

27 January 2010

Judges' Chambers
Land and Environment Court
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Hon James Wood, AO, QC
Chairperson
NSW Law Reform Commission
DX 1227
SYDNEY

Dear Mr Wood

In the absence overseas of the Chief Judge, I am replying to your letter to him dated 11 December 2009 concerning security for costs and associated orders.

The Land and Environment Court of NSW submits that there should be a discretion **not** to order security for costs if the court is satisfied that the proceedings have been brought in the public interest, at least in the case of judicial review proceedings. This view is reflected in the Land and Environment Court Rules 2007 r 4.2(2). Rule 4.2 provides:

“4.2 Proceedings brought in the public interest

- (1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.*
- (2) The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.*
- (3) In any proceedings on an application for an interlocutory injunction or interlocutory order, the Court may decide not to require the applicant to give any undertaking as to damages in relation to:
 - (a) the injunction or order sought by the applicant, or*
 - (b) an undertaking offered by the respondent in response to the application,**

if it is satisfied that the proceedings have been brought in the public interest.

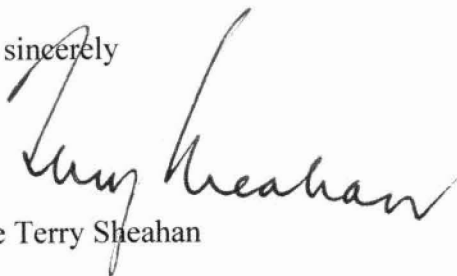
The rule gives statutory recognition to the principle underlying the judgments of the High Court in *Oshlack v Richmond River Council* (1998) 193 CLR 72, although that case was concerned with costs rather than security for costs.

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Usually, some special circumstance additional to categorisation of the proceedings as public interest litigation is required before the discretion is exercised: *Sales-Cini v Wyong City Council* [2009] NSWLEC 201 at [47], [60].

This court sees no reason for this preliminary submission to be treated as 'confidential', and the Chief Judge looks forward to further contact from the Commission as your inquiry progresses.

Yours sincerely

A handwritten signature in black ink, appearing to read "Terry Sheahan". The signature is written in a cursive style with a large, sweeping initial "T".

Justice Terry Sheahan