Submission to the NSW Law Reform Commission concerning costs in public interest litigation

prepared by

EDO NSW

06 September 2012

About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

Submitted to:

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1. Introduction

In September 2011, EDO NSW responded to the NSW Law Reform Commission in respect of *Consultation Paper 13 (May 2011) – Security for Costs and Associated Costs Orders* (**Consultation Paper 13**).

Following a request for further information regarding public interest costs matters that have arisen in jurisdictions other than the NSW Land and Environment Court (**LEC**), EDO NSW has prepared this supplementary submission.

As you would be aware, the appellate jurisdiction of the LEC is the NSW Court of Appeal (**CA**). EDO NSW is therefore able to provide an overview of the barriers to justice encountered by public interest litigants in this superior court.

First, the *Uniform Civil Procedure Rules 2005* (**UCPR**) which apply in the CA do not include explicit public interest costs provisions. For example, they do not specify criteria to assist the court in determining whether a matter may properly be classed as one that is in the public interest. Nor do they include any special provisions regarding the awarding of costs in public interest litigation.

Furthermore, the case law by which the CA is bound does not provide litigants with sufficient clarity regarding the treatment of costs in public interest matters.

Taken together, these factors have deterred a number of our clients from appealing unfavourable decisions handed down in the LEC.

Public interest environmental matters are by definition relevant to the broader Australian community. Indeed, some cases (for example those concerning climate change) have global implications. It is therefore concerning that the UCPR and relevant case law obstruct public interest litigants from accessing the LEC's appellate jurisdiction.

In light of the above, our submission will discuss the need to include public interest costs provisions in the UCPR. It will go on to provide specific examples of case law that may act as an impediment to public interest environmental litigants accessing the CA.

2. UCPR

Our initial submission responding to Consultation Paper 13 recommended amending the UCPR to include provisions favourable to litigants who can demonstrate that their proceedings are in the public interest. We will briefly reiterate those issues and recommendations which are particularly relevant to the CA.

Unlike the *Land and Environment Court Rules 2007* (LEC Rules),[1] the UCPR do not include specific provisions concerning costs in public interest matters. While rule 42.1 of the UCPR empowers the CA to waive costs, it is worded in very general terms, providing that:

[1] LEC Rule 4.2.

> *Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.*

In short, 42.1 provides the CA with broad, discretionary powers which may or may not be invoked in respect of public interest environmental matters. Indeed, there is absolutely no obligation arising out of this rule for the court to even contemplate imposing 'some other order' in respect of public interest proceedings. We would accordingly recommend amending this provision to include two key elements.

First, it is necessary to insert criteria to assist the court in determining whether a matter is in the public interest. Indeed, developing an objective threshold test is by far the simplest means of clarifying this issue for litigants and the CA alike. The three-step criteria developed by Preston J in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Or (No 3)* [2] would be instructive in this regard.

Second, the rule should be amended to include a requirement that public interest litigants be exempted from costs, or in the alternative subject to a maximum costs order

With respect to the latter, we note that while rule 42.4 of the UCPR provides the CA with scope to enforce a maximum costs order, it is also worded in very broad terms. That is, it does not indicate whether a maximum costs order should be contemplated by the court in respect of public interest matters. Consistent with our previous recommendation, we submit that this rule be amended to provide that public interest litigants who are not otherwise exempted from costs under rule 42.1 benefit from a maximum costs order. Furthermore, such an order must be proportional to the appellant's means, thereby ensuring that it does not act as a barrier to justice.

Finally, rule 51.50, which concerns security for costs, may arguably be enforced against a public interest litigant in the CA. Relevantly, subsection (1) provides that:

> *In special circumstances, the Court may order that such security as the Court thinks fit be given for costs of an appeal.*

Again, 'special circumstances' is a general term which has been variously interpreted by the courts. Accordingly, and as discussed in more detail in part 3 of this submission, impecunious public interest litigants may be required to provide security for costs before being permitted to continue in the CA. As noted in our original submission, we recommend amending this rule to exempt litigants who can demonstrate that they are bringing proceedings in the public interest.

[2] [2010] NSWLEC 59.

3. Case law

3.1 Background

The leading High Court case (*Oshlack v Richmond River Council*),[3] and relevant CA cases cannot necessarily be relied upon by public interest litigants to fill the regulatory lacunae outlined in part 2 of this submission. That is, these cases do not provide such litigants with sufficient clarity regarding the costs framework that is likely to apply in the CA.

Relevantly, the CA has failed to develop a clear set of guiding principles in respect of public interest costs matters. As noted by Justice McHugh in *Oshlack,*

> *If discretions concerning costs are to be exercised consistently and rationally, it is essential that courts formulate principles and guidelines that can be applied with precision in most cases.*[4]

To the best of our knowledge, the only court in Australia that has attempted to develop guiding principles of this nature is the LEC.[5] Thus while public interest litigants who commence proceedings in the LEC can be *relatively* certain of the costs framework that will be applied,[6] the same cannot be said of the LEC's appellate jurisdiction. Accordingly, unsuccessful parties pursuing genuine public interest environmental matters must face the prospect of an order for costs in the CA. EDO NSW is of the view that this very obvious barrier undermines the justiciability of environmental laws in NSW. This is particularly concerning as public interest environmental matters on appeal are invariably of a serious nature and may help to clarify an important point of law.

3.2 Cases

While the leading High Court case, *Oshlack v Richmond River Council,*[7] confirmed that the public interest nature of proceedings could be taken into account when exercising a general statutory discretion concerning costs, it did not indicate that this was mandatory. That is, it was held that public interest factors are not necessarily sufficient to avoid a costs order being made against an unsuccessful litigant.

Furthermore, CA cases dealing with costs in public interest matters have been varied in their interpretation of first, what constitutes public interest litigation and second, the costs regime that should apply in such instances. By way of illustration, we will

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[3] (1998) 193 CLR 72.

[4] At 72.

[5] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Or (No 3)* [2010] NSWLEC 59.

[6] However as noted in our original submission, the LEC Rules should be amended to provide that in all LEC jurisdictions litigants pay their own costs (except in exceptional circumstances).

[7] (1998) 193 CLR 72.

discuss two recent public interest costs cases decided in the CA. The first concerns the awarding of costs, and the second security for costs.

Hastings Point Progress Association v Tweed Shire Council

In *Hastings Point Progress Association Inc v Tweed Shire Council*,[8] Young JA referred to the five-part guidelines developed by Lloyd J in *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)*[9] for determining costs in public interest matters.

Nevertheless, in relying on *Minister for Planning v Walker*[10], His Honour made it abundantly clear that 'the public interest' was not sufficient justification for deviating from the usual regime of 'costs follows the event.'

Citing *New South Wales v Gebethner,*[11] His Honour also noted that:

> *'a person seeking to displace [the] prima facie effect [of rule 42.1 of the UCPR] must show that there is something out of the ordinary in the case in order to justify the departure.'*[12]

'Something out of the ordinary' is a nebulous concept which Young JA did not seek to define with any precision. In any case, though His Honour resolved to 'assume' that the appellant was bringing the proceedings in the public interest, he found the extra element required pursuant to *Walker* was lacking, and ordered the appellant pay the second respondent's costs.

Basten J agreed with the orders proposed by Young JA, however approached the issue from a slightly different angle. While His Honour indicated that he accepted 'that the proceedings were brought predominantly in the public interest',[13] three factors militated against departure from the general rule espoused in 42.1 of the UCPR. Specifically: the defendant was a commercial enterprise; the matter did not have broad ramifications for the community at large; and the matter was not entirely without consequences for the private interests for the members of the appellant association insofar as the outcome (overdevelopment) impacted the amenity of their neighbourhood.

EDO NSW submits that the (arguably vague) notion that something above and beyond the public interest is required to 'justify departure' from 42.1 is problematic for two key reasons. First, it undermines the important role played by public interest litigation in clarifying points of law and protecting the broader interests of the community. Second, it arguably deters genuine public interest environmental litigants from accessing the CA.

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[8] (No 3) [2010] NSW CA 39.
[9] (2004) 136 LGERA 365.
[10] (no 2) [2008] NSWCA 334.
[11] [2009] NSWCA 237.
[12] At 18.
[13] At 11.

We would further respectfully submit that Basten J's judgment does not appear to apprehend one of the key features of the NSW planning system: that local environment plans apply exclusively to local government areas and to that extent are inclined to only affect local residents. Excluding this class of the public from public interest litigation is therefore at odds with one of the building blocks of the *Environmental Planning and Assessment Act 1979.* It is also fails to recognise that the first level of 'public' within a democratic system occurs at the local government level, which is in turn broken up into smaller neighbourhoods (or 'wards'). While we do not contest that some 'local' matters brought under the banner of the 'public interest' in reality concern the private interests of a small group of people, this judgment does not set a good precedent insofar as it fails to acknowledge that some public interest environmental and planning matters are inherently local in scale and relevance.

EDO NSW would also respectfully submit that this finding may reflect a lack of specialist knowledge in the CA regarding environmental and planning law. This is an extremely technical area of practice which in most instances requires some background knowledge of planning, science and engineering if one is to properly understand the core legal issues. The structure and operations of the LEC reflect the balance that must be struck between technical and legal expertise. With this in mind, EDO NSW is of the opinion that the CA requires particular guidance with respect to matters on appeal from the LEC. Public interest costs provisions in the UCPR would assist in this regard.

Melville v Craig Nowlan and Associates Pty Ltd

The second CA case concerns security for costs. In *Melville v Craig Nowlan and Associates Pty Ltd,*[14] the appellant (a pensioner) sought to overturn interlocutory orders in the LEC staying proceedings until she provided security for costs.[15] The CA accepted that the substantive matter being heard in the LEC was being brought in the public interest.

Heydon JA examined the long history of case law dealing with impecunious litigants. While he found ample precedent to support the notion that 'poverty should be no bar to the courts', His Honour concluded that this body of law was not intended to apply to impecunious litigants seeking judicial review under section 123 of the *Environmental Planning and Assessment Act 1979.* Specifically, requiring the appellant to provide security for costs would not deprive her of any 'fundamental right' insofar as section 123 was an open standing provision that could be accessed by all other solvent natural persons in Australia.

Stein JA and Young CJ agreed with Heydon JA, dismissing the appeal and ordering the appellant to pay the respondent's costs. We note that Stein JA sought to distinguish his reasoning from that of Heydon JA and Young CJ, providing that the existence of other potential applicants who could bring proceedings under section

[14] [2002] NSWCA 32.

[15] We note that this matter was brought in the LEC before the LEC Rule 4.2 regarding costs in public interest matters had been introduced.

123 did not mean the applicant was not denied any fundamental right (if security for costs were ordered and she could not proceed).

In any case, Heydon JA and Young CJ's reasoning is of concern as it assumes any person is indeed willing to enforce environmental laws in respect of a particular decision. EDO NSW would submit that public interest litigants bringing an action under section 123 (or any other open standing provision) are not interchangeable. In our experience, individuals or associations willing to commence proceedings are relatively rare. Indeed, lack of certainty regarding costs actively deters the public from seeking to enforce environmental laws, thereby reducing the pool of potential litigants.

Accordingly, this case highlights the need to change the UCPR to exempt genuine public interest environmental litigants – impecunious or otherwise - from providing security for costs.

4. Recommendations

In light of the foregoing analysis, EDO NSW recommends amending the UCPR to include explicit provisions concerning costs orders in public interest matters. Specifically:

1. The UCPR should include criteria to determine whether a matter may be properly classified as one that is in the public interest. The three steps developed by Preston J in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Or (No 3)* are appropriately adapted to this purpose;

2. Rule 42.1 should be amended to provide that unsuccessful public interest litigants may be exempted from paying costs, or in the alterative subject to a maximum costs order.

3. Rule 42.4 should be amended to provide that public interest litigants who are not otherwise exempted from costs under rule 42.1 are subject to a maximum costs order. The amended rule should further stipulate that the maximum amount is to be proportional to the appellant's means.

4. Rule 51.50 should be amended so to exempt litigants who can demonstrate that they are bringing proceedings in the public interest.