THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Security for Costs and Associated Costs Orders

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Submission to the NSW Law Reform Commission

NSW Young Lawyers
Communications, Entertainment & Technology Law Committee
Level 6, 170 Phillip Street
Sydney NSW 2000
www.younglawyers.com.au

Executive Summary

The Young Lawyers Environmental Law Committee (Committee) welcomes the opportunity to make a submission on the Law Reform Commission's (Commission) inquiry into the law and practice relating to security for costs and to associated orders. This submission will focus on the practice and procedure in the Land and Environment Court of New South Wales (LEC), and particular attention is paid to the following legislation:

- *Environmental Planning and Assessment Act* 1979;
- *Land and Environment Court Act* 1979;
- *Land and Environment Court Rules* 2007;
- *Uniform Civil Procedure Rules* 2005.

Rather than comment strictly on the terms of reference as outlined by the Commission, this submission is structured as an overarching discussion the relevant issues.

Key recommendations

The Committee's key recommendations are as follows:

- that a legislative definition be inserted in the *Land and Environment Court Rules* 2007 or the *Uniform Civil Procedure Rules* 2005, defining "public interest litigation" in accordance with the definition expounded by the Court in *Oshlack v Richmond River Council* (1998) 193 CLR 72;
- that the costs rule for public interest litigation in r4.2 of the *Land and Environmental Court Rules 2007* be extended to the Court's jurisdiction in Class 8 – Mining Matters; and
- that there be specific legislative preclusion of security for costs orders and undertakings as to damages in proceedings that are bought in the public interest.

Access to Justice

The are a number of barriers affecting the ability of litigants (both private and public interest) to access legal representation in relation to proceedings in the Land and Environment Court (LEC). The first hurdle is the ability or "standing" of litigants to commence proceedings in the first place. Second is the costs associated with litigation in the Courts from the initial filing through to appeals, which is often prohibitive. Finally, there is a lack of quality legal representation available to impecunious litigants.

Standing

This state boasts one of the most liberal standing provisions in relation to the ability of litigants to commence proceedings in relation to environmental law. Private citizens, associations and other non-government organisations can commence actions in the LEC challenging environmental and planning decision under the *Environmental Planning and Assessment Act* 1979[1] (EP&A Act) or bring civil enforcement proceedings under the *Protection of the Environment Operations Act* 1997[2].

The experience of nearly thirty years of the open standing provision, section 123 of the *EP&A Act*, has not resulted in a barrage of vexatious litigation, as initially feared by some. The former Chief Judge of the LEC, Justice Jerrold Cripps has noted that:

> It was said when the legislation was passed in 1980 that the presence of section 123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited.[3]

Accordingly, the Committee submits that the open standing provisions allowing for the civil enforcement of environmental laws be maintained to maximise public participation.

Costs

The cost of litigation is a burden which forces many litigants to reconsider their decision to commence and/or contest proceedings. As Toohey J has observed:

> There is little point in opening the door to the courts if litigants cannot afford to come in. The General rule in litigation that "costs follow the event" is in point. The fear, that if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealth private corporation), with devastating consequences to the individual or the environmental group bringing the action must inhibit the taking of cases to court. In any event, it will be factor that looms large in any consideration to initiate litigation.[4]

Whilst the Land and Environment Court Rules have been amended to facilitate the participation of public interest litigants, the indifferent application of the rules has been a concern for practitioners and litigants alike.

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[1] *Environmental Planning and Assessment Act* 1979, s 123.

[2] *Protection of the Environment Operations Act* 1997, ss 252 and 253.

[3] Cripps J "People v The Offenders", Dispute Resolution Seminar, Brisbane 6 July 1990.

[4] *Toohey J, "Address to the NELA Conference" (1989) quoted in Stein P, "The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law" (1996) 13 Environmental Planning Law Journal 179 at 181.*

Further discussion on the issues of costs is below under *Public Interest Litigation* and *Costs and Associated Orders under the Uniform Civil Procedure Rules*.

Access to legal representation

There are very few avenues for impecunious litigants to access legal representation in relation to environmental matters. The sole community legal centre operating in the field of environmental law is the Environmental Defenders Office (**EDO**). With only a handful of solicitors, the caseload that the EDO can undertake on behalf of clients is extremely limited. It is also often reliant on the goodwill of barristers working on a pro bono basis or on reduced fees. Further restrictions include the EDO's guidelines, which require certain factors to be taken into consideration prior to taking on a matter on behalf of community members or groups. These include whether:

- the issue involves a real threat to the environment; or
- engagement in the issue has the capacity to result in good environmental outcomes; or
- the issue concerns the manner in which the environment is regulated, now and into the future and across all areas of government; or
- the issue raises matters regarding the interpretation and future administration of statutory provisions.

If potential clients do not fit into the above criteria, there is little chance that they will be able to acquire representation from other community legal centres as they too have caseload guidelines. Furthermore, most of the funding for legal centres is committed to particular social justice issues (such as domestic violence and discrimination) that force the centres to retain staff specialised in those areas only.

As a result, public interest litigants are into required to seek private legal representation which is expensive and, therefore, prohibitive for many individuals and community groups. This will lead them to reconsider their position in commencing litigation if they cannot acquire pro bono assistance or lawyers who will act for reduced fees.

There is, the Committee submits, a clear need to provide more funding from public and private resources to community legal centres such as the EDO, to ensure that litigants are provided with avenues to access quality legal representation.

Public Interest Litigation

The possibility of a potentially ruinous costs order may act as a deterrent to a litigant seeking to commence or continue litigation bought in the public interest.[5] The need for such litigants to be protected is important so as not to nullify the open standing provision under s123 of the *EP&A* Act, but also to ensure that justice is available to those who seek to enforce environmental laws in the public interest.

Whilst any litigant's own costs can be estimated in advance (in the public interest litigant's case these may involve capped fee arrangements), the costs of the other parties will be largely unknown. This leaves public interest litigants in a position of uncertainty and exposed to a potentially large costs order which they are, in most cases, not in a position to pay.

The ALRC has also noted that:

[5] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited & Anor* (2009) 170 LGERA 22; [2009] NSWLEC 165 at [56].

> Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation.[6]
>
> …
>
> The significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules.[7]

Since the High Court's decision in *Oshlack v Richmond River Council*[8], costs won't necessarily be awarded to the victor in cases where it can be shown there are 'special circumstances' justifying a departure from the general rule. However, the task of defining public interest litigation has made been difficult by a series of cases that have distinguished the rule in *Oshlack*. To date, the discretion not to award costs has been seldom applied and has done little to reduce the exposure of public interest litigants to the risk that they will be required to pay the costs of the other party/parties if they are unsuccessful.[9]

One barrier is the difficulty in applying the definition of public interest litigation. Therefore, the Committee advocates the formulation of a legislative definition. Such a definition or provision could identify relevant considerations for the court when considering whether actions qualify for statutory protection from costs orders.[10]

Finally, although the LEC is now vested with jurisdiction to hear matters previously heard in the Mining Warden's Court under the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991, the practice and procedure relating to such appeals do not specifically offer protection to public interest litigants from adverse costs orders as in other jurisdictions of the court.

Although the public interest was raised in seeking a maximum costs order in an earlier case before the LEC[11], the *Land and Environment Court Rules* 2007 do not make it clear whether unsuccessful public interest litigants are protected from costs orders in this new jurisdiction.[12] Accordingly, the Committee submits that the *Land and Environment Court Rules* 2007 should be amended in such a way as to extend the existing public interest rules to the new mining jurisdiction, in the same manner as r4.2 of the *Land and Environment Court Rules* 2007.

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6 (ALRC 75 at [2.2]).

7 (ALRC 75 at [13.11]).

8 (1998) 193 CLR 72.

9 See, *Sales-Cini v Wyong City Council & Others* [2009] NSWLEC 201; *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v Director-General of the Department of Environment and Climate Change* [2008] NSWLEC 299; *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44 at [56] per Bignold J; *Roy Kennedy v Director-General of the Department of Environment and Conservation* (No 2) [2007] NSWLEC 271.

10 *Land and Environment Court Rules* 2007, r4.2.

11 *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited & Anor* (2009) 170 LGERA 22; [2009] NSWLEC 165 at [65], where Preston CJ was not satisfied the action can be characterised as public interest.

12 *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited & Anor* [2010] NSWLEC 1, where Preston CJ dismissed the appeal. His Honour reserved the costs of the appeal, however a motion for costs has been filed by the respondents and yet to be heard as at the date of this submission.

Costs and Associated Orders under the Uniform Civil Procedure Rules

The *Uniform Civil Procedure Rules* 2005 (**UCPR**) allows for various orders which, if used inappropriately, can have the effect of being oppressive and stifle access to justice for impecunious litigants. Some of the relevant provisions that have raised concerns include security for costs,[13] and undertaking as to damages.[14] Also of concern is the sparing use of the court's powers to issue maximum costs orders in public interest litigation.[15].

Security for Costs

Security for costs involves litigants demonstrating, upon commencement of proceedings, that they will be able to pay the other side's costs in the event that they are unsuccessful. In the LEC, orders for security for costs have been applied in a number of cases involving impecunious and public interest litigants.[16] In examining security for costs orders, although the court is mindful of that the imposition of such orders may force the applicant/plaintiff to discontinue its case,[17] the LEC has also taken into account various other reasons in making such orders. This includes lack of evidence from the applicant/plaintiff to show such an order will be oppressive or deny justice[18], evidence that a corporation or incorporated association has insufficient funds to pay the other side's costs[19] as well as a weak prima facie case.[20]

While some of the above reasons have legitimate purposes in protecting defendants from costly litigation, these considerations must be balanced with the ability of impecunious litigants to access justice. The current legislative position has public interest litigants relying on the discretion of the court and has the potential of discouraging the mere commencement of proceedings.

The Committee calls for relevant legislative provisions (such as the UCPR) to be amended to specifically exclude security for costs orders against litigants who have demonstrated that they are acting in the public interest.

Undertaking as to Damages

In many environmental law cases there is an overwhelming need for urgent interlocutory injunctions to prevent further damage to the environment. However, the granting of such injunctions is often predicated on the applicant/plaintiff providing an undertaking as to damages. As the failure to give such an undertaking is often fatal to seeking an interim or interlocutory injunction, further litigation can become futile.

The Committee submits that the requirements to provide undertakings as to damages should specifically exempt public interest litigants. Such provisions would not diminish the Court's power to strike out vexatious or frivolous proceedings, but would allow public

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[13] *Uniform Civil Procedure Rules* 2005, r42.21.

[14] *Uniform Civil Procedure Rules* 2005, r25.8.

[15] *Uniform Civil Procedure Rules* 2005, r42.4.

[16] See *Diamond and Anor v Birdon Contracting Pty Limited and Anor* [2007] NSWLEC 92; *Burrell Place Community Action Group Inc v Griffith City Council* [2009] NSWLEC 120; *Sales-Cini v Wyong City Council & Others* [2009] NSWLEC 201.

[17] *Razorback Environment Protection Society Inc v Wollondilly Council* [1999] NSWLEC 8.

[18] *Sales-Cini v Wyong City Council & Others* [2009] NSWLEC 201.

[19] *Burrell Place Community Action Group Inc v Griffith City Council* [2009] NSWLEC 120.

[20] *Burrell Place Community Action Group Inc v Griffith City Council* [2009] NSWLEC 120; *Sales-Cini v Wyong City Council & Others* [2009] NSWLEC 201.

interest litigants to commence meaningful proceedings without the fear of financial repercussions. An example of such a provision is the previous section 478 of the *Environmental Protection and Biodiversity Conservation Act* 2000 (Cth), prior to its amendment.

Maximum Costs Orders

Impecunious litigants have the ability to seek an order limiting the maximum amount recoverable by a succeeding party, either prior to or after the substantive hearing.
The courts have held that an issue relevant to the making of such an order is whether the proceedings are of a public interest nature.[21] The LEC has recently dealt with the issues and considerations with regards to the orders and came to differing conclusions on separate facts.[22] The differences between the two cases were based on the nature of the applicant, the public interest element as well as the prima facie strength of the case.

Whilst such orders have been used to a much greater extent in the Federal Court and the Supreme Court, the provision for such orders under the UCPR certainly of benefit to public interest litigants in environmental law. However, such orders have been applied sparingly and comment on the effectiveness of such orders will require further judicial analysis from the LEC.

END

[21] *Woodlands v Permanent Trustee Company Limited* (1995) 58 FCR 139 at 148.

[22] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited & Anor* (2009) 170 LGERA 22; [2009] NSWLEC 165, *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150.