumstances to justify departure from the ordinary rule as to costs.

- However, the Oshlack principles have been applied narrowly by the courts. In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (unreported FCA 10 July 2000, 16 August 2000 and 16 November 2001), the Federal Court made an order for security for costs against a public interest applicant. The court held that the public interest nature of the case was one factor to be considered, but it weighed in favour of a security for costs order in this case.
- Another exception to the general rule is found in some statutes where parties are required to bear their own costs unless the court considers that the proceedings are frivolous or vexatious, delaying, unreasonable or unnecessary (see s4.1.23 *Integrated Planning Act 1997* (QLD) and ss49 and 50 *Judicial Review Act 1991*).
- These exceptions fall short of conferring immunity from costs on public interest litigants.
- In seeking to resolve these issues (albeit before the Oshlack and following cases), the Australian Law Reform Commission (ALRC) recommended “public interest cost orders” (ALRC, *Costs Shifting – who pays for litigation*, Report No 75 (1995)) in circumstances where:
 - The proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector
 - The proceedings will affect development of the law generally
 - The proceedings otherwise have the character of public interest or test case proceedings
- The ALRC recommended that the following criteria be used by a court in determining a public interest costs order:
 - The resources of the parties
 - The likely cost of the proceedings
 - The ability of each party to present their case properly
 - The extent of any private or commercial interest each party may have in the litigation.
- The ALRC also recommended that the court be able to make the following orders:
 - Costs follow the event
 - Each party bear their own costs
 - Irrespective of the outcome, the public interest party
 - Not be liable for the other party’s costs
 - Only be liable for a specified proportion of the other party’s costs
 - Be able to recover all or part of their costs
 - Another person, group or fund, in relation to which the court is empowered to make a costs order, is to pay all or part of the costs of one or more of the parties.
- However, even if adopted, these guidelines, like the Oshlack principles, could be interpreted narrowly by the courts.
- In USA, some jurisdictions have established systems in public interest cases where the public interest plaintiff can recover costs if successful and is not liable for costs if unsuccessful. California Private Attorney General Statute CCP 1021.5 (1977) provides:

1021.5. Upon motion, a court may award attorney’s fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:

- (a) a significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large class of persons,
- (b) the necessity and financial burden of private enforcement, or of enforcement of one public entity against another public entity, are such as to make the award appropriate, and
- (c) such fees should not in the interest of justice be paid out of the recovery, if any.

With respect to actions involving public entities, this section applies to allowances against, but not in favour of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 of Division 3.6 of Title 1 of the Government Code.

- This is clearly the most favourable option for the public interest litigant.
- The principle behind the Californian system is simple – if the public interest litigant wins, they should not be personally out of pocket for acting in the public interest, and if they lose, they should not be penalised for either clarifying the law or testing an issue of public interest and importance.

Proposal

We recommend that the exercise of the courts discretion to award costs in public interest litigation should be different to practices adopted in private litigation.

We propose:

- that the government move towards adopting a policy which would lead to either amendment of the Uniform Civil Procedure Rules or development of specific legislation to implement a regime that clearly limits costs, undertakings as to damages and security for costs orders against public interest litigants
- for a trial period, a temporary system, based on the Californian one way fee-shifting rule be adopted in Queensland as a way of determining the impact of such an approach and gauging the views of the community. If there is concern about industry acceptance of such a pilot, the government could lead the way by limiting costs awards in all public interest cases in which the State of Queensland is a party, and
- the development of a policy (rather than case by case) that enables the courts to waive fees in public interest and pro bono litigation in Queensland.