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The National Pollutant Inventory – a test for co-operative federalism

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At the 6 November 1992 meeting of the Australian and New Zealand Environment and Conservation Council (ANZECC) the Commonwealth Environment Protection Agency (CEPA) proposed the development of a National Pollutant Inventory. The aim of the National Pollutant Inventory (NPI) is to bring together data at a national level on emissions to air, land and water. The data base would cover releases of environmentally harmful substances including substances harmful to human health.

The proposal is essentially similar to that introduced in the United States by s.313 of the Superfund Amendments and Re-authorisation Act (SARA) which dealt with Toxics Release Inventories (TRIs). This required manufacturing facilities that emitted substances in a specified list to report details of their chemical emissions.

Despite being overshadowed at the time by the emergency planning and community right to know aspects of the legislation the requirement to file returns on toxic releases to the environment has performed several useful functions -

(a) it has made regulators, regulated and the general community aware of the magnitude of releases into the environment. This is important not only in bringing together widely dispersed information in regional and national figures but also in terms of plant specific release information which is now publicly disclosed

(b) it provided the incentive for voluntary planned reductions in pollution output prior to the setting of targets under the Pollution Prevention Act 1990

(c) it assisted regulators in identifying the most important substances at which to direct efforts at pollution reduction.

In summary the requirement to publicly disclose discharges in a uniform manner has proved to be a powerful tool in mobilising industry, regulatory authorities and the public to ensure that the release of toxics into the environment is reduced.

It is into this context that the CEPA proposal falls. CEPA has proposed that the NPI would be introduced in stages. It would sequentially expand its coverage over the following areas:

(1) Releases of hazardous or toxic materials from institutions handling or processing significant amounts of such substances (including sewerage treatment works).

(2) Transport emissions in major cities.

(3) Solid (non-hazardous) wastes.

(4) Scheduled (intractable) wastes.

As is evident from this list, the NPI would be an excellent tool to assess and monitor the progress of pollution prevention and pollution control strategies at a national level.

According to the CEPA proposal, the NPI would operate by voluntary reporting over a developmental period of two years. This would allow for both regulators and regulated to develop an operation which dovetailed with current State reporting requirements. After this the NPI would be established by umbrella Commonwealth legislation that made provision for the establishment of the NPI data base. The legislation would also allow for the making of model provisions for NPI reporting that could be adopted

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by the States. State legislation could then be made which incorporated the model provisions.

The proposal for an NPI is the logical extension of Commonwealth-State occupational health and safety initiatives. In particular, the model proposed is, in many respects, similar to that adopted through the National Occupational Health and Safety Commission in relation to the control of hazardous substances in the workplace.

In 1991 the Commission published model regulations and a national code of practice for the control of hazardous substances in the workplace (National Occupational Health and Safety Commission, "Control of Workplace Hazardous Substances" National Model Regulations, National Code of Practice, June 1991). The standard made by the Commission under s.38(1) of the *National Occupational Health & Safety Commission Act* 1985 provides for the provision of information on hazardous substances in the workplace to workers and for the control and monitoring of those substances. The regulations are based on the same principal as the proposed NPI, namely that disclosure of information in relation to hazardous substances to those who may be affected by them is an important first step in reducing the use of those substances and, where use cannot be avoided, using it in a manner that minimises environmental risk.

The NPI proposal is also consistent with the promise made in the second reading speech of the *Protection of the Environment Administration Act* by the then Minister, Tim Moore that stage 2 of the reform of New South Wales environmental legislation would include mandatory hazardous substances audits "whereby those who are involved with toxic or hazardous substances will be obliged to produce an environmental audit" (Hansard 9 December 1992 p5910).

In the context of a Commonwealth government that is committed to co-operative federalism it will be interesting to see how the proposal for a national pollutant inventory fares. The Inter-Governmental Agreement on the Environment (IGAE) appeared to provide a relatively restricted agenda for environmental reform. In this regard the proposal for a national pollutant inventory is a welcome sign that useful initiatives will continue to come from the Commonwealth. However, in a very real sense the NPI proposal will be a test of inter-governmental arrangements after the IGAE. While the NPI is a useful proposal that would take relatively few resources to implement it can be expected to have a difficult future in the hands of those state governments that do not wish to see a national approach to pollution control.

Special Feature – Costs in Public Interest Litigation

The New Cost of Public Interest Litigation in New South Wales

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Introduction

The recent decision of the Legal Aid Commission to remove legal aid for almost all civil litigation in New South Wales has serious ramifications for the future of public interest litigation in this state. This is particularly so because the indemnity against adverse costs orders provided by s.47 of the Legal Aid Commission Act will no longer be available for public interest litigants. In addition, the decision can be perceived as a hammerblow to the concept of citizen participation in the decisions that affect them, a concept that underlies all environmental protection legislation in New South Wales.[1] This raises the issue of the cost of such litigation, and just as importantly, who bears the cost of litigation that has been brought in the public interest.

Public interest litigation is not a new phenomena in Australia, or indeed New South Wales, but there has been little attempt by Governments of any persuasion to clarify the position with regard to costs in this type of litigation. The failure to confront this potentially controversial issue has meant that it has had to be dealt with by the courts, the legal profession and legal aid bodies, leaving all parties confused and ensuring that a major procedural barrier to public interest litigation remains in place.[2] This is not a situation that could be said to be satisfactory from any potential litigant's point of view, and it undermines the possibilities for greater public participation and accountability.

Costs in Public Interest Environmental Litigation

In planning and environmental matters in New South Wales, this has left the matter as it was dealt with in 1979 by the *Land and Environment Court Act* 1979 (NSW). Section 69 of that Act provides that costs are in the discretion of the Court. The civil enforcement, or judicial review, of decisions made under the environmental laws of New South Wales are heard in Class 4 of the Land and Environment Court's (the Court) jurisdiction.[3] This means that public interest litigation, made possible by the open standing provisions of certain environmental legislation,[4] will almost exclusively be brought within this class. In hearing this type of litigation, the Court has had to develop certain practices with respect to the ordering of costs to accommodate the special role it plays in the enforcement of public law. However, the point to be remembered from a discussion of the procedural issue of costs is that they mask

the debate about the underlying substantive issues of public participation and accountability.

It has been clearly recognised that the Court's role is not only to do justice between the parties in any matter before it, but to "administer social justice in the enforcement of the [Environmental Planning and Assessment] Act."[5] From the earliest decisions, the Court recognised the possibility of special circumstances that might justify a departure from the normal rule of costs following the event.[6] The issue was, and is, what can be said to constitute these special circumstances? The importance of this issue has been evidenced by the many decisions of the Court on how the Class 4 costs discretion is to be exercised, from the relatively early decisions in *Prineas v Forestry Commission of NSW*[7], *Fuller (on behalf of Save Our Scenery Committee) v Bellingen Shire Council*[8] *and Campbell (on behalf of the Lord Howe Island Preservation Movement) v Minister for Environment and Planning & Ors*[9] to several orders made in 1992. These decisions have grown out of, and were related to, earlier decisions of the Federal Court regarding persons and groups bringing public interest proceedings under Federal environmental legislation.[10] However, there is an important difference between the Federal and State legislation, and that is the capacity of any citizen to enforce public law.

In *Campbell's* and *Fuller's* Cases, the Court heard submissions that costs should not be ordered against unsuccessful applicants because, amongst other submissions, the proceedings could be properly categorised as public interest litigation.[11]

In *Campbell's* case, Cripps J declined to depart from the normal rule as to costs. Whilst noting the position adopted by Wilcox J in *Arnold's* Case[12], Cripps J held that there was no evidence before him to allow a finding that Alan Campbell represented the public interest, nor was he provided with any information about the Lord Howe Island Preservation Movement. It was not sufficient "merely to lay claim to representing the public interest for the proposition to be accepted."[13] In these circumstances, there was no reason to depart from the usual order.[14]

In *Fuller's* case, Hemmings J held that the action could properly be categorised as public interest litigation, but that there was not enough information before him to justify departure from the normal rule on this ground alone, based upon reasons similar to those outlined by Cripps J in *Campbell's* case. However, he made no order as to costs against the unsuccessful applicant with regard to the Bellingen Council's costs because the procedures and legal action of the Council had contributed to the delay and expense of the proceedings. The important point from these decisions is that the judges heard and did not dismiss out of hand submissions regarding the nature of the litigation. Indeed, as Cripps J said in *Campbell's* Case, "I accept that in an appropriate case the ordinary rule as to costs might not apply by reason of the fact that one of the parties can legitimately claim to represent the public interest."[15] This is exactly what happened in *Nettheim's* case.

In *Nettheim v The Minister for Planning and Local Government*[16], the questions that Cripps J asked himself were can the matter be properly categorised as public interest litigation and, if so, are the circumstances surrounding such litigation such that they justify departure from the normal rule? He answered both in the affirmative. The finding that the proceedings could be so categorised rested primarily upon the fact that a public inquiry was held and the recommendation of the Commissioner that the Regent Theatre, the subject of the proceedings, be preserved. Implicit in this finding is the taking into account of the fact that this was an open, statutory, public inquiry into a matter of public controversy and at which Actor's Equity, on whose behalf Mr Nettheim brought his application, made submissions. More importantly, his honour rightly found that the fact that Actor's Equity may have had some interest in the protection of the theatre above and beyond other members of the public did not mean that the proceedings could not be said to be public interest litigation.[17] This is an important finding for those seeking to enforce public law.

There followed two decisions of the Court that moved away from the trend established by *Nettheim's* Case in favour of 'unsuccessful' applicants in what might be categorised as public interest litigation, highlighting the fact that the issue of costs is still a matter of the exercise of judicial discretion. The decisions of Bignold J and Cripps J respectively in *Rundle v Tweed Shire Council* [18] and *Liverpool City Council v Roads and Traffic Authority*[19] bear brief examination. In both cases, their honours found that the litigation could not be categorised as public interest litigation, and hence the normal order as to costs should apply. It must be said that it would have been open to both Bignold J and Cripps J to find that the matters could have been so categorised, given the subject matter of the litigation. The first dealt with the spraying of 2,4 -D pesticide and whether this was an activity covered by the *Environmental Planning and Assessment Act* 1979. The second dealt with the construction of the Western F5 Freeway in Sydney. Clearly, these were,and are, important issues and in that context, it is in the public interest that they be determined by the Court. Hence, it was open to their honours to have found differently. This would have left the way clear for no order as to costs to have been made in both of these matters.

Finally the 1992 cases *Darlinghurst Resident's Association v Elarosa Investments Pty Ltd & South Sydney City Council*[20] and *Cooper & Wilton v Maitland City Council*[21] the court developed the principles upon which it determines whether special circumstances can be said to exist. In both matters, the applicants were unsuccessful but no order as to costs were made. These decisions spelt out several additional points that contribute towards a finding that the litigation was brought in the public interest and that no order as to cost should be made. They can be summarised as follows:

- An important aspect of public law has been determined, even if this was not in the applicant's favour;
- The case concerned a project that would affect a large number of people and is a matter of public notoriety, that

is the subject matter of the application cannot be ignored;

- The applicant did not bring claims that were completely without substance; and
- The aims and objectives of the person or group who bought the application must be taken into account.

These points should be noted by any person contemplating public interest litigation in the Court, and if possible, evidence of such should be presented to the Court to assist it in the exercise of its discretion.

Even without empirical evidence, there can be no doubt that public interest litigation[22] has resulted in greater government accountability and an improved environmental decision-making process. The possibility of this type of litigation also makes an important statement about the relationship between the individual and the state, giving tangible value to citizenship of this State and emphasising the democratic notions of our society. It is in this light that the cuts to legal aid for civil litigation must be seen. This, in combination with the somewhat flexible nature of the discretion as to costs, results in a system that is undesirable on legal, practical and social grounds and represents yet another procedural barrier to parties otherwise seeking to enforce the law.[23]

Conclusions

There are several points to be made here. Firstly, as the law stands, applicants should not be tempted to use a shotgun approach, but keep the challenge restricted to those issues that have a chance of success. Generally, it will be better to have an association launch the action, if for no other reason than the aims of the group will be clear from the articles of incorporation. The larger or more controversial the project, the more likely it will be seen to be in the public interest to ensure that proper procedures are followed. Finally, thought must be given by every litigant to the issue of public interest in the preparation of the case, and if possible, some evidence of this adduced to ensure that the Court is made aware of the concerns of the public and why no order as to costs should be made in the event of the application being unsuccessful.

Suggestions

There are several ways in which the difficulties of the current system could be avoided. However, any suggested solution must ensure that the public interest is protected whilst at the same time allow the Court enough flexibility to be able to deal with any unforseen circumstances. This could be achieved in the following manner. The normal rule as to costs, being that costs follow the event, should remain for the common or garden variety of Class 4 litigation. However, a special rule should be invoked where the applicant falls within a certain category so that the Court's discretion starts from a different presumption. This presumption is there be no order for costs save in the most exceptional circumstances, for example, where the litigation has been brought for some ulterior motive. In this way, the notion of public participation in the protection of the environment is upheld whilst ensuring that the Court is able to protect itself from being used for some ulterior purpose. Further, the Court should be specifically empowered to order costs, or part thereof, against successful respondents to actions brought by applicants who fall within the defined category. This covers the situation where an applicant has succeeded on several points before the Court, but fails to get orders from the Court due to one final issue or the exercise of judicial discretion. In this situation, it should be open for the Court to order costs against such a respondent.

This approach avoids the difficulties of the indeterminate nature of the public interest, with the definition of the category being the issue to be resolved. A preliminary definition would include the following characteristics:

- The primary reason for the action is not for the personal gain of the applicant;
- The applicant is not a profit-making organisation and does not represent or is not associated with a profit-making organisation or industry;
- The applicant seeks to uphold environmental and planning laws of the state; and
- The applicants aim is the protection of environment.

There are several issues that remain to be determined, such as should unions be afforded this type of protection.[24] However, it should be not be forgotten that the real issue is not the procedural one of costs, but whether or not citizens are able to actively participate in protection of their environment and the planning process of this state. Keeping this, the enforcement of public law, in mind, it can be seen that no matter how open the standing provisions are, access to justice, social or otherwise, requires that the procedural barriers be removed and the merits of the action be determined.

Notes

[1] See s 25 of the *Environmental Offences and Penalties Act* 1989 (NSW), which allows any person to bring civil action in the Land and Environment Court, subject to leave of the Court, to restrain a breach of any act if such a breach is causing, or is likely to cause, harm to the environment.

[2] Indeed, some recent proposals that are designed to increase the costs involved for unsuccessful parties who bring public interest cases. Specifically, see cl 143, 145 and 491 in the Exposure Draft of the Local Government Bill 1992 in NSW. The first clauses propose that an action for damages can be brought against local councils if they delay a project, and clause 491 propose that an action for damages can be brought against an unsuccessful applicant if it is deemed by the Court that applicant's action unnecessarily delayed the respondent's project. This last seems an empty provision, given that such an action would be an abuse of the Court's process and so would not proceed.

[3] Section 20 of the *Land and Environment Court Act* 1979 (NSW).

[4] The open standing provisions that allow proceedings to be brought within class 4 of the Court's jurisdiction can be found in the following pieces of legislation:
Section 123 of the *Environmental Planning and Assessment Act* 1979
Section 57 of the *Environmentally Hazardous Chemicals Act* 1985
Section 176A of the *National Parks and Wildlife Act* 1974
Section 27 of the *Wilderness Act* 1987
Section 153 of the *Heritage Act* 1977
Section 25 of the *Environmental Offences and Penalties Act* 1989 allows standing to prevent a breach of any act, as outlined in note 1. above.

[5] Street CJ, as he then was, in *F Hannan v Electricity Commission of New South Wales [No 3]* (1985) 66 LGRA at 313.

[6] See the decision of Cripps J, as he then was, in *Prineas v Forestry*

Commission of NSW (1983) 49 LGRA at 418 on costs. In this matter, commenced in December 1981, his Honour held that the applicant, having had his application dismissed, should pay only half of the Forestry Commission's costs and none of the loggers costs. The reasons for this are outlined at 418-419. However, his Honour also held that proceeding under an open standing provision did not, of itself, constitute special circumstances justifying departure from the normal rule as to costs.

[7] (1983) 49 LGRA at 418.

[8] Unreported, LEC, Hemmings J, 13 July 1988, Judgement on Costs.

[9] Unreported, LEC, Cripps J, 24 June 1988, Judgement on Costs.

[10] For a more detailed review of the the early decisions on costs in the context of public interest environmental litigation in both the Land and Environment Court and the Federal Court, see Preston BJ, *Environmental Litigation*, Sydney, Law Book Co., 1989, p 329 - 335. This covers *Kent v Cavanagh* (1973) 1 ACTR 43 and *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607 at 621 in the Federal Court and *Campbell (on behalf of the Lord Howe Island Preservation Movement) v Minister for Environment and Planning & Ors* (Unreported, LEC, Cripps J, 24 June 1988, Judgement on Costs.), *Fuller (on behalf of Save Our Scenery Committee) v Bellingen Shire Council & Anor* (Unreported, LEC, Hemmings J, 13 July 1988, Judgement on Costs.) and *Nettheim v The Minister for Planning and Local Government* (Unreported, LEC, Cripps J, 28 September 1988, Judgement on Costs.).

[11] It has never been suggested in any of the decisions of the Court that the use of the open standing provisions automatically entitles the matter to be categorised as public interest litigation. Obviously, this cannot be the case.

[12] *Arnold (on behalf of Australians for Animals) v Queensland & National Parks and Wildlife* (1987) 73 ALR 607.

[13] *Campbell (on behalf of the Lord Howe Island Preservation Movement) v Minister for Environment and Planning & Ors* (Unreported, LEC, Cripps J, 24 June 1988, Judgement on Costs, p 4).

[14] However, Cripps J ordered that Campbell pay only one set of costs in the proceedings. This was because there was no real difference between the positions of the first respondent and that of the second and third respondents', and so their separate representation did not warrant an order for costs in favour of the second and third respondents.

[15] As had already been clearly established in the decisions of the Federal Court, see 14 above.

[16] (Unreported, LEC, Cripps J, 28 September 1988, Judgement on Costs.).

[17] Indeed, Cripps J rejected the notion that this was a commercial dispute, as submitted by the Minister between the developer and the actor's union, because by the time of the hearing, only the foyer and facade could have been protected, and Actor's Equity had no financial interest in protecting these items. Further, even if this was the case, it would not preclude the litigation being so categorised, see *Nettheim's* Case Unreported, LEC, Cripps J, 28 September 1988, Judgement on Costs, p 3-4.

[18] (1989) 69 LGRA 21.

[19] (1992) 75 LGRA 210.

[20] (1992) 75 LGRA 214

[21] Unreported, LEC, Stein J, 17 June 1992, Judgement on Costs.

[22] Including, of course, open standing provisions.

[23] This problem being exactly the type of malady that open standing provisions sought to avoid.

[24] On initial reflection, the answer to this should be no, not least because unions have the funds to undertake this type of litigation if they so chose.

Special Feature – Costs in Public Interest Litigation

Award and distribution of costs in public interest litigation – Alaska's experience

Rule 82(a)(1), Alaska Rules of Civil Procedure, provides that in cases where there is no monetary recovery, "attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount." This amounts to a departure from the 'American rule' that each party to a legal dispute is responsible for its own attorney's fees, regardless of the ultimate disposition of the suit.

An exception to this rule was first enunciated in *Gilbert v State of Alaska* 526 P.2d 1131 (1974), in which a state senatorial candidate sought a declaration that an electoral residency requirement violated equal protection rights. The court held that to award attorney fees against a losing party who had in good faith raised a question of genuine public interest before a court amounted to an abuse of the court's discretionary powers[1]. The court saw the awarding of attorney's fees as designed to provide justifiable compensation to a prevailing party rather than to serve a punitive function against the unsuccessful litigant. It appears that the underlying rationale was that the public interest served by the unsuccessful litigants' expenditure was sufficient compensation to the State, though the basis for the rule's extension to public interest suits between private parties is less clear.

The Supreme Court of Alaska also supported the position arrived at in *Gilbert's* case in *Anchorage v. McCabe* 568 P.2d 986 (1977), but applied it in the converse - namely that a successful homeowner, who challenged a ruling by a zoning commission that granted an exception from zoning regulations to a developer, could receive attorney fees. Aside from recognising that the "American rule" had been departed from in other US jurisdictions where the private litigant was acting as a "private attorneys general"[2], the court supported a policy of encouraging public interest litigants by an award that would remove the "awesome financial burden of such a suit" (at 990). The rule has been most clearly supported in *Hunsicker v. Thompson* 717 P.2d 358 (1986)[3] where a successful school board election candidate successfully prevented the assembly from decertifying her appointment, which also supported the converse of the *Gilbert* rule, namely that a successful public interest litigant "is normally entitled to full reasonable attorney fees."[4]

On the issue of unreasonableness of attorney's fees, the court cited the example of excessive total hours or excessive hourly rate, or where the case settles before trial and it finds that the plaintiff is not the prevailing party. However, the court could not reduce the attorney fee award merely in order to discourage such litigation or to penalise the plaintiff acting as a private attorneys general[5].

The respondent in *Anchorage v. McCabe* (the zoning case) raised the concern that the rule in *Gilbert* encouraged litigiousness and allowed a householder who was not a

public interest litigant to re-label their claim so as to fall under the rule. In reply, the Court restated the need to identify the presence of factors for determining what constitutes private-initiated public interest litigation[6].

The present rule was stated in *Southeast Alaska Conservation Council v. State of Alaska* 665 P.2d 544 (Alaska 1983)[7] where a conservation group unsuccessfully sought injunctive relief against adherence by the State to a timber sale contract. The Court outlined the questions that must be asked by a court where it is claimed that the action is in the public interest:

1) Is the case designed to effectuate strong public policies?

2) If the Plaintiffs succeed will numerous people receive benefits from the law-suit?

3) Can only a private party have been expected to bring the suit?

4) Would the purported public interest litigant have sufficient economic incentive to file the suit even if the action involved only narrow issues lacking general importance?[8]

The court noted that the conservation council's case was designed to effectuate strong public policies, that numerous people would have received benefit from the suit in the event of council's succeeding, that no public entity could have been expected to bring suit, and that council's objective was not economic, but solely to challenge what in its good faith view was an improper and illegal disposal of Alaskan timber[9].

On the fourth criterion, it is worthwhile to return to *Hunsicker v. Thompson* (the school board election case) where the court stated that a court may not reduce an award because of the plaintiff's significant personal interest in the outcome of the suit. Such an interest could only go to the question of whether plaintiff is a public interest litigant or a private suitor hiding beneath the cloak of immunity cast by a claim that the suit is in the public interest.[10]

The Alaskan experience has witnessed an expansion of the immunity of public interest litigants from costs orders alongside an expansion of the ability of such litigants to claim indemnity costs. This can only serve to encourage public interest litigants to bring a suit to court, especially against better resourced respondents. However, it is important to be mindful of the restrictions placed upon an applicant in these matters. The applicant must demonstrate that they can fulfil the courts' requirements as to what is public-interest litigation, and must accept that any unreasonable fees or even excessive litigiousness may prejudice their immunity from a claim of costs or their right to make such a claim. Additionally, an applicant must demonstrate the significance of the public interest as against private economic incentive if they are to qualify under the *Gilbert* rule. This final restriction may ensure the viability of public interest litigants' immunity in years to come by excluding from its domain those that would hide from a claim of damages under the cloak of public interest advocacy.

Justin Hogan-Doran

Notes

[1] 526 P.2d 1131 at 1136 (1974).

[2] at 990 citing the US Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 US 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)

[3] More recently, see *Murphy v. City of Wrangell* 763 P.2d 229 (1988) at 233. In this case Murphy successfully brought a damages claim against the municipality after it failed to reduce his prison term for "good time". This case underlines the distinction that must be made between public and private interest litigation in the assessment of costs under the rule in *Gilbert's* case.

[4] at 359.

[5] at 359.

[6] As laid out in La Raza Unida v. Volpe 57 F.R.D. 94 at 101 (N.D.Cal. 1972).

[7] The court restated the rule laid out in the earlier case of *Kenai Lumber Co. v. LeResche*, 646 P.2d 215 (Alaska 1982) which essentially added the fourth factor to the list provided by the Court in *La Raza Unida and McCabe.*

[8] at 553.

[9] at 553-554.

[10] 717 P.2d 358 at 359 (Alaska 1986).

Special Feature – Costs in Public Interest Litigation

Awarding costs against unsuccessful public interest litigants – Reese v Alberta

The recent judgment on costs in *Reese v. Alberta* (unreported 28 August 1992, Court of Queens Bench of Alberta, McDonald J) provides an interesting discussion of costs in public interest environmental litigation. The case involved an application for declaratory relief in relation to a forest management agreement between the Minister of Forestry and Daishowa Canada Co. Ltd (see *Re Reese et al. and The Queen in right of Alberta* (1992) 87 DLR(4th) 1). It was claimed that the agreement was in breach of s.16 of the Forests Act which required that a forest management agreement be "for the purpose of establishing, growing and harvesting timber in a manner designed to provide a perpetual sustained yield." The Applicants argued that the agreement failed to accommodate the requirement for "perpetual sustained yield".

The application was ultimately unsuccessful and the respondents sought an order that costs be paid by the

unsuccessful applicants.

McDonald J characterised the second and third and fourth applicants as public interest groups. He defined a public interest group as being

> an organisation which has no personal, proprietary or pecuniary interest in the outcome of the proceedings, and which has as its object the taking of public or litigious initiatives seeking to effect public policy in respect of matters in which the group is interested (here the protection of the environment) and to enforce Constitutional, statutory or common law rights in regard to such matters.

He also characterised the first applicant, Reese, as being a public interest litigant in that "essentially his motivation in bringing the application was altruistic."

As in Australia, although the award of costs lies in the Court's discretion, that discretion must be exercised on the basis of rational and sound principles. Because the principles to be applied in judicial review proceedings in Canada were not well developed the Judge then discussed the principles to be applied to the exercise of judicial discretion in such cases. He declined to follow the Alaskan line of authority in relation to costs in public interest cases. This line of authority is characterised by the approach in *Southeast Alaska Conservation Council Inc v State of Alaska & Ors* 665 P2d 544 (1983) which held that it would be an abuse of discretion to award attorney's fees in cases where the law suit involved the public interest, the applicant had public interest status, and the applicant had believed in good faith that there had been a breach of the law, and that if the suit had been successful or citizens would have benefited by the protection of the natural resources.

Counsel for the applicant argued that they should not be required to pay the costs of the first respondent because, while the application was ultimately unsuccessful (1) it was an arguable case, (2) there was no one who else who would present the evidence and arguments necessary to bring the issue before the Court, and (3) that the public interest was served by the applicants doing so. The applicants also argued that to require the payment of costs would render worthless the granting of standing to bring the application in that public interest groups would be hesitant to challenge the validity of legislation or of executive acts purportedly authorised by such legislation, if they faced the possibility that should they be unsuccessful they would face the obligation to pay costs of such a magnitude as might render them insolvent and thus unable to take further steps to protect the public interest.

While McDonald J conceded that "there is a good deal to be said for the applicants argument" he questioned whether it was sufficiently persuasive to overcome the general rule that a successful party is entitled to recover party and party costs.

A further consideration in relation to the first respondent was the fact that the costs of the litigation would be borne by the taxpayers of Alberta. He did not consider that the taxpayers should have the burden imposed on them of successfully defending the validity of an act of government. However this was not to be a paramount consideration in all cases of public interest litigation. The weight to be attached to the consideration would, according to the Judge, vary from case to case. He foreshadowed that

> If it is a close case, in which the Court recognises that there is considerable force to the facts or legal interpretation advanced by the applicants, the Court will regard the applicants as having performed a public service in having the issue adjudicated, such that it is appropriate that, although the Court has held that the claim failed on its merits, the Crown ... should not recover any of its costs from the unsuccessful applicants.

He thought that without statutory reform the Court should feel free to allow recovery of some costs by a successful respondent where the case was not a "close case" even where the Court would not describe the applicant's case as vexatious, frivolous or an abuse of process.

In circumstances of the case the Judge allowed a proportion of the respondents' claim for costs on the basis that (1) the witnesses called by the applicant provided evidence entitled to little weight, (2) that the applicants had prolonged the case by not allowing cross-examination of expert witnesses on their affidavits prior to trial and (3) the evidence of the applicant expert witnesses contained "elements of advocacy of public policy unrelated to their professional expertise and irrelevant to the narrow legal issue [in question]".

In considering the scale of costs to be awarded against the unsuccessful applicants the Judge considered the award should not be

> such as to discourage future prospective applicants for judicial review from initiating such an application when the application is reasonably meritorious but there is a risk of failure.

He held that it is in the public interest that even applications that may turn out to be unsuccessful should not be discouraged by the risk of heavy costs being awarded against an unsuccessful applicant. The same policy considerations might in the event that a public interest group applicant is successful lead to an award of costs on an indemnity basis. In this regard he referred to the decision of *Australian Federation of Consumer Organisations Inc. v. The Tobacco Institute of Australia Ltd.* (1991) 100 ALR 568.

David Mossop

Awarding indemnity costs in public interest litigation - AFCO v Tobacco Institute of Australia

In *AFCO v. Tobacco Institute* (1991) 98 ALR 670 Morling J found that certain advertisements and statements made by the Tobacco Institute in relation to risk of smoking, contravened s.52 of the *Trade Practices Act* 1974 (Cth). The Applicant obtained an injunction restraining further publication of the advertisements and statements. The Applicant then applied to have its costs paid by the Respondent on a indemnity basis. The judgment is reported at (1991) 100 ALR 568.

The hearing dealt with the construction of s.43(2) *Federal Court of Australia Act* 1976 (Cth), which provides that "Except as provided by any other Act, the award of costs is in the discretion of the court or judge."

Prior to this decision the award of costs on an indemnity basis (ie covering solicitor-client costs) has generally been arrived at in cases where the conduct of the parties against whom the order has been deserved criticism. However this case differed in that there was no unreasonable conduct on the part of the Respondent. Morling J. felt that s.43(2) was not meant to be restrained to situations such as those where a litigant was deserving of criticism due to its conduct.

The respondent was ordered to pay the applicants costs on an indemnity basis for the following reasons. Firstly, the applicant had made a reasonable offer to settle the litigation which did not differ significantly to the courts order and which a prudent respondent should have accepted. The rejection of this offer led to the applicant incurring great expense in the subsequent litigation. Secondly, the proceedings concerned a matter of public interest (misleading or deceptive statements on the matter of public health) and was brought by a public interest group. However the relevance lay at the purpose of the litigation, public health, and not the fact that it was brought by a public interest group. The proceedings were also by their very nature a test case on the issue of passive smoking and its possible affects on people's health. The importance of the litigation to the tobacco industry led to the respondents devoting vast resources to the case. In order to be able to succeed the applicant had to itself expend large amounts of money. Morling J. stated that if a party incurs such very great expenses in the public interest, it deserves to be reimbursed for its outlay, but that whether or not such an order should be made ought to be decided on a case by case basis.

The final order made in relation to costs was that the respondent pay the whole of the applicants costs except in so far as they were unreasonable costs so that subject to that exception the applicant would be completely indemnified by the respondents for its costs.

Chris Tsovolos

EDO NEWS

New South Wales

The EDO recently made submissions on various matters to the EPA, including:

- the State of the Environment Discussion Paper,
- the Draft Prosecution Guidelines, and
- the content of the new Protection of the Environment legislation.

We set out below summaries of these submissions and welcome any comments or suggestions from our readers.

NSW EPA State of the Environment Reporting Discussion Paper

Reference Standards

There are numerous references in Part 1, State of the Environment, to comparisons of data with a standard. It is important to note that those standards are in no way objective or value free. For example in

2.1 "data should be compared with NHMRC levels",

2.2 "these concentrations and/or amounts should be compared with agreed safety levels such as NHMRC or WHO", and

8.6 "number of days when air pollution is in the low range".

A range of levels, including the more stringent levels often applicable in the United States, should be included for comparison. The absence of public participation in the setting of NHMRC standards precludes them from being adequate indicators alone, without international benchmarks for comparison.

Inland Waters

One indicator discussed for discharges to water under section 3.2.1 is number of water pollution incidents and prosecutions. These indicators are meaningless.

Firstly, prosecutable reality as a policy means that licence levels are set at existing pollution levels. Since the introduction of the policy the number of prosecutions in the Land & Environment Court in Class 5 of its jurisdiction has plummeted. It is not unlike setting the maximum speed limit at 5 kilometres per hour faster than a car can achieve downhill with a tailwind. Of course the number of "incidents" and therefore prosecutions will drop.

Secondly, there have been no publicly available prosecution guidelines. With the introduction of the Environmental Offences & Penalties Act, with three levels or tiers of offences, several classes of persons are allowed to bring prosecutions and must elect on each occasion whether to prosecute under Tier 1, Tier 2 or Tier 3. Despite assurances in February 1991 that prosecution guidelines would be forthcoming within two months, draft guidelines have only recently been put forward for comment.

Human Health/Quality of Life

Chapter 8 deals with human health and quality of life. While air pollution and visits to national parks are important issues, indicators should also be found for other important issues relating to human health and quality of life. For example, quantities and types of pesticide used in NSW, per cent of children with blood lead levels in excess of various Australian and international standards, number of people adversely affected by traffic and aircraft noise.

Conclusion

One further indicator which has not been included but which is directly relevant to the state of the environment is the extent of the role played by the Environment Protection Authority in development decisions. Under the current development and planning process, pollution control approvals and licences are granted after development consent has been granted. The EPA should monitor:

1.the number of recommendations made to development consent authorities that consent be *refused* because of pollution obstacles

2.the number of recommendations made to development consent authorities that *conditions* be imposed in the consents regarding pollution control

3.the degree to which the recommendations in 1 and 2 are included in consent authority determinations

4.the degree to which the EPA insists on 1 and 2 in refusing to grant licences and approvals where consent authorities grant consent despite EPA concerns.

Such indicators would illustrate to what extent a proactive role has been taken by the EPA, demonstrating whether or not the EPA simply rubber stamps and facilitates any development for which approval or licensing is sought from the EPA. No application for a pollution control licence has ever been refused.

Prosecution Guidelines

Prosecution and Politics - Public authorities

The Premier's memorandum No. 91/9 is a critical document if one is going to understand the points made in Section 10 of the discussion paper. The memorandum provides that consultation must take place at "senior officer" level and that if this does not resolve a dispute, for example, between the EPA and another government authority, then the Ministers concerned must confer in an attempt to resolve the matter. The matter is then to be referred to the Attorney-General who will seek Crown Law's opinion as to whether a prosecution will succeed - all this is hopefully to take place before statutory time limits expire and evidence is lost.

In the case of civil proceedings, it appears that the Premier's consent is necessary before proceedings can be instituted.

While clause 1.3 of the discussion paper talks about separating the prosecution process from the political arena, on reading clause 10.4 of the prosecution guidelines and clause 2.4 of the memorandum No. 91/9 it is clear that, in the case of the prosecution of public authorities, the prosecution process is squarely within the political arena.

Clearly then the prosecution of public authorities is not separated from the political process and this ought to have been made clear in cl 1.3, which at the moment is misleading.

Liability of directors and those concerned in the management of a corporation.

In clause 8.3 the Draft Guidelines put forward that

> The crucial issue is the person's actual control or influence over the conduct of the corporation in relation to its criminal conduct.

The clause concludes

> As a general policy the EPA will institute proceedings under s.10 only when there is evidence linking a director or manager with the corporation's illegal activity.

We are concerned that this guideline appears to require some positive action on behalf of a manager or director. The crucial issue is not the person's actual role in the criminal conduct but the capacity to influence the corporation's operations. This capacity ought to be sufficient to establish liability. Approaching prosecutions in the way described in clause 8.3 will defeat the effectiveness of s.10 of the *Environmental Offences and Penalties Act* 1989.

Managers and directors ought to be encouraged to concern themselves with the corporation's activities. The need to demonstrate actual control in relation to the criminal conduct will defeat the purpose and intent of the legislation and encourage ignorance of corporate practices and conduct among managers and directors.

Penalty Notices

12.9 provides that an authority shall not issue a penalty notice where the EPA is "already involved" in a matter. Given the 14 day time limit for imposing a Tier 3 penalty notice, which time we consider to be too short, it is quite possible that a polluter will escape all penalty where the EPA considers a matter for some time and decides that prosecution under Tier 1 or 2 is not appropriate.

The decision to issue a penalty notice is also important because after 28 days from the issue of the notice, no further proceedings can be taken in relation to the offence. It would appear clear that clean-up actions and the recovery of the costs of those actions from the polluter would be "further proceedings" for the alleged offence. (Section 8 G(5) EOP Act). Given the wide range of people at liberty to issue penalty notices and their differing views on, and understanding of, what constitutes environmental damage it may be advisable for all penalty notices to be immediately advised to the EPA in order that the EPA can:

- ensure consistency of treatment,
- monitor the use of penalty notices,
- promulgate further guidelines, and

ensure that offences warranting prosecution under either a Tier 1 or Tier 2 proceeding including those involving major clean up costs are not dismissed with a penalty notice.

Protection of the Environment Legislation

Maintaining existing concepts

The EDO is concerned that the strengths of the existing legislation should not be lost in the process of attempting to "modernise" the legislation. For example the definition of pollution should be preserved. The first two objectives in section 6 of the *Protection of the Environment (Administration) Act* 1991 reflect an inconsistency and an uncertainty of vision. They are in turn *to prevent pollution* and *to reduce to "harmless" levels of pollution*. It would be of major concern if there were a move towards a definition of pollution where one is only looking at and working towards reducing levels of harm.

Agricultural Chemicals and Pesticides

The EDO continues to be concerned by the omission of agricultural chemicals and pesticides from the umbrella of the EPA. This is especially in so in light of the thrust of the Minister's discussion papers which was to rationalise and bring together under one roof a multitude of responsibilities.

Standing

There should be open standing to restrain breaches of the new pollution legislation. This means removing "if" and "but", allowing standing without having to satisfy the Court (beyond the usual requirements) or notify the EPA or have any commercial or private interest whatsoever in the proceedings.

Integration with planning

There ought to be a better integration of the planning and pollution processes. One way would be to have pollution control approvals precede development consent and then for licensing to follow consent. Another would be for pollution control approvals and development consent to be granted concurrently.

The current process is not working. This is seen by the fact that a pollution control licence has never been refused once development consent has been granted. It is politically very difficult to refuse a pollution licence to a development where development consent has been granted by a local authority. The EPA ought not simply try to make the best out of whatever atrocious decision may have been passed its way by a body with no expertise in the area.

Audits

Concern has been expressed by industry they are more likely to carry out audits if the results are confidential. We can see no legitimate argument for extending privilege or confidentiality to the results of voluntary or compulsory environmental audits. The argument that companies will

not do audits voluntarily if the results can be used against them is specious. Failure to perform an audit may well preclude the defence of "due diligence". Environmental audits are becoming accepted practice and those who bury their head in the sand and refuse to conduct them leave themselves wide open to prosecution.

In view of the recently released Draft Prosecution Guidelines, it seems highly unlikely that a company which performed a voluntary environmental audit and came to the EPA with full disclosure would be prosecuted. (Obviously though we are not proposing an environmental audit as a means of absolving repeated breaches of the law.) Perhaps consideration could be given to treating an environmental audit in the same way as a financial audit: to be conducted annually by an accredited auditor and the signed results to be filed with the EPA.

Performance Bonds

Despite the fanfare with which prosecutable reality and performance bonds were introduced they are not legal under the existing legislation. If licences were for a longer period together with provisions enabling performance bonds, a programme of works could be enforced over a period of say three years. This would also enable companies to plan a programme of investment with more certainty than at present.

Licence standards

Third party rights to participate in the setting of licence standards are essential. The EPA has expressed concern for the possibility of challenges to 3,000 licences each year. When third party appeal provisions on the merits for designated developments were proposed in the Environmental Planning & Assessment Act there were fears that the floodgates would be opened and that every possible development would be challenged. This has not happened.

The starting point must be that pollution licences are privileges not rights. Bearing in mind what we consider to be the ultimate aim of preventing pollution, there is an ongoing need for the public to be involved in the setting of standards. Increasing the period of licence to a period of say 3 years would enable ongoing collection of data and monitoring of performance.

The concerns of those who wish to restrict third party rights to challenge licence standards ignore the fact that community groups and concerned individuals rarely can muster the resources to bring such an appeal. The Court has the power to control vexatious litigation by competitors. The current methods for determination of standards which are determined by the polluters and regulators alone are clearly inappropriate. There have few appeals to the land & environment court by polluters against conditions imposed by the EPA/SPCC.

EDO Advice Service

The Environmental Defender's Office free advice service will be operating from on top of the Three Sisters near Katoomba 12–2pm 26 March 1993

Queensland

EDO Queensland has passed two landmarks this year with the conduct of its first court case in the Queensland Planning and Environment Court during January and February, and with the appearance of Professor Doug Fisher, chairperson of EDO, as a witness before the Queensland Electoral and Administrative Review Commission's (EARC) Public Hearing into the "Review of the Preservation and Enhancement of Individuals' Rights and Freedoms".

Appearance before EARC

In the evidence that Professor Fisher gave before EARC on 18 February, 1993, he commented on 'environmental rights'. Professor Fisher gave the opinion that environmental rights do not exist in Australia, but that rather environmental law consists principally of statutory prohibitions, obligations and duties upon individuals and to some extent, governments. He further suggested that it appeared inappropriate for insertion of environmental rights into any proposed Bill of Rights, but suggested that Queensland should consider introducing an 'environmental charter' which includes a statement of obligations, a statement of priorities in relation to those obligations and a statement with respect to their enforcement and implementation.

Davis Gelatine Case

The Appellant, G.F.W. Davis Limited ("Davis") appealed against the decision of the Beaudesert Shire Council to refuse Davis' application for town planning consent to establish and operate a gelatine factory in a Rural zone on the banks of the Logan River, south of Brisbane. The Council was the Respondent in the appeal and EDO Queensland represented three community groups which decided to become Respondents by Election.

The nature of the appeal is an appeal de novo. In Queensland, a single Judge of the Planning and Environment Court, which is a court at District Court level, stands in the shoes of the Local Authority and makes a fresh decision on the merits of the application before it. Under s7.2(3) of the *Local Government (Planning and Environment) Act (1990)*, the onus of proof is on the Applicant to show that the application should be approved according to the civil standard of proof.

Davis Proposal

The proposed Gelatine factory involves the annual production of 1900 tonnes of gelatine and some hundreds

of tons of fallow from fourteen thousand tonnes of cattle hide pieces. The manufacturing process produces a gelatine liquid and fat which is further processed into tallow and waste water. Water for production is proposed to be pumped from bores on the property.

The waste water is proposed to be treated on the site by passage through anaerobic digesters and aerobic ponds before irrigation onto the property, when it will include sodium, calcium, nitrogen and phosphorous. It was proposed that Rhodes grass and Sorghum would be grown and harvested to dispose of water and nutrients from the waste stream. The river and the ground water would receive any drainage.

Environmental Issues

The main environmental issue in the case was the impact of the proposal on the water quality of the Logan River.

Downstream of the subject site the Logan River supplies water for irrigation of vegetable crops, pastures and aquaculture and after treatment, drinkable water to the towns of Beaudesert and Jimboomba and neighbouring residential estates.

The Court is obliged to consider any deleterious effects of the proposal upon the environment, including the river, under s8.2(1) of the *Local Government (Planning and Environment) Act (1990)*.

A submission made by EDO Queensland noted that even if Davis' evidence was accepted, 1000 tonnes in total of calcium and sodium salts would be deposited upon the alluvial soil next to the river and much of that would go into the ground water and eventually the Logan River. Expert witnesses debated the effect of the sodium and calcium salts on the TDS (Total Dissolved Solids) level of the river by comparison with standards set out in ANZECC Guidelines.

At issue was whether Davis' proposal for dealing with the waste water would work. Beaudesert Shire Council called an expert witness who considered that Davis had overestimated the area of available land for growing Sorghum and Rhodes Grass. The consequence of the overestimation would be that those crops could not export all the available water and nutrients as proposed by Davis, that the land may become waterlogged and that water and nutrients would drain from the site into the river and the ground water. Davis gave evidence that if the water disposal system did not work, it would shut down the factory and not release water into the Logan River.

On behalf of the community groups, it was submitted that the Court should adopt the "precautionary principle" and the principle of "intergenerational equity", when carrying out the deliberative obligation contained in s8.2(1) of the *Local Government (Planning and Environment) Act (1990)*. The Intergovernmental Agreement on the Environment (May, 1992) was tendered to the Court as an expression of those principles.

Planning Issues

One of the main planning grounds was the alleged direct and indirect inconsistency of the proposal with the Beaudesert Shire Council Strategic Plan.

Section 4.13(5A) of the *Local Government (Planning and Environment) Act (1990)*, imposes a duty upon the Court to refuse the application if two conditions are satisfied. These conditions are if:

(a) the application conflicts with any relevant strategic plan; and
(b) there are not sufficient planning grounds to justify approving the application despite the conflict.

On behalf of the community groups it was submitted that there was a direct conflict with the strategic plan, as part of the site was designated "Arable Resource Areas", but was proposed to be used for waste water disposal. Davis contended that the irrigation of crops was "agriculture", and denied the conflict.

It was submitted that there was an indirect conflict with the strategic plan, which expressed a preference for major industrial uses and ancillary uses to be located in the Bromelton Industrial Area, which was several kilometres from the subject site. Davis denied that there was an indirect conflict, submitting that there was sufficient flexibility in the strategic plan to accommodate its proposal.

It was further submitted on behalf of the community groups that there were no planning grounds to justify approval of the proposal despite the conflict, and in fact the proposal will have a significant negative effect upon the amenity of the local area through increases in traffic, noise and possible odour.

His Honour Judge Quirk is expected to hand down his decision shortly.

Jo-Anne Bragg
Solicitor

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