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COSTS IN CRMINAL CASES

Presented by

Luke Brasch

Samuel Griffith Chambers

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THE PRESENTER

Luke Brasch is a Barrister at Samuel Griffith Chambers practicing in Criminal law.

He is also an Adjunct Lecturer in Law at the University of Sydney lecturing in Evidence.

COSTS IN CRIMINAL CASES

INTRODUCTION

When acting for a successful defendant in criminal proceedings the awarding of costs in his or her favour often provides the "icing on the cake" to the victory in court. Obtaining an award for costs is not that common in the practice of criminal law, but when it occurs it gives the defendant and the practitioner that extra sense of satisfaction.

I first presented a paper on costs in criminal proceedings and the *Criminal Procedure Act* in 2004 to a Young Lawyers Seminar. Since then I have had the opportunity to update the paper and expand on for the College of Law so that it includes the *Costs in Criminal Cases Act 1969* and the *Suitors Fund Act 1951* for the College of Law.

For the Legal Aid Commission 2012 Conference I have endeavoured to update the paper as best I can in a relatively short period of time. Any failure to mention recent cases is entirely my own fault.

Luke Brasch
Samuel Griffith Chambers
Winter 2012

BACKGROUND AND HISTORY

The Common Law

The common law rule was that the Crown neither receives nor pays costs. The rule could be excluded by necessary implication. In *Affleck v The King (1906) 3 CLR 608*, a probate case, Griffith CJ said at 630:

> *"There is no doubt that at common law the Crown is by its prerogative exempt from the payment of costs in any judicial proceeding, and that this right cannot be taken away except by Statute. The words of the Statute need not, however, be express: It is sufficient if the abolition of the privilege appears by necessary implication. The reason formerly given for the rule was that it was beneath the dignity of the Crown either to receive or pay costs. In the case of Attorney-General v. Corporation of London, Lord* Cottenham *L.C., put the rule on the ground of reciprocity of right and obligation, and said that in cases in which the Attorney-General sued for the Crown he ought not to receive costs unless he could if unsuccessful have been ordered to pay them."*

Historically, a different approach has been taken in relation to summary proceedings as opposed to proceedings on indictment. Until 1967 there was no provision for the awarding of costs against the Crown in prosecutions on indictment. Even now, somewhat different statutory provisions apply to summary and indictable proceedings. These differences are probably still a remnant of the rule that the Crown does not pay or receive costs and historically, the Crown always prosecuted on indictment.

In summary matters the courts of NSW were cautious in awarding costs against police. The rationale was expressed by Darley CJ in *Ex Parte Jones (1906) 6 SR 313 at 315* where he said:

> *"It has been argued that the applicant ought to have his costs, because the prohibition goes upon the merits of the case and not upon a mere technicality, and it is said that the police should make careful enquiry into the circumstances before instituting proceedings. I think it would be dangerous to the public welfare if we laid upon the police any such duty, and held that they were bound to make enquiries before commencing a prosecution. In making such enquiries they might easily be deceived. The proper course for the police to pursue, is, if they*

see that a prima facie case exists, to bring it before the court which has jurisdiction to decide it. It is the duty of the magistrate to decide the case upon the evidence, and not of the police to determine whether the accused is guilty or not. In some countries the police have this duty charged upon them of making enquiries, and exercising quasi judicial functions, but that is not our system. Our system is that if there is apparently good ground to suspect that an offence has been committed, it is the duty of the police to lay a complaint and bring the accused before the magistrate. I have no doubt that the inspector in the present case did his duty in preferring the charge, and if the police find that they run the risk of being ordered to pay costs, they may hesitate to bring cases before the Court."

Ex Parte Jones was a case in which a publican had sold alcohol to a minor but was acquitted as he had supplied alcohol in circumstances where it was for the use of someone else who was sick. Apparently, the man who was sick had been ordered to have a glass of beer before going to bed to help his rheumatism.

The Effect of Statutory Provisions

In 1933 the NSW Supreme Court considered the issue of costs in summary matters in *Ex Parte Hivis*; *Re Michaelis and Anor (1933) 50 WN (NSW) 90*. In this case a taxi driver had been charged with loitering on Market Street outside Her Majesty's Theatre. Justice Rogers found that the evidence was insufficient to support a finding that the driver was loitering.

By the time that the decision in *Ex Parte Hivis* was considered the legislature had introduced section 117 *of the Justices Act* which stated:

"*The costs of all proceedings and of all amendments under the last five preceding sections shall be in the discretion of the Court or Judge*."

Justice Rogers was of the view that:

- There is no rule that costs should be awarded against public officials only in exceptional circumstances.

- The terms of the Justices Act are such that the old rule that the crown neither pays nor receives costs is displaced.
- The Court has a discretion that is unfettered and the granting or refusal of costs depends on the circumstances of the case.
- The argument that costs ought not to be awarded against police officers so they are not discouraged from doing their duty no longer applies, as their liability is no longer personal.

In relation to matters dealt with on indictment, until 1967 there was no legislation dealing with costs. Accordingly, the old rule that costs could not be awarded against the Crown continued to apply. This rule continued to apply because, unlike the *Justices Act* in relation to summary proceedings, there was no legislation that necessitated the implication that the old rule no longer applied.

In 1967 the *Costs in Criminal Cases Act* was passed. This had a two fold effect. First, it provided for the awarding of costs in indictable matters. Second it provided for the awarding of costs in committal hearings by inserting into the *Justices Act* section 41A.

In 1980, the NSW Supreme Court considered the issue of costs in the case of *Barton v Berman [1980] 1 NSWLR 63*. This was an appeal from a decision of the magistrate not to award costs after a lengthy committal hearing. The defendants had been charged with conspiracy to defraud. The prosecution withdrew the charges, and filed ex-officio charges in the Supreme Court, after the Magistrate had found a prima facie case but prior to a determination as to whether the defendants ought to be committed. Section 41A of the *Justices Act* was under consideration.

Although this case dealt with a committal hearing, the judgement was equally applicable to a summary trial. At p 74 Hope JA said:

> *"But the question which the magistrate has to decide is whether to make or not to make an order for costs; it is not simply whether, for some reason, he should decline to make an order. The fact that the defendant has been discharged gives the Court jurisdiction. That the*

defendant has qualified to make the application is, of course, a relevant circumstance, but it does not give rise to any presumption that he should get an order. Nor do I think that the proper approach, or the relevant considerations, would be the same…as apply in civil cases. "

In summary the position, as of 1990 in NSW, was as follows:

- The common law rule was that the Crown neither pays nor receives costs.
- The common law rule could be excluded or varied by implication from statute.
- In relation to summary trials, Section 81 *Justices Act* altered the common law rule to give the Magistrate jurisdiction to award costs when a defendant was discharged but there was no presumption that the defendant should get such an order.
- Similarly, from 1967 in committal hearings, Section 41A *Justices Act* altered the common law rule to give the Magistrate jurisdiction to award costs when a defendant was discharged but there was no presumption that the defendant should get such an order. Prior to 1967 a defendant could not be awarded costs in a committal hearing.
- In relation to the awarding of costs pursuant to the *Justices Act*, the discretion to award costs was unfettered but the relevant considerations were not the same as those that applied in a civil case.
- The discretion must be exercised judicially and for reasons connected with the case.
- In practice, costs were rarely awarded against a police informant pursuant to the *Justices Act*.
- In relation to matters dealt with on indictment, until 1967 and the *Costs in Criminal Cases Act 1967,* costs could not be awarded against or in favour of the Crown. This *Act* altered the application of the common law rule.
- The discretion to award costs pursuant to the *Costs in Criminal Cases Act* was not unfettered. The Court had to consider certain matters or criteria, as it must as the law currently stands.
- Furthermore, unlike the current provisions, there had to have been a hearing on the merits leading to an acquittal or discharge.

LATOUDIS v CASEY

1990 was a significant year in relation to the awarding of costs in summary criminal matters. The principles applied differed between states and the High Court came to consider the matter in *Latoudis v Casey (1990) 170 CLR 534*.

The appellant had been acquitted in the Victorian Magistrates Court of three dishonesty charges. The Magistrate refused an application for costs as the informant police officer had acted reasonably and the appellant had caused suspicion to fall upon him by failing to get proof of ownership at the time that he purchased the goods in question.

The issue was what are the criteria to be applied by a court of summary jurisdiction in exercising a statutory discretion to award costs in favour of a successful defendant in criminal proceedings? By a 3-2 majority, the High Court handed down its decision in *Latoudis v Casey*.

Chief Justice Mason gave the leading judgement of the majority. It is convenient to extract at some length, some of the passages from his judgement. At p 52 His Honour said:

> *By conferring on courts of summary jurisdiction a power to award costs when proceedings terminate in favour of the defendant, the legislature must be taken to have intended to abrogate the traditional rule that costs are not awarded against the Crown…. Once that proposition is accepted, as in my view it must be, there is no sound basis for drawing a distinction in relation to the award of costs against an unsuccessful informant between summary proceedings instituted by a police or other public officer and those instituted by a private citizen. In the case of proceedings commenced by a private prosecutor which terminate in favour of the defendant, the private prosecutor should in ordinary circumstances be ordered to pay the costs, even if he or she initiates the proceedings for a public rather than a private purpose.*
>
> *In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the*

proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs…

It will be seen from what I have already said that, in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings. Most of the arguments which seek to counter an award of costs against an informant fail to recognize this principle and treat an order for costs against an informant as if it amounted to the imposition of a penalty or punishment. But these arguments only have force if costs are awarded by reason of misconduct or default on the part of the prosecutor. Once the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings.

The argument that police and other public officers charged with the enforcement of the criminal laws will be discouraged by the apprehension of adverse orders for costs from prosecuting cases which should be brought is without substance and is no longer accepted by the courts. The courts have rightly recognized that the Executive's practice of indemnifying police officers against payment of costs ordered against them undermines the argument which found favour so long ago in Ex parte Jones.

The availability of legal aid might be regarded as a possible reason for refusing to award costs. But no court can assume that a particular defendant is entitled to, or is in receipt of, legal aid. In any event the courts have traditionally made orders for costs without regard to considerations of that kind.

I am not persuaded that there is a complete analogy between the discretion to award costs in summary proceedings and the power to award costs in civil proceedings. For that reason I would not be prepared to accept that in summary proceedings there should be a general rule that costs follow the event….The differences between criminal and civil proceedings are substantial, not least of them being the absence of pleadings, the different onus of proof, the defendant's inability in criminal proceedings to enter into a compromise and the possibility that the charge, if proved, may affect the defendant's livelihood and reputation. These differences may possibly provide grounds in the circumstances of particular cases for refusing to order costs in favour of a successful informant which would have no application in civil proceedings.

***Nevertheless, I am persuaded that, in ordinary circumstances, an order for costs should be made in favour of a successful defendant**. However, there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs. If, for example, the defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor.*

I agree with Toohey J that, if a defendant has been given an opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs.

In his judgement McHugh J says at p 569:

a successful defendant in summary proceedings has a reasonable expectation of obtaining an order for the payment of his or her costs because it is just and reasonable that the informant should reimburse him or her for liability for costs which have been incurred in defending the prosecution….

Hence in most cases, the successful defendant in summary proceedings, like the successful party in civil proceedings, should obtain an order for costs in respect of those issues on which the defendant succeeds.

As one may expect, the decision in *Latoudis* had a significant effect on the awarding of costs in summary matters. I was not practicing at that time but those who were tell me that the period that followed the decision was a remarkable, and lucrative, time for criminal defence practitioners.

As you would probably expect, within months significant legislative changes were made to the *Justices Act* in order to restrict the circumstances in which costs will be awarded. Those changes essentially continue to today.

POWER TO AWARD COSTS MUST BE CONFERRED BY STATUTE

An understanding of the historical context of costs assists one to appreciate that any power to award costs in criminal cases must be conferred by statute. In *DPP v Deeks (1994) 34 NSWLR 523* Kirby P said:

DPP v Deeks (1994) 34 NSWLR 523 was a case where the question to be determined was whether proceedings for forfeiture pursuant to the *Confiscation of Proceeds of Crime Act 1989* were criminal or civil in nature. The District Court judge had dismissed the proceedings and was of the view that the proceedings were civil and as a consequence his jurisdiction to award costs was within the court's civil jurisdiction. The DPP argued that they were criminal in nature. Kirby P concluded that the DPP was correct.

His Honour then considered whether the District Court had jurisdiction to award costs. In the course of his judgement the President said at p 532:

> *if the ancient rule were to be reversed, and the Crown (or its manifestation the DPP) to be made liable for costs in criminal proceedings, this would have to be done with sufficient clarity to dispel the presumptions derived from the history of such proceedings and the limited powers of the District Court.*

In *R v Mosely (1992) 28 NSWLR 735* the DPP had sought an adjournment on the first day of trial. Mosely had been charged with culpable driving and some police were unable to attend as witnesses. The District Court Judge granted the adjournment but ordered the Crown to

pay the defendant's costs. The Judge relied upon section 6 of the *District Court Act* as the source of his power to award costs. Section 6 was as follows:

> "*Where under this Act or the civil or criminal procedure rules the Court may make any order or give any direction or leave or do any other thing on terms, the Court may make the order or give the direction or leave or do the thing on such terms and conditions (if any) as the Court thinks fit."*

In *Mosely* Gleeson CJ found that section 6 of the *District Court Act* could not be construed to give the court power to grant an adjournment subject to costs. The decision in *Mosely* on this point, illustrates that there must be a clear power conferred in order for the court to award costs.

Accordingly, if you are seeking costs in a criminal matter you must be able to point to a clear legislative intention to overcome the presumption that costs will not be awarded.

In NSW there are three pieces of legislation that deal directly with the issue of costs and clearly confer jurisdiction to order costs. They are:

1. *Criminal Procedure Act 1986*
2. *Costs in Criminal Cases Act 1967*
3. *Suitors Fund Act 1951*

The advantage of the *Criminal Procedure Act*, to a successful defendant, is that the amount of costs is assessed immediately and the payment is not dependent on the discretion of the Director General of the Attorney General's department.

CRIMINAL PROCEDURE ACT 1986

As a result of the decision in *Latoudis v Casey*, significant amendments were made to fetter the court's discretion in making cost orders in favour of a successful defendant against a public informant. Different states dealt with the decision differently, some seeking to codify the decision in *Latoudis* whilst others retained a broader discretion. In NSW significant restrictions were placed on the awarding of costs in favour of a defendant. Those restrictions remain until today.

The principle provisions concerning the awarding of costs in committal and summary matters are now contained within the *Criminal Procedure Act 1986*. Until recent years they were within the now repealed *Justices Act*. For proceedings commenced prior to 7 July 2003, reference should be had to sections 41A and 81 of the *Justices Act*.

Sections 116-120 *Criminal Procedure Act 1986* deals with costs in a committal hearing. Sections 211-218 *Criminal Procedure Act 1986* deals with costs in a summary proceeding. For your assistance, those sections are extracted in full at the end of the paper. You will see that the relevant provisions in relation to committal and summary provisions are similar. In relation to sections 117 and 214 they are identical. Those are the sections designed to fetter the effects of the decision in *Latoudis v Casey*. Due to their similarity, I will deal with committal hearings and summary proceedings together. There is no power for a Magistrate to award costs of a bail application. (*DPP v Donaczy [2007] NSWSC 923*)

In 2006, sections 257A to 257G of the *Criminal Procedure Act* came in to effect and apply to the awarding of costs in the Supreme Court and other higher courts exercising summary jurisdiction. The Land and Environment Court is an example and is a good source of cases for the consideration of costs.

MATTER IS WITHDRAWN OR INFORMATION IS INVALID

Under the *Justices Act* provisions, the court had no power to award costs in committals or summary hearings when the prosecutor withdrew a charge. This is no longer the case. Pursuant to sections 116 (1) (a) and 213 (1), the withdrawal of a charge invokes the magistrate's jurisdiction to award costs in the same way as it does when a charge is dismissed or an accused discharged. This is a significant change and has a real practical effect for practitioners. Previously, prosecutors would often withdraw matters (although leave is required), rather than offer no evidence, so as to avoid any possible costs implications. The risk was that if a defendant opposed a charge being withdrawn, so to allow an argument on costs, then the prosecutor might run the case in any event, and possibly win. This dilemma is now less likely to be faced by practitioners.

A further change to the law has occurred in relation to invalid proceedings. Section 213 (3)(b) provides for the awarding of costs in cases where the "proceedings are for any reason invalid." This amendment overcomes the problem that arose in *DPP v Goben [1999] NSWSC 696*. In *Goben*, the informations were found by the Magistrate to be invalid as they failed to include an element of the offences. The magistrate proceeded to dismiss the charges and award costs to the successful defendant. The DPP sought an order in the nature of certiorari and the matter was heard by Justice James in the Supreme Court. His Honour agreed that the informations were defective and consequently the charges could not be dismissed. The consequence of that was that the magistrate did not have jurisdiction to award costs.

A similar issue arose in Inspector *Simone Costin v Austral Roller Shutters [2004] NSWCIMC 64*. In that case the prosecution had failed to prove an essential legal element of the charge, being place of work. The Chief Industrial Magistrate found that the decision in Goben was binding in occupational health and safety prosecutions.

As I have already stated section 213 (4) overcomes the problem of *Goben*. For completeness it is noted that in *DPP v Cakici [2006] NSWSC 454* Johnson J at [38] explicitly states that section 213(4) overcomes the difficulty caused by the decision in *Goben*.

WHEN TO MAKE THE APPLICATION

Under Section 41A of the *Justices Act* the position had been that an application for costs had to be made so that the cost order became part of the process of discharging the defendant at the conclusion of the committal. This was the clear position after *Fosse v DPP (1989) 16 NSWLR 540*.

In *Fosse*, the defendant was charged, with others, with conspiring to supply heroin and conspiring to import heroin. Due to inadequate identification evidence he was discharged. The committal involving the other defendants continued. His counsel failed to make a cost application at the day, or on the day of the discharge. Nor did he seek a date for a cost application. He returned at a later day to make the application but the magistrate found that he was functus officio as the defendant had already been discharged. Smart J, agreed with the magistrate, relying upon the words of section 41A which required any cost order at a committal to be made "when making an order discharging a defendant."

Accordingly, if one failed to make an application for costs at the time of the formal discharge then an application could not be brought at a later date. As long as one made the application at the time of discharge then the matter could be adjourned for a cost argument, but the formal application would still have had to have been made as part of the process of the defendant being discharged. If the application was made at a later date then the court had no jurisdiction to deal with it.

Fosse dealt specifically with Section 41A and committal hearings but the same principle may have applied to summary hearings and section 81. Sections 116 (1) and 213 (1) of the *Criminal Procedure Act* are worded slightly differently to their predecessors in the *Justices Act*. The former Section 41A, as considered in *Fosse* was as follows:

> *The Justice or Justices:*
>
> *(a)* ***when making an order discharging a defendant as to the information then under inquiry****, or*

(b) when committing a defendant for trial for an indictable offence which is not identical in all respects to the indictable offence with which the defendant was charged,

may, in and by an order made by the Justice or Justices (which, in the circumstances referred to in paragraph (a), may be the same order as the order discharging the defendant) adjudge that the informant shall pay to the clerk of the court to be paid to the defendant (or, if the informant so elects, directly to the defendant) such costs as to the Justice or Justices seem just and reasonable.

The former Section 81 (1A) reads as follows:

> ***When making an order dismissing the information, complaint or charge against a defendant**, the Justice or Justices may order that the prosecutor or complainant pay to the defendant such professional costs as the Justice or Justices consider to be just and reasonable.*

The new provisions make reference to "the end of the … proceedings". It is arguable that this is a change to the law under the *Justices Act* however; the Attorney's Second Reading Speech of 4 December 2001 makes no reference to this issue.

Recently in *Trevitt v Police [2012] NSWLC 4* a Magistrate considered section 213 and at [27] concluded:

> *When an opportunity to make an application for costs is given to an accused, upon dismissal of the charge, two things may happen. An application for costs may be made by the accused, or no application is made. If no application is made, in my opinion, the summary proceedings are at an end. The charge has been dismissed, there is no application before the Court, and therefore there is nothing further that the Court is required to determine. If an application for costs is made, the summary proceedings, in my opinion, are not at an end but will be once that application is decided. It is of course not necessary for the application for costs to be heard to finality or determined on the day of the dismissal of the charge, but it must be made.*

Whilst it is a decision of a single Magistrate, whilst there is no other binding authority, it is strongly advisable to assume that the law remains unchanged and that an application for costs should be made at the time of the formal discharge or at the time that the accused is acquitted and before the Court adjourns or moves on to another matter.

In circumstances in which there is more than one charge, the "proceedings" are for each separate charge. The charges are not collectively "the proceedings" and it is an error not to entertain the possibility that costs could be awarded for a single charge or that an order for the portion of costs can be made. *(V (a child) v Constable Joshua Hedges [2011] NSWSC 2011 at [25].*

COSTS ON ADJOURNMENT

Under the earlier *Justices Act* provisions, there was no express power to order the payment of costs in circumstances in which an adjournment of the Local Court proceedings was necessary. The one exception to this was an adjournment necessitated by the prosecution varying or correcting a defect in the information or summons pursuant to the then section 65 (now incorporated in section 21 *Criminal Procedure Act*).

In *R v Le Boursicot (1994) 79 A Crim R 548*, the prosecution had sought an amendment to the date on the charge on the day of the hearing. The defendant had intended to defend the charge on the basis of an alibi. The Magistrate allowed the amendment but granted an adjournment. In doing so he made an order that the prosecution pay the defendant's costs. Justice Smart found that the words "upon such terms as he or they may think fit" in section 65 were wide enough to give the justice power to grant an adjournment upon condition that the prosecution pay the wasted costs. Where an adjournment is occasioned by careless or blameworthy conduct by the prosecution a just term would be an order that the prosecution pay the wasted costs.

The provisions of the *Criminal Procedure Act* create new circumstances in relation to adjournments. Sections 118 and 216 give the Court express power to award costs when there is an adjournment. The circumstances are limited to when there has been additional

costs incurred "because of the unreasonable conduct or delay of the party against whom the order is made." The order must specify the amount of the costs payable or provide for them to be determined at the conclusion of the proceedings. The order may be made regardless of the ultimate result of the proceedings. The provisions are not restricted only to the adjournment of hearings but would apply equally to adjournments of mentions or the like.

An example of the awarding of costs for an adjournment resulting from the "unreasonable conduct" of the prosecution is in *Police v Ben Alcott [2005] NSWLC 17*. It is important to note that this is a decision of a single magistrate. Mr Alcott was the defendant to an application for apprehended domestic violence orders being prosecuted by the police on behalf of the complainant. A magistrate had made orders for the service of evidence by the parties prior to the hearing. The prosecution failed to do so in respect of some important evidence. The defendant sought and obtained an adjournment. After considering the specific provisions relating to costs and AVOs, Her Honour was of the view that section 216 of the Criminal Procedure Act applied to police in AVO proceedings. Accordingly, Her Honour awarded costs against the prosecution, resulting from the adjournment.

In *D-G NSW Department of Industry v Mato Investments (No 2) [2010] NSWLEC 196* a judge of the Land and Environment Court made a cost order against three defendants in favour of a fourth defendant, as a result of costs incurred due to the delays of the other three defendants.

LIMITS ON THE AWARDING OF COSTS

Usually the principle issue that a successful defendant's legal representative has to deal with in an application for costs against a public informant is to persuade the Court that the circumstances exist such as to satisfy one of the four criteria which act as limitations on the awarding of costs. These are the criteria that were designed to deal with the impact of the decision in Latoudis.

The criteria are contained in sections 117 and 214 *Criminal Procedure Act* and are in essentially identical terms. They are as follows:

Professional costs are not to be awarded in favour of an accused person in summary proceedings unless the court is satisfied as to any one or more of the following:

(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,

(b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,

(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs.

Connection between the reasons for dismissal and the Cost Order

There is no requirement for there to be a connection between the reason for dismissing the charge or discharging the defendant and the facts upon which the court relies to make an order for costs.

In *R v Hunt [1999] NSWCCA 375*, the Magistrate had discharged the defendant on a charge of sexual intercourse without consent. The basis of the discharge was that the Magistrate had concerns about the absence of consent. However, he then went on to award costs on the basis that there were matters which were unreasonably not investigated.

The Crown appealed the decision to the District Court and Freeman DCJ stated a case to the Supreme Court. One of the questions of law stated was:

"Is it necessary before the Magistrate makes an order for costs in favour of a successful defendant that not only the section 41A requirements or at least one of them is made out to

> *the satisfaction of the Magistrate, but that such requirement or requirements be one of the reasons or substantially connected with the reasons for the discharge of the defendant…?*

Delivering the leading judgement, Chief Justice Spigelman answered the question *"no"*.

That is, it does not have to be one of the four facts, matters or circumstances set out in sections 117 and 214 that led to the dismissal or discharge in order for the Court to make an order for costs.

Therefore, one is entitled to tender further evidence on a cost application beyond the evidence called at the hearing. Evidence of representations made to the prosecution is such an example.

The Onus of Proof

The onus of proof to establish one of the four factors which limit the award of costs rests on the successful defendant. The issue of the onus of proof arose in *Dong v Hughes [2005] NSWSC 84*. Levine J at [29] made reference to section 140 of the *Evidence Act* and said:

> *"This is a civil case. The onus of proof is upon the party seeking the order for costs. That which that party has to prove are the matters that would trigger the criteria in the section".*

His Honour went on to say at [31] that *"I am of the view that there is a positive onus of proof on the plaintiff to lead evidence of substance that is more than "a slight degree of proof."* His Honour rejected a submission that the tender of an exculpatory statement by the defendant, which had been in the possession of the Crown, threw the ball into the Crown's court.

The Prosecutor

In considering the limitations of the awarding of costs one need be aware of the definition of "prosecutor".

The *Criminal Procedure Act* provides as follows:

> *"prosecutor" means the Director of Public Prosecutions or other person who institutes or is responsible for the conduct of a prosecution and includes (where the subject-matter or context allows or requires) an Australian legal practitioner representing the prosecutor.*

The fact that prosecutor includes a person who institutes the prosecution, means the definition is wide enough to include the police informant and not just the actual police prosecutor themself.

The Four Criteria Limiting the Awarding of Costs

I set out below the four criteria and refer to applicable cases which either assist in understanding the particular criteria or are examples of the application of the particular criteria

(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,

In *JD v DPP [2000] NSWSC 1092* Justice Hidden considered the meaning of an investigation being "conducted in an unreasonable manner". In that case JD had been discharged at committal after the DPP withdrew charges of sexual misconduct involving one of his daughters. Expert evidence tendered on the cost application from an eminent child psychologist demonstrated serious inadequacies in the manner of the investigation. The inadequacies related, in particular, to the methodology in the interviewing of the alleged victim and the reliability of the complaint.

The learned magistrate declined to make an order for costs because:

> *"the fact that an investigation does not come up to optimum standards would not put it into the category of being unreasonable or improper unless it was grossly below optimum standards."*

Justice Hidden found the Magistrate's characterisation of the test was an error of law. His Honour said at [31]:

> *"an investigation which fails to meet optimum standards is not necessarily unreasonable. Equally, however, it might fairly be classed as unreasonable even though it does not fall grossly below those standards. .. To find that the conduct of the investigation of a particular case was unreasonable does not necessarily impugn the general competence, far less the integrity, of those responsible for it."*

In *Cliftleigh Haulage Pty Ltd v Byron Shire Council [2007] NSWCCA 13*, the Court of Criminal Appeal considered this test. That case dealt with an appeal from a magistrate to the Land and Environment Court. Talbot J then stated a case to the Court of Criminal Appeal. The Court was considering section 70 of the *Crimes (Local Court and Appeal Review) Act 2001*. Section 70 is in effect the same as sections 117 and 214 of the *Criminal Procedure Act* but relates to appeals from the Local Court.

In *Cliftleigh* the appellant company had been found not guilty of crushing cars and thereby causing pollutants to discharge into the ground and cause water pollution. It had been alleged that the company had engaged in such conduct between particular dates. During the course of the investigation, the appellant company had asserted to the Council that no authorised person was on the site at the relevant times and that, further more, the principal of the company had an alibi.

Hodgson JA found that the Council officers had failed to investigate the matter properly in that they failed to ask a relevant witness about his observations of the site and of any employees at the relevant times. His Honour said that whether or not it was reasonable to rely on a circumstantial case before the appellant company's assertion, it was arguably no longer reasonable after the assertion was made and there was a witness, not connected with the company, who may have been able to give direct evidence on the point. It is important to note that the witness was not called and therefore it was not known what he may have said in evidence.

Hodgson JA went on to say at [21]:

"I do not think it is necessary for the person seeking costs in every case to show that an investigation conducted in a reasonable manner would have suggested that the appellant might not be guilty or that the proceedings ought not to be brought. If a prosecutor knows there are five eye-witnesses to an event, and interviews and calls only one of them, and the prosecution then fails, I think s.70(1)(a) may apply even if the person seeking costs does not prove what the other four witnesses would have said. Similarly,…if the prosecutor knows there is an eye-witness to what happened, but does not interview this witness, and instead relies on a circumstantial case, in my opinion s.70(1)(a) may be satisfied even if the person seeking costs does not prove what the eye-witness would have said."

The Court also considered the failure to investigate the alibi of the company's principal. Hodgson J, with whom the rest of the Court agreed, found that the failure to investigate the alibi did not as a matter of law necessitate a conclusion that the investigation was unreasonable. His Honour said at [23]:

"Any requirement for the prosecution to disprove alibis beyond reasonable doubt only arises if there is evidence capable of raising a reasonable doubt as to whether an accused was elsewhere at the time of the offence; and mere assertion by an accused person that there is an alibi is insufficient for this."

In *De Varda v Constable Stengold (NSW Police) [2011] NSWSC 868* Davies J considered *Cliftleigh* and at [31] said:

"In relation to s 214(1)(a), therefore, that paragraph can be satisfied without proof of what an uncalled witness would have said. It is enough that, if the prosecution interviews and calls fewer than the available eye-witnesses, s 214(1)(a) may apply. A fortiori, if the witness who was not interviewed and called would have thrown a different perspective on the matter, the paragraph may apply."

His Honour went on to say at [32]:

The question to have asked was not whether interviewing and calling Paris would have made a difference to the way the trial would run, but whether the failure to do so meant that the

investigation was conducted in an unreasonable or improper manner. Further, when the statement of Paris provided strong support for what the Plaintiff had said to police at the outset (that the Complainant had deliberately cut herself), His Honour should have considered whether the investigation was unreasonable in terms of para (c). That may have been by asking himself what difference it would have made, not to the way the trial would run, but to whether the Plaintiff might not have been guilty or that the proceedings should not have been brought.

In *Eslarn Holdings Pty Ltd v Tumut Shire Council (No 3) [1999] NSWLEC 163* the prosecution presented a circumstantial case alleging that the defendant had polluted waters contrary to the *Clean Waters Act 1970*. Lloyd J of the Land and Environment Court dealt with the matter as an appeal from the magistrate.

His Honour found that *"there were other rational inferences consistent with the facts and which were also consistent with the appellant's innocence which the prosecution had not negatived, so that the guilt of the appellant was not the only rational inference to be drawn therefrom."*

This led to the defendant being acquitted.

His Honour observed that there had been a failure to investigate the other reasonable hypotheses which were available to explain the source of the pollution. Accordingly the unreasonable or improper investigation test had been satisfied.

This is a useful case for cost applications in circumstantial cases, or cases which depend on the drawing of an inference, in which the charge has been dismissed on the basis that other rational inferences consistent with innocence were available.

In *R v Reed [1980] 1 NZLR 758*, the trial judge, Mahon J of the High Court of New Zealand, considered a cost application pursuant to the New Zealand *Costs in Criminal Cases Act*. A consideration as to whether costs ought to have been awarded was whether "generally the investigation into the offence was conducted in a reasonable and proper manner".

In *Reed*, the accused was interviewed by police but the police failed to promptly investigate the presence or otherwise of the accused's fingerprints on some wrapping and magazines in which heroin had been hidden and posted to New Zealand. The accused was not charged for eight months and only after the fingerprint investigation was conducted. The accused was acquitted. The delay in conducting the fingerprint examination caused serious obstacles for the prosecution.

His Honour was therefore not satisfied that the investigation was conducted in "a reasonable and proper manner."

(b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,

The meaning of whether proceedings are instituted "without reasonable cause" was considered in the context of an Industrial Case in *Canceri v Taylor (1994) 123 ALR 676*. Mr Canceri discontinued proceedings for unlawful termination of his employment. Taylor applied for an order for costs. The powers of the Industrial Relations Court of Australia were limited.

Justice Moore was required to determine whether the proceedings were instituted without reasonable cause. In determining that issue Justice Moore adopted the approach of Justice Wilcox in *Kanan v Australian Postal and Telecommunications Union (1992) 43 IR 257 at 264*. Justice Wilcox said;

> *"It seems to me that one way of testing whether a proceeding is instituted "without reasonable cause" is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceedings, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being "without reasonable cause". But where, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks reasonable cause".*

The question as to whether at the time the proceedings were initiated there were no prospects of success is a question to be determined as a matter of objective fact. *Halpin v Department of Gaming [2007] NSWSC 815 at [58].*

In *Burns v Seagrave [2000] NSWSC 77*, an appeal against a magistrate's decision, the fact that there was a prima facie case was significant in deciding not to grant a certificate.

In *V (a child) v Constable Joshua Hedges [2011] NSWSC 2011* the decision in *Burns* was applied. The case does lend support to the view that in a case in which the prosecution evidence appears to be honest and reliable, and there is a prima facie case, it will be difficult to satisfy section 214(1) (b).

In *Eslarn Holdings Pty Ltd v Tumut Shire Council (No 3) [1999] NSWLEC 163* Lloyd J applied the test of Wilcox J in *Kanan* although he found that in that particular case it could not be said that the prosecution had no substantial prospects of success and rejected the cost application on that point. Costs were however awarded on another basis.

In *Inspector Morgenthal v Johnston's Transport Industries Pty Ltd [2005] NSWCIMC 173*, the Chief Industrial Magistrate also adopted the test set out by Wilcox J in *Kanan*. His Honour went on to refuse an application for costs on the basis that the dismissal of the charge was based on his preference for the evidence of defence witnesses, including an expert witness, over the evidence of the prosecution witnesses. It was not a case in which the prosecution was without merit.

In *JD v DPP [2000] NSWCA 1092 at [28]* Hidden J in obiter commented on the issue of whether the proceedings were initiated without reasonable cause. His Honour suggests that this question should be answered with "reference to the quality of the evidence that the police had gathered, with an eye not only to the enquiries which had been made but also to those which should have been made."

In *Turner v Randall; Ex parte Randall [1988] 1 Qd R 726*, the defendant had been charged with doing an act calculated to harass a person whilst "performing duties " connected with the supply of electricity. The prosecution failed as the prosecutor conceded that they did not have evidence to prove an essential part of the charge. There was no evidence from any of the electricity company employees. The inability to prove an element of the offence did not depend on issues of credit or balancing of issues. Accordingly an order for costs was made.

In *Turner*, the Court said at p 730, *"it is not possible to act with utmost propriety while making an arrest that cannot be sustained on the evidence that may be presented."*

In the New Zealand case of *R v Boyd (1984) 2 DCR 372*, a prosecution against a police officer, although initially brought in good faith, was found not to have been continued in good faith. The prosecution had continued with the proceedings so that the court and not the police would make the decision on the charges. The reason that the prosecution had taken this course was because the accused was a police officer.

Returning to the New Zealand case of *R v Reed [1980] 1 NZLR 758*, Mahon J found that the police had made an agreement with the accused not to charge him so long as he co-operated with the police in an attempt to get evidence against a major suspect. The police broke their undertaking by charging the accused. His Honour left open the question as to whether the charging of the accused in such circumstances meant that the police had not acted "in good faith in bringing and continuing the proceedings."

(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

This provision similarly to (a) relates to the conduct of the investigation.

In *Southon & Ors v Gordon Plath [2010] NSWCCA 292* Beazley J (with who the court agreed), in considering an identical provision, said:

"s 257D(1)(c) does not provide an entitlement to costs merely because one expert trumps another, or where one aspect of the evidence is found to be unmaintainable either because of contrary evidence given by the defence, or because the prosecution evidence has been effectively undermined in cross-examination."

Returning to the case of *Cliftleigh Haulage Pty Ltd v Byron Shire Council [2007] NSWCCA 13* Hodgson JA was not satisfied that the failure to interview the eye-witness satisfied this criteria as it could not be said that the evidence suggested that the defendant might not be guilty, it not being known what the witness would have said.

As earlier noted, in *Eslarn Holdings Pty Ltd v Tumut Shire Council (No 3) [1999] NSWLEC 163*, Lloyd J was satisfied that the failure to investigate other reasonable hypotheses consistent with innocence was sufficient to satisfy criteria (a). His Honour was satisfied that the failure by the prosecution to exclude other rational hypotheses consistent with innocence was also sufficient to satisfy this criterion.

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs.

In *Halpin v Department of Gaming [2007] NSWSC 815* Hall J said:

The expression "exceptional circumstances" is a broad one. Without it being necessary to define its outer limits, the question essentially is whether or not there was any relevant conduct by the prosecutor which would make it "just and reasonable" to award costs in favour of the plaintiff.

In *Fosse v DPP [1999] NSWSC 367*, Woods CJ at CL considered the "exceptional circumstances" criteria and said at [30]:

"The defence had to establish something about the conduct of the proceedings being an 'exceptional circumstance' other than some matter mentioned in subss (a)(b) or (c)…to make it

just and reasonable for the plaintiff to have his costs. In that regard the mere fact that the proceedings were resolved in his favour was not enough. There had to be something in relation to the manner in which the proceedings were conducted that led to it being just and reasonable for a costs order to be made."

In *ASIC v Farley (2001) 51 NSWLR 494*, Farley had been charged with market manipulation contrary to the Corporations Law. The information was prosecuted summarily and dismissed by the magistrate. Mr Farley had also been banned by the AAT from carrying on a stoke broker's business. In awarding costs on the basis of "exceptional circumstances" the learned magistrate took the view that the instituting and maintaining of the prosecution was "persecution" of the defendant.

In *Farley,* Sperling J agreed with the construction of the legislation as stated by Wood CJ in CL in *Fosse* and extracted above. His Honour accepted that prior events to the prosecution may be relevant in providing a context to the criminal proceedings. However in order for there to be "exceptional circumstances" there must be something in the manner in which the proceedings were conducted for it to be just and reasonable for a costs order to be made. His Honour found that there was no basis to make such a finding.

In *Dong v Hughes [2005] NSWSC 84* the Commonwealth DPP Dong had been charged with a conspiracy to defraud the Commonwealth. The proceedings concluded with the CDPP offering no evidence. A costs application was made but refused by the magistrate. Mr Dong appealed to the Supreme Court on a matter of law. During the course of the proceedings in the Local Court the CDPP had given an undertaking, and the court had ordered, that particulars be provided prior to the committal hearing. They failed to do so. It was argued that the failure to provide the particulars justified an order for costs.

Levine J rejected this argument. In the circumstances of the case, where the particulars became unnecessary given that no evidence was offered, and there was a multi-volume brief, His Honour was not persuaded that the CDPP acted other than reasonably. His Honour said at [25]:

"this conduct is quite insufficient to attract, by itself, any one of the relevant criteria."

His Honour was referring to the four criteria, of which one must be satisfied in order to give jurisdiction to award costs against a public informant. This includes the "exceptional circumstances" criteria. Later in His Honour's judgement, further consideration is given to the meaning of "exceptional circumstances". His Honour considers whether the fact that the defendant gave an exculpatory version to investigators, combined with failure by the Crown to offer evidence, satisfied a finding of "exceptional circumstances relating to the conduct of the proceedings."

His Honour refers to what was said by Wood CJ at CL in Fosse, and extracted above, and goes on to say at [48]:

> *"The phrase "exceptional circumstances" means what it says as a matter of ordinary English I would have thought. …something of substance is required… Mere proffering of no evidence is not enough. Nor is mere reliance on exculpatory statements of the plaintiff. Neither is remarkable in itself nor in combination. Here there is nothing more that does constitute "exceptional circumstances."*

In *Workcover v Lubo Zivanovic [2002] NSWCIMC 86*, the Chief Industrial Magistrate was satisfied that the failure to offer evidence with no explanation given for the decision not to proceed, was sufficient to satisfy the test of "other exceptional circumstances." His Honour's view may have been different if he had had the benefit of Justice Levine's decision in *Dong v Hughes.*

In *Inspector Steve McMartin v Moltoni Adams [2005] NSWCIMC 183*, the successful prosecution of one of the charges depended on a point of law. The Court held that this point of law basically had no merit, and that the defendant had pointed this out to the prosecutor prior to the hearing. Consequently this was sufficient to satisfy the "exceptional circumstances" criteria.

In *Inspector David Clyant v Allan Wood [2002] NSWCIMC 59*, the Chief Industrial Magistrate was satisfied that the failure to interview the defendant, in order to obtain his version of the incident, prior to prosecuting him, combined with the failure to prosecute another party, was sufficient to satisfy "exceptional circumstances."

In *Inspector Stephen Charles v Electrical Maintenance [2002] NSWCIMC 26*, the defendant had written to the prosecution explaining that they could make out a defence, which the defendant had to prove on the balance of probabilities. The prosecution rejected the representations and in due course the defendant established the defence and the charge was dismissed. The Chief Industrial Magistrate found that this did not satisfy "exceptional circumstances."

JUDICIAL DISCRETION

Even if the Magistrate is satisfied that one of the four factors has been established by a successful defendant, the Court retains a discretion whether to make an order for costs. This discretion also applies to the award of costs against an unsuccessful defendant.

In *Barry Graham Fairlie v Magistrate Ross Sterland and anor [2004] NSWSC 1001*, the defendant had been charged with offensive language towards a police officer. In acquitting the defendant the magistrate rejected the evidence of the Police Officer and accepted the contrary evidence of an independent civilian witness. An application for costs was made on the basis that the proceedings were initiated without reasonable cause or in bad faith. The Magistrate refused the application on the basis that the independent witness did not provide a statement to the prosecution and if they had have had one then the proceedings may have been reconsidered.

The defendant sought relief in the Supreme Court in the nature of certiorari. In the course of his judgement Hislop J said at [25]:

> *"It appears clear from the decision in Latoudis that matters such as the non-disclosure to investigatory police of evidential material which may have a substantial impact on the prosecution case may provide a legitimate basis for refusing a defendant's costs application."*

His Honour's reference to *Latoudis* was a reference to what McHugh J said (at 69-70). McHugh J said:

> *"Speaking generally, before a Court deprives a successful defendant in summary proceedings of his or her costs, it will be necessary for the informer to establish…that the conduct of the defendant occasioned unnecessary expense in the institution or conduct of the proceedings…Thus, non-disclosure to investigatory police of a tape recording later successfully used in cross-examination of the informant's witnesses may be a relevant matter to be taken into account in determining whether the defendant should be awarded costs."*

Likewise in Latoudis, Toohey J said:

> *"Now , in a particular case there may be good reasons connected with the prosecution such that it would not be unjust or unreasonable that the successful defendant should bear his or her own costs or, at any rate, a proportion of them… if a defendant has been given the opportunity of explaining his or her version of events before a charge is laid and refused the opportunity, and it later appears that an explanation could have avoided a prosecution, it may well be just and reasonable to refuse costs….Again, if the manner in which the defence of a prosecution is conducted unreasonably prolongs the proceedings, for instance by unnecessary cross-examination, neither justice nor reasonableness demands that the successful defendant be indemnified, at any rate, as to the entirety of the costs incurred."*

In *Fairlie* Hislop J found that there was no error in the exercise of magistrate's discretion in refusing costs.

It is clear that even when one has satisfied one of the four criteria the Court retains a discretion. In the exercise of this discretion the judgement in *Latoudis* is authority as to how this discretion ought to be exercised. The conduct of the defendant both during the investigation and the proceedings may have a significant bearing on whether the Court will

make an order for costs. The failure to disclose matters to the prosecution, which may have led to the prevention or termination of the prosecution, is a basis upon which costs may be refused.

A further illustration of the consideration of the discretion and the applicability of *Latoudis* is found in *Eslarn Holdings Pty Ltd v Tumut Shire Council (No 3) [1999] NSWLEC 163*. Lloyd J considered the conduct of the defendant in his dealings with the council officer. He found that the defendant hid nothing from the prosecutor and willingly cooperated in the investigation. There was none of the disentitling conduct referred to in Latoudis.

The decision of Higgins J in *Emanuele v Dau (1996) 87 A Crim R 417 at 424 - 429* is also useful. In this case there was no conduct which justified an order for costs not been made despite the defendant having put up a sham defence, which was rejected by the Court. The defendant was acquitted on another basis.

In *Southon & Ors v Gordon Plath on behalf of the Department of Environment and Climate Change [2010] NSWCCA 292*, Kirby and Johnson JJ at [81-85] were of the view that the holding back of an expert report operated strongly against being awarded costs.

COSTS AWARDED TO BE "JUST AND REASONABLE"

It is the usual course that the magistrate will hear submissions on quantum once they have determined whether an order for costs will be made. It is helpful to come to court with a prepared bill of costs to tender on the application.

As a tip, it is best to avoid advising the magistrate of the amount to be sought during the substantial application for costs. It really only becomes relevant once it is decided whether costs will be awarded.

Sections 213 (5), 215 (3) and 116 (3) requires the magistrate to specify the amount of professional costs payable. Accordingly, the Court cannot make an order that the costs be "as agreed or assessed". That does not prevent the parties on agreeing on quantum so that

the magistrate can then make an order for a specific amount. Sections 116 (2) and 213 (2) and 215 (1)(a) *Criminal Procedure Act* requires that the costs that are awarded are to be "just and reasonable".

In *Caltex Refining Co Pty Ltd v Maritime Services Board (1995) 36 NSWLR 552* the meaning of "just and reasonable" was considered in the context of costs pursuant to the *Land and Environment Court Act 1979*. Caltex pleaded guilty to contravening the *Marine Pollution Act 1979*. They were fined and ordered to pay $60,000 in costs. They appealed against the cost order on the basis that they were not just and reasonable.

The following principles emerge from the judgement of Sully J;

- For an order to be just and reasonable there must be both a fair hearing on the merits of the application for the order, and the terms of the final order must be reasonable in the circumstances of the case.
- The judge is entitled and bound to receive any relevant evidence presented in admissible form by any party wishing to be heard as to the terms of the final order.
- The judge is entitled to any other assistance lawfully available to him/her. This would include taxation of the bill of costs. The taxation is not to finally determine the issue but so as to provide assistance to the judge in determining the appropriate order, subject to submissions by the parties.
- The judge must make the costs order. It is not permissible for the judge to make an unquantified order leaving it to some other person or agreement by the parties to determine quantum.
- The judge must act judicially. An intuitive stab in the dark is neither just nor reasonable.

Sully J concluded that $60,000 was not "just and reasonable" and remitted the matter to the Land and Environment Court.

It is apparent from the wording of sections 116 and 213 that the above principles apply to the determination of costs pursuant to the *Criminal Procedure Act*. That is, the Magistrate must make an order quantifying the amount of costs.

"Professional Costs" are defined to mean costs (other than court costs) relating to professional expenses and disbursements (including witness expenses) in respect to proceedings before a court.

It would seem from the decision in *Ly v Jenkins (2001) 187 ALR 178*, that a wide scope will be given to the meaning of "professional costs". The real issue is whether they are "just and reasonable".

In *Ly v Jenkins* the defendants pleaded guilty to contravening the *Copyright Act 1968 (Cth)*. The informations were laid by NSW Police and involved the possession for sale of large quantities of videos and DVDs. The magistrate made an order for costs against the defendants which included substantial costs associated with the United States based film production companies preparing affidavits to prove ownership of the copyrights and also the cost of investigations in Australia. It was the award of these costs which were one subject of the appeal in the Federal Court.

Moore, Sackville and Kiefel JJ all delivered judgements in this matter. There is detailed reference to the history of the awarding of costs. What seems to emerge from the judgements is that;

1. The award of costs can include disbursements and expenses incurred in the preparation of the prosecution even if not directly incurred by the prosecutor. That is, expenses incurred by a third party. In this case, the preparation of the affidavits by the American corporations. (see Moore J at [13] and Sackville J at [134])

2. The award of costs can include costs associated with the investigation of the offence. (see Moore J at [41]. Although Sackville J appears to disagree at [133]. Kiefel J does not explicitly state a view but does not appear to challenge the validity of such costs being awarded.)

All three Justices agreed that the magistrate had not properly considered whether the costs were "just and reasonable" and therefore error was shown and the order for costs was remitted to the magistrate for further consideration. At [161] Kiefel J states that "just and reasonable" requires "that it be just in the outcome and reasonable in its terms."

The meaning of "reasonable legal expenses" was considered in *New South Wales Crime Commission v Heal and Fleming (1991) 24 NSWLR116* and the subsequent decision of Justice Studdart in *New South Wales Crime Commission v Heal and Fleming Supreme Court of NSW, unreported 21 December 1992*.

The issue of "reasonable legal expenses" was originally considered by Justice Matthews in this matter however on appeal it was ruled that she had insufficient evidence to come to a determination as to the quantum of "reasonable legal expenses". On appeal, the Court of Appeal confirmed that it was appropriate for the court to provide for rates of payment but it must be based on appropriate evidence.

His Honour Justice Gleeson, then of the NSW Supreme Court said

> *A primary factor affecting the reasonableness of the legal expenses for which provision is sought will be the market for legal services in which the client, as a consumer, is obliged to seek such services. Underlying the policy of s10 and s17 is a recognition that justice requires that persons accused of criminal offences, or confronted with a threat of forfeiture of their property, should not be unfairly deprived of the means of defending themselves, and it would be inconsistent with that recognition to adopt an approach to the question of reasonableness of legal expenses which had the practical consequence of depriving persons of the opportunity of obtaining proper legal representation.*

President Kirby identified the criteria that should be addressed when determining "reasonable legal expenses". One should approach these with caution as His Honour was dealing specifically with the *Drug Trafficking (Civil Proceedings) Act*, however I would suggest that the principles would have relevance to the issue of costs in criminal proceedings more generally. Some of the matters that His Honour stated were as follows:

- The right of an individual to secure private legal representation to contest applications for orders under the *Act* and to defend related criminal proceedings.
- The opinion as to what is "reasonable" or "unreasonable" on the part of the person affected, their legal representatives or other witnesses called by them on the issue may be relevant to, but cannot be conclusive of, this issue which remains ultimately for determination by a Judge.
- An application for bail is within the defence of a criminal charge.
- The determination will be made upon evidence which relates to the purposes for which the expenses are specified. It will also be decided upon the basis of the evidence (including any opinion evidence) which is placed before the Judge.
- Ordinarily, "reasonable" legal expenses of proceedings in the District Court will be lower than those in the Supreme Court. Likewise, those in the Local Court will be lower than those in the District Court. There may be cases where the special circumstances, the complexity of the case, the amount of property at stake or other considerations make a greater or a lesser provision appropriate as "reasonable legal expenses".
- The Legal Aid Commission scale, and the amounts which an "average" barrister or solicitor accepts as daily fees, will not be a sufficient basis to determine the "reasonable legal expenses" of a person under the *Act*. Average fees are set by market and other considerations.

The matter was remitted and dealt with by Justice Studdart. As a result specific rates that are said to be "reasonable" were established. The rates were agreed by the parties other than the rate for a senior solicitor. His Honour was required to determine that issue.

An illustration of a magistrates assessment of "just and reasonable" costs can be seen in *Workcover v Lubo Zinanovic [2002] NSWCIMC 86*. His Honour dismissed six charges against two defendants, whom had been represented by one legal team. Costs were awarded in relation to just one charge. His Honour proceeded to divide the costs by six representing one charge. His Honour then reduced the costs to a party/party basis and therefore reduced the solicitor's costs by 70%. His Honour was also of the view that the case was not so complex as to require senior and junior counsel.

With respect to His Honour's approach, it does not seem to me that the test of "just and reasonable" strictly requires that costs be paid only on a party/party basis. In *Caltex v MSB*, referred to above, Sully J agreed with the lower court judge that the fact that a bill was prepared on a client/client basis was a basis to reduce the gross figure. However, His Honour did not say that "just and reasonable" required an assessment on a party/party basis.

Ultimately, the question is what is "just and reasonable" in the circumstances of the case.
It has been said that there is power to award costs on a partial basis. *(Port Macquarie-Hastings Council v Lawlor Services Pty Ltd [2008] NSWLEC 75)*

Two Counsel

In *Stanley v Phillips (1966) 115 CLR 470* the High Court considered the meaning of a Victorian Court Rule which allowed costs "as appear…necessary or proper for the attainment of justice or for defending the rights of any party". The issue was whether the case justified the payment of costs to both senior and junior counsel. It was a civil case.

During the course of his judgement Barwick CJ said:

> *"As the question is whether the presentation of a case to ensure a just determination reasonably requires the services of more than one counsel, it is the nature and circumstances of the case which provide the determinants. The matter cannot as a general rule be determined by reference to the court in which the proceedings are taken, though the position of that court in the hierarchy of a judicial system may well be such that only cases of a complicated nature are generally litigated before it."*

…..

The question for the taxing officer is whether the case by reason of any of its features, the volume of material to be handled, the number or character of the witnesses to be examined, the nature or extent of the cross-examination required, the anticipated length of the case, the complexity of its issues of fact or of law, the extent of the preparatory research of fact or of law to be undertaken, the involvement of charges of fraud, or other serious imputations of personal reputation or integrity, the complexity of the required presentation and so on, make it reasonably necessary or proper that the services of two counsel be engaged in order that the court may do justice between the parties."

His Honour's reference to "charges of fraud or other serious imputations of personal reputation or integrity" is particularly relevant to criminal proceedings. It is difficult too suggest that any criminal charge does not impact upon the reputation or integrity of the defendant.

In *Bailey v Wallace [1970] VR 109* a charge contrary to the *Water Act 1958 (Vic)* was dismissed in the Court of Petty Sessions. The Magistrate found that it was a proper case for the employment of senior counsel, along with junior counsel. Menhennitt J of the Supreme Court of Victoria rejected a submission that the costs of employing senior counsel in the Court of Petty Sessions should never be allowed.

His Honour said at p 118:

"Having regard to the nature and circumstances of the case including its importance, the possible far reaching consequences to the defendant and its difficulties,…it was reasonably open to the magistrate to decide that the case warranted and justified the employment of senior counsel…"

His Honour's reference to the consequences for the defendant is important. In this day and age, in which the Local Court is called upon to deal with more and more serious matters, including the imposition of custodial sentences, it follows that the awarding of costs for senior counsel can be readily be made.

Reducing Costs Due to Defence Conduct

In *Emanuele v Dau (1996) 87 A Crim R 417* the defendant was successful in the ACT Supreme Court in an appeal against his conviction in the Magistrates Court of offering a bribe to a public servant. The hearings in the Magistrate's Court and the Supreme Court were lengthy. Higgins J was required to make an assessment of costs. His Honour reduced the award of costs to take into account the unnecessary waste of court time caused by the defendant's insistence that recorded conversations were played rather than relying on the transcripts, the contents of which were not in dispute. The playing of the tapes took 12 days. His Honour said that the defendant should also not have costs for unreasonably caused adjournments and wasted court time.

At p 429 Higgins J said:

> *The defendant has no duty of disclosure but the prosecution must disclose all relevant material. Nevertheless, the public interest in the efficient conduct of criminal litigation warrants some denial of costs to a successful defendant who wastes the time of the court whether by lack of reasonable cooperation or by pursuing unarguable points or any other time-wasting conduct after due allowance for proper forensic objectives."*

His Honour accepted that it was an appropriate case for senior and junior counsel.

Costs of a Previously Aborted Hearing

In *Hanna & Anor v Horler & Anor [1999] NSWSC 1159*, the Magistrate initially hearing a committal hearing was required to disqualify himself. Magistrate Horler then conducted the committal hearing relying substantially on the transcript from the earlier hearing before the now disqualified magistrate. Magistrate Horler discharged the defendant and made an order for costs. However she declined to award costs in relation to the proceedings conducted before the earlier magistrate. Her reason for doing so was that the earlier committal was "a different committal", and she therefore lacked jurisdiction to make an order in relation to costs for the earlier committal.

The defendant sought relief in the Supreme Court. Simpson J found error in the magistrate's reasoning and said at [16]:

> *"In my opinion the answer to this question lies in a simple analysis of s 41A(1). [Now section 116] That section provides for an award of costs following an order discharging a defendant "as to the information then under inquiry." The magistrate is empowered to order the payment of "such costs as …seem just and reasonable". In my opinion there is nothing in that section which deprives the magistrate of the power to award costs which include the costs of an aborted hearing. They are the costs relevant to the prosecution of the information on which the defendants have been discharged."*

Her Honour went on to say that "such a construction has the advantage of being consonant with notions of ordinary justice."

It is true that Her Honour was considering the issue in relation to the specific legislative provisions for committal hearing and relied somewhat upon the words "as to the information then under inquiry." However it does not seem to me that much falls on those words and that the same principle should apply to summary trials.

APPEALS AGAINST COST ORDERS

Section 23 (2) *Crimes (Local Courts Appeal and Review) Act 2001* provides for appeals by the prosecution against an award for costs made against a prosecutor in a summary or committal hearing.

A successful defendant has no such right of appeal to the District Court against a decision not to award costs in their favour. Any "appeal" would have to be of a kind seeking relief from the Supreme Court. This will require a point of law.

LEGAL AID

Just because one is representing a client on Legal Aid one should not disregard a cost application.

It is also important to note section 42 of the *Legal Aid Commission Act 1979* that states as follows:

> *A court or tribunal which may order the payment of costs in proceedings before it shall, where a legally assisted person is a party to any such proceedings, make an order as to costs in respect of the legally assisted person as if he or she were not a legally assisted person.*

One should also bear in mind the comments of Chief Justice Mason in *Latoudis v Casey* at [15] on this point.

> *"The availability of legal aid might be regarded as a possible reason for refusing to award costs. But no court can assume that a particular defendant is entitled to, or is in receipt of, legal aid. In any event the courts have traditionally made orders for costs without regard to considerations of that kind."*

Therefore, it appears that, having regard to section 42 of the *Legal Aid Commission Act*, the fact that one is on legal aid is not a relevant consideration in determining whether costs should be awarded. It seems to me that it should also not bear on the issue of what costs are "just and reasonable".

However I acknowledge that the awarding of costs is designed to be compensatory and not punitive and it is unclear how section 42 of the *Legal Aid Commission Act* operates in light of this long established principle.

THE COSTS IN CRIMINAL CASES ACT 1967

An Overview

The *Costs in Criminal Cases Act* was enacted in 1967. It is a cost provision which has application in all courts. It is not restricted to the Local Court.

In the Second Reading Speech in the Legislative Council on 14 March 1967 it was said that the:

> *"aim is to protect the good citizen unjustly accused and to relieve him of the responsibility of paying an indirect fine by way of costs on his acquittal, and at the same time the public is protected from having to pay for every acquittal whatever the circumstance."*

More recently McColl JA in *Mordaunt v DPP [2007] NSWCA 121* at [64] said that the purpose of the *Act*:

> *"is to ensure an objective review of the criminal prosecution upon which a person was ultimately acquitted, discharged or had his or her conviction quashed in order to determine whether, in all those circumstances, it was not reasonable that that person should have been exposed to the proceedings in the first place."*

The *CCC Act* says nothing about the awarding of costs to the Crown against an unsuccessful defendant. It is solely concerned with the awarding of costs to a successful defendant against the Crown. Strictly speaking, the *CCC Act* does not provide for the awarding of costs to a successful party. It provides for the awarding of a certificate.

As Kirby P said in *Frazer v The Queen (No 2) (1985) 1 NSWLR 680* at 683:

> "..the Costs in *Criminal Cases Act* does not permit the court to award costs against the Crown. It simply permits a certificate to be granted."

On receipt of that Certificate the applicant can then make an application to the Director-General for payment from consolidated revenue.

In *Solomons v Distrct Court (NSW) (2002) 211 CLR 119* the majority of the High Court said that the granting of a certificate under section 2 is the:

> *"necessary precondition for the exercise by a state official of the discretions conferred by section 4, the favourable exercise of which may result in the making of a payment from the Consolidated Fund of the State."*

And in *Fraser v The Queen (No 2) (1985) 1 NSWLR 680* at 687 McHugh JA said that:

> *"the granting of the certificate merely acts as a recommendation to the Treasurer who has a discretion whether or not to pay."*

Since its introduction the *Act* has been amended on a number of occasions. Some of those amendments have been subtle but significant. When making an application for a certificate it is important to ensure that one has the most up to date version of the *Act*. Much of the case law deals with the *Act* in a slightly different form and amendments have been made as a direct response to problems and curiosities that have been identified by the courts in reported cases.

For convenience I have attempted to approach the legislation in parts. On analysis, the *Act* seems to throw up three questions;

1. Section 2- When can a certificate be granted?
2. Section 3- What must the Court be satisfied of in order to grant the certificate?
3. Section 3A- What are the relevant facts that the court may rely on in considering whether it is so satisfie

WHEN CAN A CERTIFICATE BE GRANTED?

A Certificate cannot be given in respect of Commonwealth Offences

Before moving on to the terms of section 2 of the *Costs in Criminal Cases Act*, it is important to note that the *Act* does not apply to Commonwealth offences. A NSW Court is not empowered to grant a certificate under the Costs in *Criminal Cases Act* in respect of a prosecution of Commonwealth Offences. (*Solomons v District Court (NSW) (2002) 211 CLR 119*)

The effect of section 29(2) of the *Corporations (NSW) Act* is that offences contrary to the *Corporations Law* of New South Wales are taken to be offences against the law of the Commonwealth and therefore a cost certificate cannot be granted in relation to them. (*Kruse v Commonwealth Director of Public Prosecutions [2001] NSWCA 59*.

Legal Aid

It has been held that it is no impediment to the bringing of an application that the defendant is represented by Legal Aid. (See section 42 of the *Legal Aid Commission Act 1979* and *R v Carrick [2003] NSWSC 313* per Buddin J at [6].)

However the application of section 42 of the *Legal Aid Commission Act* to the *Costs in Criminal Cases Act* is at least arguable given what has been said by Kirby P in *Frazer* and by Hoeben J in *DPP v Howard [2005] 64 NSWLR 139* in that the granting of a certificate is not an order for costs.

Section 2 *Costs in Criminal Cases Act* 1967

Section 2 sets out circumstances in which a certificate may be granted. It provides as follows:

2 Certificate may be granted

(1) The Court or Judge or Magistrate in any proceedings relating to any offence, whether punishable summarily or upon indictment, may:

(a) where, after the commencement of a trial in the proceedings, a defendant is acquitted or discharged in relation to the offence concerned, or a direction is given by the Director of Public Prosecutions that no further proceedings be taken, or

(b) where, on appeal, the conviction of the defendant is quashed and:

(i) the defendant is discharged as to the indictment upon which he or she was convicted, or

(ii) the information or complaint upon which the defendant was convicted is dismissed,

grant to that defendant a certificate under this Act, specifying the matters referred to in section 3 and relating to those proceedings.

(2) For the avoidance of doubt, a certificate may be granted in accordance with subsection (1) (a) following an acquittal or discharge of a defendant at any time during a trial, whether a hearing on the merits of the proceedings has occurred or not.

*(3) In this section, **trial**, in relation to proceedings, includes a special hearing conducted under section 19 of the Mental Health (Forensic Provision) Act 1990 and also includes preliminary proceedings that form part of the trial, for example, a voir dire.*

In *Fraser v The Queen (No 2) (1985) 1 NSWLR 680* at 689 McHugh JA commented that the terms of section 2 of the *Costs in Criminal Cases Act* were "very curious". His Honour was referring to the terms of s 2(a), as they then stood, which provided for the granting of a certificate after discharge or acquittal as to the **information** then under enquiry. It did not explicitly provide for the granting of a certificate after an acquittal by a jury after a trial on **indictment**.

In *Fraser,* McHugh J was prepared to construe the term "information" to include "indictment" for the purpose of the *Act*. This curiosity has been rectified by amendment to s 2(a) of the *Act* so that no reference is made to "information" or "indictment" but rather use is made of the more general expression "in relation to the offence concerned." The earlier wording of section 2 has been the cause of much judicial consideration. It was considered in cases such as *Fraser v The Queen (No 2) (1985) 1 NSWLR 680, Allerton v DPP (1991) 24 NSWLR 550, Nadillo v DPP (1995) 35 NSWLR 738*. The wording of the section now seems to have clarified some of the earlier curiosities.

The opening words of section 2(1) are wide. The granting of a certificate may be made by a Judge, or Magistrate and in any proceedings related to any summary or indictable offence. The word "Magistrate" replaced "Justice or Justices" in 2001. It has been held that a judicial officer of a court, other than the judicial officer before whom the proceedings were conducted, has jurisdiction to determine an application for a certificate. (*R v Manley [2000] NSWCCA 196* per Simpson J, with whom Wood CJ at CL agreed).

However it is preferable that the application be determined by the judicial officer before whom the original proceedings were determined or by the same judicial officers that sat on the Court of Criminal Appeal. *R v Manley [2000] NSWCCA 196* per Wood CJ at CL at [4].

It has been suggested that the use of the words "The Court" at the commencement of the section is intended to provide for the appellate court as contemplated in section 2(b). (see *Allerton v DPP (1991) 24 NSWLR 550 at 555*)

The terms of section 2 that then follow restrict the circumstances in which a certificate may be granted. Section 2 (1)(a) deals with trials and section 2 (1)(b) deals with appeals. It follows that when one is considering making an application then one must determine whether the proceedings fall within the terms of section 2 (1)(a) or 2 (1)(b). If they are at first instance then section 2(1)(a) will apply. If they are an appeal then section 2(1)(b) will apply.

Section 2 does not apply to a review of bail. *DPP v Donaczy and Anor [2007] NSWSC 923* at [10].

TRIALS- SECTION 2 (1)(a)

1. A Trial Must Have Commenced

In 2001 section 2(1)(a) of the *Act* was amended so that a certificate could be granted "after the commencement of a trial". Prior to 2001 it could only be granted when there had been a "hearing on the merits." For a discussion of what was considered a "hearing on the merits" see *R v Turner [1980] 1 NSWLR 19 and Nadillo v DPP (1995) 35 NSWLR 738*.

What is a trial?

Section 2 (3) gives an extended meaning to the word "trial" so that it is clear that it includes preliminary proceedings such as a voir dire. Therefore, it is not predicated on the empanelling of a jury.

A committal is not a trial

But a trial does not include a committal hearing. A certificate cannot be granted on the discharge of a defendant at committal.

In *DPP v Howard [2005] 64 NSWLR 139* Howard was discharged at committal having been charged with aggravated sexual assault. The Magistrate awarded a certificate. The DPP appealed. The issue was whether the wording of section 2 was such that a committal proceeding was incorporated into the expression "trial".

Prior to 2001 there was no issue that a certificate could be given on the discharge at committal. Before 2001 the *Act* provided for the granting of a certificate when there had been a "hearing on the merits". That was taken to include a committal.

In 2001, section 2(1)(a) of the *Act* was amended to provide for the granting of a certificate "after the commencement of a trial". In *Howard* Hoeben J found that "trial" does not include committal hearing. Therefore the Magistrate had no power to award a certificate.

His Honour also said:

- "The concept of trial is not restricted to trial by judge and jury but means a final and conclusive hearing… such as also occurs in summary proceedings before a magistrate or criminal proceedings before a judge sitting alone. It does not include committal proceedings." (p146)

- The reference to "preliminary proceedings that form part of the trial" in section 2(3) does not include committal proceedings." (p147)

- The certificate can cover the costs of committal proceedings as long as the trial has actually commenced and one of the events referred to in the section has occurred. (p146)

- An order granting a certificate "is not an order for costs against a prosecutor." Accordingly there lay no right of appeal to the Supreme Court pursuant to s 56 and 59(2) of the *Crimes (Appeal and Review) Act 2001*.

Applying that principle it is at least arguable that there is no avenue of appeal for the prosecution by way of s23(2) of the *Crimes (Appeal and Review) Act 2001* to appeal to the District Court against the awarding of a certificate in a summary proceedings.

This view is supported by the comments of Kirby P in *Frazer v The Queen (No 2) (1985) 1 NSWLR 680* at 683 where His Honour says "...the Costs in Criminal Cases Act does not permit the court to award costs against the Crown. It simply permits a certificate to be granted."

When does a trial commence?

This issue was addressed by Buddin J in *R v Carrick [2003] NSWSC 313*.

Carrick was charged with murder. In order to allow negotiations to occur an indictment for murder was never presented and accordingly the applicant was never arraigned for murder. The judge was never required to make any preliminary rulings and only engaged in case management. Negotiations took place which resulted in the presentation of an indictment alleging a number of offences of violence but not murder or manslaughter. On pleading guilty to these charges the DPP "no billed" the murder charge. Having pleaded guilty to other charges the applicant sought a certificate in relation to the murder charge.

The issue was whether a trial had commenced for the purpose of section 2(1)(a). The commencement of a trial is a prerequisite to the granting of a certificate pursuant to s2 (1)(a).The Crown submitted that a trial only commenced on the presentation of the indictment and the arraignment of the accused. Although Buddin J did not specifically adopt

the Crown's submission as the test, His Honour found that the case management function he had prior to the arraignment of the accused could not be considered preliminary proceedings forming part of the trial as referred to in s2(3) of the *Act.*

The preferable view would seem to be that a trial commences on the presentation of the indictment and the arraignment of the accused.

2. Proceedings Must Have Concluded Favourably To The Defendant

In order to grant a certificate the defendant must be acquitted or discharged, or a direction given by the DPP that there be no further proceedings.

The terms of the *Act* make it clear that it has no application in cases where the proceedings have been adjourned or a trial aborted but are still on foot. The *Act* is concerned with circumstances in which the proceedings have been concluded, and have been concluded in favour of the defendant.

The section was amended in 2002 to make it clear that a certificate can be issued when there is a "no bill" by the DPP. There is no specific provision for granting a certificate if charges are withdrawn in the Local Court by the police or for that matter by any other government agency. However section 2(2) makes it clear that a certificate can be granted after an acquittal or discharge even though there has not been a "hearing on the merits".

A defendant in the Local Court is arguably discharged when a charge is withdrawn and dismissed. A defendant acquitted by a directed verdict or discharged after no evidence is offered will fall within the terms of section 2(2).

APPEALS- SECTION 2(1)(B)

Section 2(1)(b) provides for the granting of a certificate by an appellate Court. The conviction must be quashed. If the conviction was on indictment then the defendant must have been discharged. Therefore, an order for a retrial will not suffice. If the conviction was on an

information or complaint then it must be dismissed. That is most likely going to be a conviction in the Local Court quashed in the District Court.

In *Fraser* McHugh J was of the view that the words "information or complaint" in s 2(b)(ii), is confined to informations and complaints under the then *Justices Act 1902.*

WHAT MUST THE COURT BE SATISFIED OF IN ORDER TO GRANT THE CERTIFICATE?

Section 3- An Overview

It is inferred from the wording of section 2 that in order to grant a certificate the Court must be satisfied of the matters specified in section 3. Section 3 provides as follows:

3 Form of certificate

(1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the certificate:

(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, and

(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

The task which the Court is called upon to perform pursuant to section 3 was stated by Simpson J in *R v Johnston [2000] NSWCCA 197* at [16].

> *i) an evaluation of all of the evidence as it emerged at trial;*
> *(ii) an assumption that all that evidence was available to the prosecution before the proceedings were instituted;*
> *(iii) a determination whether, if the prosecution had been in possession of all of that evidence, it would not have been reasonable to institute the proceedings;*
> *where it is concluded that, in those circumstances, it would not have been reasonable to institute the proceedings:*
> *(iv) a determination whether any act or omission of the accused contributed to the commencement of or continuation of the proceedings;*

and, where such an act or omission is found to exist:

(v) a determination whether that act or omission was, in the circumstances, reasonable.

Her Honour also noted at [*17] that:*

"having regard to the framing of the test contained in s 3(1)(a), the section imposes on an applicant an onus of establishing the facts that are to be stated in the certificate."

That is, the onus is on the applicant for the certificate.

In *R v Dunne* (12 August 1994, SC, Unreported) Hunt J neatly summarised the task as follows:

> *"As I understand the provisions of s3, I have to put myself in the hypothetical place of the prosecution possessed of knowledge of all the facts which have now become apparent, either at the trial or by way of additional evidence in the application, and I have to determine whether, with the knowledge gained from such an omniscient crystal ball, it would have been unreasonable to institute the prosecution. Where the applicant could have made those facts known to the Crown before the proceedings were instituted or continued, but did not, I must specify whether that act or omission was reasonable in the circumstances."*

THE RELEVANT FACTS AND SECTION 3A(1)

Mahoney JA in *Treasurer (NSW) v Wade* (Unreported, Court of Appeal, 16 June 1994) outlines a two step process in section 3(1)(a). The first step is what His Honour calls the "facts issue" and the second is the "reasonableness issue". We are dealing here with the "facts issue". Having regard to the terms of section 3(1)(a) the first step in the process is to establish what "all the relevant facts" are.

In *Chahal v DPP [2008] NSWCA 152* Ipp JA, said in delivering the majority judgement:

"All the reasonable facts", as this phase is used in 3(1)(a), are facts relevant to the reasonableness of the institution of the criminal proceedings."

In *Johnston*, Simpson J said that it involves all the evidence as it emerged at trial. That is, in considering the hypothetical question that is posed by section 3(1)(a), the Court has regard to all the evidence, including evidence called in the defence case. It is not only an examination of the prosecution case.

It is convenient at this point to deal with section 3A. Section 3A explains what is meant by "all the relevant facts" in section 3(1)(a). It also provides for the adducing of further evidence which may not have been adduced at the trial. Such further evidence can be adduced by the defence or the prosecution.

Section 3A was enacted, and subsequently amended over time, as a result of the uncertainty that existed in determining what are "all the relevant facts" for the purpose of section 3(1)(a).

There was also authority for the proposition that section 3A required that for an application to succeed there must have emerged at trial facts other than those established by the prosecution. In effect, facts that the defence sprung on the prosecution. (see *R v Williams (1970) 91 W.N (NSW) 145, R v Armstrong [1972] 1 NSWLR 559 and R v Turner [1980] 1 NSWLR 19).* This view has been rejected. (see *Allerton v DPP (1991) 24 NSWLR 550 at 559*)

It should be noted that the terms of section 3A were slightly different at the time of the decision in *Johnston* than they are today. Section 3A reads as follows:

3A Evidence of further relevant facts may be adduced

(1) For the purpose of determining whether or not to grant a certificate under section 2 in relation to any proceedings, the reference in section 3 (1) (a) to ***all the relevant facts*** *is a reference to:*

(a) the relevant facts established in the proceedings, and

(b) any relevant facts that the defendant has, on the application for the certificate, established to the satisfaction of the Court or Judge or Magistrate, and

(c) any relevant facts that the prosecutor, or in the absence of the prosecutor, any person authorised to represent the Minister on the application, has established to the satisfaction of the Court or Judge or Magistrate that:

(i) relate to evidence that was in the possession of the prosecutor at the time that the decision to institute proceedings was made, and

(ii) were not adduced in the proceedings.

(2) Where, on an application for a certificate under section 2 in relation to any proceedings, the defendant adduces evidence to establish further relevant facts that were not established in those proceedings, the Court or Judge or Magistrate to which or to whom the application is made may:

(a) order that leave be given to the prosecutor in those proceedings or, in the absence of the prosecutor, to any person authorised to represent the Minister on the application, to comment on the evidence of those further relevant facts, and

(b) if the Court, Judge or Magistrate think it desirable to do so after taking into consideration any such comments, order that leave be given to the prosecutor or to the person representing the Minister to examine any witness giving evidence for the applicant or to adduce evidence tending to show why the certificate applied for should not be granted and adjourn the application so that that evidence may be adduced.

(3) If, in response to an application for a certificate under section 2 in relation to any proceedings, the prosecutor or, in the absence of the prosecutor, any person authorised to represent the Minister on the application adduces evidence to establish further relevant facts that were not established in those proceedings, the Court or Judge or Magistrate to which or to whom the application is made may:

(a) order that leave be given to the defendant to comment on the evidence of those relevant facts, and

(b) if the Court or Judge or Magistrate think it desirable to do so after taking into consideration any of those comments, order that leave be given to the defendant to examine any witness giving evidence for the prosecutor or that authorised person.

Relevant facts extend to those discovered before arrest, or before committal, after committal and before trial, during the trial or afterwards admitted under section 3A. All those relevant facts are then considered by the Court. (*Allerton at 559-560)*

It has been held that considerations which go only to the discretion that exists in a prosecutor to decline to commence proceedings on humanitarian grounds are not relevant

to an enquiry under section 3 of the *CCC Act*. (See *Treasurer (NSW) v LKP* (Unreported, CA, 7 September 1993 per Gleeson CJ) It would seem to follow that such material does not come within the scope of "all the relevant facts" pursuant to section 3A.

"BEFORE THE PROCEEDINGS WERE INSTITUTED"

The next step in the process is for the Court to assume that it is the prosecutor, armed with "all the relevant facts" and it is before the institution of proceedings.

The"institution of proceedings "was discussed in *Allerton v DPP (1991) 24 NSWLR 551*. It means when the "criminal justice system was put in motion". This usually occurs by either by arrest, issuing of a warrant or issuing of a summons. It is not when the indictment is presented.

In *R v Krishna [1999] NSWSC 525*, the proceedings were taken to be instituted when the DPP notified the applicant of his intention to bring the charges.

THE REASONABLENESS ISSUE

Once the Court has put itself in this hypothetical situation it is then called upon to consider whether it would not be reasonable to institute proceedings? This is what Mahoney JA in *Treasurer v Wade* calls the "reasonableness issue".

In *Allerton v DPP (1991) 24 NSWLR 550* at 559 the Court stated:

> *As we read s 3(1)(a) the task of the court or judge, justice or justices in specifying their opinion is indeed to ask a hypothetical question … that question is addressed to evidence of all of the relevant facts, whether discovered before arrest or before committal (if any); after committal and before trial; during the trial; or afterwards admitted under s 3A of the Act. All of the relevant facts proved, whenever they became known to the prosecution and whether or not in evidence at the trial, must then be considered by the decision-maker. The decision-maker must then ask whether, if the prosecution had evidence of all the relevant facts immediately before the proceedings were instituted it would not have been reasonable to institute the proceedings.*

This passage has been repeated with approval on numerous occasions. (see *Gwozdecky v DPP (1992) 65 A Crim R 160 at 164, R v Hatfield 126 A Crim R 169* at [8], *R v Abdul Darwiche [2006]NSWSC 878* at [19])

What will be considered unreasonable? This is a question which is difficult to answer and to which there are no black and white answers. Some guidance is provided by the Courts. It is important to note, particularly when addressing the Court, that it does not follow that the making of a finding of unreasonableness is a criticism of the prosecution. The test is not whether the prosecution did in fact act "unreasonably".

The following is a lengthy extract from the Court's decision *in John Fejsa (1995) 82 A Crim R 253* at 255, which affirms certain observations by Blanch J in *R v McFarlane* (Unreported, SC, 12 August 1994). The judgement of Blanch J has been endorsed in other cases including *Manley, Pavey,* and *Hatfield*.

> *"This Court too has never sought to lay down any all-embracing definition of the circumstances in which it would (to adapt the language of the statute) be unreasonable within the meaning of s.3(1)(a) of the Act to have instituted proceedings. In our opinion, it would be unwise to attempt to do so. The circumstances of the different cases vary to such an extent that, unless such a definition were expressed in terms of such generality as to be of no assistance in the particular case, it may well cause an injustice in the case whose circumstances have not been foreseen.*
>
> *There is nevertheless a helpful discussion of various situations which do not make it reasonable to prosecute (in the context of s 3(1)(a), in the decision of Blanch J in Warwick Ian McFarlane. It was not reasonable to prosecute, the judge said, merely because there had been a reasonable cause to suspect that the accused was guilty, thus justifying an arrest: Nor was it reasonable to prosecute merely because the usual test adopted by prosecution agencies throughout Australia had been satisfied - namely that there was a reasonable prospect of conviction: nor was it reasonable to prosecute merely because the magistrate (presumably with all of the relevant facts before him or her) had declined to hold, pursuant to s 41(6) of the Justices Act1902 (NSW), that a jury would not be likely to convict the accused.*

Nor was it reasonable to prosecute merely because there was at the trial (again, presumably with all of the relevant facts before the trial judge) a prima facie case to go to the jury, because such a decision necessarily disregards all of the evidence which favours the accused.

We agree with all that Blanch J said, and we would for ourselves add that, conversely, merely because this Court enters a judgment of acquittal in favour of an accused does not mean that it was not reasonable to have prosecuted him, because sometimes that course is followed rather than to order a new trial if (for example) the accused has already served most of the sentence imposed upon him.

Blanch J held in that case that it had been unreasonable to have prosecuted the accused because the evidence favouring him was "overwhelmingly strong". We agree with Blanch J that, in such circumstances, it would be open to find that it had been unreasonable to prosecute, although we stress that he did not suggest (and nor do we) that a certificate will be granted to a successful accused only where the evidence favouring him is "overwhelmingly strong".

I think the following can be extracted from the above extract.

A prosecution is not reasonable merely because:

- there were reasonable grounds to suspect, thus justifying an arrest.
- there were reasonable prospects of a conviction.
- a magistrate was satisfied of the test required to commit an accused for trial.
- there is a prima facie case.

In addition:

- a prosecution may be unreasonable where the evidence favouring the accused is "overwhelmingly strong".
- A prosecution is not unreasonable merely because an appeal court orders an acquittal.

In *Wade*, at p3, it was agreed between the parties, and apparently accepted by the Court, that the fact that the jury came to the conclusion that there were no facts established beyond reasonable doubt leading to a conviction cannot as such lead to a conclusion that it must have been unreasonable to institute the proceedings. The trial judge appeared to have come to that view. Such a view of the reasonableness test would almost always lead to the granting of a certificate after an acquittal.

Similarly, the fact that it was concluded that the evidence was insufficient to warrant a conviction does not necessarily mean that there was unreasonableness. (*R v Williams (1970) 91 W.N (NSW) 145* per Sugerman P at 146)

A Prima Facie Case is not sufficient

One may expect that in arguing an application for a cost certificate one may be met with the argument that a certificate should not be granted as there was a prima facie case.

In relation to a prima facie case, in *McFarlane* Blanch J said:

> *In the ordinary course of events a prosecution may be launched where there is evidence to establish a prima facie case but that does not mean it is reasonable to launch a prosecution simply because a prima facie case exists. There may be cases where there is contradictory evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence."*

These observations were endorsed by Wood CJ at CL in *Manley* at [12].

Conflicting Expert Evidence

The issue of conflicting expert evidence has been the subject of a number of decisions which have been concerned with applications for cost certificates.

In *Manley* Wood CJ at CL said at [14]:

"Given the wide variety of cases that might arise for consideration, I am similarly reluctant to attempt any exhaustive definition of the test. It seems to me that the section calls for an objective analysis of the whole of the relevant evidence, ***and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case.*** *Matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be Judge or Jury."*

In *Manley* at [11], Wood CJ at CL also endorsed the following statement by Blanch J in *McFarlane*.

"If a highly qualified expert in a medical field gives an opinion, such opinion would normally have to be accepted by a tribunal of fact unless there were other aspects of the case which would cause the opinion to be questioned. …
If the hypothetical prosecutor instituting proceedings knew there were equally qualified experts who gave conflicting evidence in a case where that opinion was conclusive as to whether the prosecution should succeed, it seems to be questionable whether it would be reasonable to proceed with the prosecution."

It is apparent from the observations of Wood J and what was said in *McFarlane* by Blanch J, that it is not sufficient for the prosecution merely to assert that there is expert evidence to establish a prima facie case. The prosecution is expected to make some assessment of that evidence, particularly where there may be other evidence available which will leave a doubt.

The Discredited Witness

Following on from the comments of Wood CJ at CL in *Manley*, issues of the credibility of witnesses will usually fall for the tribunal of fact to determine.

"Matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be Judge or Jury."

However that is not the complete picture. The situation is different if the prosecution case depends on a witness that is substantially lacking in credit. In *Dunne* Hunt J addressed this issue. His Honour said:

> *"It would, for example, be an unusual case in which it was held that it was not reasonable for the prosecution to allow a case to go to the jury simply because an issue of self-defence-even a relatively strong case of self-defence- was to be raised. Nor is it sufficient to establish this issue in favour of the applicant for a certificate that, in the end, the question for the jury depended on word against word. In a majority of such cases, it would be quite reasonable for the prosecution to allow those matters to be decided by the jury.* ***It would, however, be different where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit.***

Examples of cases in which the Court has found a witness to be demonstrably lacking in credit are *R v Cardona [2002] NSWSC 823* and *John Ibrahim v R [2006] NSWDC 45*.

In contrast cases falling on the other side include *R v Abdul Darwiche [2006] NSWSC 878* and *R v Pratt [2006] NSWDC 48*.

Further examples of cases falling on both sides are referred to below under the heading "Cases considering applications pursuant to the *Costs in Criminal Cases Act*."

Relationship with the Criminal Procedure Act cost provisions and the limits on awarding costs under section 214 of the Criminal Procedure Act

One may detect from some of the preceding material that the test that a defendant must overcome to receive a certificate is less onerous than the test which is imposed in order to obtain a cost order against a public prosecutor in the Local Court pursuant to the *Criminal Procedure Act*.

In *Cumberland v DPP* (Unreported, SC (NSW) 7 June 1996) the Plaintiff had been found not guilty in the Local Court of assault occasioning actual bodily harm. The Magistrate made no

order as to costs. Orders were being sought in the Supreme Court to have the Magistrate review the decision refusing a cost order.

In considering the corresponding provisions that then appeared in section 81(4) of the *Justices Act*, and which are now at section 214 of the *Criminal Procedure Act*, Hulme J said:

> *"His Worship seems to have adopted the stance that because none of the paragraphs of s81(4) were established, therefore no certificate…should be granted. Such an approach is quite wrong. One may accept that unreasonableness or impropriety of manner in the investigation into an alleged offence or indeed the existence of circumstances fulfilling the terms of any sub-paragraph of s81(4) of the Justices Act would argue for the grant of a certificate under s2 of the Costs in Criminal Cases Act. However the absence of circumstances falling within those sub-paragraphs cannot be determinative against such an application.*
>
> *This follows from the fact that the latter contemplates no such enquiry as that envisaged by s81(4) which imposes a significantly more stringent test."*

Is it reasonable to let the Court resolve an issue of law?

It was argued by the Crown in *R v Groom [2000] NSWCCA 538*, that because an issue of law was involved then section 3(1)(a) did not apply. This argument was rejected. However that does not mean that it is not reasonable to leave the resolution of a legal issue to the Court where there are credible and competing arguments.

In *Groom,* Smart AJ with whom Barr J and Greg James J agreed, said at [16]:

> *There is no substance in the submission that because a question of law or a conclusion of law is involved s.3(1)(a) does not apply. In almost every criminal case the law has to be applied to the facts. It is the facts which determine whether it was reasonable to prosecute. I can imagine cases where the law is unclear and there is much to be said on both sides. In such cases it would usually be reasonable to leave the issue to the court to decide and for the Crown to institute proceedings. This happens most regularly in prosecutions for dishonesty or corporate malfeasance. However, the present case involved no such complexities. The issue was simple, namely, whether the evidence was sufficient to enable a jury to be satisfied beyond*

reasonable doubt that Ms Groom suffered or permitted Lonie to use the Somersby house for storing or holding cannabis for the purpose of supply. The evidence was not sufficient and this was apparent at the time Ms Groom was charged.

Are Policy issues relevant considerations in determining the reasonableness issue?

The extent to which policy issues are considerations pursuant to section 3(1)(a) has been the subject of judicial comment in various judgements. This has resulted from submissions made by the DPP in cases such as *Groom*, *Manley* and *Johnston*. Such policy issues include:

- seriousness of the offence
- the necessity to maintain public confidence in institutions such as Parliament and the courts.
- whether a resulting conviction would be regarded as unsafe and unsatisfactory
- the antecedents of the accused
- the prevalence of the alleged offence
- whether the offence is of considerable public concern

The prevailing view is that such matters are not relevant however the situation is not absolute.

In *Groom*, Smart AJ with whom Barr J and Greg James J agreed, said at [19]:

I do not regard the general policy issues to which the Crown has referred (except that as to whether any verdict would be unreasonable or insupportable) as relevant to the exercise required by s.3(1)(a) of the Act. That is wholly objective, namely, whether on all the relevant facts it would not have been reasonable to institute the proceedings.

In *Manley* Sully J at [46] could not accept the relevance of the policy considerations having regard to the authorities although His Honour invited the legislature to give consideration to recognizing those policy factors.

The view expressed in *Groom* about the relevancy of the verdict being unreasonable is consistent with the view expressed in *Krishna* by Simpson J. In *R v Krishna [1999] NSWSC 525*, Krishna was charged in relation to a fire at her home and the injuries that resulted to a man named Lingam. The evidence established that the fire must have been deliberately lit by either Krishna or Lingam. Lingam denied responsibility to police and in evidence at a Coroner's Inquest. Krishna was charged.

The DPP advised Krishna that she would be charged. Lingam attended the police again and said that he was responsible for the fire and had attempted to commit suicide. He confirmed this in an interview. The DPP proceeded with the prosecution relying on circumstantial evidence and by attacking the credit of Lingam. After 3 ½ days of deliberations the jury acquitted. Krishna applied for a certificate. At that time the proceedings were instituted the Crown Case looked strong because Lingam had not recanted. But the test is whether it would not have been reasonable to bring the proceedings having the knowledge of what subsequently transpired with Lingam.

The DPP is deemed to have had knowledge of Lingam's subsequent recantation and admissions as at the institution of proceedings. Simpson J found that had the DPP known of Lingam's subsequent position it would not have been reasonable to bring the prosecution.

> *"The DPP must realistically assess the prospects, not only that the jury would find the applicant guilty, but that a conviction based on the evidence as it then stood would survive the inevitable appeal…"*

The relevance of a policy consideration that "justice must be seen to be done" has been expressly rejected in *Johnston* by Simpson J at [19] , *Manley* by Wood CJ at CL at [18-19] and Sully J at [46].

As to whether the seriousness of the offence is a relevant consideration, that seems to have been rejected by the Court in *Groom* and also in *Pavy (1997) 98 A Crim R 396* at 401. In *Pavy* the Court said:

> *"The legitimate interest which the community has in serious crimes being prosecuted by the Director of Public prosecutions is not disputed. That cannot, in our judgement, make it reasonable as between the Crown and the accused/applicant to prosecute in face of significant weaknesses in the Crown case of which the Crown, acting reasonably, ought to have been aware."*

The only apparent contradiction of the view that the seriousness of the crime is not a relevant consideration is, what may be described as a passing comment, and at best obiter, by Simpson J in *Hatfield 126 A Crim R 169* at [51].

In *R v Padovan [2012] NSWSC 204* at [17] RA Hume J rejected a Crown submission that

> "it was proper to take into account matters of public policy such as the necessity to ensure that justice is seen to be done in serious cases of criminality, and the necessity to secure public confidence in the justice system and in the Courts, and also to have regard to the prevalence of the offence being prosecuted and the degree of public concern in relation to it."

3(1)(b) AND THE CONDUCT OF THE DEFENDANT

Assuming the Court has resolved the reasonableness issue in favour of the applicant for the certificate, the next question for resolution is whether any act or omission of the defendant contributed, or might have contributed, to the institution or continuation of the proceedings. If the answer to that question is "yes" the next step is to determine whether such conduct by the defendant was reasonable in the circumstances.

In *R v Trevor Dunne* (unreported, Supreme Court, 17 May 1990) Hunt J said about section 3(1)(b) that it:

> "is clearly intended to encourage people charged with criminal offences to disclose all of the relevant facts either before or at the committal stage, or between committal and trial, unless it is reasonable for them not to have done so. In that sense what is disclosed to the police

before being charged and what is put before the magistrate in the committal proceedings is relevant, as are the fact that a "no bill" application was made and the contents of that application."

In *R v Johnston [2000] NSWCCA 197* Simpson J said:

> *The legislature has sought to strike a balance pursuant to which a prosecution unreasonably instituted may result in the award of costs to a person accused, but where the entitlement may be lost where the person accused unreasonably contributes to the institution or continuation of the proceedings.....These final steps require the Court to focus on the conduct of the accused person and the reasonableness of that conduct. In practical terms, s 3(1)(b) will be primarily directed to omissions, for example cases in which defence material has been, for tactical or strategic or other reasons, withheld from the prosecution; but it is also wide enough to encompass positive acts such as the (probably more unusual) case where the defence has deliberately in some way misled the prosecution**. By the inclusion of the evaluation of reasonableness in this respect the legislature has recognised that tactical considerations and decisions are legitimate in the defence of criminal charges, and has recognised the potential value to an accused person of retaining the element of surprise in the confrontation of prosecution witnesses, or the presentation of the defence** *case. It is not in every case where defence evidence has been deliberately withheld from the prosecution that a court will consider that the omission to supply the material to the prosecution was not reasonable in the circumstances.*

It is important to note Her Honour's concluding comments that the legislation recognises that consideration be given to the defence tactics. The defence is not necessarily required to have put all their cards on the table in order to be entitled to a certificate.

In the reported cases there are few examples where an application for a costs certificate has been unsuccessful based on the unreasonable conduct of the defence. Consequently it is difficult to find clear guidance on what type of conduct will suffice.

In *R v Hatfield [2001] NSWSC 334* Simpson J referred to the decisions in *Pavey (1997) 98 A Crim R 396* and *Manley (2000) 49 NSWLR 203* and stated at [18]:

> *The question that is raised by s 3(1)(b), concerning any act or omission that might have contributed to the institution or continuation of a proceeding may here be put to one side. That provision is directed to circumstances in which an accused person may, by making admissions or other statements indicating guilt, or otherwise, have led the prosecution authorities to bring the charge, or set them on a false trail (see, for example,* ***Pavey,*** *p 400), or has withheld, unreasonably (having regard to the adversarial nature of criminal proceedings), evidence that contradicts or casts a different light on the prosecution case (* ***Manley,*** *paragraph 78). It is not suggested by the Crown that either of those circumstances, or any other circumstance that would or might bring the sub paragraph into play, here exists. S 3(1)(b) is not material to the present decision.*

In *Dunne* Hunt J considered the conduct of the defence. It was argued by the DPP that the applicant ought to have informed the DPP of the names of witnesses or alternatively provided copies of their statements. His Honour was of the view that in most cases it would be proper and reasonable to provide the names of witnesses in a "no bill" application but in the circumstances of that case it would not have made a difference.

Hunt J did not think it was reasonable to require an applicant to disclose the statements of witnesses as opposed to the general tenor of their evidence.

THE RESIDUAL DISCRETION

If the Court has formed the view required by section 3(1)(a) and (b), the Court may exercise it's discretion and issue a certificate. However the granting of the certificate remains at the Court's discretion even though it may be satisfied of the matters required. Other facts, beyond those going to the questions posed by section 3(1)(a) and (b) may be admitted. (see *Gwozdecky v DPP (1992) 65 A Crim R 160* at 165 per Sheller JA)

In *Ramskogler v DPP (1995) 82 A Crim R 128* at 140 Handley JA said:

> *"If the statutory conditions are satisfied the court "may…grant…a certificate" (s 2). It thus has a discretion which may be exercised by granting or refusing a certificate. An applicant who establishes the matters in s 3(1) is not entitled as of course to a certificate."*

However the judgement of Hulme J in *Cumberland v DPP* (unreported, Supreme Court, 7 June 1996) is worth noting. His Honour remarked on how the discretion should normally be exercised. At p3 His Honour said:

> *"When one has regard to the nature of the matters set forth in subpara(a) and subpara(b) of s3(1) it seems to me that the Act contemplates that generally if the matters referred to in sub-para(a) are established and those in subpara(b) are not, a certificate under the Act should be granted….Against the background of the general principle that costs are intended to wholly or partly indemnify a successful party against the consequences of litigation caused by the unsuccessful party this attention to the reasonableness or otherwise of the parties' conduct carries with it the implication that if the circumstances to which the certificate must be granted exist then normally it should be granted."*

It has been explicitly stated that the need "that justice be seen to be done" is not a basis to invoke the discretion. (*R v Johnston [2000] NSWCCA 197* per Simpson J at [19])

SUMMARY OF PRINCIPLES

Conveniently in *Mordaunt v DPP [2007] NSWCA 121* at [36] McColl JA thoroughly considered the existing authorities and summarised the principles. They are set out below with citations removed:

The following principles can be extracted from the authorities dealing with applications for a s 2 certificate:

(a) The *CCC Act* is reforming legislation with a beneficial purpose designed to confer valuable privileges upon persons who succeed in criminal prosecutions; its provisions should not be narrowly construed so as to defeat the achievement of its general purposes:

(b) The judicial officer dealing with an application for a certificate need not be the trial judge: however it is "always preferable for such an application to be made to the judicial officer determining the original proceedings on its merits, or to the Court of Criminal Appeal that hears and allows an appeal"

(c) The “institution of proceedings” in s 3 refers to the time of arrest or charge not to some later stage such as committal for trial or the finding of a bill:

(d) The applicant for a s 2 certificate bears the onus of showing it was not reasonable to institute the proceedings; it is not for the Crown to establish, nor for the Court to conclude, that the institution of the proceedings, was, or would have been in the relevant circumstances, reasonable:

(e) The task of the court dealing with an application under the *CCC Act* is to ask the hypothetical question, whether, if the prosecution had evidence of all the relevant facts immediately before the proceedings were instituted it would not have been reasonable to institute the proceedings: the judicial officer considering an application must find what, within the *Act*, were “all the relevant facts” and assume the prosecution to have been “in possession of evidence of” all of them and must then determine whether, if the prosecution had been in possession of those facts before the proceedings were instituted, “it would not have been reasonable to institute [them]; an applicant for a certificate must succeed on both the “facts issue” and the “reasonableness issue”

(f) The hypothetical question is addressed to evidence of all of the relevant facts, whether discovered before arrest or before committal (if any); after committal and before trial; during the trial; or afterwards admitted under s 3A of the *CCC Act*; all of the relevant facts proved, whenever they became known to the prosecution and whether or not in evidence at the trial, must then be considered by the decision-maker: the relevant facts include those relevant to the offences charged and the threshold question posed by s 3(1)(a); other facts will also be relevant and admissible going, amongst other things, to the question posed by s 3(1)(b) and to the ultimate question whether, assuming that the court is of the opinion required to be specified, it should exercise its discretion under s 2:

(g) Courts should not attempt to prescribe an exhaustive test of what constitutes unreasonableness for the institution of the proceedings within the meaning of s 3(1)(a):

however the factors set out in (h) – (n) have been identified as germane;

(h) The reasonableness of a decision to institute proceedings is not based upon the test that prosecution agencies throughout Australia use as the discretionary test for continuing to prosecute, namely whether there is any reasonable prospect of conviction, nor is it governed by the test in applied by magistrates, namely whether no reasonable jury would be likely to convict; the test cannot be a test of reasonable suspicion which might justify an arrest and it cannot be the test which determines whether the prosecution is malicious.:

(i) The fact a prosecution may be launched where there is evidence to establish a prima facie case does not mean it is reasonable to launch a prosecution; there may be cases where there is contradictory evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence.

(k) The fact that a court concluded the evidence was insufficient to warrant a conviction is not necessarily indicative of unreasonableness.

(l) The fact that a court enters a judgment of acquittal in favour of an accused does not mean that it was not reasonable to have prosecuted; sometimes that course is followed rather than to order a new trial if (for example) the accused has already served most of the sentence imposed upon him or her

(m) Section 3 calls for an objective analysis of the whole of the relevant evidence, and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case; matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be Judge or Jury: it is not sufficient to establish the issue of unreasonableness in favour of an applicant for a certificate that, in the end, the question for the jury depended upon word against word; in a majority of such cases, it would be quite reasonable for the prosecution to allow those matters to be decided by the jury; it

would be different where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit.

(n) The mere fact that the Court of Criminal Appeal allows an appeal and enters a verdict of acquittal upon the "unsafe and unsatisfactory" ground, is not necessarily a touchstone for an exercise of the discretion in favour of the applicant.

(o) In considering an application for a certificate it is relevant to have regard both to the information in the possession of the prosecuting authorities, and the conduct of the defendant, bearing in mind the essentially adversarial nature of a criminal prosecution and the tactical decisions that are legitimately a part of the process.

(p) Section 3(1)(b) recognises that tactical considerations and decisions are legitimate in the defence of criminal charges, and the potential value to an accused person of retaining the element of surprise in the confrontation of prosecution witnesses, or the presentation of the defence case; it will primarily be directed to omissions, for example cases in which defence material has been, for tactical or strategic or other reasons, withheld from the prosecution; it is also wide enough to encompass positive acts such as the (probably more unusual) case where the defence has deliberately in some way misled the prosecution; it is not in every case where defence evidence has been deliberately withheld from the prosecution that a court will consider that the omission to supply the material to the prosecution was not reasonable in the circumstances.

(q) Delay in foreshadowing and making the application may be relevant to the exercise of the discretion whether to grant a certificate

(r) Before a certificate is granted, the judge must have formed an opinion specifying the matters in s3(1)(a) and (b), and must also exercise the residual discretion, contemplated by s2, to grant a certificate

CASES CONSIDERING APPLICATIONS PURSUANT TO THE COSTS IN CRIMINAL CASES ACT

Thanks to online reporting of cases, there are now a number of cases available for consideration where trial courts have considered applications pursuant to the *Costs in Criminal Cases Act*. Some of those cases often contain a convenient summary of the law and also provide varying factual circumstances in which the *Act* has been considered. Many of the aces involve a thorough consideration of the evidence at trial. The following are some of them:

R v Padovan [2012] NSWSC 204- RA Hume J granted a certificate following an acquittal for charges including affray and riot arising from a confrontation at Sydney Airport between rival motorcycle gangs. Whilst there was a prima facie case, the evidence was inherently tenuous and weak.

R v Pike [2010] NSWDC 224- Trial judge issued a certificate after a directed verdict in circumstances that there failed to be the evidence anticipated by the Crown to prove a common purpose.

Field v DPP [2010] 2010 NSWDC- Trial judge issued a certificate after a majority verdict of not guilty. The Crown case depended on the reliability and truthfulness of a witness who by the end of the trial was "very substantially lacking in credit."

R v CPR [2009] NSWDC 219- After the acquittal of the applicant on charges alleging sexual offences some years earlier, the trial judge issued a certificate due to significant inconsistencies in the Crown Case raising doubts about the complainant's reliability.

Presland v DPP [2009] NSWDC 178- In a circumstantial case, the applicant had been acquitted of four counts of manslaughter by criminal negligence arising from the construction of a broken keel on a yacht which capsized and four people drowned. A consideration of the evidence could not establish that the applicant was responsible for the keel.

Cittadini v R [2010] NSWCCA 291- The co-accused of Presland, who was acquitted by the CCA. Fullerton J said that "it was a case contingent on a diverse range of variables of proof and approaches to proof which, while theoretically available, did not comprise a sufficient body of relevant facts to meet the test of reasonableness."

JC v DPP [2009] NSWDC 424- The applicant was acquitted of a number of counts of sexual intercourse without consent. A certificate was granted as "even if the matter could be categorised as a case dependant upon judgment as to the credibility of the complainant, it is not a matter 'on the other side of the line of unreasonableness', as the complainant's evidence ended up 'substantially without credit'.

R v Cutmore and David [2009] NSWDC 261- The trial judge excluded identification evidence pursuant to section 137 of the *Evidence Act* due to weaknesses with it. The DPP then no billed the charges. A certificate was then granted.

R v MLR [2012] NSWDC 75- An unsuccessful for a certificate following acquittals on 9 counts of having sexual intercourse with a 15 year old child. The trial judge was of the view that the complainant was no so lacking in credit and a jury could have convicted on the complainant's evidence.

R v El Masri (No 3) [2010] NSWSC 1351- In a circumstantial murder case the Crown was unable to prove that the Applicant had been the person that stabbed the deceased in a brawl on a dance floor. The memory of some witnesses had significantly deteriorated.

R v KT [2009] NSWDC 224- The trial judge found in a sexual assault case that there "was a wealth of other direct evidence of facts and circumstances from which the only rational inference to draw…was that there was no sexual intercourse between the Applicant and the complainant without her consent such as she alleged." A certificate was granted.

R v Tooes [2008] NSWSC 291- The applicant was acquitted of murder. Studdert J said:

"It is in general reasonable for the prosecution to allow issues such as the assessment of the credibility of a witness to be determined by the jury as "quintessentially within the realm of the ultimate fact finder": His Honour found it to be a borderline but concluded that it was reasonable for the prosecution to allow the credibility issue to be determined by the jury.

R v Tsmilas [2009] NSWSC 436- The applicant was acquitted after a Prasad direction of drug related charges. The trial judge granted a certificate. The Crown could not have excluded the possibility that the drugs were in fact those of the main Crown witness who was a convicted drug dealer.

WHAT HAPPENS WHEN THE CERTIFICATE IS GRANTED?

As I noted at the start, the granting of a certificate is only the precondition to making an application to the Director- General. It then becomes an administrative issue. The quantity of the costs is not set out in the certificate. It is a matter to be determined by the Director General. For convenience I set out section 4 of the *Costs in Criminal Cases* Act.

4 Payment of costs

(1) A person to whom a certificate has been granted under this Act may apply to the Director-General for payment from the Consolidated Fund of costs incurred in the proceedings to which the certificate relates. The application is to be accompanied by a copy of the certificate.

(2) The Director-General may, if of the opinion that, in the circumstances of the case, the making of a payment to the applicant is justified, determine the amount of costs that should be paid to the applicant, not exceeding the maximum amount referred to in subsection (3).

(3) The maximum amount is the amount that, in the opinion of the Director-General, would reasonably have been incurred for costs by the applicant in the proceedings, reduced by any amounts that, in the opinion of the Director-General, the applicant:

(a) has received or is entitled to receive, or

(b) would, if the applicant had exhausted all relevant rights of action and other legal remedies available to the applicant, be entitled to receive,

independently of this Act, because of the applicant's having incurred those costs.

(4) The Director-General may refuse an application under this section if of the opinion that, in the circumstances of the case, the making of a payment to the applicant is not justified or (without limitation) if costs are otherwise recoverable.

(5) The Director-General may defer consideration of an application under this section for as long as the Director-General considers it necessary to do so to enable the Director-General to ascertain any amount referred to in subsection (3).
(6) The amount specified in the determination is payable from the Consolidated Fund to the applicant or to another person on the applicant's behalf. Any payments from the Consolidated Fund under this section may be made without further appropriation than this Act.

The link below will take you to the relevant Attorney General's Department which will assist is providing the information required to lodge the application and the form of the certificate required to be signed by the Judicial Officer.

http://www.lsb.lawlink.nsw.gov.au/lsb/legal_services_appl_costs/legal_services_cccact1967.html

THE SUITORS' FUND ACT 1951 AND IT'S APPLICATION IN CRIMINAL PROCEEDINGS

INTRODUCTION

Unlike the *Criminal Procedure Act 1986* and the *Costs in Criminal Cases Act 1967*, the *Suitors' Fund Act* applies to both civil and criminal proceedings. In fact it probably has more relevance to civil proceedings than criminal proceedings, especially in relation to appeals.

I have limited my discussion to what I may describe as conventional criminal proceedings. I have not looked in any detail at criminal proceedings in the Land and Environment Court or the Industrial Relations Commission.

Frankly, I find the subject matter of the *Suitors' Fund Act* far less interesting that that of the other two *Acts*, especially in the context of criminal proceedings. The consequence is that this part of the paper may be somewhat less fascinating. Nevertheless I hope that it is useful in assisting practitioners in knowing both when and when not the *Act* will be useful in criminal proceedings. The entirety of the *Act* is produced at the end of the paper.

WHAT IS THE SUITORS'FUND AND THE SUITORS FUND ACT?

The Suitors fund is a fund established as part of the Attorney General's Department Account. It is created by the *Suitors' Fund Act 1951*. The *Act's* long title is as follows:

> *"An Act to make further and better provision in respect of the liability for costs of certain litigation; to establish a Suitors' Fund to meet such liability; and for purposes connected therewith."*

The fund is designed to relieve parties that incur, or become liable for costs, not by reason of their own conduct.

In outlining the "spirit and intent" of the *Act*, the Attorney General's website states:

> *"The general intent of the Act is to mitigate costs incurred in proceedings through no fault of the parties, in certain circumstances. The fundamental principle underlying the Act is that parties should not have to have two sets of proceedings to determine one matter. It is not the purpose of the Act to assist meeting costs unreasonably incurred, or incurred through the vicissitudes of litigation (including where proceedings are adjourned."*

Pursuant to section 5 of the *Act,* the fund is funded by monthly contributions paid as a percentage of court fees.

FEDERAL AND STATE JURISDICTION

The terms of section 2(2) of the *Act* make it clear that the *Suitors Fund Act* applies to a court exercising either State or Federal Jurisdiction. Section 2 provides as follows:

(2) This Act applies to and in respect of:
(a) a court,
(b) an appeal to or from a court,
(c) proceedings or actions before a court, and
(d) a decision of a court,
exercising State or federal jurisdiction.

Accordingly, a court has jurisdiction to issue a certificate under the *Suitors Fund Act* in the case of both State and Commonwealth prosecutions.

In *Commonwealth DPP v Seymour [2009] NSWSC 555* a certificate was issued in an appeal brought by the Commonwealth Director of Public Prosecutions against a decision of a magistrate. However in *R(Cth) v Petroulias (No 19) [2007] NSWSC 536* Johnson J said at [9]:

"no application was made by the Accused for a certificate under s.6A Suitors' Fund Act 1951. Accordingly, it is unnecessary for me to determine whether that Act is available where a jury trial for Commonwealth offences has been aborted: cf Commissioner of Stamp Duties (NSW) v Owens [No. 2] [1953] HCA 62; [1953] 88 CLR 168 at 169; *Solomons v District Court of NSW [2002] HCA 47; [2002] 211 CLR 119 at 130"*

I imagine that if His Honour had had to determine the issue then Section 2(2) would have resolved the issue.

LIMITATION ON PAYMENT

As will be discussed, in relation to criminal proceedings, payment may be made pursuant to sections 6, 6A and 6C. Regardless of which section is invoked, the maximum amount payable from the fund will be $10,000. The exceptions to this are:

(i) where a certificate is issued pursuant to section 6 and there has been a sequence of appeals. In that case the maximum amount is $10,000 per appeal. (see section 6(2A).

(ii) where a certificate is issued pursuant to section 6 for a High Court appeal the maximum amount payable is $20,000.

CIVIL AND CRIMINAL PROCEEDINGS

The *Suitors' Fund Act* has application to both criminal and civil proceedings. In fact it will more often have application to civil proceedings. As will be discussed, the awarding of a certificate pursuant to the section 6 will rarely occur in criminal proceedings.

The issuing of a certificate pursuant to section 6B will only apply in civil proceedings as it deals with appeals to the Court of Appeal in circumstances that the damages awarded in the trial court are excessive or inadequate. For this reason I will not touch further on section 6B in this paper.

SECTION 6- COSTS OF CERTAIN APPEALS

As an introductory note to cost orders in relation to appeals, it is important to note section 17(1) of the C*riminal Appeal Act 1912* which states:

> *On the hearing or determination of an appeal, or any proceedings preliminary or incidental thereto under this Act, no costs shall be allowed on either side.*

Consequently, one cannot get an order for costs as a result of a successful appeal to the Court of Criminal Appeal.

Section 6 of the *Suitors'Fund Act* deals with the granting of an indemnity certificate in relation to certain appeals. Such a certificate is not a cost order and therefore not affected by Section 17(1) of the C*riminal Appeal Act.* However entitlement to an indemnity certificate pursuant to section 6 will be few and far between in criminal proceedings.

The granting of an indemnity certificate is necessary to seek payment from the *Suitors' Fund* pursuant to section 6. Section 6 is a rather lengthy and convoluted piece of legislative drafting. It is difficult to readily understand. For the purposes of this paper I will only extract part of section 6.

> ***6 Costs of certain appeals***
>
> *(1) If an appeal against the decision of a court:*
> *(a) to the Supreme Court on a question of law or fact, or*
> *(b) to the High Court from a decision of the Supreme Court on a question of law,*
> *succeeds, the Supreme Court may, on application, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.*
>
> *(1A) Where an appeal against a decision of a court to the Industrial Relations Commission of New South Wales or to the District Court of New South Wales on a question of law succeeds, that Commission or Court, as the case may be, may, upon application made in that behalf, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.*

……

(2) Where a respondent to an appeal has been granted an indemnity certificate, the certificate shall entitle the respondent to be paid from the Fund:

(a) an amount equal to the appellant's costs of:

(i) the appeal in respect of which the certificate was granted, and also

(ii) where that appeal is an appeal in a sequence of appeals, any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted,

ordered to be paid and actually paid by the respondent: Provided that where the Director-General is satisfied that the respondent is unable through lack of means to pay the whole of those costs or part thereof or that payment of those costs or part thereof would cause the respondent undue hardship, or where those costs or part thereof have not been paid by the respondent and the Director-General is satisfied that the respondent cannot be found after such strict inquiry and search as the Director-General may require or that the respondent unreasonably refuses or neglects to pay them, the Director-General may, if so requested by the appellant or the respondent, direct in writing that an amount equal to those costs or to the part of those costs not already paid by the respondent be paid from the Fund for and on behalf of the respondent to the appellant and thereupon the appellant shall be entitled to payment from the Fund in accordance with the direction and the Fund shall be discharged from liability to the respondent in respect of those costs to the extent of the amount paid in accordance with the direction,

(b) fifty per centum or such other percentage as may be prescribed (at the time when the indemnity certificate is granted) in lieu thereof by the Governor by proclamation published in the Gazette of the amount payable from the Fund pursuant to paragraph (a) or, where no amount is so payable, an amount equal to the costs of:

(i) the appeal in respect of which the certificate was granted, and also

(ii) where that appeal is an appeal in a sequence of appeals, any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted,

as taxed, incurred by the respondent and not ordered to be paid by any other party: Provided that where an amount is payable from the Fund pursuant to paragraph (a), but the Director-General directs that the costs of the appeal or appeals referred to in subparagraph (i) or in subparagraphs (i) and (ii) incurred by the respondent and not ordered to be paid by any other party be taxed at the instance of the respondent or those costs are, without such a direction, taxed at the instance of the respondent, the amount payable from the Fund under this paragraph shall be the amount equal to those costs as so taxed, and

(c) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, an amount equal to the costs incurred by the respondent in having those costs taxed.

Notwithstanding the foregoing provisions of this subsection:

(i) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, the aggregate of the amounts payable from the Fund pursuant to that paragraph and paragraph (c) shall not exceed the amount payable from the Fund pursuant to paragraph (a).

(2A) The maximum amount payable from the Fund for any one appeal is:

(a) $20,000 in the case of an appeal to the High Court, or

(b) $10,000 in the case of any other appeal.

….

(5) The grant or refusal of an indemnity certificate shall, except as provided by subsections (5A), (6) and (7), be in the discretion of the Supreme Court, Land and Environment Court, Industrial Relations Commission of New South Wales or District Court of New South Wales, as the case may be, and no appeal shall lie against any such grant or refusal.

(5A) Where a respondent to an appeal referred to in subsection (1), (1A) or (1AA) is a legally assisted person, the respondent shall, for the purpose of exercising the discretion referred to in subsection (5) and for the purpose of determining the amount which the respondent is entitled to be paid from the Fund:

(a) be deemed not to be a legally assisted person, and

(b) be deemed to have incurred such costs as have been incurred by any other person in the course of acting for the respondent as a legally assisted person.

(6) An indemnity certificate shall not be granted in respect of any appeal from proceedings begun in a court of first instance before the commencement of this Act.

(7) An indemnity certificate shall not be granted in favour of:

(a) the Crown,

(b) a corporation that has a paid-up share capital of two hundred thousand dollars or more, or

(c) a corporation that does not have such a paid-up share capital but that, within the meaning of section 50 of the Corporations Act 2001 of the Commonwealth, is related to a body corporate that has such a paid-up share capital, unless the appeal to which the certificate relates was

instituted before the commencement of the Legal Assistance and Suitors' Fund (Amendment) Act 1970.

SECTION 6(1)

For our purposes, it is apparent from the terms of section 6(1) that an indemnity certificate is only available in the circumstances in which one is an **unsuccessful respondent** to an appeal to the Supreme Court, High Court or District Court. Unlike provisions for the payment of costs pursuant to the *Costs in Criminal Cases Act* and the *Criminal Procedure Act*, success disentitles one to obtain a certificate pursuant to section 6 of the *Suitors' Fund Act*.

Putting that in terms of criminal proceedings, in order for the court to have jurisdiction to grant a certificate pursuant to section 6, one must have been an unsuccessful respondent to an Appeal. That would ordinarily mean a Crown Appeal. In relation to an appeal to the District Court, one must be the unsuccessful respondent to a Crown Appeal on a question of law.

For our purposes, a certificate can only be issued if three requirements are satisfied. They are:

1. There is an appeal to the Supreme Court, High Court or District Court
2. the appeal is against a decision of a court, and
3. the appeal succeeds on a question of law or fact. (Although in the District Court and High Court it is limited to appeals which succeed on a question of law only.)

In relation to an appeal in the Supreme Court succeeding on a question of law or fact, the *Act* has been amended relatively recently to include a question of fact. It originally only applied to appeals succeeding on a question of law.

What is an appeal?

Section 2 of the *Act* defines appeal to include "any motion for a new trial and any proceedings in the nature of an appeal."

An appeal to the Court of Criminal Appeal is an appeal to the Supreme Court. (*Ex parte Neville; Re Suitors' Fund Act [1966] 2 NSWR 481*) As is an appeal to the Court of Appeal. (*Mir Brothers Developments v Atlantic Constructions (1985) 1 NSWLR 491* at 494)

The *Criminal Appeal Act* provides for a number of circumstances in which the Crown may appeal. The relevant provisions are sections 5C, 5D, 5DA, 5DB, 5Dc, 5F and 5G.

As the *Act* is remedial legislation it should be given a beneficial construction. Accordingly, a liberal construction will be given to the word "appeal" in the *Suitors Fund Act*. (McHugh J in *Australian Postal Commission v Dao (No 2) (1986) 6 NSWLR 497* at 515)

The meaning of an "appeal" has been found to include a stated case pursuant to section 5B of the C*riminal Appeal Act*. (*Ex parte Neville; Re Suitors' Fund Act [1966] 2 NSWR 481* and *R v Hookham (No 2) (1993) 32 NSWLR 345*).Applying these principles, an "appeal" pursuant to section 6 should also include points of law stated pursuant to sections 5AE and 5A of the *Criminal Appeal Act*.

It is not necessary that the successful appeal to the Supreme Court turned on a question of fact or law which was determined by the court below. (*Australian Postal Commission v Dao (No 2) (1986) 6 NSWLR 497 at 512*)

What is a decision?

There must also have been a "decision" by the court below which is the subject of the appeal. Whether there has been a decision may be a matter of some debate. In *Mir Brothers Developments v Atlantic Constructions (1985) 1 NSWLR 491 at 502* McHugh J was of the opinion that a "decision" is a conclusion of a court "which finally disposes of the proceedings before that court".

I do not propose to go into any detail on this rather fine point however if the case you are dealing with relates to the referral of a point of law or is a stated case then I draw your attention to the decision in *Mir Brothers* including the judgement of Kirby P and Samuels JA.

Maguire J in *Ex parte Neville; Re Suitors' Fund Act [1966] 2 NSWR 481* also deals with this issue.

Section 6 certificates in criminal proceedings

I have been unable to find even one example of an indemnity certificate being issued in the case of a successful appeal by the Crown against sentence. By my research, there are limited cases in the Supreme Court involving criminal proceedings in which an indemnity certificate has been issued.

One example of an indemnity certificate being issued in a criminal proceeding pursuant to section 6 is *Regina v King [2003] NSWCCA 399*. This was an appeal by the Crown against an order by a trial judge to order a permanent stay of an indictment. The appeal was pursuant to section 5F of the *Criminal Appeal Act 1912*. Section 5F gives the Crown the right to appeal against an interlocutory order.

The Crown Appeal was successful and an application was made by the unsuccessful respondent for an indemnity certificate pursuant to section 6 of the *Suitors Fund Act*. In considering whether to grant the certificate Dunford J said:

> *101 Although the Criminal Appeal Act 1912 s 17 prevents this Court making an order for costs in any appeal, that does not prevent the Court making an order pursuant to s 6(1) Suitor's Fund Act 1951 granting to an unsuccessful respondent an indemnity certificate under that Act. Such certificate entitles such respondent to recover the costs incurred in the appeal: s 6(2)(b), but there is no provision for the grant of an indemnity certificate to a successful appellant.*
>
> *102 In relation to appeals under s 5F of the Criminal Appeal Act, this creates an anomalous situation in the sense that whilst an unsuccessful respondent to an appeal under s 5F(2) can obtain a certificate, a successful appellant in an appeal under s 5F(3) cannot, and is left to his or her right to make an application under s 5C, which depends on the discretion of the Director General.*
>
> *103 It has not in my experience, been the practice of this Court to grant certificates of indemnity in appeals under s 5F and I see no reason why the practice should be varied as a general rule. This case was exceptional in that it raised a question of public importance and involved a consideration of*

decisions of the highest courts of the United Kingdom, Canada and New Zealand; and although the Crown Advocate in written submissions submitted that the appropriate remedy for the respondent was an application under s 6C, in oral submissions he conceded that s 6(1) of the Act applied.

104 In these circumstances I have, with some hesitation, come to the conclusion that this is an appropriate case for the grant of an indemnity certificate, but in my opinion the grant of such certificates to unsuccessful respondents in appeals under s 5F should be limited to exceptional cases.

At [99] Spigelman CJ agreed with Dunford J and stated:

I have seen the judgment of Dunford J in draft. I agree with his Honour's observations that only in an unusual case under s5F would it be appropriate that a certificate should issue under the Suitors' Fund Act 1951. However, the Crown did not oppose that course being taken in the present case. It also acknowledged the important issue of principle that arose.

Accordingly in order to obtain an indemnity certificate pursuant to section 6 in the case of an appeal pursuant to section 5F, one will have to show that it is an "exceptional" or "unusual" case.

Other examples of cases in which the Court has granted a certificate following on from a successful Crown Appeal pursuant to 5F are *R v Rima [2003] NSWCCA 405* and *R v N.K.S [2004] NSWCCA 144.* Another example of a certificate being issued is the case of *R v Hookham (1993) 32 NSWLR 345*. That was a stated case brought by the Crown which was successful in the Court of Criminal Appeal. An application was made by the unsuccessful respondent for a certificate pursuant to section 6.

Priestley JA delivered the Court's judgement with which Wood and Sully JJ agreed. The Court accepted that the stated case was "an appeal against the decision of a court" for the purposes of the *Act*. The Court therefore had jurisdiction to grant a certificate.

Section 6 and the exercise of the Court's discretion

The Court has a discretion whether to issue an indemnity certificate pursuant to section 6. (*Acquilina v Dairy Farmers Co-operative Milk Company (1965) 82 W.N. (Part.1)(NSW) 531* at 532)

The issue of how the Court should exercise its discretion was discussed in *Hookham*. In *Hookham* the Court noted that the *Act* gave the Court a discretion but provided no guidance as to how that discretion should be exercised.

Continuing on in deciding how the discretion should be exercised Priestley J at p346 stated;

> *"The reasoning behind the Act must be to the general effect that the court system, in what has happened prior to the appeal being upheld, has made a mistake and that there will be at least some circumstances in which cost caused by the fault of the system should not be visited on the respondent.*
>
> *In light of this, it is possible to see how discretion should be exercised in some obvious cases. In a case for example where the respondent had succeeded below only because the court below erroneously took a view of the law or facts which the respondent had not put to that court, there could be no reason for withholding exercise of discretion in favour of granting the certificate. At the other end of the scale, if counsel persuaded the court below to act upon the basis of a decision which had been overruled, it could be said that it was not the system that had been the main cause of the mistake, but the respondent. Discretion would then be exercised against the respondent.*
>
> *The present case does not fall into either of the obvious categories. The arguments which were put to the judge below could in no way be described as irresponsible, improper or baseless. It happens that this Court did not think they were correct. Although my opinion is that the trial judge should not have accepted the arguments of H's counsel I do not think the matter was so clear that any blame can be attached to H or his counsel for putting them to the judge below. In the circumstances therefore I think that it is better to treat the system as having gone wrong through the medium of the court rather than any action of H …"*

His Honour then went on to cite with approval the conclusion of Cross J in *Builders Licensing Board v Pride Constructions Pty Ltd [1979] 1 NSWLR 607;*

"…What the company argued was quite arguable and, indeed, convinced the magistrate. Nor was it a matter which this Court found capable of easy disposition. The Court reserved, and required a degree of reflection, in view of the exhaustive researches of counsel, before coming to a decision…..a decision I may say in honesty was not come to in absolute confidence that it is correct. The attitude of the company was perfectly proper. The submissions were perfectly proper. There was nothing in the history of this litigation, and the decision of the magistrate which would require or suggest the Court's discretion be exercised against the company."

It is clear from the decision in *Hookham* that the Court will look to the conduct of the party seeking the indemnity certificate and consider whether their conduct during the course of the litigation has contributed to the need for the appeal.

This approach is consistent with the approach applied in non-criminal cases. For example in *Allard v Murwillunbah Bowling Club Ltd [1976] 1 NSWLR 275* the plaintiff had sued for defamation. The defendant made an application to discharge the jury as a result of matters raised in the plaintiff's opening address. Before that application was determined, the plaintiff also made an application to discharge the jury based on an allegation that the defendant's solicitor had acted improperly. Without resolving the merits of the applications or the factual issues, the trial judge exercised his discretion to discharge the jury. His Honour then ordered that costs wasted await the ultimate outcome of the trial.

On appeal, the Court of Appeal determined that the judge's discretion had miscarried. The plaintiff (the respondent on the appeal) had caused the miscarriage by leading the judge into error and also by having made, and persisting with, unsubstantiated and serious allegations against the defendant's solicitor. As a result of that conduct the Court refused to issue a certificate pursuant to the *Suitors Fund Act*.

Misconduct by counsel and the exercise of the discretion is discussed in *Steele v Mirror Newspapers Ltd [1975] 2 NSWLR 48.*

As is probably apparent, the Court did grant a certificate in *Hookham*. It is noteworthy that the certificate was issued even though the Court had not made an order for costs against the

respondent. Likewise in *King* an indemnity certificate was issued although there was no order for costs made against the respondent.

WHEN SHOULD AN APPLICATION BE MADE?

There is no limitation period by when an application must be made for an indemnity certificate however practicalities militate in favour of an application being made at the conclusion of oral argument or at the time of judgement. (*Hometeam Constructions V McCauley (No 2) [2007] NSWCA 278)*

WHAT COSTS CAN BE PAID?

It is difficult to ascertain from a reading of section 6(2) of the *Act* what costs can be paid. With assistance from the Attorney General's website and my own understanding it is as follows;

Where the unsuccessful respondent has received a certificate but has not been ordered to pay the successful appellant's costs, the respondent can recover their costs as assessed.

Where the respondent has been ordered to pay the appellant's costs payment may be made from the Fund for an amount being:

- The costs of the appeal ordered to be paid and actually paid to the appellant, PLUS 50% of their own assessed costs, OR
- The costs of the appeal ordered to be paid and actually paid to the appellant, PLUS A sum equal to 50% of the appellant's costs provided this is less than or equal to the respondents own assessed costs.

However it must be remembered that the total amount payable is almost always limited to $10,000.

SECTION 6(5)- NO APPEAL AGAINST DECISION

It had been held that the terms of section 6(5) are a bar against any appeal and that when the discretion is exercised by a grant or refusal of a certificate, the decision is final. This includes

both an appeal against the exercise of the discretion or a collateral error of law. (*Cordell and Another v Goodwin [1976] 1 NSWLR 417)*

SECTION 6(5A)- LEGAL AID

Section 6(5A) provides that the fact that a person is legally aided should be disregarded for the purpose of determining whether a certificate should be granted and in determining the amount which they should be paid.

SECTION 6A- COSTS OF PROCEEDINGS NOT COMPLETED BY REASON OF DEATH OF JUDGE ETC

It is this section which may have most practical relevance to the day to day practice of a criminal lawyer. Section 6A provides for the Court to grant a certificate .Similarly to section 6, section 6A is drafted in such a way that on a first reading it is difficult to ascertain precisely when and how it has application.

To assist I have edited section 6A to excise those parts which deal with civil proceedings. I have also edited the part dealing with Legal Aid. After that edit section 6A provides as follows:

(1) Where on or after the day on which Her Majesty's assent to the Suitors' Fund (Amendment) Act 1959 is signified:

(a) … criminal proceedings are rendered abortive by the death or protracted illness of the judge or magistrate before whom the proceedings were had,

(a1) any .. criminal proceedings are rendered abortive for the purposes of this paragraph by… section 6AA (Appeal against sentence may be heard by 2 judges) of the Criminal Appeal Act 1912, because the judges who heard the proceedings were divided in opinion as to the decision determining the proceedings,

(b) an appeal on a question of law against the conviction of a person (in this section referred to as the appellant) convicted on indictment is upheld and a new trial is ordered,
or
(c) the hearing of any civil or criminal proceedings is discontinued and a new trial ordered by the presiding judge or magistrate for a reason not attributable in any way to disagreement on the part of

the jury, where the proceedings were with a jury, or to the act, neglect or default,… in the case of criminal proceedings, of the accused or the accused's counsel or attorney, and the presiding judge or magistrate grants a certificate (which certificate the presiding judge or magistrate is hereby authorised to grant):

…

(ii) in the case of criminal proceedings—to the accused stating the reason why the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to disagreement on the part of the jury or to the act, neglect or default of the accused or the accused's counsel or attorney,

and … the accused in the criminal proceedings or the appellant, as the case may be, incurs additional costs (in this section referred to as additional costs) by reason of the new trial that is had as a consequence of the proceedings being so rendered abortive or as a consequence of the order for a new trial, as the case may be,

then the Director-General may, upon application made in that behalf, authorise the payment from the Fund to the party or the accused or the appellant, as the case may be, of the costs (in this section referred to as original costs), or such part thereof as the Director-General may determine, incurred by the party or the accused or the appellant, as the case may be, in the proceedings before they were so rendered abortive or the conviction was quashed or the hearing of the proceedings was so discontinued, as the case may be.

(1B) If an application has been made under subsection (1) in respect of proceedings rendered abortive, or a new trial ordered, after the commencement of the Suitors' Fund (Amendment) Act 1987, the amount payable under that subsection to any one person shall, in respect of that application, not exceed:

(a) $10,000, or

(b) such other amount as may be prescribed (at the time when the proceedings were rendered abortive or the new trial was ordered).

As best I can, the circumstances in which one may be entitled to payment from the *Suitors' Fund* in criminal proceedings may be summarised as follows:

1. Proceedings are aborted by the death or protracted illness of the Judge or Magistrate before whom the proceedings are being held.

2. A sentence appeal before two judges to the Court of Criminal Appeal is aborted because the two judges are divided in opinion.

3. An appeal on a question of law against conviction on indictment is upheld and a new trial ordered.

4. A hearing is discontinued and a new trial ordered by a judge or magistrate, which is due to a reason not attributable in any way to:
    i) disagreement on the part of the jury, or
    ii) the act, neglect or default of the accused or the accused's counsel or attorney

In relation to the fourth of these circumstances it has been held that the word "act" does not mean a "wrongful act". (*Greaves v Blackborrow (1961) 78 W.N 517*)

In *R v El Masri (No 3) [2010] NSWSC 1351* Hoeben J issued a certificate after the jury was discharged as a juror knew a person associated with the deceased.

Is a certificate required?

In relation to the first three of the above situations it does not appear that it is necessary for the Court to grant a certificate. Subject to there being "additional costs" as a result of a new trial, an application can be authorised by the Director General.

In relation to the fourth of the above circumstances, as a prerequisite to making the application for payment the judge or magistrate must first grant a certificate which states the reason that the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to:

i) disagreement on the part of the jury, or
ii) the act, neglect or default of the accused or the accused's counsel or attorney

It has been held that the issuing of the certificate is not subject to a judicial discretion and is intended to operate once the conditions of its operation are certified by the presiding judge or magistrate to have been fulfilled. (*Steele v Mirror Newspapers Ltd [1975] 2 NSWLR 48* at 50)

This is contrary to the assertion on the Attorney General's website that the presiding judge or magistrate has a discretion as to whether to grant a certificate.

Additional Costs

Assuming one is granted a certificate or the circumstances are such which otherwise allow an application to be made pursuant to section 6A, payment will only be made if the accused has incurred "additional costs" by reason of a new trial. If there is no new trial then the accused is not able to obtain payment. For example, if the new trial is no billed or a plea of guilty entered there has been no new trial and one cannot receive payment for the costs associated with the earlier proceedings.

Assuming that the accused has incurred "additional costs" payment will nevertheless be limited to the "original costs". That is costs incurred prior to the original trial being aborted or a new trial ordered.

The Director General's Role

Section 6A provides for a significant role to be played by the Director General in determining whether payment will be authorised and, if so, how much will be paid. Section 6(1) appears to vest in the Director General a residual discretion as to payment even though a certificate has been granted or the circumstances are such that a payment is otherwise authorised.

SECTION 6A(1A)- LEGAL AID

Section 6A(1A) effectively provides that Director general is to disregard the fact that a person is legally aided or a legally assisted person for the purpose of determining their entitlement to payment. They are to be treated as if they were not a legally assisted person.

SECTION 6C- PAYMENTS NOT OTHERWISE AUTHORISED BY THE ACT

Section 6C provides for application to be made for a payment from the *Suitors' Fund Act* in circumstances in which one is not otherwise entitled to a payment. This section may be useful for criminal practitioners given the narrow scope for the payment of costs in criminal proceedings under the *Act*.

Section 6C is as follows:

> *6C Payments not otherwise authorised by this Act*
>
> *(1) If:*
>
> *(a) a party to an appeal or other proceedings incurs or is liable to pay costs in the appeal or proceedings,*
>
> *(b) the party is not otherwise entitled to a payment from the Fund in respect of the costs, and*
>
> *(c) the Director-General is of the opinion that a payment from the Fund in respect of the costs, although not authorised by section 6, 6A or 6B, would be within the spirit and intent of those sections,*
>
> *the Director-General may, with the concurrence of the Attorney General, pay from the Fund to the party such amount towards the costs as is assessed by the Director-General having regard to the circumstances of the case.*
>
> *(2) A payment under this section shall not exceed $10,000.*

An example of such a situation given on the Attorney general's website is where a judicial officer resigns before finalising a matter. In that situation payment would not be authorized under section 6A(1)(a) because it only provides for payment when proceedings are aborted due to death or protracted illness. Neither have the proceedings been discontinued nor a new trial ordered as provided for under section 6A(1)(c).

Such an application should be made in writing to the Director General of the Attorney General's Department. The Attorney General must agree to such a payment.

"Spirit and Intent" of the Act

As I have noted at the beginning of this paper the "spirit and intent" of the *Act* is described on the Attorney General's website as follows:

> "The general intent of the *Act* is to mitigate costs incurred in proceedings through no fault of the parties, in certain circumstances. The fundamental principle underlying the *Act* is that parties should not have to have two sets of proceedings to determine one matter. It is not the purpose of the *Act* to assist meeting costs unreasonably incurred, or incurred through the vicissitudes of litigation (including where proceedings are adjourned."

The case law makes it clear that the Court has no power to make an order under section 6C.

In *R v Pack [1999] NSWCCA 316*, the appellant appealed to the Court of Criminal Appeal against his conviction. The Court began to hear the application and went part heard. The Court as constituted could not continue with the hearing and the appeal had to commence afresh before a differently constituted court. This was due to no fault of either party.

In dealing with section 6C the Court said:

> *9 Clearly the appellant has incurred, or is liable to pay, costs in the appeal for 21 June 1999, thus satisfying s 6C(1)(a), and the appellant is not entitled to a payment from the Suitors Fund in respect of those costs unless under s 6C. Hence s 6C(1)(a) and (b) are satisfied for the purposes of the appellant's application. This leaves s 6C(1)(c), the requirements of which are the concern of the Director General. It is for the Director General to be satisfied that a payment from the fund would be "within the spirit and intent" of s 6A, in which event he may, with the concurrence of the Attorney General, make a payment in accordance with s 6C.*
>
> *10* ***This Court can make no order under s 6C of the Suitors Fund Act but in our opinion there is merit in the submission that a payment from the Fund would be within the spirit and intent behind s 6A(1)(c) of the Suitors Fund Act.***
>
> *11 However, no circumstance has been shown which enlivens any power in this Court to make an order under the Suitors Fund Act and accordingly the Court makes no order in relation to the appellant's costs of 21 June 1999.*

In *Pack* the Court was prepared to state that there "was merit" in the submission that payment would be within the "spirit and intent" of the *Act*. However the Court will not make a recommendation for payment.

In *R v Lilley [2000] NSWCCA 57* the Court was asked to make a recommendation for payment pursuant to section 6C following a successful Crown Appeal against sentence.
In relation to the issue of costs Smart J said:

> *36 An examination of the provisions of the Act reveals that there are areas where the Court has a role in that it may grant a certificate and others where it has no role, for example, as under s.6C. The accused makes his application direct to the Director-General supported by the reasons why the Director-General should authorise a payment.*
>
> *37 Counsel for Mr Lilley submitted that with Crown Appeals there were cogent reasons why an accused should receive his reasonable costs. He has already been dealt with by the Courts below, he faces double jeopardy and it is the Crown which seeks to disturb the finality attaching to a judge's sentence. Counsel pointed out that with Crown Appeals, legal aid is almost invariably granted to an accused who seeks it, and that there should not be an economic penalty (or rather no costs allowance) for those who are privately represented. There is force in these arguments. Those and any others should be advanced to the Director-General. The situation which arises as to an accused's costs in Crown Appeals merits the consideration of the Law Reformers.* ***However, this Court should not make the recommendation sought. There is no statutory warrant for such a course. The Act indicates those cases in which the Court has a role.***

The decision in Lilley was followed by the Court of Criminal Appeal in *R v Gilfillan [2003] NSWCCA 102*, *DPP v Moradian, Saliba and Sparos [2010] NSWCCA 27* and *R v Dennison [2011] NSWCCA 114*.

CONCLUSION

Having considered the matters I have raised in this paper, a practitioner would be quite entitled to feel that the *Suitors' Fund Act* will have relatively little practical application to their day to day practice in criminal law. The circumstances in which one may be entitled to draw from the fund may be few.

In addition to that, even if one is entitled to do so, the limit is $10,000. In today's world that is unlikely to go very far in the overall scheme of things. On the other hand, in the case of a trial aborting after a day or two it may provide some relief.

What I have not dealt with is the administrative process involved in claiming. Documentation, assessment of costs and the like. For assistance in the practical steps of making an application, I would refer you to the Attorney General's website in relation to the *Suitors' Fund Act*. I have referred to it a number of times in this paper. It can be found at :

http://www.lsb.lawlink.nsw.gov.au/lsb/legal_services_appl_costs/legal_services_suitors_fund.html

I also recommend a more detailed paper entitled "*The Suitors Fund Act 1951*" which is available online by Valentino Musico from the NSW Crown Solicitor's Office. It is available at:

http://www.lsb.lawlink.nsw.gov.au/agdbasev7wr/lsb/documents/pdf/suitorsfundactpaper.pdf

COMMITTALS - 116-120 Criminal Procedure Act 1986

Division 7 Costs

116 When costs may be awarded to accused persons

(1) A Magistrate may at the end of committal proceedings order that the prosecutor pay professional costs to the registrar, for payment to the accused person, if:

(a) the accused person is discharged as to the subject-matter of the offence or the matter is withdrawn, or

(b) the accused person is committed for trial or sentence for an indictable offence which is not the same as the indictable offence the subject of the court attendance notice.

(2) The amount of professional costs is to be the amount that the Magistrate considers to be just and reasonable.

(3) The order must specify the amount of professional costs payable.

(4) If the accused person is discharged, the order for costs may form part of the order discharging the accused person.

(5) In this section:

professional costs means costs (other than court costs) relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a Magistrate.

117 Limit on circumstances when costs may be awarded against a public officer

(1) Professional costs are not to be awarded in favour of an accused person in any committal proceedings unless the Magistrate is satisfied as to any one or more of the following:

(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,

(b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,

(c) that the prosecution unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs.

(2) This section does not apply to the awarding of costs against a prosecutor acting in a private capacity.

(3) In this section:

professional costs means costs (other than court costs) relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a Magistrate.

118 Costs on adjournment

(1) A Magistrate may in any committal proceedings, at his or her discretion or on the application of the prosecutor or an accused person, order that one party pay costs if the matter is adjourned.

(2) An order may be made only if the Magistrate is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delay of the party against whom the order is made.

(3) An order may be made whatever the result of the proceedings.

119 Content of costs orders

The order must specify the amount of costs payable or may provide for the determination of the amount at the end of the proceedings.

120 Enforcement of costs orders

An order made by a Magistrate under this Division for the payment of costs is taken to be a fine within the meaning of the Fines Act 1996.

SUMMARY HEARINGS- Sections 211-218 Criminal Procedure Act 1986

Division 4 Costs

211 Definition

In this Part:

professional costs means costs (other than court costs) relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a court.

212 When costs may be awarded

(1) A court may award costs in criminal proceedings only in accordance with this Act.

(2) This Act does not affect the payment of costs under the Costs in Criminal Cases Act 1967.

213 When professional costs may be awarded to accused persons

(1) A court may at the end of summary proceedings order that the prosecutor pay professional costs to the registrar of the court, for payment to the accused person, if the matter is dismissed or withdrawn.

(2) The amount of professional costs is to be the amount that the Magistrate considers to be just and reasonable.

(3) Without limiting the operation of subsection (1), a court may order that the prosecutor in summary proceedings pay professional costs if the matter is dismissed because:

(a) the prosecutor fails to appear or both the prosecutor and the accused person fail to appear, or

(b) the matter is withdrawn or the proceedings are for any reason invalid.

(5) The order must specify the amount of professional costs payable.

214 Limit on award of professional costs to accused person against prosecutor acting in public capacity

(1) Professional costs are not to be awarded in favour of an accused person in summary proceedings unless the court is satisfied as to any one or more of the following:

(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,

(b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,

(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.

(2) This section does not apply to the awarding of costs against a prosecutor acting in a private capacity.

(3) An officer of an approved charitable organisation under the Prevention of Cruelty to Animals Act 1979 is taken not to be acting in a private capacity if the officer acts as the prosecutor in any proceedings under that Act or section 9 (1) of the Veterinary Practice Act 2003.

215 When costs may be awarded to prosecutor

(1) A court may at the end of summary proceedings order that the accused person pay the following costs to the registrar of the court, for payment to the prosecutor, if the accused person is convicted or an order is made against the accused person:

(a) such professional costs as the court considers just and reasonable,

(b) court costs, to be paid to the registrar for payment to the prosecutor if the costs have been paid by the prosecutor or, if they have not been so paid, to be paid to the registrar of the court.

(1A) The court may not order the accused person to pay professional costs referred to in subsection (1) (a) if the conviction or order concerned relates to an offence:

(a) for which a penalty notice, within the meaning of section 20 of the Fines Act 1996, has been issued, and

(b) in respect of which the person has elected to have the matter dealt with by a court, and

(c) in respect of which the person has lodged a written plea of guilty, in accordance with section 182, not later than 7 days before the date on which the person is required to first attend before the court.

(1B) Subsection (1A) does not apply in relation to proceedings for an offence against the Occupational Health and Safety Act 2000, the regulations under that Act or the associated occupational health and safety legislation within the meaning of that Act.

(2) The amount that may be awarded under subsection (1) (b) for court costs is:

(a) the filing fee for a court attendance notice, or

(b) such other amount as the court considers to be just and reasonable in the circumstances of the case.

(3) The order must specify the amount of costs payable.

(4) For the purposes of this section, an accused person is taken to have been convicted if an order is made under section 10 of the Crimes (Sentencing Procedure) Act 1999. The order for costs may be in the order under that section.

(5) This section applies to all summary proceedings, including orders made in proceedings conducted in the absence of the accused person.

216 Costs on adjournment

(1) A court may in any summary proceedings, at its discretion or on the application of a party, order that one party pay costs if the matter is adjourned.

(2) An order may be made only if the court is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made.

(3) The order must specify the amount of costs payable or may provide for the determination of the amount at the end of the proceedings.

(4) An order may be made whatever the result of the proceedings.

217 Enforcement of costs orders

An order made by a court under this Division for the payment of costs is taken to be a fine within the meaning of the Fines Act 1996.

218 Public officers and police officers not personally liable for costs

(1) A public officer or a police officer is entitled to be indemnified by the State for any costs awarded against the officer personally as the prosecutor in any criminal proceedings in a court in which the officer is acting in his or her capacity as a public officer or a police officer.

(2) In this section:

public officer does not include a councillor or an employee of a council or any other person prescribed by the regulations for the purposes of this section.

Suitors' Fund Act 1951

Long Title

An Act to make further and better provision in respect of the liability for costs of certain litigation; to establish a Suitors' Fund to meet such liability; and for purposes connected therewith.

1 Name of Act and commencement

(1) This Act may be cited as the Suitors' Fund Act 1951.

(2) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.

2 Definitions

*(1) In this Act, unless the context or subject matter otherwise indicates or requires:" **Appeal**" includes any motion for a new trial and any proceeding in the nature of an appeal."**Corporation**" has the same meaning as it has in the Corporations Act 2001 of the Commonwealth."**Costs**", when used in relation to an appeal in respect of which an indemnity certificate is granted, includes:*

(a) the costs of the application for the indemnity certificate but, except as provided by paragraph (b) of this definition, does not include costs incurred in a court of first instance,

(b) where a new trial is ordered upon the appeal, the costs of the first trial.

***"Court"** includes such tribunals or other bodies as are prescribed.**"Director-General"** means:*

(a) the Director-General of the Attorney General's Department, or

(b) any person employed within that Department who is authorised in writing by the Director-General to exercise the powers and perform the functions of the Director-General under this Act.

***"Fund"** means the Suitors' Fund established under this Act.**"Indemnity certificate"** means an indemnity certificate granted under section 6 (1), (1A) or (1AA) or 6B.**"Land and Environment Court"** means the Land and Environment Court constituted under the Land and Environment Court Act 1979.**"Legally assisted person"** has the meaning ascribed thereto in section 4 (1) of the Legal Services Commission Act 1979.**"Sequence of appeals"** means a sequence of appeals in which each appeal that follows next after another appeal in the sequence is an appeal against the decision in that other appeal.**"Supreme Court"** means the Supreme Court of New South Wales or a judge thereof.*

(2) This Act applies to and in respect of:

(a) a court,

(b) an appeal to or from a court,

(c) proceedings or actions before a court, and

(d) a decision of a court,

exercising State or federal jurisdiction.

3 Suitors' Fund

(1) There is to be established in the Attorney General's Department Account a "Suitors' Fund" into which shall be paid the moneys referred to in section 5 and from which shall be paid the amounts referred to in sections 6 (2), 6A, 6B and 6C.

(2) In addition to the money payable out of the Fund under this Act the following amounts shall be a charge against and shall be paid out of the Fund:

(a) all costs of management of the Fund as certified by the Auditor-General,

(b) any amount considered by the Director-General to be surplus to the Fund's requirements,

(c) fees payable to consultants retained by the Director-General to advise on the

proper investment of the Fund.

(2A) An amount referred to in subsection (2) (b) shall not be paid out of the Fund without the concurrence of the Attorney General.

(2B) An amount paid out of the Fund under subsection (2) (b) shall be used for expenditure:

(a) on improving (or on projects designed to lead to improving) court facilities and services, and

(b) towards the administrative costs incurred in relation to the operation of Part 5 of the Civil Procedure Act 2005.

(3) The Fund shall, subject to this Act and the regulations, be under the direction, control and management of the Director-General.

(4) All moneys payable to the Fund under this Act and interest allowed thereon shall be made available to the Director-General for investment or for the purpose of paying the amounts referred to in subsection (2) of section 6 or any other amount properly payable out of the Fund.

(5) Interest at a rate to be determined by the Treasurer shall be allowed on the amount at the credit of the account first referred to in subsection (4).

(6) The Fund shall as far as practicable be invested in securities in which trustees are by law authorised to invest.

(7) Interest derived from the investment of the Fund shall form part thereof.

(8) The income of the Fund shall not be subject to taxation under any Act of this State.

(9) The Director-General may retain consultants to advise on the proper investment of the Fund.

4 Director-General to be corporation sole

(1) For the purposes of the exercise and discharge of the powers, authorities, duties, functions and obligations conferred and imposed upon the Director-General by this Act, the Director-General is hereby declared to be a corporation sole under the name of "The Director-General of the Attorney General's Department".The said corporation sole shall have perpetual succession and an official seal and may in the corporate name sue and be sued and shall be capable of purchasing, holding, granting, demising, disposing of and alienating real and personal property and of doing and suffering all such other acts and things as a body corporate may by law do and suffer.

(2) The assets of the Fund shall be vested in the said corporation sole.

(3) Where any property real or personal or the interest therein or charge thereon is vested in

or is acquired by the said corporation sole, the same shall unless otherwise disposed of by the said corporation sole pass to and devolve on and vest in its successors.

(4) The seal of the said corporation sole shall not be affixed to any instrument or writing except in the presence, or by the direction, of the Director-General who shall attest by the Director-General's signature the fact and date of the seal being so affixed.

(5) The appointment of the Director-General and the Director-General's official seal shall be judicially noticed.

(6) (Repealed)

5 Contributions to the Fund

(1) As soon as practicable after the last day of each month, there shall be paid to the Fund such percentage, not exceeding in any case ten parts per centum, of the fees of court collected in any court or in any jurisdiction of any court which are paid into the Consolidated Revenue Fund during the month ending on that day, as may be fixed by the Governor, upon the recommendation of the Colonial Treasurer, by proclamation published in the Gazette with respect thereto.The Governor may from time to time in like manner vary or revoke any such proclamation.

(2) Any proclamation under subsection (1) may fix different percentages in respect of:

(a) different courts,

(b) different jurisdictions of the same court,

(c) courts held at different places.

(3) Any amounts payable to the Fund under subsection (1) shall be paid out of the Consolidated Revenue Fund, and are hereby specially appropriated.

6 Costs of certain appeals

(1) If an appeal against the decision of a court:

(a) to the Supreme Court on a question of law or fact, or

(b) to the High Court from a decision of the Supreme Court on a question of law,

succeeds, the Supreme Court may, on application, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(1A) Where an appeal against the decision of a court to the Industrial Relations Commission of New South Wales or to the District Court of New South Wales on a question of law succeeds, that Commission or Court, as the case may be, may, upon application made in that

behalf, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(1AA) Where an appeal under section 56A of the Land and Environment Court Act 1979 to the Land and Environment Court on a question of law succeeds, that Court may, upon application made in that behalf, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(1B) For the purposes of this section, a taxing officer of a court shall, when acting as such a taxing officer, be deemed to be exercising the jurisdiction of a court of first instance.

(2) Where a respondent to an appeal has been granted an indemnity certificate, the certificate shall entitle the respondent to be paid from the Fund:

(a) an amount equal to the appellant's costs of:

(i) the appeal in respect of which the certificate was granted, and also

(ii) where that appeal is an appeal in a sequence of appeals, any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted,

ordered to be paid and actually paid by the respondent: Provided that where the Director-General is satisfied that the respondent is unable through lack of means to pay the whole of those costs or part thereof or that payment of those costs or part thereof would cause the respondent undue hardship, or where those costs or part thereof have not been paid by the respondent and the Director-General is satisfied that the respondent cannot be found after such strict inquiry and search as the Director-General may require or that the respondent unreasonably refuses or neglects to pay them, the Director-General may, if so requested by the appellant or the respondent, direct in writing that an amount equal to those costs or to the part of those costs not already paid by the respondent be paid from the Fund for and on behalf of the respondent to the appellant and thereupon the appellant shall be entitled to payment from the Fund in accordance with the direction and the Fund shall be discharged from liability to the respondent in respect of those costs to the extent of the amount paid in accordance with the direction,

(b) fifty per centum or such other percentage as may be prescribed (at the time when the indemnity certificate is granted) in lieu thereof by the Governor by proclamation published in the Gazette of the amount payable from the Fund pursuant to paragraph (a) or, where no amount is so payable, an amount equal to the costs of:

(i) the appeal in respect of which the certificate was granted, and also

(ii) where that appeal is an appeal in a sequence of appeals, any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted,

as taxed, incurred by the respondent and not ordered to be paid by any other party: Provided that where an amount is payable from the Fund pursuant to paragraph (a), but the Director-General directs that the costs of the appeal or appeals referred to in subparagraph (i) or in subparagraphs (i) and (ii) incurred by the respondent and not ordered to be paid by any other party be taxed at the instance of the respondent or those costs are, without such a direction, taxed at the instance of the respondent, the amount payable from the Fund under this paragraph shall be the amount equal to those costs as so taxed, and

(c) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, an amount equal to the costs incurred by the respondent in having those costs taxed.

Notwithstanding the foregoing provisions of this subsection:

(i) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, the aggregate of the amounts payable from the Fund pursuant to that paragraph and paragraph (c) shall not exceed the amount payable from the Fund pursuant to paragraph (a).

(ii) (Repealed)

(2A) The maximum amount payable from the Fund for any one appeal is:

(a) $20,000 in the case of an appeal to the High Court, or

(b) $10,000 in the case of any other appeal.

(2B) If more than one indemnity certificate has been issued in connection with the same appeal, the maximum amount payable from the Fund with respect to any one indemnity certificate is:

(a) an amount equal to the maximum amount payable from the Fund for that appeal divided by the number of indemnity certificates issued in connection with that appeal, or

(b) subject to subsection (2A), such other amount as may be determined by the court by which the indemnity certificate is issued.

(2C) Subsections (2A) and (2B) do not apply to appeals lodged before the commencement of those subsections.

(3) An indemnity certificate granted in respect of an appeal to the respondent to the appeal,

being an appeal in a sequence of appeals, shall be vacated if:

(a) in a later appeal in the sequence the successful party is the one to whom the indemnity certificate was granted, or

(b) an indemnity certificate is granted in respect of a later appeal in the sequence and the respondent to the earlier appeal is a party to the later appeal.

(4)

(a) An indemnity certificate granted in respect of an appeal to the respondent to the appeal shall have no force or effect:

(i) where a time is limited for appealing against the decision in the appeal--during the time limited for appealing against the decision in the appeal,

(ii) where an appeal lies against the decision in the appeal but no time is so limited--until an application for leave to appeal against the decision in the appeal has been determined and, where leave is granted, the appeal is instituted, or until the respondent lodges with the Director-General an undertaking in writing by the respondent that the respondent will not seek leave to appeal, or appeal pursuant to the leave granted, against the decision in the appeal, whichever first happens,

(iii) notwithstanding anything contained in subparagraph (ii) where the respondent gives the undertaking referred to in that subparagraph and thereafter seeks leave to appeal, or appeals, against the decision in the appeal--until the application for leave has been determined and, where leave is granted, the appeal is instituted,

(iv) notwithstanding anything contained in the foregoing provisions of this paragraph where the decision in the appeal is the subject of an appeal--during the pendency of the appeal.

Where the appeal and a later appeal or later appeals form a sequence of appeals and the indemnity certificate has not been vacated under subsection (3):

(v) the reference to the decision in the appeal in the foregoing provisions of this paragraph shall be construed as including a reference to the decision in the later appeal or in each such later appeal, as the case may be, and

(vi) the reference to the pendency of the appeal in those provisions shall be construed as including a reference to the pendency of the later appeal or of each such later appeal, as the case may be.

(b) Where an undertaking has been given by a respondent under the foregoing

provisions of this subsection and thereafter the respondent seeks leave to appeal or appeals, as the case may be, against the decision to which the undertaking relates, the respondent shall, upon demand made by the Director-General, pay to the Director-General any amount paid to the respondent, or for and on behalf of the respondent, under the indemnity certificate or, if the respondent notifies the Director-General in writing of the respondent's seeking leave to appeal or of the respondent's appeal, as the case may be, any amount paid to the respondent, or for and on behalf of the respondent, under the indemnity certificate before the respondent gave the notification, and the amount concerned may be recovered by the Director-General from the respondent as a debt in any court of competent jurisdiction.Any amount paid to, or recovered by, the Director-General under this subsection shall be paid by the Director-General into the Fund.

(c) Nothing in this subsection affects the operation of subsection (3).

(5) The grant or refusal of an indemnity certificate shall, except as provided by subsections (5A), (6) and (7), be in the discretion of the Supreme Court, Land and Environment Court, Industrial Relations Commission of New South Wales or District Court of New South Wales, as the case may be, and no appeal shall lie against any such grant or refusal.

(5A) Where a respondent to an appeal referred to in subsection (1), (1A) or (1AA) is a legally assisted person, the respondent shall, for the purpose of exercising the discretion referred to in subsection (5) and for the purpose of determining the amount which the respondent is entitled to be paid from the Fund:

(a) be deemed not to be a legally assisted person, and

(b) be deemed to have incurred such costs as have been incurred by any other person in the course of acting for the respondent as a legally assisted person.

(6) An indemnity certificate shall not be granted in respect of any appeal from proceedings begun in a court of first instance before the commencement of this Act.

(7) An indemnity certificate shall not be granted in favour of:

(a) the Crown,

(b) a corporation that has a paid-up share capital of two hundred thousand dollars or more, or

(c) a corporation that does not have such a paid-up share capital but that, within the meaning of section 50 of the Corporations Act 2001 of the Commonwealth, is related to a body corporate that has such a paid-up share capital, unless the appeal to which the certificate relates was instituted before the commencement of the Legal

Assistance and Suitors' Fund (Amendment) Act 1970.

6A Costs of proceedings not completed by reason of death of judge etc

(1) Where on or after the day on which Her Majesty's assent to the Suitors' Fund (Amendment) Act 1959 is signified:

(a) any civil or criminal proceedings are rendered abortive by the death or protracted illness of the judge or magistrate before whom the proceedings were had,

(a1) any civil or criminal proceedings are rendered abortive for the purposes of this paragraph by section 46A (Appeal against damages may be heard by 2 Judges) of the Supreme Court Act 1970 or section 6AA (Appeal against sentence may be heard by 2 judges) of the Criminal Appeal Act 1912, because the judges who heard the proceedings were divided in opinion as to the decision determining the proceedings,

(b) an appeal on a question of law against the conviction of a person (in this section referred to as the appellant) convicted on indictment is upheld and a new trial is ordered, or

(c) the hearing of any civil or criminal proceedings is discontinued and a new trial ordered by the presiding judge or magistrate for a reason not attributable in any way to disagreement on the part of the jury, where the proceedings were with a jury, or to the act, neglect or default, in the case of civil proceedings, of all or of any one or more of the parties thereto or their counsel or attorneys, or, in the case of criminal proceedings, of the accused or the accused's counsel or attorney, and the presiding judge or magistrate grants a certificate (which certificate the presiding judge or magistrate is hereby authorised to grant):

(i) in the case of civil proceedings--to any party thereto stating the reason why the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to disagreement on the part of the jury, where the proceedings were with a jury, or to the act, neglect or default of all or of any one or more of the parties to the proceedings or their counsel or attorneys, or

(ii) in the case of criminal proceedings--to the accused stating the reason why the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to disagreement on the part of the jury or to the act, neglect or default of the accused or the accused's counsel or attorney,

*and any party to the civil proceedings or the accused in the criminal proceedings or the appellant, as the case may be, incurs additional costs (in this section referred to as **"additional costs"**) by reason of the new trial that is had as a consequence of the proceedings being so rendered abortive or as a consequence of the order for a new trial, as the case may be, then the Director-General may, upon application made in that behalf, authorise the payment from the Fund to the party or the accused or the appellant, as the case may be, of the costs (in this section referred to as **"original costs"**), or such part thereof as the Director-General may determine, incurred by the party or the accused or the appellant, as the case may be, in the proceedings before they were so rendered abortive or the conviction was quashed or the hearing of the proceedings was so discontinued, as the case may be.*

(1A) Where, in the opinion of the Director-General:

(a) the Director-General would, but for this subsection, not be entitled to authorise payment of an amount to a person under subsection (1) because that person incurred neither original costs nor additional costs by reason only of the fact that that person was a legally assisted person, and

(b) that person would have incurred original costs and additional costs had that person not been a legally assisted person,

subsection (1) shall apply to and in respect of that person as if that person had not been a legally assisted person and as if that person had incurred such original costs and additional costs as the Director-General determines:Provided that the Director-General may, in lieu of authorising payment under that subsection of an amount to that person, authorise payment of that amount to such person or persons as in the Director-General's opinion is or are entitled to receive payment thereof.

(1B) If an application has been made under subsection (1) in respect of proceedings rendered abortive, or a new trial ordered, after the commencement of the Suitors' Fund (Amendment) Act 1987, the amount payable under that subsection to any one person shall, in respect of that application, not exceed:

(a) $10,000, or

(b) such other amount as may be prescribed (at the time when the proceedings were rendered abortive or the new trial was ordered).

(2) No amount shall be paid from the Fund under this section to:

(a) the Crown,

(b) a corporation that has a paid-up share capital of two hundred thousand dollars or more, or

(c) a corporation that does not have such a paid-up share capital but that, within the meaning of section 50 of the Corporations Act 2001 of the Commonwealth, is related to a body corporate that has such a paid-up share capital, unless the proceedings were rendered abortive or the new trial was ordered (as referred to in subsection (1)) before the commencement of the Legal Assistance and Suitors' Fund (Amendment) Act 1970.

6B Costs of certain appeals on ground that damages were excessive or inadequate

(1) Where an appeal to the Court of Appeal on the ground that the damages awarded in the action in respect of which the appeal is made were excessive or inadequate succeeds, the respondent to the appeal or any one or more of several respondents to the appeal, shall (if granted an indemnity certificate under subsection (2)) be entitled to be paid from the Fund:

(a) an amount equal to the costs of the appellant in the appeal ordered to be paid and actually paid by the respondent: Provided that where the Director-General is satisfied that the respondent is unable through lack of means to pay the whole of those costs or part thereof or that payment of those costs or part thereof would cause the respondent undue hardship, or where those costs or part thereof have not been paid by the respondent and the Director-General is satisfied that the respondent cannot be found after such strict inquiry and search as the Director-General may require or that the respondent unreasonably refuses or neglects to pay them, the Director-General may, if so requested by the appellant or the respondent, direct in writing that an amount equal to those costs or to the part of those costs not already paid by the respondent be paid from the Fund for and on behalf of the respondent to the appellant and thereupon the appellant shall be entitled to payment from the Fund in accordance with the direction and the Fund shall be discharged from liability to the respondent in respect of those costs to the extent of the amount paid in accordance with the direction,

(b) fifty per centum or such other percentage as may be prescribed (at the time when the indemnity certificate is granted) in lieu thereof by the Governor by proclamation published in the Gazette of the amount payable from the Fund pursuant to paragraph (a) or, where no amount is so payable, an amount equal to the costs of the appeal, as taxed, incurred by the respondent and not ordered to be paid by any other party: Provided that where an amount is payable from the Fund pursuant to paragraph (a), but the Director-General directs that the costs of the appeal incurred by the

respondent and not ordered to be paid by any other party be taxed at the instance of the respondent or those costs are, without such a direction, taxed at the instance of the respondent, the amount payable from the Fund under this paragraph shall be the amount equal to those costs as so taxed, and

(c) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, an amount equal to the costs incurred by the respondent in having *those costs taxed.*

Notwithstanding the foregoing provisions of this subsection:

(i) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, the aggregate of the amounts payable from the Fund pursuant to that paragraph and paragraph (c) shall not exceed the amount payable from the Fund pursuant to paragraph (a),

(ii) the amount payable from the Fund in respect of the appeal shall not in any case exceed the sum of $10,000 or such other amount as may be fixed (at the time when the indemnity certificate is granted) in lieu thereof by the regulations under this Act.

(2) If an appeal to the Court of Appeal on the ground that the damages awarded in the action in respect of which the appeal is made were excessive or inadequate succeeds, the Court of Appeal may, on application, grant:

(a) to the respondent to the appeal, or

(b) to any one or more of several respondents to the appeal,

an indemnity certificate in respect of the appeal.

(3) The grant or refusal of an indemnity certificate shall, except as provided by this section, be in the discretion of the Court of Appeal and no appeal shall lie against any such grant or refusal.

(4) The provisions of section 6 (4) (a) (i)-(iv) and (b) apply to and in respect of an indemnity certificate granted under this section in the same way as they apply to and in respect of an indemnity certificate granted under section 6.

(5) If a respondent to an appeal is a legally assisted person, the person shall, for the purpose of exercising the discretion referred to in subsection (3) and for the purpose of determining the amount which the respondent is entitled to be paid from the Fund:

(a) be deemed not to be a legally assisted person, and

(b) be deemed to have incurred such costs as have been incurred by any other person in the course of acting for the respondent as a legally assisted person.

(6) An indemnity certificate shall not be granted in favour of:

(a) the Crown,

(b) a corporation that has a paid-up share capital of two hundred thousand dollars or more, or

(c) a corporation that does not have such a paid-up share capital but that, within the meaning of section 50 of the Corporations Act 2001 of the Commonwealth, is related to a body corporate that has such a paid-up share capital, unless the appeal was instituted before the commencement of the Legal Assistance and Suitors' Fund (Amendment) Act 1970.

6C Payments not otherwise authorised by this Act

(1) If:

(a) a party to an appeal or other proceedings incurs or is liable to pay costs in the appeal or proceedings,

(b) the party is not otherwise entitled to a payment from the Fund in respect of the costs, and

(c) the Director-General is of the opinion that a payment from the Fund in respect of the costs, although not authorised by section 6, 6A or 6B, would be within the spirit and intent of those sections,

the Director-General may, with the concurrence of the Attorney General, pay from the Fund to the party such amount towards the costs as is assessed by the Director-General having regard to the circumstances of the case.

(2) A payment under this section shall not exceed $10,000.

6D Reduction of payment if taxation of costs not contested

The Director-General may, if:

(a) an amount is payable from the Fund under this Act in relation to costs incurred in an appeal, and

(b) taxation of the costs was not contested by the other party to the appeal,

reduce the amount payable to an amount that would, in the Director-General's opinion, have been payable had the taxation been contested.

7 Regulations

(1) The Governor may make regulations not inconsistent with this Act prescribing all matters which, by this Act, are required or permitted to be prescribed or which are necessary or

convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without prejudice to the generality of subsection (1) the regulations may make provision with respect to the manner of operating on the Fund and the custody of documents evidencing investment of the Fund and with respect to the taxation, for the purposes of this Act, of the costs of an appeal incurred by a respondent and with respect to all matters relating thereto, including but without limiting the generality of the foregoing provisions of this subsection:

(a) the specification of the principles to be followed in the preparation of a bill of those costs and in the taxation of such a bill,

(b) the specification of who shall be the taxing officer of such a bill and in relation thereto that different persons or officers shall be the taxing officers in respect of bills that relate to different courts or different jurisdictions of a court,

(c) the persons to be served with a copy of such a bill.

(3) (Repealed)

8 Savings and transitional provisions

Schedule 1 has effect.