Costs and the *Workplace Relations Act* 1996

By Phillipa Alexander

The *Workplace Relations Act* 1996 (the WRA) generally provides immunity from costs. In certain situations, however, costs may be ordered against a party. Under the Model Provisions relating to the legal profession, which have been adopted Australia-wide, practitioners are (or will be) required to disclose '*an estimate of costs which a party may be ordered to pay if the client is unsuccessful*'. The provisions of the WRA make this disclosure somewhat challenging.

THE GENERAL RULE

General immunity against costs is now provided by s824 (formerly s347) which provides a party to a proceeding (including an appeal) in 'a matter arising under this Act' (other than an application under s663) must not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.

In addition, if a court hearing a proceeding (including an appeal) in a matter arising under this Act (other than an application under s663) is satisfied that a party to the proceeding has, by an unreasonable act or omission, caused another party to the proceeding to incur costs in connection with the proceeding, the court may order the first-mentioned party to pay some or all of those costs.

PROCEEDINGS IN A MATTER ARISING UNDER THE ACT?

Applications for costs on the basis that s347 did not apply because the proceedings were not in respect of 'a matter arising under the Act' have had mixed success.[1] The test is whether the right or duty that is sought to be enforced owes its existence to a provision of the WRA.[2] Where proceedings involve the WRA and another Act, the court has generally taken the view that severance of different causes of action in a proceeding is not possible, so that the costs immunity applies to the whole proceeding.[3] However, in some cases apportioned orders have been made to reflect the joinder of other causes of action.[4]

WITHOUT REASONABLE CAUSE

In determining whether an application was instituted vexatiously or without reasonable cause, the court looks to the circumstances existing at the time the proceedings were commenced.[5] Costs orders have been made in a number of matters where the court considered that the proceedings were instituted without reasonable cause, variously describing the application as 'devoid of merit'[6], 'hopeless'[7] or having 'no substance in fact and law'.[8]

However, just because an argument is unsuccessful or an application has been discontinued, does not necessarily mean that the proceeding will be found to have been commenced without reasonable cause.[9] Even where there was only a minor chance of success, the High Court was not persuaded that the application was commenced without reasonable cause and refused to order costs against an applicant, noting that the applicant had received legal advice that he had an arguable case.[10]

UNREASONABLE CONDUCT

Costs orders may be made against an applicant who has engaged in unreasonable conduct, causing the other party to >>

incur costs in cases where the applicant has failed to accept a settlement offer that could not be bettered on hearing.[11] Late withdrawal of an application has also been claimed to be unreasonable conduct.[12]

APPLICATIONS RE TERMINATION

In respect of applications for relief against termination under s643, the Australian Industrial Relations Commission is empowered by s658 to award costs against either party or their representative in the circumstances specified in the section.[13] Similarly, a court is empowered under s666 to order costs where a s663 application for unlawful termination has been instituted vexatiously or without reasonable cause, or where costs have been incurred because of an unreasonable act or omission. ■

Notes: **1** *Spotless Services Australia Ltd v The Honourable Senior Deputy President Jeanette Marsh* [2004] FCAFC 155, where application to deal with motion subject to s347; *BGC Contracting Pty Ltd v The Construction Forestry Mining & Energy Union of Workers (No 2)* [2005] FCA 908, where action for declarations re rights of entry subject to s347; *Re McJannet; ex parte Australian Workers' Union of Employees, Queensland* (1997) 189 CLR 654, where application for prohibition not subject to s347; *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303, where order sought for writs of certiorari and prohibition not subject to s347. **2** *Re McJannet; ex parte Australian Workers' Union of Employees, Queensland* (supra at 656). **3** *Jordan v Aerial Taxi Cabs Co-Operative Society Ltd (No. 2)* [2001] FCA 1272; *Maritime Union of Australia v Geraldton Port Authority (No 2)* (2000) 94 IR 404 *Thompson v Hodder* (1990) 21 FCR 467. **4** *Seven Network (Operations) Limited v Media Entertainment and Arts Alliance* [2004] FCA 637; *Lee v Aerial Taxi Cabs Co-operative Society Ltd* [2000] FCA 157. **5** *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257 at 264; *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2002] FCA 1166. **6** *Spotless Services Australia Ltd v The Honourable Senior Deputy President Jeanette Marsh* [2004] FCAFC 155. **7** *PG & LJ Smith Plant Hire Pty Ltd v Lanskey Constructions Pty Ltd* [2005] FCA 134. **8** *Raisanen v Special Broadcasting Services Corporation* [2001] FCA 1525. **9** *Australian Liquor, Hospitality & Miscellaneous Workers Union v Dimension Cleaning Service Pty Ltd* [1999] FCA 90. **10** *Re Commonwealth of Australia & Anor; Ex parte Marks* [2000] HCA 67. **11** *Sallehpour v Frontier Software Pty Ltd* [2005] FCA 663. **12** *Shirley Christine Graham v Dunnyhire (Vic) Pty Ltd* [1998] 890 FCA (31 July 1998) where the argument was made but not accepted by the court. **13** Schedule 7 of the *Workplace Relations Regulations* 2006 prescribes the costs payable for certain work. However, the Commission is not limited to the items listed in the Schedule.

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STOP PRESS

NSW LEGAL PROFESSION AMENDMENT BILL 2006

The *Legal Profession Amendment* Bill 2006 (NSW) has been passed by the Legislative Assembly and was introduced into the Legislative Council on 4 May 2006. The proposed changes include:

UPLIFT FEES

Of major importance is the removal of the 25% limit on success premiums for non-litigious matters. The uplift fee will be limited to 25% only in respect of 'litigious matters'. The prohibition on uplift fees in conditional agreements in respect of claims for damages remains. However, an agreement entered into in contravention of the uplift fee restrictions in s324(2)-(5) will disentitle the solicitor from recovery of the uplift fee rather than all costs.

EXEMPTED FROM DISCLOSURE

The categories of clients exempted from initial disclosure is to be expanded to include large proprietary companies (see s45A(3) *Corporations Act* 2001 definition), liquidators, administrators, receiverships, large partnerships and participants in certain joint ventures.

CONDITIONAL COSTS AGREEMENTS

If a client is exempted from initial disclosure under s312(c) or (d), it is proposed that a conditional costs agreement need not be signed by the client, the statement as to independent legal advice will not be required and the five-day cooling off period will not apply.

LUMP-SUM BILLS

A person who receives a lump-sum bill can request an itemised bill within 30 days of receiving the lump-sum bill. The law practice will be unable to commence proceedings to recover the costs until 30 days after the giving of the itemised bill.