Chapter 8
Costs Awards

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Costs Awards

8.1 Introduction

8.1.1 General discretion applies

There are no specific provisions relating to costs in unlawful discrimination proceedings before the Federal Magistrates Court ('FMC') and Federal Court. The courts have a general discretion to order costs under the provisions of the *Federal Court Act 1976* (Cth) ('the Federal Court Act') and the *Federal Magistrates Act 1999* (Cth) ('the Federal Magistrates Act').[1]

The Federal Court and FMC generally exercise those powers according to the principle that costs follow the event (see further 8.2 below).[2] Under that principle, an unsuccessful party to litigation is ordinarily ordered to pay the costs of the successful party. However, the FMC and Federal Court may depart from this approach in appropriate circumstances. For example, courts have exercised their discretion to deprive a successful party of costs where:

- the successful party has only succeeded in a portion of her or his claim;[3]
- the costs of the litigation have been increased significantly by reason of the need to determine issues upon which the successful party has failed;[4]
- the successful party has unreasonably or unnecessarily commenced, continued or encouraged the litigation or has acted improperly;[5] or
- the character and circumstances of the case make it inappropriate for costs to be ordered against the unsuccessful party.[6]

[1] See s 43 of the Federal Court Act and s 79 of the Federal Magistrates Act.
[2] See *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136. As will be discussed below, there was initially some doubt as to whether the principle that costs follow the event applied to federal unlawful discrimination matters. However, it now appears clear that this principle does apply.
[3] *Forster v Farquhar* (1893) 1 QB 564 (cited with approval in *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136). In those circumstances, it may be reasonable for the successful party to bear the expense of litigating that portion upon which they have failed. See further 8.3.5 below.
[4] *Cretazzo v Lombardi* (1975) 13 SASR 4 (cited with approval in *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136). See also *Cummings v Lewis* (1993) 41 FCR 559, 602-604. In those circumstances, the successful party may not only be deprived of the costs of litigating those issues but may also be required to pay the other party's costs.
[5] *Ritter v Godfrey* (1920) 2 KB 47 (cited with approval in *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136). See also *Jamal v Secretary Department of Health* (1988) 13 NSWLR 252, 271.
[6] In *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 the majority of the Full Federal Court (Black CJ and French J) considered it appropriate to make no orders for costs against the two unsuccessful respondents. Their Honours had particular regard to the fact that the proceedings raised novel and important questions of law concerning alleged deprivations of liberty, the executive power of the Commonwealth, the operation of the *Migration Act 1958* (Cth) and Australia's obligations under international law. Other relevant factors listed included that there was no potential for the unsuccessful parties to make financial gain from bringing their actions and that their legal representation was provided on a pro-bono basis.

The manner in which the Federal Court and FMC have applied these and other principles in unlawful discrimination cases is considered below (see 8.3).

8.1.2 Power to limit and set costs

The Federal Court has the power pursuant to O 62A of the *Federal Court Rules* (Cth) ('Federal Court Rules') to specify the maximum costs that may be recovered on a party-party basis.[7] The Court may vary the amount recoverable where there are 'special reasons' and it is 'in the interests of justice to do so'.[8]

The FMC has a similar rule. Rule 21.03 of the *Federal Magistrates Court Rules 2001* (Cth) ('FMC Rules') enables the FMC to specify the maximum costs that may be recovered on a 'party-party' basis by order at the first court date. Such an order may be made on application by a party or on the Court's own motion. The Court may subsequently vary the maximum costs specified if there are 'special reasons' and 'it is in the interests of justice to do so'.[9]

Any order made pursuant to these rules must apply in favour of both parties and cannot be made solely for the benefit of one party to the proceedings.[10]

The order will not, however, necessarily apply to all of the costs in the proceedings.[11] Order 62A rule 2 provides that any amount specified in such an order will not include costs that a party has been ordered to pay because they have:

> (a) failed to comply with an order or with any of these Rules; or
>
> (b) sought leave to amend its pleadings or particulars; or
>
> (c) sought an extension of time for complying with an order or with any of these Rules; or
>
> (d) otherwise caused another party to incur costs that were not necessary for the economic and efficient:
>
> (i) progress of the proceedings to trial; or
>
> (ii) hearing of the action.

Rule 21.03(2) of the FMC Rules is similar and provides:

> (2) …an amount specified must not include an amount that a party is ordered to pay because the party:
>
> (a) has failed to comply with, or has sought an extension of time for complying with, an order or with any of these Rules; or
>
> (b) has sought leave to amend a document; or
>
> (c) has otherwise caused another party to incur costs that were not necessary for the economic and efficient progress of the proceeding or hearing of the proceeding.

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[7] 'Party-party' costs are those reasonable costs incurred in the conduct of litigation. The court may make this order at a directions hearing: O 62A, r 1 Federal Court Rules.
[8] Order 62A r 4 Federal Court Rules.
[9] Rule 21.03(3).
[10] *Maunchest Pty Ltd v Bickford* (Unreported, Queensland Supreme Court, Drummond J, 7 July 1993); *Roger Muller v HREOC* [1997] FCA 634; *Hanisch v Strive Pty Limited* (1997) 74 FCR 384, 389-390; *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 513.
[11] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [58]-[61].

(a) The rationale for the rule

The reason behind the introduction of O 62A of the Federal Court Rules was concern 'that within the wider community and the legal profession, how the cost of litigation, particularly for a person of ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice'.[12] In *Flew v Mirvac Parking Pty Ltd*[13] ('*Flew*'), Barnes FM said that this concern did not apply with as much force to the FMC because the FMC handled less complex matters and it had provision for costs to be calculated in accordance with a pre-set scale.[14]

In *Hanisch v Strive Pty Ltd*,[15] Drummond J considered the primary purpose of the rule stating that the

> principal object of O 62A is to arm the Court with power to limit the exposure to costs of parties engaged in litigation in the Federal Court which involves less complex issues and is concerned with the recovery of moderate amounts of money, although it may be appropriate for an order to be made under O 62A in other cases, of which *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139 is an example.

(b) Factors to consider when determining whether or not to make an order limiting costs

In *Corcoran v Ferguson*[16] ('*Corcoran*') Bennett J considered an application for an order pursuant to O 62A limiting the amount of costs that would be payable by applicants to unlawful discrimination proceedings.

Bennett J held that when determining whether to make an O 62A order the court had to consider whether there was anything about the particular proceedings to persuade it that it was appropriate to depart from the usual order that a successful party is entitled to their costs.[17]

Her Honour considered the following factors to be relevant to determining whether to make an order and what type of order to make:[18]

(a) the timing of the application;
(b) the complexity of the factual or legal issues raised in the proceedings;
(c) the amount of damages that the applicant seeks to recover and the extent of any other remedies sought;
(d) whether the applicant's case is arguable and not frivolous and vexatious;
(e) whether, in the absence of an order the applicant may discontinue or be inhibited from continuing;

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[12] This concern was expressed in a letter dated 6 November 1991 from the then Chief Justice of the Federal Court to the then President of the Law Council of Australia, quoted by Beazley J in *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 511.
[13] [2006] FMCA 1818.
[14] [2006] FMCA 1818, [43].
[15] (1997) 74 FCR 384.
[16] [2008] FCA 864.
[17] [2008] FCA 864, [8], [56].
[18] [2008] FCA 864, [6], [15]-[41].

(f) whether there is a public interest element to the case;

(g) whether the respondent could continue with the proceedings if an order was made;

(h) the financial position of the applicant;

(i) the likely costs to be incurred by the parties in the proceedings.

In relation to point (e) her Honour rejected the argument made by Virgin Blue that the applicants needed to show they would be forced to abandon the proceedings.[19] Nonetheless, Her Honour expressed the view that 'mere concern as to the effect of an adverse costs order on a party's asset position, or a concern that a party may become bankrupt if unable to meet a costs order are not, by themselves, factors that sufficiently render the applicants' position different from other litigants faced with the usual costs order'.[20]

In relation to point (f) Her Honour expressed a similar view to that taken in other cases, namely, that whilst the existence of a public interest in proceedings is a factor of some importance when determining costs issues, it will not, even when accompanied by an arguable case, necessarily be sufficient to warrant a departure from the usual costs order.[21]

Her Honour held that the combination of the following factors warranted making an order fixing costs in this case:[22]

- the application for the order limiting costs was made reasonably early in the litigation;
- the applicants did not claim any personal financial reward;
- the applicants' case was arguable and not frivolous;
- there was a public interest in the subject matter of the proceedings – the questions raised in the case had not previously been considered and raised novel issues the determination of which will impact on the ability of disabled persons to fly with Virgin;
- if an order was not made the applicants may discontinue the litigation or at least be inhibited from continuing;
- there was no suggestion that Virgin could not afford financially to continue with the proceedings if the proposed order was made.

In reaching the decision as to the amount at which to limit costs, Her Honour took into account the likely costs of the proceedings and the financial position of the parties. Taking these matters into account her Honour decided to make a different order in respect of the two applicants. In the case of Mr Ferguson, who was unemployed and in receipt of a disability support pension, Her Honour limited the costs payable by either party in those proceedings to $15,000, an amount representing the legal aid indemnity. In the case of Mr Corcoran, whose income and asset position was considered to be 'reasonably

[19] [2008] FCA 864, [39]-[41].
[20] [2008] FCA 864, [41].
[21] [2008] FCA 864, [45].
[22] [2008] FCA 864, [54].

substantial,' her Honour did not consider it appropriate to limit costs to $15,000 and fixed the costs payable by either party to $35,000.[23]

Further, in accordance with O 62A r 2, her Honour expressly provided in the orders that the maximum amount of costs excluded:

- all costs incurred prior to the dates on which the Notices of Motion seeking the O62A orders were filed;
- all costs associated with amendments to the Applicants' Points of Claim; and
- consequential amendments to the defence or the provision of particulars that make clear the Applicants' claims.

The approach taken by Bennett J is substantially the same as that taken by the Federal Magistrates Court to the application of r 21.03 of the FMC Rules[24] and to the Federal Court in other types of proceedings.[25]

An additional factor that is relevant to applications made in the FMC that is not relevant to applications for such orders made in Federal Court proceedings is the fact that the FMC, unlike the Federal Court, was established to handle less complex matters and makes provision for costs to be calculated in accordance with a pre-set scale. As such, in *Flew* Barnes FM held that the concern about the costs of litigation were not as significant as they were in the case of Federal Court matters and this was a factor to be taken into account when determining applications pursuant to r 21.03.[26]

In making an order for costs in a proceeding once it has been determined, the FMC may also set costs rather than, for example, referring the costs for taxation.[27] For example, in *Escobar v Rainbow Printing Pty Ltd (No 3)*,[28] Driver FM decided the application for costs by the successful applicant as follows:

> Generally in human rights proceedings before this Court a simple costs order would lead to the application of the fixed event based costs scale in schedule 1 to the Federal Magistrates Court Rules 2001 (Cth) ('the Federal Magistrates Court Rules'). The application of that scale in these proceedings would lead to an outcome of costs and disbursements in the order of $18,000, including today's costs hearing.
>
> It seems to me that in the context of these proceedings that would be an excessive amount to award in favour of the applicant and I have decided instead to fix the amount of costs payable pursuant to rule 21.02(2)(a) of the Federal Magistrates Court Rules. I have decided that I should make an award of costs and disbursements pursuant to that rule in the sum of $12,000, which is approximately two-thirds of the amount which the applicant would have received by a strict application of the costs schedule.

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[23] The orders were made on 1 July 2008.
[24] *Flew v Mirvac Parking Pty Ltd* [2006] FMCA 1818; *Vickers v The Ambulance Service of NSW* [2006] FMCA 1232.
[25] *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509; *Dibb v Avco Financial Services Ltd* [2000] FCA 1785; *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 138. Also see Joanna Shulam, 'Order 62A of the Federal Court Rules – An untapped resource for unlawful discrimination cases' (2007) 32 *Alternative Law Journal* 75.
[26] *Flew v Mirvac Parking Pty Ltd* [2006] FMCA 1818, [41]-[44].
[27] See FMC Rules, r 21.02(c): the Court may refer costs for taxation under O 62 of the *Federal Court Rules* (Cth).
[28] [2002] FMCA 160. See also *Barghouthi v Transfield Services* [2001] FMCA 113; *Chung v University of Sydney* [2001] FMCA 94; *Miller v Wertheim* [2001] FMCA 103.

> I am satisfied that that is a reasonable outcome in terms of the costs that were likely to have been incurred on behalf of the applicant and in terms of the nature and conduct of the proceedings which, while involving a significant body of evidence, dealt with what was ultimately a relatively straight forward issue.[29]

8.1.3 Limitation on amount of costs that can be awarded in the Federal Court

If costs awarded in the Federal Court are taxed then O 62 r 36A of the Federal Court Rules provides for any award of costs to be reduced by one-third if either:

- a party is awarded judgment for less than $100,000 on a claim for a money sum or damages (unless a judge or Court orders otherwise) (O 62 r 36A(1)); or
- the Court or a judge declares that a proceeding could more suitably have been brought in another court or tribunal (O 62 r 36A(2)).

This rule is particularly relevant in discrimination cases where damages awards are often less than $100,000.[30] It is also open to a Federal Court judge to find that a discrimination case could more suitably have proceeded in the Federal Magistrates Court.

In cases where an award of damages is less than $100,000 the court retains a discretion to order that costs not be reduced in accordance with the rule. As, however, such an order can only be made by the court or a judge and not a taxing officer, a party that is awarded damages of less than $100,000 that does not want their costs reduced on taxation must apply to the court for an appropriate order.[31]

In *LED Builders Pty Ltd v Hope*[32] Tamberlin J cautioned against applying O 62 r 36A(1) automatically stating:

> In my opinion r 36A, unless applied with discretion and caution can lead to harsh results. Especially is this so in relation to claims for small monetary amounts in matters such as copyright. If the rule is allowed to apply automatically in all cases where a sum, less than $100,000, is recovered, this can lead to harsh results in situations where there is no other more appropriate court.[33]

Matters that courts have taken into account when deciding not to order costs to be reduced include:

- the complexity and importance of the issues raised by the matter,[34]

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[29] [2002] FMCA 160, [7]-[9].
[30] See Chapter 7: Damages and Remedies.
[31] *Australasian Performing Right Association Ltd v Pashalidis* [2000] FCA 1815, [13].
[32] (1994) 53 FCR 10.
[33] (1994) 53 FCR 10, 12. See also *Axe Australasia Pty Ltd v Australume Pty Ltd (No 2)* [2006] FCA 844, [6].
[34] *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* [2004] FCA 1371, [8]-[12]; *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2003] FCA 747; *Tu v Pakway Australia Pty* Ltd (2006) 227 ALR 287, 293 [32].

- whether relief, other than damages, such as injunctive relief was sought and granted;[35] and
- whether the proceedings could have been brought in any other court.[36]

8.1.4 Scale of costs in FMC proceedings

Rule 21.10 of the FMC Rules provides that, unless the Court orders otherwise, where a costs order is made the amount of costs are to be determined in accordance with the scale of costs set out in Part 1 of Schedule 1 to the Rules. However, if costs are taxed then the relevant scale of costs is that set out in Schedule 2 to the Federal Court Rules.[37]

In *Hinchliffe v University of Sydney (No 2)*,[38] Driver FM said the following about the application of the scale of costs to unlawful discrimination proceedings:

> Ordinarily, in human rights proceedings, costs are assessed in accordance with the event based scale appearing in schedule 1 to the Federal Magistrates Court Rules. That scale was adopted by the Court in order to provide simplicity and certainty in determining issues of costs. In some cases, as is likely to be the case here, a successful party will incur significantly more in costs than is recoverable pursuant to the Court scale. It does not follow that that is an unjust result, where it occurs. The Court scale is publicly known and parties to litigation should be aware that the scale is likely to determine their maximum recoverable costs should they succeed. If parties wish to incur significantly more costs in litigation in this Court than they could ever recover, that is a matter for them.
>
> In any event, it should not be assumed that because substantial legal costs have been incurred by a party, their money has been well and wisely spent. The scale of costs ordinarily applicable in human rights proceedings reflects the Court's assessment of what costs can be accepted as reasonable in ordinary proceedings. If proceedings are exceptionally long or complex there is the opportunity to ask for the proceedings to be transferred to the Federal Court, where a more appropriate scale of costs for long and complex proceedings would be available. That was not done in this case.
>
> An additional factor is that there is commonly a disparity between an applicant and a respondent in human rights proceedings in their relative capacity to fund the legal proceedings. This applicant was legally aided but commonly applicants must depend upon their own limited financial resources. Commonly, a respondent will have access to significantly more funds than an applicant. This Court's event based costs scale establishes a level playing field. I see no reason to depart from it in these proceedings. [39]

In *Ingui v Ostara (No 2)*,[40] Brown FM reduced the amount of costs that would be awarded under the scale of costs (which together with disbursements amounted to $4,694) to $3,000 on the grounds that $4,694 was excessive

[35] (1994) 53 FCR 10, 12.
[36] (1994) 53 FCR 10, 12. Cf *Universal Music Australia Pty Ltd v Miyamoto* [2004] FCA 982.
[37] FMC Rules, r 21.11(2)(b).
[38] [2004] FMCA 640.
[39] [2004] FMCA 640, [10]–[12].
[40] [2003] FMCA 531.

given the proceedings were discontinued well before the matter was fixed for final hearing, thus saving the respondents from incurring considerable costs.

Similarly in *Antic v Dimeo Holdings Pty Ltd*,[41] the matter was listed for a five day hearing. The applicant accepted an offer of compromise several months before the hearing date, in which the respondent offered to pay the applicant's costs 'as agreed or assessed in accordance with Part 1 of Schedule 1 of the Federal Magistrates Court Rules 2001'. The parties were unable to reach agreement on the issue of costs. In Barnes FM's view, *Joyce v St George Bank Ltd*[42] supported the view that there is no 'automatic' entitlement to preparation costs calculated by reference to the number of days for whch the hearing is listed.[43] Federal Magistrate Barnes decided to assess costs on the basis of preparation for a three day hearing, in light of the stage at which the matter had settled.

8.2 Usual Principles of Costs to Apply

In the first year following the transfer of the federal unlawful discrimination jurisdiction to the FMC and Federal Court, there was an acceptance by some Federal Magistrates that the nature of the jurisdiction may warrant a departure from the traditional 'costs follow the event' rule.[44] It would seem now, however, that the weight of authority in the Federal Court and FMC is to the effect that the usual principles relating to costs are to be applied.

In *Minns v New South Wales (No 2)*,[45] Raphael FM reconsidered his decision in the earlier case of *Tadawan v South Australia*[46] and concluded:

> The decision in *Tadawan* was always meant to be one made on its own facts and it has not been universally followed in the Federal Magistrates Court. To the extent that it may be considered a precedent for the non-imposition of costs orders in 'deserving cases' this should no longer continue. I am satisfied that the superior courts have now made it clear what the law should be in relation to such applications in the anti-discrimination area and I am content to follow them.[47]

In reaching this view, his Honour made reference to decisions in other unlawful discrimination matters and other cases which raised 'public interest' issues.[48]

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[41] [2009] FMCA 740.
[42] [2005] FMCA 868.
[43] [2009] FMCA 740, [30].
[44] *Tadawan v South Australia* [2001] FMCA 25, [62], [63]; *McKenzie v Department of Urban Services* (2001) 163 FLR 133, 156 [95]; *Ryan v The Presbytery of Wide Bay Sunshine Coast* [2001] FMCA 12, [20]; *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433, 440-441 [20]; *Paramasivam v Wheeler* [2000] FCA 1559, [9]-[10]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56, 61 [31].
[45] [2002] FMCA 197.
[46] [2001] FMCA 25, [62], [63].
[47] [2002] FMCA 197, [13].
[48] The unlawful discrimination matters were: *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815; *Sluggett v Human Rights & Equal Opportunity Commission* [2002] FCA 1060 (but note that both matters were decided prior to the transfer of the hearing of matters in the unlawful discrimination jurisdiction to the FMC and Federal Court from the Commission). The 'public interest' matters to which his Honour referred were: *De Silva v Ruddock (in his capacity as Minister for Immigration & Multicultural Affairs)* [1998] FCA 311; *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229; *Oshlack v Richmond River Council* (1998) 193 CLR 72.

In a range of other cases, the Federal Court and FMC have confirmed that the general rule that 'costs follow the event' will apply in unlawful discrimination matters.[49]

For example, in *Fetherston v Peninsula Health (No 2)*,[50] Heerey J explicitly rejected the argument that normal costs principles should not apply to cases brought under what is now the AHRC Act and affirmed the general rule that 'a wholly successful defendant should receive his or her costs unless good reason is shown to the contrary'.[51] His Honour stated:

> While the Disability Discrimination Act is without doubt beneficial legislation, its characterisation as such does not mean that this Court is to apply any different approach as to costs. In conferring jurisdiction under a particular statute Parliament may conclude that policy considerations warrant a special provision as to costs, for example that there be no order as to costs or that costs only be awarded in certain circumstances, such as, for example, where a proceeding has been instituted vexatiously or without reasonable cause: *Workplace Relations Act 1996* (Cth) s 347. The absence of any such provision applicable to the present case confirms that the usual principles as to costs are to apply.[52]

8.3 Factors Considered

Some of the factors that have been identified in federal unlawful discrimination cases as being relevant to the discretion to order costs include:[53]

- where there is a public interest element to the complaint;
- where the applicant is unrepresented and not in a position to assess the risk of litigation;
- that the successful party should not lose the benefit of their victory because of the burden of their own legal costs;
- that litigants should not be discouraged from bringing meritorious claims and courts should be slow to award costs at an early stage;
- that unmeritorious claims and conduct which unnecessarily prolongs proceedings should be discouraged; and
- whether the applicant was only partially successful.

Each of these matters will be considered in turn.

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[49] See, for example, *Tate v Rafin* [2000] FCA 1582, [71]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1150, [1]; *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [57]; *Paramasivam v Wheeler* [2001] FCA 231, [24] (Hill, Tamberlin and Carr JJ); *Jacomb v Australian Municipal Administrative Clerical & Services Union* [2004] FCA 1600, [4]; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, [11]; *Ball v Morgan* [2001] FMCA 127, [93]; *Gluyas v Commonwealth (No 2)* [2004] FMCA 359, [5]; *Hollingdale v North Coast Area Health Service (No 2)* [2006] FMCA 585, [10]; *Clack v Command Recruitment Group Pty Ltd and Anor* (No 2) [2010] FMCA 198. See, however, *Ryan v Albutt (No 2)* [2005] FMCA 95 in which Rimmer FM cited *Tadawan v South Australia* [2001] FMCA 25 in support of the view that costs do not follow the event in unlawful discrimination matters: [7]. Her Honour's decision would appear to be contrary to the weight of recent authority, to which no reference is made in the decision.

[50] [2004] FCA 594.

[51] [2004] FCA 594, [8].

[52] [2004] FCA 594, [9].

[53] *Wiggins v Department of Defence - Navy (No 3)* [2006] FMCA 970, [35].

In cases where interlocutory relief is sought, different considerations apply in relation to the award of costs.[54] Where an application for interlocutory relief succeeds, the usual order is that the costs either be costs in the cause or that costs be reserved.[55] However, where an application for interlocutory relief is refused and dismissed, it may be appropriate that the applicant pay the respondent's costs of and incidental to the application for interlocutory relief.[56]

It is also noted that self-represented applicants are not entitled to any legal costs.[57]

8.3.1 Where there is a public interest element

A factor that may warrant a departure from the usual rule that costs will follow the event is in cases where there is a significant public interest element.[58]

(a) What is a 'public interest element'

The term 'public interest' is not judicially defined. In determining whether a matter has a public interest element, a court may consider all the circumstances of the case to determine whether there is sufficient 'public interest' to influence the exercise of the court's discretion as to costs.[59] In *Ruddock v Vadarlis (No 2)*,[60] Black CJ and French J cautioned against advancing an argument against cost orders solely on the basis that the proceedings are 'public interest litigation' or are proceedings brought in the 'public interest'. In this regard their Honours referred to the cautionary comments of Gaudron and Gummow JJ in *Oshlack v Richmond River Council*,[61] that the term 'public interest litigation' is a 'nebulous concept unless given...further content of a legally normative nature'.[62] Their Honours went on to say:

> To say of a proceeding that it is brought 'in the public interest' does not of itself expose the basis upon which the discretion to award or not award costs should be exercised.[63]

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[64] the Federal Court held that a human rights and/or discrimination case will not automatically be regarded as a proceeding in the public interest.

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[54] *Thompson v IGT (Australia) Pty Ltd* [2008] FCA 994, [63].
[55] *Thompson v IGT (Australia) Pty Ltd* [2008] FCA 994, [63].
[56] *Thompson v IGT (Australia) Pty Ltd* [2008] FCA 994, [64]-[65].
[57] See, for example, *Wattle v Kirkland* [2001] FMCA 66.
[58] *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433, 44 [24], [25]; *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2002] FMCA 71, [5]; *Chau v Oreanda Pty Ltd* [2001] FMCA 114; *Gibbs v Wanganeen* (2001) 162 FLR 333; *Murphy v Loper* [2002] FMCA 310. In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, Driver FM noted that there were, in that matter, no issues of public interest that would indicate a departure from the general principle that costs follow the event, nor had the conduct of the applicant disentitled her to an order for costs: [4].
[59] *Ruddock v Vadarlis* (2001) 115 FCR 229, [18], [23]; cited with approval in *Jacomb v Australian Municipal Administrative Clerical & Services Union* [2004] FCA 1600, [8].
[60] (2001) 115 FCR 229.
[61] (1998) 193 CLR 72.
[62] (1998) 193 CLR 72, 84.
[63] (2001) 115 FCR 229, 238 [18].
[64] [2007] FCA 974, [27].

In *Vijayakumar v Qantas Airways Ltd* (No 2)[65] Scarlett FM held that an Application which challenged the principle established in *Brannigan v Commonwealth of Australia,*[66] that discrimination laws do not apply extra-territorially, did not have a significant public interest element.

(b) Cases in which the public interest element has been held to be sufficient to depart from the usual costs rule

As the cases discussed below indicate, the following matters have been taken into account when deciding whether there is a sufficient public interest to warrant the usual costs order not being made against an unsuccessful applicant:

- that the outcome of the case will have implications for persons beyond the applicant, for example, because the decision will be of precedent value or because it concerns the operation of a policy or issues that affect persons other than the applicant;
- that the applicant's case was arguable; and
- that a legal practitioner has appeared pro bono for the applicant.

It is important to note, however, that the cases discussed under paragraph (c) below demonstrate that the presence of one or more of the above matters may not necessarily be sufficient to warrant a departure from the usual rule as to costs. Accordingly, the cases should only be used as a guide as to the types of matters that will and will not warrant a costs order.

In *Xiros v Fortis Life Assurance Ltd*[67] ('*Xiros*'), Driver FM dismissed the application but declined to award costs to the respondent on the basis of a 'significant public interest element'. His Honour stated:

> All human rights proceedings contain some element of public interest in that the legislation is remedial in character, addressing the public mischief of discrimination. But the legislation confers private rights of action for damages. There will be many human rights proceedings where no sufficient public interest element can be shown: *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815.
>
> In the present case, the proceedings have called for the interpretation and application of s 46(2) of the DDA, a provision on which I have found no previous judicial consideration.
>
> The decision of this Court will have some precedent value and will have implications for other insurance policies; and possibly a large number of similar policies. The proceedings therefore contain a public interest element of substance.[68]

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[65] [2009] FMCA 966 [47].
[66] (2001) 110 FCR 566
[67] (2001) 162 FLR 433.
[68] (2001) 162 FLR 433, 441 [24], [25]. See similar views expressed in *Dranichnikov v Minister for Immigration & Multicultural Affairs* [2002] FMCA 71, [5]; *Chau v Oreanda Pty Ltd* [2001] FMCA 114; *Gibbs v Wanganeen* (2001) 162 FLR 333; *Murphy v Loper* [2002] FMCA 310. In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, [4], Driver FM noted that there were, in that matter, no issues of public interest that would indicate a departure from the general principle that costs follow the event, nor had the conduct of the applicant disentitled her to an order for costs.

Wilcox J commented as follows in *Ferneley v The Boxing Authority of New South Wales*:[69]

> Although the applicant fails, it is not clear to me that she should be required to pay the respondents' costs. Her case in relation to s 22 was arguable. Her argument in relation to s 42, which was disputed by the respondents, is correct. Perhaps more importantly, the case has served the public interest in clarifying important issues of discrimination law.[70]

In *Jacomb v Australian Municipal Administrative Clerical & Services Union*,[71] Crennan J accepted that there was an element of public interest in the matter, and ordered the unsuccessful applicant to pay 75% of the respondent's costs.[72] Her Honour stated as follows:

> There is no set formula for determining whether a case is brought in the public interest. The decision made in the present proceedings may act as a useful guide for other unions, whose rules are affected by the operation of s 7 of the *Sex Discrimination Act* and, to this extent, there is a degree of public interest in having the dispute judicially determined. However, the applicant stood to benefit personally from the decision and, in this regard, I could not be satisfied that the applicant brought the proceeding entirely in the public interest. The public interest was subservient to, although coincided with, his own interests. However, it is important to note in this context, that in the absence of any judicial determination of the question of statutory construction, to which the facts gave rise, the applicant was not acting unreasonably in seeking a determination. While it remains undisturbed, the determination is one which will have the effect of governing the position of persons who find themselves in a similar position to the applicant. In that sense the case can be genuinely described as a test case with some element of public interest. It may be of assistance to the respondent in respect of future rules and may be of assistance to similar bodies in similar circumstances.[73]

In *AB v New South Wales (No 2)*,[74] Driver FM considered the issue of costs for an applicant who was unsuccessful in bringing a claim of indirect racial discrimination in the admission criteria for a NSW selective High School.[75] Driver FM ordered that there be no order for costs, stating:

> the applicant was represented *pro bono publico* by Mr Robertson. It is appropriate that the Court should place on record its gratitude to counsel for his willingness to appear on that basis. Counsel only agrees to appear *pro bono publico* where an element of public interest is discerned. As I said in *Xiros v Fortis Life Assurance*, there is always an element of public interest in human right proceedings, given that the legislation is beneficial and seeking to redress the public mischief of discrimination.
>
> However, ordinarily in human rights proceedings a claimant is exercising a private right to claim damages. There will frequently be an insufficient public interest element to outweigh the general principle that costs should follow the event in such proceedings [see *Physical Disability Council of NSW v Sydney City Council*]. I was also taken by Ms Barbaro to a decision

[69] (2001) 115 FCR 306.
[70] (2001) 115 FCR 306, 326 [97].
[71] [2004] FCA 1600.
[72] [2004] FCA 1600, [12]. See further 8.4.2 below.
[73] [2004] FCA 1600, [10].
[74] [2005] FMCA 1624.
[75] See *AB v New South Wales* (2005) 194 FLR 156.

> of Federal Magistrate Raphael in *Minns v New South Wales (No 2)* where His Honour said, at paragraph 13, that something more than precedent value is required in order to establish an element of public interest sufficient to warrant a departure from the ordinary principle that costs follow the event.
>
> In this case, in my view, a combination of the public interest inherent in a case which is relatively novel and which counsel recognised by appearing *pro bono publico*, the fact that there was no claim for damages but simply the seeking of a right of access to a public school (which raised an issue of public importance) and the fact that but for the issue of evidence the applicant would have succeeded, all lead me to the view that there should be no order as to costs.[76] (footnotes omitted)

Driver FM appears to accept in this passage the view of Raphael FM in *Minns v New South Wales (No 2)* ('*Minns*')[77] that something more than precedent value is necessary to establish a sufficient public interest.

In *Wiggins v Department of Defence – Navy (No 3)*,[78] McInnis FM held that the case had a significant public interest element relevant in determining costs.[79] His Honour identified the issues of public interest as being:

- the treatment of employees in the armed forces suffering from depression;[80]
- the manner in which the armed forces makes provision for the communication to relevant supervising officers of the nature of the condition suffered by an officer leading to the classification of fit for shore activities;[81] and
- ensuring that serving personnel of the armed forces are provided with the opportunity of rehabilitation and advancement of their career.[82]

After citing those factors, his Honour stated:

> In my view, those factors are sufficient to constitute a significant degree of public interest above and beyond the benefit which the applicant obtains personally from the decision of the court. In that sense, although the public interest element in this case coincides with the personal interest of the applicant, it is still a public interest element of significance which I regard as relevant to take into account in the exercise of my discretion concerning costs.[83]

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[76] [2005] FMCA 1624, [5]-[7].
[77] [2002] FMCA 197.
[78] [2006] FMCA 970.
[79] [2006] FMCA 970, [42]. Applying *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815, [9]; *Jacomb v Australian Municipal Administrative Clerical & Services Union* [2004] FCA 1600, [10].
[80] [2006] FMCA 970, [39].
[81] [2006] FMCA 970, [40].
[82] [2006] FMCA 970, [41].
[83] [2006] FMCA 970, [42].

(c) Cases in which the public interest element has been held not to be sufficient to depart from the usual costs rule

In *Xiros*, Driver FM observed that not every case which raises a significant issue and in which there is an arguable case will avoid the application of the principle that costs follow the event.

Examples of the matters taken into account when deciding not to depart from the usual costs rule in public interest cases are:

- the strength of the applicant's case - in *Physical Disability Council of NSW v Sydney City Council*,[84] the unsuccessful applicant was ordered to pay the respondent's costs because even though the case raised important issues the overall prospects of the applicant's case were little better than speculative;
- whether an exclusively personal benefit is sought by the applicant in the proceedings - in *Minns*[85] Raphael FM held that where proceedings seek an 'exclusively personal benefit' (such as damages), the public interest element of a matter is 'much diminished'.[86] His Honour also appeared to express views at odds with those expressed by Driver FM in *Xiros*, stating:

> if public interest is to be used to mitigate the normal order for costs then that public interest must go further than mere precedent value.[87]

- that there is no evidence that the applicant was discriminated against because of his disability;[88] and
- whether legal proceedings are an appropriate medium for the purpose of examining the ambiguities in a policy - in *Hurst and Devlin v Education Queensland (No 2)*,[89] Lander J accepted that 'it would be in the interests of all parties if Education Queensland's Total Communication Policy could be understood by all persons affected in the same way'[90] but expressed the view that 'legal proceedings are not the appropriate medium for the purpose of examining the ambiguities in an education policy.[91]

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[92] the Federal Court considered whether to make a costs order against a disability rights organisation that was held not to have standing to commence proceedings alleging a breach of the *Disability Standards for Accessible Public Transport 2002* (created under s 31 of the *Disability Discrimination Act*

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[84] [1999] FCA 815, [9]; *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 974, [28].
[85] [2002] FMCA 197.
[86] [2002] FMCA 197, [13]. See also *De Silva v Ruddock (in his capacity as Minister for Immigration & Multicultural Affairs)* [1998] FCA 311*; Physical Disability Council of NSW v Sydney City Council* [1998] 311 FCA; *Sluggett v Human Rights & Equal Opportunity Commission* [2002] 123 FCR 561; *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934, [15].
[87] [2002] FMCA 197, [13]. Note, however, that his Honour did not expressly refer to Driver FM's decision in *Xiros*.
[88] *Gluyas v Commonwealth (No 2)* [2004] FMCA 359, [8].
[89] [2005] FCA 793, [33].
[90] [2005] FCA 793, [33].
[91] [2005] FCA 793, [33]. Note that the decision of Lander J was overturned on appeal and the consequent costs order set aside: *Hurst v Queensland* (2006) 151 FCR 562, 585 [136].
[92] [2007] FCA 974.

1992 (Cth) ('DDA')). On the question of costs, the applicant argued that the proceedings raised issues of public interest, noting that the applicant had:

- sought to raise important issues relevant to the scope and operation of disability standards made under the DDA; and
- brought the proceedings to effect social change, rather than for personal or financial gain.

The Court rejected these arguments, for the following reasons:[93]

- the weight of the case law was against the applicant having standing to be able to bring the proceedings;
- the question of standing of an organisation to bring proceedings in relation to a breach of disability standards is not of sufficient public interest to cause the Court to depart from its usual orders;
- given that the applicant lacked standing to commence the proceedings, the Court was never able to consider the merits of the case so the substantive issues that the applicant sought to raise were never resolved; and
- the case did not raise fundamental rights of individuals to take action on their own behalf to determine their rights.

8.3.2 Unrepresented applicants

Driver FM's discussion of the public interest element of *Xiros v Fortis Life Assurance Ltd* ('*Xiros*'),[94] was considered in 8.3.1 above. His Honour also identified the following matter as being relevant to the exercise of the discretion to award costs in that case:

> Another circumstance that may warrant a departure from the general principle is where the unsuccessful party is unrepresented and was not in a position to make a proper assessment of the strength or weakness of his case, and, hence, the risk associated with the litigation. Mr Xiros had the benefit of legal assistance for his complaint to [the Commission] but he was unrepresented in these proceedings. The issue to be resolved was a technical one: whether there was a sufficient actuarial basis for the exclusion from benefits in the insurance policy of HIV/AIDS derived conditions, an issue on which the respondent bore the onus of proof. That issue could only be resolved by the pursuit of the present application to this Court, and Mr Xiros was not in a position to make a reliable assessment of his prospects of success.[95]

In *Hassan v Smith*,[96] Raphael FM noted that the applicant was self-represented and that he had brought the proceedings out of deeply held beliefs. His Honour also noted that 'in this jurisdiction of the Federal Magistrates Court discretion may be exercised more leniently in favour of unsuccessful applicants'.[97] However, Raphael FM ordered that the

[93] [2007] FCA 974, [26]-[33].
[94] (2001) 162 FLR 433.
[95] (2001) 162 FLR 433, 441 [23].
[96] [2001] FMCA 58.
[97] [2001] FMCA 58, [25]. Note, however, that his Honour cited *Tadawan v South Australia* [2001] FMCA 25 in support of that proposition. See the discussion in 8.2 above.

unsuccessful applicant pay the respondent's costs as his Honour was of the view that the applicant had been aware of the problems that his case faced and had wished to continue the matter so as 'to have his day in court'.[98]

Similarly, in *Gluyas v Commonwealth (No 2)*,[99] Phipps FM was not persuaded that the fact that the unsuccessful applicant was unrepresented justified departing from the ordinary rule that costs follow the event.

8.3.3 The successful party should not lose the benefit of their victory

The relevance of this factor appears to have been closely associated with the suggestion in earlier cases[100] that the principle that costs follow the event should not be too readily applied to federal unlawful discrimination matters. While that approach may have benefited unsuccessful applicants, it stood to render futile the claims of applicants whose awards of compensation might be 'swallowed up' by legal fees. To ameliorate that potential problem, the Court indicated that it was appropriate to have regard to that issue as a factor weighing in favour of ordering costs to be paid to a successful applicant.

In *Shiels v James*,[101] Raphael FM held that the amount of the award of damages to the applicant would be totally extinguished if no order for costs was made and in those circumstances costs should follow the event.

In *Travers v New South Wales*,[102] Raphael FM stated:

> This matter was originally commenced in the Federal Court. There was a lengthy hearing of Notice of Motion before Justice Lehane and the case before me lasted 2 ½ days. If costs were not awarded Stephanie would lose the benefit of the entire judgment. I order that the respondent should pay the applicant's costs to be taxed on the Federal Court scale if not agreed.[103]

Similarly, in *McKenzie v Department of Urban Services,*[104] Raphael FM ordered that the respondents pay the costs of the applicant, stating:

> Anti-Discrimination matters are generally considered to be a type of dispute which do not attract orders for costs. There was no provision for costs in the inquiry system previously operated by HREOC. In state tribunals there is provision to award costs but this is not often done. The Federal Court and the Federal Magistrates Court are courts of law and not tribunals and the *HREOC Act* does not contain any prohibition on the award of costs. In previous matters which have come before me e.g. *Shiels* and *Travers* I have indicated that I think an award of costs is appropriate where otherwise

[98] [2001] FMCA 58, [27].
[99] [2004] FMCA 359.
[100] See *Tadawan v South Australia* [2001] FMCA 25, [62], [63]; *McKenzie v Department of Urban Services* (2001) 163 FLR 133, 156 [95]; *Ryan v The Presbytery of Wide Bay Sunshine Coast* [2001] FMCA 12, [20]; *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433, 440-441 [20]; *Paramasivam v Wheeler* [2000] FCA 1559, [9]-[10]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56, 61 [31].
[101] [2000] FMCA 2. In *Frith v The Exchange Hotel (No 2)* [2005] FMCA 1284, [6] Rimmer FM expressed agreement with the approach taken by Raphael FM in *Shiels.*
[102] (2001) 163 FLR 99.
[103] (2001) 163 FLR 99, 117 [74].
[104] (2001) 163 FLR 133.

> a party may have the benefit of his or her award of damages totally eliminated by the cost of the proceedings.[105]

In *Johanson v Blackledge*,[106] Driver FM ordered that costs should follow the event. His Honour agreed with the views expressed by Raphael FM in *Shiels v James*[107] concerning the general desirability of an award of costs in favour of a successful applicant in human rights proceedings, so as to avoid an award of damages being swallowed up by the cost of litigation.

His Honour made similar comments in *Escobar v Rainbow Printing Pty Ltd (No 3)*,[108] stating:

> My general approach to the issue of costs in human rights proceedings where an applicant is successful is set out in my decision in *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91. In that case I expressed agreement with views expressed by Federal Magistrate Raphael in *Shiels v James* [2000] FMCA 2, in particular at paragraph 80 of his decision. I noted the general desirability of an award of costs in favour of a successful applicant in human rights proceedings so as to avoid an award of damages being swallowed up by the cost of litigation.[109]

With courts being apparently more inclined to award costs following the event,[110] it may be that this factor becomes less relevant. Alternatively, it may have some residual relevance as a factor in supporting the proposition that the FMC should be reluctant to depart from the principle that costs follow the event in such cases.

8.3.4 Courts should be slow to award costs at an early stage

In *Low v Australian Tax Office*[111] ('*Low*'), Driver FM dismissed the application on the basis that an extension of time for the filing of the application should not be granted because the application did not disclose an arguable case. His Honour declined to award costs, however, stating:

> In my view the Court should be slow to award costs at an early stage of human rights proceedings so that applicants have a reasonable opportunity to get their case in order, to take advice and to assess their position. It would, in my view, be undesirable for costs to be awarded commonly at an early stage, as that would provide a deterrent to applicants taking action under what is remedial legislation in a jurisdiction where costs have historically not been an issue.
>
> By disposing of the application now at this relatively early stage the respondent is able to avoid being put to the substantial expense of a full hearing and in those circumstances I do not think it necessary or appropriate to make any order as to costs.[112]

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[105] (2001) 163 FLR 133, 156 [95].
[106] (2001) 163 FLR 58.
[107] [2000] FMCA 2.
[108] [2002] FMCA 160.
[109] [2002] FMCA 160, [5].
[110] See discussion in 8.2 above.
[111] [2000] FMCA 6.
[112] [2000] FMCA 6, [11]. His Honour made similar obiter comments in *Chau v Oreanda Pty Ltd* [2001] FMCA 114, [26].

In *Saddi v Active Employment*,[113] Raphael FM cited with approval and applied the approach of Driver FM in *Low*. Although Raphael FM declined to exercise his discretion to allow Mr Saddi to continue with his proceedings out of time (as Raphael FM was not satisfied that Mr Saddi's application had any prospect of success), he made no order for costs.

Driver FM has since reconsidered his decision in *Low*, suggesting that it reflected the relative novelty of the legislation at that time (a factor which no longer applies). In *Drury v Andreco-Hurll Refractory Services Pty Ltd*,[114] his Honour awarded costs to the respondent following summary dismissal of the complaint, stating:

> In the matter of *Low v Australian Taxation Office* [2000] FMCA 6, I declined to make a costs order noting that at that time I was dealing with relatively new legislation and that I considered that applicants should have a reasonable opportunity to take advice and assess their position before being subjected to a costs order. Conversely, in *Chung v University of Sydney* I did make a costs order in accordance with the scale of costs applicable generally to proceedings in this Court. Some three years have passed since I made the decisions in *Low* and *Chung*. We are no longer dealing with new legislation.[115]

Relevant to the matter before his Honour, the applicant was 'attempting to relitigate matters he was litigating in the [Australian Industrial Relations Commission]' and had been notified by the respondent of their intention to seek summary dismissal and the possible costs implications.[116]

However, Driver FM reaffirmed that parties should be given 'a reasonable opportunity to take advice as to their circumstances and to get their claim into a proper form' in *Hinchliffe v University of Sydney (No 2)*.[117] In that matter his Honour cited his decision in *Low* in declining to order indemnity costs against an unsuccessful applicant who had withdrawn aspects of her case throughout the course of proceedings.[118]

In *Ingui v Ostara*,[119] where the applicant discontinued proceedings prior to the hearing, Brown FM held that it was reasonable that the applicant should make some contribution to the costs incurred by the respondents in the proceedings to date.[120] He therefore ordered that each party have the opportunity to make submissions as to the quantum of costs to be allowed.[121]

Subsequently in *Ingui v Ostara (No 2)*,[122] the applicant argued that as a result of intimidation and harassment by the respondents she did not pursue her claim of sexual harassment. Brown FM stated that as there had been no substantive hearing, he was not in a position to assess the bona fides of the respondents in respect of the position they took in the litigation and could find no reason to change his view that the applicant should contribute towards the

[113] [2001] FMCA 73.
[114] [2004] FMCA 398.
[115] [2004] FMCA 398, [13].
[116] [2004] FMCA 398, [14].
[117] [2004] FMCA 640, [8].
[118] See further 8.4 below.
[119] [2003] FMCA 132.
[120] [2003] FMCA 132, [36].
[121] [2003] FMCA 132, [41].
[122] [2003] FMCA 531.

respondents' costs. He did, however, reduce the amount of costs that would be awarded under the scale of costs.

8.3.5 Unmeritorious claims and conduct which unnecessarily prolongs proceedings

Courts have declined to order costs to successful parties, or reduced the amount of a costs award, where aspects of their claims have been unsuccessful or where their behaviour has prolonged the trial. On the issue of indemnity costs being awarded against unsuccessful parties, see 8.4 below.

In *Xiros v Fortis Life Assurance Ltd*,[123] Driver FM made the following observation in the course of considering the issue of costs after dismissing the application:

> One circumstance that might disentitle a successful litigant to an order for costs can be the behaviour of the litigant during the course of the proceedings, for example, by taking unnecessary technical points or otherwise inappropriately prolonging the proceedings. That is certainly not the case here. On the contrary, the respondent, through its legal representatives, has behaved impeccably.[124]

His Honour nevertheless declined to award costs to the respondent for other reasons.[125]

In *Vijayakumar v Qantas Airways Ltd* (No 2)[126] the Applicant claimed that the parties should pay their own costs of an adjourned hearing because Counsel for the Respondent took too long to make submissions. Scarlett FM held:

> That, with respect, is an overly optimistic submission. It does occur from time to time that matters take longer to dispose of than the time the Court originally allocates for that purpose. Clearly, if the Court forms a view that one party is unnecessarily prolonging proceedings, that is a matter that may well sound in costs.
>
> This is not such a case. There was a considerable amount of material to be covered and I did not find it necessary to warn counsel that the submissions were unnecessarily lengthy.

In *Horman v Distribution Group Ltd*,[127] Raphael FM held that the fact that the trial was prolonged by the conduct of the applicant and her untruthfulness and that her Counsel persisted in suggesting a conspiracy between the respondent's witnesses militated against a costs order despite the fact that the applicant had been successful in the proceedings. His Honour therefore ordered that each party pay their own costs. On appeal, Raphael FM's approach to costs was affirmed by Emmett J.[128]

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[123] (2001) 162 FLR 433.
[124] (2001) 162 FLR 433, 441 [22].
[125] See discussion in 8.3.2 above.
[126] [2009] FMCA 966 [55].
[127] [2001] FMCA 52.
[128] See *Horman v Distribution Group Ltd* [2002] FCA 219, [45]. Note, however, that Emmett J raised some queries regarding Raphael FM's description of a *Calderbank* letter as 'defective'. As Emmett J noted, there are no technical requirements for a *Calderbank* letter: [44].

In *Bruch v Commonwealth*[129] McInnis FM stated that in the exercise of his discretion on the issue of costs, it was relevant to take into account the fact that the applicant had made an extravagant claim for damages 'solely to demonstrate anger'.[130] His Honour was of the view that this was not a valid basis for claiming damages or for exaggerating a claim in a human rights application. However, by reason of the fact that the respondent's application for summary dismissal was dismissed, McInnis FM determined that it was appropriate to order that the applicant pay only eighty per cent of the respondent's costs.

In *Creek v Cairns Post Pty Ltd*,[131] Kiefel J took into account the fact that the proceedings were lengthened by the respondent in raising a defence which was found not to be available to it:

> The only matter which seems to me to weigh against the applicant being ordered to pay the respondent's costs in the proceedings is the time taken in the hearing on the defence raised by the respondent, which I found would not have been available to it. Indeed it was upon the basis that the provisions of s 18D had not been judicially considered, that the matter remained in this Court when it would otherwise have been transferred to the Magistrates' Court with consequent savings on costs. Taking these matters into account I consider it appropriate to order that the applicant pay one-half of the costs incurred by the respondent in the proceedings, including reserved costs.[132]

In *Tate v Rafin*,[133] Wilcox J found the behaviour of the respondent prior to the commencement of proceedings was relevant in declining to order costs upon the dismissal of the application. His Honour stated:

> Generally speaking, it may be expected an order will be made in favour of the successful party. However, in the present case, I do not think it appropriate to make an order for costs. Although I have determined the proceeding must be dismissed, the respondents bear substantial responsibility for the fact that it was commenced in the first place; generally, because of the way they handled the situation that arose at the training session and, more particularly, because of the misleading impression conveyed by the fifth paragraph of the letter of 20 February 1996 [which suggested that the decision to revoke the applicant's membership was by reason of his disability].[134]

However, in *Ho v Regulator Australia Pty Ltd (No 2)*,[135] Driver FM rejected an argument by the applicant that the conduct of the respondent during the investigation and attempted conciliation of the matter by the Human Rights and Equal Opportunity Commission ('HREOC'), now the Australian Human Rights Commission ('Commission'), was relevant to the question of costs:

> I do not regard the conduct of the parties to a complaint to HREOC as relevant to a consideration of a costs order in proceedings before the Court consequent upon the termination of a complaint by HREOC. In the first

[129] [2002] FMCA 29.
[130] [2002] FMCA 29, [64].
[131] [2001] FCA 1150.
[132] [2001] FCA 1150, [2].
[133] [2000] FCA 1582.
[134] [2000] FCA 1582, [71]. See also *Ingui v Ostara (No 2)* [2003] FMCA 531.
[135] [2004] FMCA 402.

> place, the proceedings before HREOC are in the nature of private alternative dispute resolution proceedings. The Court only has jurisdiction to deal with a matter where conciliation fails before HREOC. It is entirely inappropriate for the Court to take into account what may or may not have occurred in the attempts at conciliation before HREOC for the purposes of costs in the court proceedings. No costs apply to conciliation proceedings before HREOC and there should be no costs implication arising subsequently in respect of those conciliation proceedings.[136]

Although the grounds of direct and indirect discrimination have been held to be mutually exclusive,[137] an incident of alleged discrimination may nonetheless be pursued by an applicant as a claim of direct or indirect discrimination, pleaded as alternatives.[138] It has been suggested, however, that doing so may give rise to an adverse costs order as only one element of the claim can succeed. In *Hollingdale v Northern Rivers Area Health Service,*[139] Driver FM commented as follows:

> There is, in my view, no obligation upon an applicant to make an election between mutually exclusive direct and indirect disability claims. If both claims are arguably open upon the facts, they may be pleaded in the alternative. The fact that they are mutually exclusive would almost inevitably lead to a disadvantageous costs outcome for an applicant, but that is the applicant's choice.[140]

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[141] the unsuccessful party in that case had also alleged that the Council had unreasonably prolonged the proceedings. This argument was primarily based on the fact that the Council's application for summary dismissal had also sought to raise constitutional questions, however those questions could not be heard because of the Council's failure to comply with the requirements of s 78B of the *Judiciary Act 1903* (Cth). The Court did not accept that this was a sufficient basis to warrant departure from the usual rules as to costs.[142]

8.3.6 Applicant only partially successful

In cases in which an applicant has only been partially successful courts have taken varying approaches to the award of costs. In some cases they have ordered the respondent to pay all of the applicant's costs[143] and in other cases they have only awarded the applicant a proportion of their costs.[144]

There is no set rule for determining in what circumstances a partially successful applicant will be awarded part or all of their costs. However, what

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[136] [2004] FMCA 402, [6].
[137] *Australian Medical Council v Wilson* (1996) 68 FCR 46, 55 (Sackville J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (McHugh J); *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209.
[138] See *Minns v New South Wales* [2001] FCA 704; *Hollingdale v Northern Rivers Area Health Service* [2004] FMCA 721; *Tate v Rafin* [2000] FCA 1582, [51], [66]-[69].
[139] [2004] FMCA 721.
[140] [2004] FMCA 721, [19].
[141] [2007] FCA 974.
[142] [2007] FCA 974, [34]-[39].
[143] *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516; *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934; *Kelly v TPG Internet Pty Ltd (No 2)* [2005] FMCA 291.
[144] *McBride v Victoria (No 2)* [2003] FMCA 31; *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402.

the cases do suggest is that whilst the court should consider the outcome in the proceedings, it should not attempt to engage in a precise mathematical determination of the extent to which an applicant was successful.[145]

In *McBride v State of Victoria (No 2)*,[146] the applicant had been successful in only one of seven separate and discrete episodes of discrimination. McInnis FM rejected the respondent's submission that the applicant should only be entitled to one-seventh of her costs saying:

> I do not accept that in characterising what may be the event, one should look narrowly at the issue in human rights claims of there being discrete episodes in the one proceeding.
>
> …Although analysed and presented as discrete events [of discrimination], there is an element of continuity, at least in the perception of the applicant, and it is somewhat artificial, in my view, to divide the issues exactly in the way proposed by the respondent, that is, to apportion costs on a six-seventh or one-seventh basis.[147]

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[148] the Federal Court held that a party should not be regarded as having succeeded in relation to only part of its claim simply because some of its arguments had not been accepted:

> While clearly some arguments put before the Court by the respondent in its application for summary dismissal were not accepted, nonetheless it is not unusual for a successful party to advance a number of alternative arguments to the Court and be ultimately successful on only some of them. I agree with the respondent that this result does not mean that the respondent was 'successful only in part' in this case.[149]

In cases in which courts have awarded full costs to a partially successful applicant the court appears to have been influenced by the following factors:

- the general desirability in human rights proceedings that an award of damages not be swallowed up by the costs of litigation;[150]
- that the court accepted the veracity of the applicant's evidence;[151]
- if costs were awarded the applicant would achieve a better outcome than what the respondent had offered, although not as good as the amount the applicant had sought;[152]
- the applicant's claim in respect of which they were unsuccessful was reasonably arguable;[153] and

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[145] *McBride v Victoria (No 2)* [2003] FMCA 31, [7]-[8]; *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402, [17]; *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 974, [18].
[146] [2003] FMCA 313.
[147] [2003] FMCA 313, [7]-[8]. This approach was accepted as correct by Driver FM in *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402, [16].
[148] [2007] FCA 974.
[149] [2007] FCA 974, [18]. See also [22].
[150] *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [44]. Note in *Ho v Regulator Australia Pty Ltd (No 2)* [2004] Driver FM reconsidered his decision in *Cooke* in light of the decision of McInnis FM in *McBride v Victoria (No 2)* [2003] FMCA 313 and expressed a preference for the approach taken by McInnis FM.
[151] *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, [7]; *Kelly v TPG Internet Pty Ltd (No 2)* [2005] FMCA 291, [7]. Cf *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402, [16].
[152] *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, [7].

- that an applicant has incurred significant costs in dealing with a very detailed and complex response made by the respondent and is 'largely successful on the law'.[154]

8.4 Applications for Indemnity Costs

8.4.1 General principles on indemnity costs

Indemnity costs have been sought in a number of cases litigated in the federal unlawful discrimination jurisdiction. By way of example, in *Hughes v Car Buyers Pty Ltd,*[155] the respondents ignored the Commission's conciliation process and did not enter appearances in the proceedings in the FMC. Walters FM awarded the applicant $5,000 aggravated damages for the additional mental distress caused by the respondents' conduct. The applicant also sought costs on an indemnity basis on the basis of the respondents' behaviour. Walters FM noted[156] the following examples set out by Sheppard J in *Colgate-Palmolive v Cussons*[157] in which a court may make an indemnity costs order (the list not being exclusive):

- the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- misconduct that causes loss of time to the court and to other parties;
- the fact that the proceedings were commenced or continued for some ulterior motive or in wilful disregard of known facts or clearly established law;
- the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions;
- an imprudent refusal of an offer to compromise; and
- where one party has been in contempt of court.

In the circumstances, Walters FM declined to order indemnity costs, stating:

> In my opinion, to award costs on an indemnity basis in the present circumstances would be to inappropriately punish the respondents. It seems to me that the attitude that they adopted to the HREOC complaint is irrelevant insofar as costs in this court are concerned — although I recognise that the application in this court may not have had to be filed at all if the respondents had responded to the HREOC complaint. Whilst the respondents' refusal to participate in the proceedings in this Court has obviously upset and frustrated Ms Hughes, the fact of the matter is that the respondents have not sought to justify their actions or made inappropriate or unfounded allegations against Ms Hughes. They did not prolong the proceedings by making groundless contentions or filing unmeritorious applications. They simply let the proceedings run their course.[158]

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[153] [2003] FMCA 516, [9], [11].
[154] *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934, [14].
[155] [2004] FMCA 526.
[156] [2004] FMCA 526, [92].
[157] (1993) 46 FCR 225, 231-234.
[158] [2004] FMCA 526, [96]. In relation to the behaviour of a respondent in proceedings before the Commission, see *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402, discussed at 8.3.5 above.

In *Hassan v Smith*,[159] Raphael FM held that the applicant should pay party-party costs because although he was told by the Commission upon termination of his complaint of the difficulties he faced in establishing his claim, and by Raphael FM at two directions hearings, he nevertheless 'wanted his day in court'.[160] However, Raphael FM held that the applicant's conduct was not so unreasonable so as to warrant indemnity costs being awarded.

An application for indemnity costs was also refused in *Kowalski v Domestic Violence Crisis Service Inc (No 2)*,[161] where Driver FM noted that the fact the applicant 'was wholly unsuccessful does not mean that the proceedings should not have been instituted or continued'.[162]

In contrast, indemnity costs were awarded against the unsuccessful applicant by Driver FM in *Wong v Su*,[163] where his Honour noted:

> The applicant has been wholly unsuccessful in these proceedings. The application was pursued in a desultory way by the applicant and in the knowledge that the allegations made by her were untruthful. Accordingly, the application must be dismissed with costs. In addition, it is appropriate in the circumstances that the Court express its strong disapproval, both of the fact that the application was made at all and also the manner in which it was pursued. Applications of this nature, based upon untruthful evidence, are apt to bring anti-discrimination legislation into disrepute, and do a grave disservice to others wishing to pursue a genuine grievance. The respondents should not be out of pocket in having dealt with this application.[164]

In *Hinchliffe v University of Sydney (No 2)*,[165] Driver FM considered an application by the successful respondent for indemnity costs in relation to:

- costs of and incidental to the proceedings from the time at which an offer of compromise lapsed;
- costs thrown away by the respondent occasioned by the applicant's late withdrawal of a significant part of her claim; and
- costs of complying with an onerous request for documents.

Driver FM rejected the application for indemnity costs and awarded costs on a party-party basis. On the first issue, his Honour noted that an offer of compromise had been made in relation to an issue that was severed from the claim, and never litigated to judgment. No offer was made in relation to the matters that were litigated to judgment.

On the second point, Driver FM stated:

> as I pointed out at an early stage in the life of the human rights jurisdiction of this Court (*Low v Australian Taxation Office* [200] FMCA 6) applicants should be given a reasonable opportunity to take advice as to their circumstances and to get their claim into a proper form. The respondent adopted a legalistic approach to the conduct of the litigation. To some

[159] [2001] FMCA 58.
[160] [2001] FMCA 58, [27].
[161] [2003] FMCA 210.
[162] [2003] FMCA 210, [8].
[163] [2001] FMCA 108.
[164] [2001] FMCA 108, [19].
[165] [2004] FMCA 640.

> extent, that was a legitimate attempt to clearly identify what the applicant was claiming. However, as I pointed out in my principal judgment, the respondent was unduly legalistic in relation to the issue of pleadings. It certainly took a considerable period for the applicant, through her legal advisers, to finally settle upon the way in which her claim would be pursued. However, the factual and legal issues were by no means simple, as is reflected in the length of the written submissions received in the principal proceedings and the length of my judgment. There was nothing improper in the conduct of the applicant or her legal advisers and she was not so tardy in the refinement of her claim as to expose herself to an indemnity costs order.[166]

As to the costs sought in relation to the request for documents, his Honour noted that if the respondent considered the request to be oppressive, 'it could have sought interlocutory relief from the Court'.[167] Driver FM noted that the FMC Rules make specific provision for photocopying and that disbursements should be agreed between the parties under that scale.[168]

In *Piper v Choice Property Group Pty Ltd*,[169] McInnis FM summarily dismissed an unlawful discrimination application and awarded the respondent indemnity costs at a fixed sum of $3,500. His Honour did so because it was clear to him, although he accepted it may not have been as clear to the applicant, that at all material times the respondent could not have been the appropriate party for the applicant to pursue.[170]

8.4.2 Offers of compromise

Litigants in unlawful discrimination matters should be aware that O 23 of the Federal Court Rules in relation to offers of compromise apply to proceedings before both the Federal Court and FMC.[171] While readers should consult the Federal Court Rules directly, one significant aspect of O 23 is that:

> where an offer is made by the first party in accordance with the *Federal Court Rules*; and
>
> that offer is not accepted by the second party; and
>
> that second party is less successful in the proceedings than had they accepted the offer; then
>
> unless the Court otherwise orders,[172] the first party is entitled to *indemnity* costs from the day upon which the offer was made.[173]

This exposure to indemnity costs following the rejection of an offer was only previously faced by a respondent. Since 23 March 2004 it is also faced by an applicant.[174]

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[166] [2004] FMCA 640, [8].
[167] [2004] FMCA 640, [9].
[168] [2004] FMCA 640, [9].
[169] [2005] FMCA 87.
[170] [2005] FMCA 87, [19]-[20].
[171] Part 2 of Schedule 3 of the FMC Rules provides that O 23 (except rules 14 and 15 which are not relevant for present purposes) of the *Federal Court Rules* applies to the FMC. See also *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243, [112]–[113].
[172] For a useful discussion of the law on when a Court might 'otherwise order', see *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc. (No 2)* (2004) 212 ALR 281, 284 [16]–[18] where Hely J approved the comments of Heerey J in *Wills v Bigmac Pty Ltd* (Unreported, Federal Court of Australia, Heerey J, 9 December 1994, [13]).
[173] See O 23, r 11.

Order 23 only applies, however, in situations where an applicant obtains some form of relief and does not apply in circumstances where an applicant fails altogether to obtain relief.[175]

Further, if there is more than one respondent and an applicant makes an offer of compromise that requires all of the respondents to accept it, then this is not considered to be an offer under O 23 and a failure to accept it does not enliven the rule.[176]

Offers of compromise made by parties in litigation which do not fall within the terms of O 23 (also known as '*Calderbank*'[177] offers) may nevertheless be taken into account in the exercise of a court's general discretion in awarding costs. In *Henderson v Amadio Pty Ltd*[178] Heerey J stated:

> Counsel for the respondents argued that O 23 now constitutes a code and excludes any reliance on Calderbank letters. I do not agree. The Calderbank letter is such a useful and flexible weapon for litigants who want to achieve a reasonable settlement that in the absence of express provisions to that effect I am not prepared to draw the inference that the rule-makers intended to exclude it. In any case, I do think that O 23 was apt to cover an offer addressed to a number of respondents but conditional upon acceptance by all…[179]

Justice Hely in *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc (No 2)*[180] noted a significant distinction between an offer of compromise falling within O 23 of the Federal Court Rules and a *Calderbank* offer:

> In the case of a Calderbank offer, the issue is whether the conduct of the defendant in failing to accept the offer was unreasonable in all of the circumstances, so as to justify a departure from the usual rule as to costs. However,…in the case of an offer of compromise, the mere fact the defendant's case was 'bona fide and arguable', to adopt the language used in the defendant's submissions, is not of itself sufficient to displace the operation of the Rule [Order 23].[181]

(a) Calderbank offers in unlawful discrimination cases

A number of unlawful discrimination cases have considered the principles applicable to *Calderbank* offers. In *Forbes v Commonwealth*[182] Driver FM cited *Calderbank* as authority for the proposition that indemnity costs are available where offers of settlement have been made at an earlier stage of proceedings and the unsuccessful party has failed to achieve a better result than that expressed in the offer. His Honour stated that he would apply the principle to

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[174] Order 23 was amended by *Federal Court Amendment Rules 2004 (No 1)* 2004 No 38, effective 23 March 2004.
[175] *McDonald v Parnell Laboratories (Aust) (No 2)* [2007] FCA 2086, [20].
[176] *King v Yurisich (No 2)* [2007] FCAFC 51.
[177] *Calderbank v Calderbank* (1975) 3 All ER 333.
[178] Unreported, Federal Court of Australia, Heerey J, 22 March 1996.
[179] Unreported, Federal Court of Australia, Heerey J, 22 March 1996, [51].
[180] (2004) 212 ALR 281.
[181] (2004) 212 ALR 281, [28].
[182] [2003] FMCA 262, [6].

a *successful* party who does no better than an offer made to him/her prior to a hearing.[183]

In *Rispoli v Merck Sharpe & Dohme (No 2)*,[184] Driver FM said that:

> There is a public policy underlying the consideration of offers, especially Calderbank offers, by the courts. That public policy is that parties should be encouraged to realistically consider their claims prior to incurring substantial expense in litigation and attempt to settle proceedings on a realistic basis. Bearing that public policy in mind, where a party does not do as well as an offer made to the party during the course of the litigation, it is common for courts either to deny that party costs or even to make a costs order against the party.

In that matter, Driver FM did not grant an indemnity costs order against the unsuccessful applicant holding that 'the decision of the applicant to pursue her claim through to a final hearing was neither improper or unrealistic'.[185]

In *Jacomb v Australian Municipal Administrative Clerical & Services Union,*[186] Crennan J considered an offer from the respondent in the following terms, which was expressed to be in accordance with the principles in *Calderbank*:

> 1. That the Applicant discontinue the application by 9.30am on Monday 11 August 2003 with no order as to costs.
> 2. Each party bear its own legal costs associated with these proceedings.[187]

Her Honour stated as follows:

> The principles governing Calderbank offers have been the subject of a number of decisions of this Court: see for example *Black v Tomislav Lipovac BHNF Maria Lipovac & Ors* [1998] FCA 699; *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd* (No 2) [2000] FCA 602 ('Dr Martens'). As a general rule, the mere refusal of the Calderbank offer does not automatically mean that the Court should make an order for costs on an indemnity basis, even where the result, following refusal of the offer, is less favourable to the offeree than that contained in the offer. Rather, the offer to settle must be a genuine offer to compromise, and there must be some element of unreasonableness in the offeree's refusal to accept the offer: see *Fresh Express Australia Pty Ltd v Larridren Pty Ltd* [2002] FCA 1640; *Dr Martens.*
>
> It is doubtful that the abovementioned offer amounted to a genuine offer of compromise, consistent with the principles in Calderbank, as the offer appeared to be merely an invitation to discontinue the proceedings, a circumstance which a number of courts have found to be insufficient for the purposes of applying the principles applicable to Calderbank offers: *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd (No. 2)* [2002] FCA 192; *Vasram v AMP Life Ltd* [2002] FCA 1286; [*Fyna Foods Australia Pty Ltd v Cobannah Holdings Pty Ltd (No*

[183] [2003] FMCA 262, [6]. Note that Driver FM went on to order that each party bear its own costs in this matter notwithstanding the applicant's success. He reasoned that the successful applicant was disentitled to a costs order in her favour on the basis of her refusal of an 'exceptionally generous' settlement offer (which was a *Calderbank* offer) and the manner in which she had conducted the proceedings: [11].
[184] [2003] FMCA 516, [10].
[185] [2003] FMCA 516, [11].
[186] [2004] FCA 1600.
[187] [2004] FCA 1600, [5].

> *2)* [2004] FCA 1212]. Even if the offer were in the nature of a genuine Calderbank offer, that is but one factor to be taken into account in the Court's exercise of discretion: *Fyna Foods* at [10].[188]

Her Honour concluded, also taking into account the element of public interest in the proceedings (see 8.3.1 above):

> Bearing in mind all the circumstances of this case, and accepting that I have an overall discretion in the matter, this is not an appropriate case to award indemnity costs. In all the circumstances, the applicant was not acting unreasonably, in refusing the offer to compromise, when the question of statutory construction had not been determined by the Federal Court on any prior occasion. Bearing in mind that the proceeding had consequences going beyond the individual applicant, and bearing in mind the various other considerations urged by the applicant and the respondent in their written submissions, I propose to order that the applicant pay seventy-five per centum (75%) of the respondent's costs.[189]

In *Meka v Shell Company of Australia Ltd (No 2)*,[190] Driver FM found that the form of offer made did not strictly comply with O 23 but that the respondents should receive indemnity costs on the basis of the principles in *Calderbank*. Indemnity costs were awarded from the day after the offer was rejected. While this date was a period of time later than the offer was to have expired, the Court held, in effect, that the respondent had kept the offer open by calling the applicant's solicitor to discuss it.[191]

In *San v Dirluck Pty Ltd (No 2)*,[192] the respondent had made a number of offers to settle the matter, none of which were accepted. The last such offer was made on the first day of the hearing of the matter, expressed as follows:

> 1. The first respondent and second respondent to pay the applicant the total combined sum of $5,000 by way of damages.
>
> …
>
> 3. The complaint to be withdrawn with no order as to costs.

The applicant was successful in the proceedings[193] and was awarded $2,000 in damages. The respondent sought indemnity costs on the basis of the rejection of the final offer made. Raphael FM noted that the respondent's last offer was 'obviously less than the $5,000 offered…but it is quite clearly not less than the amount of $2,000 plus the applicant's reasonable costs calculated under schedule 1 of the Federal Magistrates Court Rules' and concluded that as the offers made did not therefore exceed the value of the judgment the respondent was not entitled to its costs at all.[194]

In *Iliff v Sterling Commerce (Australia) Pty Ltd (No 2)*,[195] Burchardt FM considered whether the rejection by the applicant of a Calderbank offer and an offer of compromise warranted ordering her to pay the respondent's costs.

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[188] [2004] FCA 1600, [6]-[7].
[189] [2004] FCA 1600, [12].
[190] [2005] FMCA 700.
[191] [2005] FMCA 700, [7].
[192] [2005] FMCA 846.
[193] See *San v Dirluck Pty Ltd* (2005) 222 ALR 91.
[194] [2005] FMCA 846, [8].
[195] [2008] FMCA 38.

Burchardt FM held that neither the Calderbank offer nor the offer of compromise warranted such an order because:[196]

- the Calderbank offer was served a week before Christmas and sought a response within two days, which was not, in his Honour's view, reasonable;
- the applicant had sought and been granted declaratory relief in addition to the order for payment of damages and neither the Calderbank offer nor the offer of compromise had addressed the issue of such relief; and
- neither the Calderbank offer nor the offer of compromise made any offer in relation to payment of the applicant's costs.

In *Vijayakumar v Qantas Airways Ltd (No 2)* the Respondent submitted that the wholly unsuccessful Applicant should pay its costs on an indemnity basis from the date on which the Respondent invited the Applicant to withdraw his claim.[197] Scarlett FM disagreed with this contention and said that the invitation to withdraw the Application was not an offer of compromise but an ultimatum.

Scarlett FM then considered when an offer of compromise was made. He states that the first offer of compromise was made by the Respondent on 20 December 2007. The Respondent offered: payment of $2000, a statement of regret, an agreement to review the Respondent's Excess baggage Policy and to consider the carriage of disability aids in the review and a written acknowledgement that the complainant could travel on international flights with an additional 10 kilograms of mobility aids/palliative aids without attracting an excess baggage fee. Scarlett FM noted that the offer appeared to have been genuine, although modest.

The Applicant rejected the Respondent's first offer of compromise. In relation to this decision, Scarlett FM stated

> Whilst this may have been an unfortunate decision, as the Applicant went on to be unsuccessful in his claim, the rejection of the offer at that stage in the proceedings does not appear to be so unreasonable, if it were unreasonable at all, that's costs on an indemnity basis from that point.

The second offer of compromise was made on 12 May 2008. Scarlett FM stated that he was satisfied that it was a genuine offer of compromise and was worth considering. Scarlett FM found that it was not unreasonable for the respondent to produce a genuine settlement offer two days out from the start of the proceedings. Scarlett FM held:

> The terms of the Respondent's letter of 12 May 2008 are clear. The Applicant was represented by solicitor and counsel. It is inconceivable that he was not made aware of the consequences of rejecting the respondent's final offer. He chose to reject it.

[196] [2008] FMCA 38, [32]-[33].
[197] [2009] FMCA 966 [60].

> I am satisfied that the Applicant took an imprudent approach and took the risk that his claim would be unsuccessful, with a costs order, and even an order for costs on an indemnity basis, as a not unlikely consequence.

Accordingly, Scarlett FM ordered that the Applicant pay the Respondent's costs on an indemnity basis from the day on which the second offer of compromise expired.

8.5 Application of s 47 of the *Legal Aid Commission Act 1979* (NSW) to Human Rights Cases in the FMC

It would appear that legally aided applicants before the FMC are *not* protected by s 47 of the *Legal Aid Commission Act 1979* (NSW) against liability for the payment of the whole or part of the costs that might be ordered by the court if unsuccessful in human rights proceedings.

Section 47 of the *Legal Aid Commission Act 1979* (NSW) provides that:

> 47 Payment of costs awarded against legally assisted persons
>
> (1) Where a court or tribunal makes an order as to costs against a legally assisted person:
>
> (a) except as provided by subsections (2), (3), (3A), (4) and (4A), the Commission shall pay the whole of those costs, and
>
> (b) except as provided by subsections (3), (3A), (4) and (4A), the legally assisted person shall not be liable for the payment of the whole or any part of those costs
>
> (2) The Commission shall not pay an amount in excess of $5,000 (or such other amount as the Commission may from time to time determine):
>
> (a) except as provided by paragraph (b), in respect of any one proceeding, or
>
> (b) in respect of each party in any one proceeding, being a party who has, in the opinion of the Commission, a separate interest in the proceeding.

In *Minns v New South Wales (No 2)*,[198] Raphael FM found that s 47 does *not* apply to proceedings in the FMC. In reaching this view, Raphael FM applied the decision of the High Court in *Bass v Permanent Trustee Co Ltd*.[199] The issue is yet to be determined by the Federal Court, but it would appear likely that it would be decided in a similar manner.

[198] [2002] FMCA 197.

[199] (1999) 198 CLR 334. The majority of the High Court in this matter noted that s 47 applies at a stage *after* which an order for costs has been made – it may, therefore, be raised in the course of enforcement proceedings in respect of a costs order. The majority expressed the view that a 'court or tribunal' for the purpose of s 47 means a State court or tribunal and further that 's 43 of the Federal Court of Australia Act provides as to the costs of proceedings in that Court and, thus, otherwise provides for the purpose of s 79 of the Judiciary Act': 361-362 [63]-[65]. Note also *Hinchliffe v University of Sydney (No 2)* [2004] FMCA 640, in which costs were awarded against a legally aided applicant, without discussion of either the *Legal Aid Commission Act 1979* (NSW) or the decision in *Minns*.