Chapter 8
Costs Awards

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Chapter 8

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 FMC and Federal Court. The courts have a general discretion to order costs under the provisions of the *Federal Court Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth).[1]

The Federal Court and FMC generally exercise those powers according to the principle that costs follow the event (see 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]

1 See s 43 of the *Federal Court Act 1976* (Cth) and s 79 of the *Federal Magistrates Act 1999* (Cth).

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 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). 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.

- 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]

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) to specify the maximum costs that may be recovered on a party-party basis.[7] This power can be exercised at a directions hearing on the court's own motion or on application of a party. 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 limit set for recoverable costs under this order applies to both parties.[9] It has been stated that the order is intended to address a concern that 'the cost of litigation, particularly for persons of ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice'.[10] The order has been held to be particularly relevant where there is a public interest aspect to the litigation.[11]

There are no decided cases in relation to O 62A in the context of the unlawful discrimination jurisdiction. An application under that provision was made to the Federal Court prior to the commencement of the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) in the context of judicial review of a HREOC decision.[12] One of the reasons for the application not being granted in that case was that the orders were sought in terms that would result in only the costs payable by the applicant being limited and not those payable by the respondent.

Rule 21.03 of the *Federal Magistrates Court Rules 2001* (Cth) ('FMC Rules') also enables the FMC to specify the maximum costs that may be recovered on a 'party and 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

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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.

7 'Party-party' costs are those reasonable costs incurred in the conduct of litigation.

8 Order 62A r 4.

9 *Maunchest Pty Ltd v Bickford* (Unreported, Queensland Supreme Court, Drummond J, 7 July 1993).

10 *Sacks v Permanent Trustee Australia Limited* (1993) 45 FCR 509, 511.

11 *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139, 146-48.

12 *Muller v Human Rights and Equal Opportunity Commission* [1997] 634 FCA.

subsequently vary the maximum costs specified if there are 'special reasons' and 'it is in the interests of justice to do so'.[13] There are also no decided cases on rule 21.03 in the unlawful discrimination jurisdiction.

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)[14] under rule 21.02(2)(a) of the FMC Rules. For example, in *Escobar v Rainbow Printing Pty Ltd (No 3)*,[15] 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.
>
> 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.[16]

8.2 Relevance of Nature of the Jurisdiction

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. 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.

8.2.1 A 'No Costs' Jurisdiction?

One of the early cases which suggested that the nature of the unlawful discrimination jurisdiction warranted a departure from the usual principles in relation to costs was Raphael FM's decision in *Tadawan v South Australia*[17] ('*Tadawan*'). His Honour stated:

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13 Rule 21.03(3).

14 See r 21.02(c): the Court may refer costs for taxation under O 62 of the *Federal Court Rules* (Cth).

15 [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.

16 [2002] FMCA 160, [7]-[9].

17 [2001] FMCA 25.

> The Court has accepted that these matters were normally considered to be 'no costs' matters, as evidenced by the practice of state tribunals and the fact that there was no power in HREOC to award costs. The Court has recognised that where proceedings are brought a successful party should not have the benefit of his or her victory lost in costs. The Court is also anxious not to discourage litigants from bringing claims which may well have merit because of the fear of an adverse costs order in the event that the applicant is unsuccessful. On the other hand, the Court can use its powers in relation to costs to discourage unmeritorious claims.
>
> Although the applicant has not succeeded in this case the Court is of the view that her claim was justifiable. It was brought against the background of poor communication, which I have attempted to discuss in some detail. I believe that this is a case where the court should acknowledge the 'no cost' nature of the jurisdiction and make no order.[18]

Similarly in *McKenzie v Department of Urban Services and Canberra Hospital*,[19] Raphael FM stated:

> 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.[20]

His Honour's approach was adopted by other members of the FMC. In *Ryan v Presbytery of Wide Bay Sunshine Coast*,[21] Baumann FM stated:

> Whilst I have the power to award costs, the nature and intent of anti-discrimination legislation could be thwarted if citizens were unreasonably inhibited from prosecuting bona fide, even ultimately unsuccessful claims.[22]

A more conventional approach to the issue of costs in the first year of the FMC's jurisdiction appeared in the decision of Driver FM in *Xiros v Fortis Life Assurance Ltd*,[23] where his Honour made the following comments regarding the nature of the power to make orders as to costs:

> Ordinarily, in this jurisdiction as in others, costs follow the event. But there is no absolute rule to that effect. There is a general principle that, in civil non jury trials, in the absence of special circumstances, a successful party has a reasonable expectation of obtaining an order for costs in its favour unless, for some reason connected with the case, a different order is specifically warranted: *Donald Campbell & Co v Pollack* [1927] AC 732 at 812, cited by McHugh J in *Latoudis v Casey* (1990) 170 CLR 534 at 569. A departure from that general principle cannot be arbitrary or idiosyncratic, but there is no right to an order for costs, notwithstanding success in litigation: *Donald Campbell & Co v Pollack* op cit at 811 …[24]

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18 Ibid [62], [63].
19 (2001) 163 FLR 133.
20 Ibid 156 [95].
21 [2001] FMCA 12.
22 Ibid [20]. Baumann FM went on to make a conditional costs order which reflected a long history of litigation in a number of fora between the applicant and respondent: see [2].
23 (2001) 162 FLR 433.
24 Ibid 440-41 [20].

In *Paramasivam v Wheeler*,[25] Moore J appeared prepared to contemplate that special considerations might apply to the issue of costs for federal unlawful discrimination claims by reason of the nature of the jurisdiction. His Honour stated:

> An application has been made for an order that the applicant pay the costs of the respondent in each of the proceedings. I am conscious of the fact that the applicant represented herself and, as I indicated a moment ago, holds a genuine belief about the conduct of the people against whom these proceedings have been brought. In the ordinary course successful respondents are entitled to their costs, though in this area of the Court's jurisdiction special considerations may arise in some cases that might warrant some departure from the normal rule.[26]

His Honour decided that it was appropriate that a costs order be made in that matter. However, he went on to say:

> Having so ordered, however, I would invite the parties for whose benefit the order is made to give consideration as to whether, in the circumstances, it is appropriate that all or, indeed, any of the costs ought to be recovered.[27]

The Full Court referred to (but expressly declined to decide upon) the issue in *Hagan v Trustees of the Toowoomba Sports Ground Trust*[28] where the appellant argued that costs should not be awarded as he was not receiving Legal Aid and the proceedings concerned a public rather than a private right. The Full Court stated:

> This is not an appropriate case in which to consider whether there should be some departure in human rights litigation from the ordinary principles governing the court's discretion to order payment of costs. In our view, this appeal should be dismissed with costs because the appeal was without merit, having no realistic prospects of success.[29]

8.2.2 Usual Principles of Costs to Apply

It seems now well-established that costs *will* generally be awarded in favour of the successful party in federal unlawful discrimination matters.

Rapahel FM reconsidered his decision in *Tadawan* in *Minns v New South Wales (No 2)*[30] 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.[31]

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25 [2000] FCA 1559.
26 Ibid [9].
27 Ibid [10].
28 (2000) 105 FCR 56.
29 Ibid 61 [31].
30 [2002] FMCA 197.
31 Ibid [13].

In reaching this view, his Honour made reference to decisions in other unlawful discrimination matter and cases which raised 'public interest' issues.[32]

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.[33]

For example, in *Fetherston v Peninsula Health (No 2)*,[34] Heerey J explicitly rejected the argument that normal costs principles should not apply to cases brought under the HREOC 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'.[35] 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.[36]

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:

- 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;

32 The unlawful discrimination matters were: *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815; *Sluggett v Human Rights and 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 HREOC). The 'public interest' matters to which his Honour referred were: *De Silva v Ruddock* [1998] 311 FCA; *Ruddock v Vadarlis* (2001) 188 ALR 143; *Oshlack v Richmond River Council* (1998) 193 CLR 72.

33 See for example *Tate v Rafin* [2000] FCA 1582, [71] (Wilcox J); *Creek v Cairns Post Pty Ltd* [2001] FCA 1150, [1] (Kiefel J); *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [57] (Emmett J); *Paramasivam v Wheeler* [2001] FCA 231, [24] (Hill, Tamberlin and Carr JJ); *Jacomb v Australian Municipal, Administrative, Clerical and Services Union* [2004] FCA 1600, [4] (Crennan J); *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, [11] (Driver FM); *Ball v Morgan* [2001] FMCA 127, [93] (McInnis FM). See, however, *Ryan v Albutt (No 2)* [2005] FMCA 95 in which Rimmer FM cited *Tadawan* in support of the view that costs do not follow the event in unlawful discrimination matters: [7]. His Honour's decision would appear to be contrary to the weight of recent authority, to which no reference is made in the decision.

34 [2004] FCA 594.

35 Ibid [8].

36 Ibid [9].

- that litigants should not be discouraged from bringing meritorious claims and courts should be slow to award costs at an early stage; and
- that unmeritorious claims and conduct which unnecessarily prolongs proceedings should be discouraged.

Each of these matters will be considered in turn.

It can be noted that self-represented applicants are not entitled to any legal costs.[37]

8.3.1 Where there 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.[38]

In *Xiros v Fortis Life Assurance Ltd*[39] ('*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:

> A further circumstance that may warrant a departure from the general principle is where the proceedings contain a significant public interest element: *Oshlack v Richmond River Council* [(1998) 193 CLR 72]. 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 s46(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.[40]

Wilcox J commented as follows in *Ferneley v The Boxing Authority of New South Wales*:[41]

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37 See, for example, *Wattle v Kirkland* [2001] FMCA 66.

38 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, [18], [23]; cited with approval in *Jacomb v The Australian Municipal, Administrative, Clerical & Services Union* [2004] FCA 1600, [8].

39 (2001) 162 FLR 433.

40 Ibid 441 [24], [25]. See similar views expressed in *Dranichnikov v Department of 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, [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.

41 (2001) 115 FCR 306.

> 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.[42]

However, as observed by Driver FM in *Xiros*, not every case with a public interest element will avoid the application of the principle that costs follow the event. In *Physical Disability Council of NSW v Sydney City Council*,[43] the applicant was unsuccessful in an application for an interlocutory injunction which was sought to preserve a footbridge pending the resolution of a complaint of disability discrimination before HREOC. Madgwick J held that there was *not* a sufficient additional element of public interest. His Honour noted that it will be necessary to consider other factors:

> These are indeed interesting and important issues and in the main, the position of the applicant in relation to them was arguable. Nevertheless, it seems to me that the overall prospects of success in relation to the proceedings in this court, ought to have been assessed as little better than speculative. The applicant should therefore have known that it was proceeding, albeit in relation to important and urgent matters, at risk of a costs order. The decision in *Oshlack* [*v Richmond River Council* (1998) 193 CLR 72] does not say and, in my opinion, it is not the law that in every case of public interest litigation, where there are significant issues involved, a party who brings proceedings as to a matter of public interest may do so with impunity as to costs, if there is an arguable case. It seems to me that the reasonably perceived strength of the applicant's case, the time of institution of the proceedings and the manner in which the matter proceeds must also be considered.

Raphael FM in *Minns v New South Wales (No 2)*[44] held that where proceedings seek an 'exclusively personal benefit' (such as damages), the public interest element of a matter is 'much diminished':

> There must be a public interest in the subject of the proceedings and once some exclusively personal benefit is sought the prospects of the proceedings having the necessary quality of public interest is much diminished. Thus in *Ruddock v Vadarlis (No 2)* [(2001) 115 FCR 229] the public interest was the liberty of individuals who were unable to take action on their own behalf to determine their rights. In *Kent v Cavanagh* (1973) 1 ACTR 43 it was the erection of a communications tower on Black Mountain in Canberra. In *Oshlack v Richmond River Council* [(1998) 193 CLR 72] the subject was a land development at Evans Head. These were cases in which the usual rule as to costs did not apply but in *De Silva v Ruddock, Physical Disability Council of NSW v Sydney City Council* [[1998] 311 FCA] and *Sluggett v HREOC* [[2002] FCA 1060] the claims were more personal to the applicants and the appeal to the public interest exception was unsuccessful.[45]

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42 Ibid 326 [97].

43 [1999] FCA 815.

44 [2002] FMCA 197.

45 Ibid [13]. See also *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934, [15] in which Driver FM accepted that there was a public interest element in the case but it was 'not as strong' as in *Xiros* and noted that the case 'was a claim for damages in which the predominant interests were private, not public'.

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.[46]

In *Gluyas v Commonwealth (No 2)*,[47] the applicant was ordered to pay costs following summary dismissal of his claim of disability discrimination in employment.[48] Phipps FM rejected the submission of the unsuccessful applicant to the effect that there was a public interest element in his case: 'namely the difficulty people suffering from Asperger's syndrome have in engaging in employment'.[49] His Honour held that '[t]here could only be a public interest element if there was some evidence that the applicant was discriminated against in employment because of his disability'.[50]

In *Jacomb v The Australian Municipal, Administrative, Clerical & Services Union*,[51] Crennan J accepted that there was an element of public interest in the matter, and 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.[52]

Having regard to those (and other) circumstances, her Honour ordered the unsuccessful applicant pay 75% of the respondent's costs.[53]

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46 [2002] FMCA 197, [13]. Note, however, that his Honour did not expressly refer to Driver FM's decision in *Xiros*.
47 [2004] FMCA 359.
48 [2004] FMCA 224.
49 Ibid [8].
50 [2004] FMCA 359, [8].
51 [2004] FCA 1600.
52 Ibid [10].
53 Ibid [12], see further 8.4.2 below.

8.3.2 Unrepresented Applicants

Driver FM's discussion of the public interest element of *Xiros v Fortis Life Assurance Ltd*[54] 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 HREOC 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.[55]

In *Hassan v Smith*,[56] 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'.[57] However, Raphael FM ordered that the 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'.[58]

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 that the principle that costs follow the event should not be too readily applied to federal unlawful discrimination matters.[59] 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*,[60] 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.

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54 (2001) 162 FLR 433.
55 Ibid 441 [23].
56 [2001] FMCA 58.
57 Ibid [25]. However, note that his Honour cited *Tadawan v South Australia* [2001] FMCA 25 in support of that proposition: see the discussion in 9.2 above.
58 [2001] FMCA 58, [27].
59 See 8.2 above.
60 [2000] FMCA 2.

In *Travers v New South Wales*,[61] 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.[62]

Similarly, in *McKenzie v Department of Urban Services*,[63] 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 a party may have the benefit of his or her award of damages totally eliminated by the cost of the proceedings.[64]

In *Johanson v Blackledge*,[65] Driver FM ordered that costs should follow the event. His Honour agreed with the views expressed by Raphael FM in *Shiels v James*[66] 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.

Driver FM awarded costs to the successful applicant in *Cooke v Plauen Holdings Pty Limited*,[67] stating:

> I agree with the views expressed by Raphael FM in *Shiels v James* [[2000] FMCA 2] at paragraph 80 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.[68]

His Honour made similar comments in *Escobar v Rainbow Printing Pty Limited (No 3)*,[69] 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 Limited* [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

61 (2001) 163 FLR 99.
62 Ibid 117 [74].
63 (2001) 163 FLR 133.
64 Ibid 156 [95].
65 (2001) 163 FLR 58.
66 [2000] FMCA 2.
67 [2001] FMCA 91.
68 Ibid [44].
69 [2002] FMCA 160.

> 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.[70]

With courts being apparently more inclined to award costs following the event,[71] 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*[72] ('*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.[73]

In *Saddi v Active Employment*,[74] 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*,[75] 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

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70 Ibid [5].

71 See discussion in 8.2 above.

72 [2000] FMCA 6.

73 Ibid [11]. His Honour made similar obiter comments in *Chau v Oreanda Pty Ltd* [2001] FMCA 114, [26].

74 [2001] FMCA 73.

75 [2004] FMCA 398.

> I made the decisions in *Low* and *Chung*. We are no longer dealing with new legislation.[76]

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.[77]

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)*.[78] 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.[79]

In *Ingui v Ostara*,[80] 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.[81] He therefore ordered that each party have the opportunity to make submissions as to the quantum of costs to be allowed.[82]

Subsequently in *Ingui v Ostara (No 2)*,[83] 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 respondents' costs. He did, however, reduce 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 given the proceedings were discontinued well before the matter was fixed for final hearing, thus saving the respondents from incurring considerable 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*,[84] Driver FM made the following observation in the course of considering the issue of costs after dismissing the application:

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76 Ibid [13].
77 Ibid [14].
78 [2004] FMCA 640, [8].
79 See further 8.4 below.
80 [2003] FMCA 132.
81 Ibid [36].
82 Ibid [41].
83 [2003] FMCA 531.
84 (2001) 162 FLR 433.

> 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.[85]

His Honour nevertheless declined to award costs to the respondent for other reasons.[86]

In *Horman v Distribution Group Limited*,[87] 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.[88]

In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)*,[89] the respondents argued that the applicant's costs order should be reduced because the applicant had only been partially successful in her claim. Driver FM noted that:

> The applicant was not successful in obtaining the financial outcome that she probably anticipated if she had been able to demonstrate a constructive dismissal. However that outcome, in my view, does not call for a reduced order as to costs for that reason alone…
>
> In this matter I have formed the view that the decision of the applicant to pursue her claim through to a final hearing was neither improper or unrealistic. She did not persuade me that she had been constructively dismissed, but on factual issues I accepted her as a reliable witness. The claim of constructive dismissal was always reasonably arguable although ultimately unsuccessful. The applicant should, in my view, receive an order for costs consistent with the general principle that costs follow the event.[90]

While the applicant's claim against the first respondent was upheld, her claim against the second and third respondents, who were employees of the first respondent, was dismissed on an issue of jurisdiction. An application for a costs order in favour of the second and third respondents was not granted on the basis that it was unlikely that the respondents' overall costs in the proceedings were increased in any significant degree by the inclusion of the second and third respondents as parties.[91]

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85 Ibid 441 [22].
86 See discussion in 8.3.1 and 8.3.2 above.
87 [2001] FMCA 52.
88 See *Horman v Distribution Group Limited* [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].
89 [2003] FMCA 516.
90 Ibid [6], [11].
91 Ibid [17]-[18].

McInnis FM in *McBride v Victoria*[92] suggested that it might be artificial in unlawful discrimination claims to divide the case into discrete events to which costs can be apportioned. His Honour stated:

> The nature of a human rights claim very often includes complaints that arise out of what are considered to be a series of events in the course of employment, more often than not in circumstances of this kind where an applicant is aggrieved by what is perceived by the applicant to be conduct in breach of the relevant human rights legislation. Although analysed and presented as discrete events, 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.
>
> Nevertheless, it is also relevant in the discretion of the court to look at the substantial outcome, and I accept that ultimately the applicant, though successful, has not been successful in all aspects of the claim, in particular has not succeeded in establishing that her current condition is attributable to the alleged contraventions of the Disability Discrimination Act.
>
> In the circumstances, taking into account the reasons for judgment and the fact that a considerable period of time, at least on the first day, was taken with jurisdiction issues and other issues in relation to the respondent's defence of this claim, it is my view that it would be fair and just in the circumstances to make an order that the respondent pay 50 per cent of the applicant's costs of and incidental to the application, including reserved costs, if any.[93]

The applicant was also only partially successful in *Howe v Qantas Airways Ltd (No 2)*.[94] Driver FM nevertheless held that she was entitled to all of her costs. Relevant to his Honour's decision was the fact that the applicant had incurred significant costs in dealing with the very detailed and complex response made by the respondent and that she was 'largely successful on the law'.[95] There was also nothing in her conduct to disentitle her to costs.

In *Bruch v Commonwealth of Australia*,[96] 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'.[97] 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*,[98] 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:

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92 [2003] FMCA 313.
93 Ibid [8]-[10].
94 [2004] FMCA 934.
95 Ibid [14].
96 [2002] FMCA 29.
97 Ibid [64].
98 [2001] FCA 1150.

> 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.[99]

In *Tate v Rafin*,[100] 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].[101]

However, in *Ho v Regulator Australia Pty Ltd (No 2)*,[102] Driver FM rejected an argument by the applicant that the conduct of the respondent during the investigation and attempted conciliation of the matter by HREOC 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 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.[103]

The applicant had succeeded in relation to her claim of direct sex discrimination although this did not result in damages, and also in her claim of direct pregnancy discrimination, for which Driver FM awarded $1,000 in general damages. However, the majority of her application, alleging sexual harassment, was rejected by the Court. Driver FM found that the applicant had a genuine but delusional belief in

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99 Ibid [2].
100 [2000] FCA 1582.
101 Ibid [71].
102 [2004] FMCA 402.
103 Ibid [6].

her claims. With some adjustments for discrete interlocutory matters, Driver FM awarded the applicant fifty per cent of her costs, stating that:

> although the issues upon which the applicant succeeded occupied less than 50 per cent of the hearing time (and presumably less than 50 per cent of the preparation time) the assessment of costs is not a strict mathematical exercise in circumstances where the parties were both partially successful and the issues between them are not readily severable.[104]

As noted above (see 6.7), although the grounds of direct and indirect discrimination have been held to be mutually exclusive,[105] an incident of alleged discrimination may nonetheless be pursued by an applicant as a claim of direct or indirect discrimination, pleaded as alternatives.[106] 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,*[107] 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.[108]

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. For example, in *Hughes v Car Buyers Pty Limited,*[109] the respondents ignored the HREOC 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 indemnity basis in reference to the respondents' behavior. Walters FM noted[110] the factors set out by Sheppard J in *Colgate-Palmolive v Cussons*[111] 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;

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104 Ibid [17].

105 *Australian Medical Council v Human Rights and Equal Opportunity Commission* (1995) 68 FCR 46, 55 (Sackville J); *Waters v Public Transport Commission* (1991) 173 CLR 349, 393 (McHugh J); *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209.

106 See *Minns v New South Wales* [2001] FCA 704; *Hollingdale v Northern Rivers Area Health* [2004] FMCA 721. See also *Tate v Rafin* [2000] FCA 1582, [51], [66]-[69] (Wilcox J).

107 [2004] FMCA 721.

108 Ibid [19].

109 (2004) 210 ALR 645.

110 Ibid 661 [92].

111 (1993) 46 FCR 225, 231-234.

- 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.[112]

In *Hassan v Smith*,[113] Raphael FM held that the applicant should pay party-party costs because although he was told by HREOC 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'.[114] 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)*,[115] 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'.[116]

In contrast, indemnity costs were awarded against the unsuccessful applicant by Driver FM in *Wong v Su*,[117] 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

112 [2004] FMCA 526 [96]. See similarly, in relation to the behaviour of a respondent in proceedings before HREOC, *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402, discussed at 8.3.5 above.

113 [2001] FMCA 58.

114 Ibid [27].

115 [2003] FMCA 210.

116 Ibid [8].

117 [2001] FMCA 108.

> 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.[118]

In *Hinchliffe v University of Sydney (No 2)*,[119] 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:

> [A]s 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 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.[120]

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'.[121] Driver FM noted that the FMC Rules make specific provision for photocopying and that disbursements should be agreed between the parties under that scale.[122]

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118 Ibid [19].
119 [2004] FMCA 640.
120 Ibid [8].
121 Ibid [9].
122 Ibid .

While accepting that the respondent may end up out of pocket, his Honour noted:

> 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.[123]

8.4.2 Offers of Compromise

Litigants in unlawful discrimination matters should be aware that Order 23 of the *Federal Court Rules* in relation to offers of compromise apply to proceedings before both the Federal Court and FMC.[124] While readers should consult the *Federal Court Rules* directly, one significant aspect of Order 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,[125] the first party is entitled to *indemnity* costs from the day upon which the offer was made.[126]

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123 Ibid [10]-[12].

124 Part 2 of Schedule 3 of the FMC Rules provides that Order 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 Davis Motors Pty Limited* [2002] FMCA 243, [112]-[113] per McInnes FM.

125 For a useful discussion of the law on when a court might 'otherwise order', see *Port Kembla Coal Terminal Limited v Braverus Maritime Inc. (No. 2)* [2004] FCA 1437, [16]-[18] per Hely J approving Heerey J's comments in *Wills v Bigmac Pty Limited* [1004] FCA 949, [13].

126 See O 23, r 11.

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.[127]

Offers of compromise made by parties in litigation which do not fall within the terms of Order 23 (also known as '*Calderbank*'[128] offers) may nevertheless be taken into account in the exercise of a court's general discretion in awarding costs. In *Henderson & Ors v Amadio Pty Ltd & Ors*[129] 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…[130]

Justice Hely in *Port Kembla Coal Terminal Limited v Braverus Maritime Inc. (No. 2)*[131] noted a significant distinction between an offer of compromise falling within Order 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].[132]

A number of unlawful discrimination cases have considered the principles applicable to *Calderbank* offers. In *Forbes v Commonwealth of Australia*[133] 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 a *successful* party who does no better than an offer made to him/her prior to a hearing.[134]

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127 Order 23 was amended by *Federal Court Amendment Rules 2004 (No 1)*, effective 23 March 2004.

128 *Calderbank v Calderbank* (1975) 3 All ER 333.

129 Unreported, Federal Court of Australia, 22 March 1996, Heerey J.

130 Ibid [51].

131 [2004] FCA 1437.

132 Ibid [28].

133 [2003] FMCA 262, [6].

134 Ibid*.* 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].

In *Rispoli v Merck Sharpe & Dohme & Ors (No. 2)*,[135] 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'.[136]

In *Jacomb v The Australian Municipal, Administrative, Clerical & Services Union*,[137] 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.[138]

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 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].[139]

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135 [2003] FMCA 516, [10].
136 Ibid [11].
137 [2004] FCA 1600.
138 Ibid [5].
139 Ibid [6]-[7].

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.[140]

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.

140 Ibid [12].

In *Minns v New South Wales (No 2)*,[141] 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 Limited*.[142] 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.

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141 [2002] FMCA 197.

142 (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': 361-2 [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*.

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