SUPREME COURT OF QUEENSLAND

CITATION:	*Globex Shipping S.A. v Magistrate Mack & Anor (No 2)* [2018] QSC 172
PARTIES:	**GLOBEX SHIPPING S.A.** (applicant) **v** **MAGISTRATE MACK** (first respondent) **MATTHEW JOSEPH SLATCHER** (second respondent)
FILE NO:	No 8772 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application on the papers
DELIVERED ON:	3 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Application on the papers
JUDGE:	Davis J
ORDER:	**The second respondent pay the applicant's costs of the application on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – POWER TO AWARD GENERALLY – GENERALLY – where the applicant sought review of a magistrate's decision – where submissions made on behalf of the second respondent led the magistrate to fall into error – where the proceedings were criminal proceedings but the review application was a civil application – whether costs should be awarded. *Judicial Review Act* 1991 (Qld) s 49 *Justices Act* 1886 (Qld) s 54, s 113A *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) s 9(1B), s 29A *Uniform Civil Procedure Rules* (Qld) r 681 *Anghel v Minister for Transport (No 2)* [1995] 2 Qd R 454, not applied *Attorney-General for the State of Queensland v Barnes &*

Anor [2014] QCA 152, followed
Foster v Shaddock & Ors [2016] QCA 163, cited
Globex Shipping S.A. v Magistrate Mack & Anor [2018] QSC 138

SOLICITORS: Thynne & Macartney for the applicant
Crown Solicitor for the first respondent
Commonwealth Department of Public Prosecutions for the second respondent

[1] The second respondent swore a complaint under the *Justices Act* 1886 against the applicant alleging that the applicant had committed offences against s 9(1B) of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) ("The *POTS Act*"). The second respondent sought to effect service of the summons which issued pursuant to the complaint by delivering the summons to Thynne & Macartney (a firm of solicitors) and a shipping agent, Monson Agencies (Monson).

[2] The applicant brought an application to the Magistrates Court in Townsville seeking rulings to the effect that it had not been effectively served with the summons, and that the Magistrates Court therefore had no power to hear the complaint. If the Magistrates Court did have power to hear the complaint, the court would conduct an examination of witnesses, as the offences are indictable.[1] The first respondent, a magistrate, decided the application against the applicant, who then sought judicial review of that decision.

[3] Consistently with the principles explained in *R v Australian Broadcasting Tribunal; ex parte Hardiman*[2], the first respondent did not appear on the application for judicial review. I heard the application on 1 June 2018 and on 14 June 2018 I made declarations, the practical effect of which was to set aside the decision of the first respondent.[3]

[4] On the question of costs of the application, I ordered:

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1 *Justices Act* 1886 (Qld) s 104 and following.

2 (1980) 144 CLR 13 at 35–36.

3 *Globex Shipping S.A. v Magistrate Mack & Anor* [2018] QSC 138.

> "2. Each party is to deliver written submissions on costs by 28 June 2018 and the question of costs will be determined without oral hearing unless either party, in their written submissions on costs, contends that there should be an oral hearing."

[5] No application for costs against the first respondent was ever contemplated.[4] The costs issue is as between the applicant and the second respondent. Both the applicant and the second respondent delivered written submissions on costs, in which neither sought an oral hearing on the costs question.

[6] This judgment determines the issue of the costs of the application heard by me.

The source of power to award costs

[7] The applicant in its submissions on costs says:

> "The applicant seeks an order as to costs pursuant to section 49(1)(d) of the *Judicial Review Act 1991*, that the second respondent indemnify it in relation to costs properly incurred in the review application from the time that the application was made. The applicant's application for review filed 28 August 2017 sought, *inter alia*, costs."

[8] Although the applicant seeks an order that the second respondent "indemnify it in relation to costs", s 49(1)(d) of the *Judicial Review Act* 1991, which is said to be the basis of the applicant's claim for costs, refers to the Court ordering costs "on a party party basis". The applicant does not in its written submissions develop any submission in support of an order for costs on an indemnity basis. I have regarded the applicant as seeking an order for costs on the standard basis.

[9] Both parties have assumed that costs in this case are determined by reference to s 49 of the *Judicial Review Act*. That section is as follows:

> "**49 Costs – review application**
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> (1) If an application (the ***costs application***) is made to the court by a person (the ***relevant applicant***) who –

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[4] Consistently with E*x parte Blume; Re Osborn* [1958] SR (NSW) 334 at 339; see the reference in *Globex Shipping S.A. v Magistrate Mack & Anor* [2018] QSC 138 at [4].

(a) has made a review application; or

(b) has been made a party to a review application under section 28; or

(c) is otherwise a party to a review application and is not the person whose decision, conduct, or failure to make a decision or perform a duty according to law, is the subject of the application;

the court may make an order –

(d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or

(e) that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.

(2) In considering the costs application, the court is to have regard to –

(a) the financial resources of –

(i) the relevant applicant; or

(ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and

(b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and

(c) if the relevant applicant is a person mentioned in subsection (1)(a) – whether the proceeding discloses a reasonable basis for the review application; and

(d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c) – whether the case in the review application of the relevant applicant can be supported on a reasonable basis.

(3) The court may, at any time, of its own motion or on the application of a party, having regard to –

(a) any conduct of the relevant applicant (including, if the relevant applicant is the applicant in the review application, any failure to prosecute the proceeding with due diligence); or

(b) any significant change affecting the matters mentioned in subsection (2);

revoke or vary, or suspend the operation of, an order made by it under this section.

(4) Subject to this section, the rules of court made in relation to the awarding of costs apply to a proceeding arising out of a review application.

(5) An appeal may be brought from an order under this section only with the leave of the Court of Appeal.

(6) In this section –

review application means –

(a) an application for a statutory order of review under section 20, 21 or 22; or

(b) an application for review under section 43; or

(c) an appeal to the Court of Appeal in relation to an order made by the court on an application mentioned in paragraph (a) or (b)."

[10] The applicant submits that it should have its costs from the time of filing the application because costs are claimed in the application, so that is "the time the application [for costs] was made" for the purposes of s 49(1)(d) of the *Judicial Review Act*.[5]

[11] Both subsections 49(1)(d) and 49(1)(e) contemplate the making of a costs order in proceedings which at the point of time of the costs application are yet to be heard and determined. Questions have arisen as to whether s 49 also applies in what might be described as the more usual course of events where costs are determined after the application for the principal relief has been decided.

[12] In *Anghel v Minister for Transport (No 2)*[6] (*Anghel*), a number of residents likely to be adversely affected by the construction of a rail link to the Port of Brisbane sought judicial review of the decision of the Minister for Transport to approve the construction. When the application was filed, an application was also made under s 49. Ultimately,

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[5] The significance of the timing of the application was highlighted by Atkinson J (with whom Margaret McMurdo P and Fraser JA agreed) in *Foster v Shaddock & Ors* [2016] QCA 163 at [16].

[6] [1995] 2 Qd R 454.

the application for judicial review was summarily dismissed before the application under s 49 was determined. The judge who determined the judicial review application determined the issue of costs by reference to O. 91 of the *Rules of the Supreme Court* rather than by reference to the discretionary features identified in s 49(2) of the *Judicial Review Act*.

[13] In finding that the judge had erred, McPherson JA considered s 49 and said:

> "The general power of the Supreme Court to award costs in proceedings before it is conferred primarily by O. 91 of the *Rules of the Supreme Court*. It is a power which, were it not for the specific provisions of s. 49, would no doubt be exercisable in proceedings under the *Judicial Review Act*. However, the plain effect of s. 49 is to displace O. 91 to the extent that its provisions are inconsistent with s. 49. Section 49(4) provides that the rules of court in relation to awarding costs apply to proceedings arising out of review applications as defined; but the subsection is expressed to be "subject to this section".
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> That shows that s. 49 is intended to be the dominant provision. It may be now the only source of power to award costs in proceedings arising out of review applications. Here, however, his Honour appears to have considered that he was exercising the general power and discretion of the Court under O .91 to award costs, rather than the power conferred by s. 49 which is what the residents' application for costs evidently envisaged. On appeal it was submitted on behalf of the appellant Minister that if the order for costs in this case was made in the exercise of the Court's general power and discretion to award costs, then it was wrong and should be set aside."[7]

And later:

> "The correct view is that the power of awarding costs in a matter like this is the power specifically conferred by s. 49 rather than the general power invested by O. 91. The words 'another party' in s. 49(1)(d) are plainly capable of including the respondent to a review application; indeed, in many cases the respondent will probably be the only other party to the application. The result is that, because by s. 49(4) the rules of court are made subject to s. 49, the rule preventing an award of costs against a successful defendant or a party in the position of a defendant is displaced in the case of a proceeding arising out of a review application. The only express restriction is imposed by the concluding words of s. 49(1)(d), which limits the extent of the

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[7] At 458-459.

> indemnity that may be awarded to costs incurred 'from the time the costs application was made'.
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> Subject to that limitation, a successful respondent may under s. 49(1)(d) be ordered to pay the costs properly incurred by the applicant in the review application. It is true that the primary purpose of s. 49 may be to enable applicants for statutory review, by making application under the section at an early stage, to find out in advance whether they can expect to be indemnified in respect of costs of proceedings in the future. However, the power conferred by the section is not in terms so confined, but under s. 49(1)(a) is exercisable whenever a person 'has made a review application'. Once that happens the Court may make an order under s. 49(10)(d) that another party indemnify the applicant for costs properly incurred. If at first sight the provision has the appearance of being prospective, there is on closer examination nothing in it to prevent its being applied *ex post facto* to cover costs already incurred from the time the costs application was made."

[14] Those statements of McPherson JA are relied upon by the second respondent, who wishes to rely on the discretionary factors prescribed by s 49(2). However, the statement that s 49 may be the only source of power to award costs under the *Judicial Review Act*, and that s 49 may operate retrospectively as well as prospectively were each clearly *obiter dicta*. In *Anghel*, the application for a costs order under s 49(1)(d) had been made upon the filing of the application for judicial review and s 49 was therefore engaged.

[15] In *Attorney-General for the State of Queensland v Barnes & Anor*[8] (*Barnes*), judicial review had been sought of a decision by the Coroner to commit the applicant for trial.[9] The Attorney-General intervened in the application pursuant to s 51 of the *Judicial Review Act*. Section 51(2)(b) provides that where the Attorney-General intervenes "… the Court may, on the proceeding make such orders as to costs against the State as the Court considers appropriate." No s 49 application was made, only an application for costs after the determination of the principal application. In determining the question of costs the judge applied the discretionary considerations of s 49(2). Atkinson J, with whom Fraser and Gotterson JJA agreed, held that s 49 had no application. As to the criteria in s 49(2), her Honour said:

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[8] [2014] QCA 152.

[9] A course available under the *Coroners Act* 1958 (Qld) which applied to the coronial inquest.

"[43] However those criteria only apply when the court is considering a costs application made under s 49(1) of the JR Act. Section 49(1)(d) and (e) set out the orders the court may make on such an application. They are:

- That another party to the review application indemnify the applicant in relation to costs incurred from the time the costs application was made;
- That a party is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.

[44] A costs application for another party to pay the applicant's costs under s 49(1)(d) is prospective only and does not apply to a situation such as the present case where the application for costs was made only after the substantive decision allowing the application for judicial review was handed down and the costs had been incurred before the costs application was made.[10]

[45] In such a case, s 49(4) of the JR Act applies so that the rules of the court in relation to awarding of costs apply to a proceeding arising out of an application for a statutory order for review, whether at first instance or on appeal.

[46] In spite of the fact that the Coroner's decision may have led to criminal proceedings, these were civil proceedings and the awarding of costs is governed by the JR Act and the UCPR.

[47] The relevant rules of court are found in Chapter 17A of the UCPR. Rule 681(1) provides that:

> 'Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.'"[11] (emphasis added)

[16] A question then arises as to when an application under s 49 is "made". In *Anghel*, the filing of the application for orders under s 49 constituted making an application. There is nothing in *Barnes* which expressly overrules *Anghel* and no suggestion that an application under s 49 had, in *Barnes*, been filed before determination of the principal application.

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[10] Cf *Anghel v Minister for Transport (No 2)* [1995] 2 Qd R 454. (footnote in original)

[11] *Barnes* [2014] QCA 152 at [43]–[47].

[17] Section 49 of the *Judicial Review Act* was considered again in *Foster v Shaddock & Ors.*[12] There, the applicant for judicial review had failed both at first instance and on appeal and was resisting a costs application brought by the respondent. As to s 49(1)(d), Atkinson J said:

> "It can be seen from the terms of s 49(1)(d) that it is of no utility to the applicant in this case as, by its terms, the applicant could only have his costs from the time that the costs application was made. The relevant application was made after the substantive decision on the appeal was delivered."[13]

[18] It was observed though that s 49(1)(e) is not limited to costs incurred from the time the application is made.[14] Therefore, after the determination of the principal application, an unsuccessful party may make an application under s 49(1)(e), to be relieved from the costs.

[19] In *Anghel*, it was held that an application which was filed but had not been heard was an application "made" for the purposes of s 49(2)(d). While *Anghel* was decided under the *Rules of the Supreme Court*, the position is no different under the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*).

[20] If the applicant has "made" an application for a costs order under s 49(1)(d) by filing the application for judicial review, then it is not fatal to the claim for a costs order under s 49(1)(d) that the costs application is to be heard after determination of the primary relief. No party argued that the applicant's success in obtaining declarations was not a relevant consideration under s 49(1)(d). Plainly, it is.

[21] However, the applicant has not made an application under s 49(1)(d) at any time before determination of the application for principal relief. The application for judicial review makes no mention of s 49. It simply seeks "costs". The applicant must then rely on r 681 of the *UCPR*.

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12 [2016] QCA 163.

13 At [16].

14 At [5], [16] and [17].

[22] Whether a successful applicant brings a costs application based on s 49(1)(d) or in reliance upon r 681 of the *UCPR* will usually not matter. If the hearing of the application for costs occurs after judgment in the principal application, the applicant will by then have succeeded in obtaining its principal relief and generally will be expected to obtain a costs order unless the respondent can rely on s 49(1)(e). By s 49(4), the usual rule that costs follow the event (r 681) is excluded to the extent that s 49(1)(e) operates.

Exercise of discretion

[23] While the applicant in its written submissions framed its costs application on s 49(2)(d), it appreciated that the real issue was whether the second respondent could escape liability in reliance upon s 49(1)(e). The applicant submitted:

> "There are, though, no reasons why this court should not make an order in favour of the applicant. The second respondent will no doubt be indemnified in respect of any costs order, so considerations of impecuniosity do not arise. Nor can the applicant's conduct be criticised. As soon as purported service was effected, it notified the CDPP that it did not accept that service as valid, and then promptly took the point before the Magistrates Court. The bringing of these proceedings was the only method by which the applicant could vindicate its position. By way of contrast, the second respondent, through the CDPP, elected to attempt service on the applicant in circumstances where it must have been aware that its approach was likely to be contentious. Further, the second respondent actively contested the proceedings, thereby putting the applicant to further expense."[15]

[24] The second respondent submitted that there was no power to award costs. That submission was made upon the principle that unless a statute clearly provides a power to award costs in a criminal proceeding, no such power exists.[16] While that principle is well entrenched, the application for judicial review was a civil, not criminal proceeding, and there is an express power to award costs given by r 681 of the *UCPR* and s 49 of the *Judicial Review Act*. Further, it has generally been accepted in Queensland that a power

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[15] Applicant's written submissions on costs at [8].

[16] *Latoudis v Casey* (1990) 170 CLR 534 at 557; *Director of Public Prosections v Deeks* (1994) 34 NSWLR 523 at 533, which was followed by the New South Wales Court of Criminal Appeal in *Stanizzo v Complainant* [2013] NSWCCA 295.

exists to award costs on judicial review applications arising from criminal proceedings.[17]

[25] In resisting the application for costs on discretionary bases, the second respondent addressed the discretionary issues identified in s 49(2) of the *Judicial Review Act*. The second respondent submitted:

> "In support of the second respondent's position on costs, the following features are relied upon:
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> a. As the applicant has placed no evidence about its financial circumstances before the court, s 49(2)(a) cannot sensibly be considered. Suffice to say, the applicant is a corporation and not an individual. It is not apparent whether the applicant is being funded by its P & I Club.
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> b. In relation to s 49(2)(b), the second respondent's case involved issues affecting the public interest. Firstly, the determination of the matter involved detailed questions of statutory construction. In particular, the construction of s 29A of the POTS Act goes to the efficacy of that legislation as a whole and to Australia's obligations under the *International Convention for the Prevention of Pollution from Ships*. Secondly, the public interest in prosecuting a corporate defendant for pollution of the Great Barrier Reef Marine Park, which is a UNESCO World Heritage Site, arguably exceeds the public interest involved in many other criminal prosecutions.
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> c. In relation to s 49(2)(d), the case advanced by the second respondent was not unreasonable. This is particularly so in the unusual circumstances of this matter. There is no clear alternative pathway to effect service, which currently presents a significant barrier to the prosecution of the criminal proceeding. As in Fullard v Vera & Byway, the Magistrate's decision was not absurd or without any rational basis, and the case involved consideration of "unusual" drafting. Section 29A is drafted vaguely and had not been subject to previous judicial consideration."[18]

[26] There is no reason to assume that the applicant does not have resources enabling it to comfortably bear its own costs. Here, a question of construction arose in relation to s

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[17] *The Commissioner of the Qld Police Service v Cornack, Magistrate & Anor* [2004] 1 Qd R 627 and *Fullard v Vera & Byway* [2007] QSC 50.

[18] Second respondent's written submissions on costs at [17].

29A of the *POTS Act*. The second respondent, being a public officer[19] swore a complaint alleging serious offending. No doubt the second respondent swore that complaint upon a proper basis and with an honest belief that the offences had been committed. It is in the public interest for those who commit serious offences to be prosecuted. The second respondent no doubt took the step of serving the summons on Thynne & Macartney and Monson upon advice, and no doubt in good faith.

[27] It is not the case that the list of considerations identified in s 49(2) is exhaustive. Both the outcome[20] and the conduct of the application before the first respondent are important considerations.

[28] The position of the applicant has always been clear and consistent, namely:

1. Service of the summons is a precondition to the power of the Magistrates Court to hear an examination of witnesses;

2. Thynne & Macartney were the legal advisers to the owners of the ship and not an "agent of the ship".

3. Monson may have at some stage been an "agent of the ship", but not at the time of service of the summons.

[29] The position adopted by the applicant was found by me to be the correct one.

[30] The second respondent made a number of submissions to the first respondent which may not have been of assistance to him and which I have rejected:

1. That the Magistrates Court had jurisdiction once the complaint had been made. This is the wrong issue. The issue is clearly not whether the Magistrates Court was seized of the matter of the complaint, but rather whether the Magistrates Court could hear the complaint in the absence of service;

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[19] As defined by *Justices Act* 1886 (Qld) s 4.

[20] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [62], followed in *Foster v Shaddock & Ors* [2016] QCA 163 at [11].

2. That service of the summons is not "an essential precondition to a case proceeding". This submission was made despite s 54(1A) of the *Justices Act* which provides "Every summons shall be served in accordance with this Act".[21] There are numerous other sections of the *Justices Act* which contemplate service as a mandatory precondition to the jurisdiction of the Magistrates Court to hear the complaint;[22]

3. That a case can proceed against a company in its absence "because a corporate defendant cannot be detained or arrested and does not have a physical manifestation".[23] This submission was made apparently in reliance upon s 113A of the *Justices Act* even though s 113A expressly provides a procedure whereby a corporation can appear "at the time and place mentioned in the summons issued against it", and, by force of s 54A, served upon it;

4. "…where a corporate defendant is, in effect, obviously before a court, to insist that a summons shall be served has an absurd quality".[24] That submission was made in the face of well-established principles that a defendant may appear under protest to argue a lack of service without waiving the requirement for due service. Relevantly, the applicant was not, to use the second respondent's language "before the court". There was no "absurd quality" about the steps the applicant took. Those steps were well-justified by good authority;

5. During argument, when faced with submissions that the applicant had not waived the requirement for service, the second respondent conceded that there had been no waiver.[25] However, the submissions that the applicant was "before the court" and that requiring service of the summons "has an absurd quality" were not

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[21] Emphasis added.

[22] These are referred to in the principal judgment: *Globex Shipping SA v Magistrate Mack & Anor* [2018] QSC 138 at [82].

[23] Referred to at [50] of the principal judgment.

[24] Referred to at [48] of the principal judgment.

[25] Referred to at [53] of the principal judgment.

withdrawn. The first respondent was therefore faced with inconsistent submissions from the second respondent.

[31] The submission that Thynne & Macartney, a firm of solicitors representing the owners of the ship were the "agent of the ship" was baseless. Further, s 54A of the Justices Act prescribes service of the summons as a mandatory precondition to the power to hear the complaint by way of an examination of witnesses. Therefore, the application before the first respondent only raised one real issue. That was whether Monson, who obviously was the "agent of the ship" at some point, was the "agent of the ship" at a time relevant to service of the summons for the purposes of s 29A of the *POTS Act*. While ultimately that point was determined against the second respondent, it was a question fairly raised by the applicant's application and involved the interpretation of s 29A of the *POTS Act* which had not previously received judicial consideration.

[32] The first respondent found that service had been effected pursuant to s 29A of the *POTS Act* by service on Thynne & Macartney and Monson. However, those findings were somewhat incidental to the primary finding that the applicant's presence before him through lawyers was sufficient to vest jurisdiction to proceed. The first respondent commenced his reasons for judgment by stating that the requirement for service is to inform the defendant "what he has been – he or she or it has been charged with". The first respondent then went on to say:

> "Now, it is clear, and it is – and no argument has sensibly been made, I do not think, that the defendant Globex is anything but acutely aware of the proceedings against it and it is on that basis alone that one might think that service has been effected. There is no other reason to – no other explanation for their appearances today, nor is there any explanation for the interaction that – Mr Hockaday from the instructing solicitors' interaction with a variety of witnesses in relation to the matter. So on that basis, it is clear, just on the face of it, that they have been served."

[33] I draw the inference that the first respondent has been led into error by the submissions made to him on behalf of the second respondent. Once the first respondent had erred, the bringing of the judicial review application and the incurring of the expense of bringing the application were necessary.

[34] In all the circumstances, notwithstanding the public interest in the prosecution of criminal offences, and the public interest in the determination of the proper construction of the *POTS Act*, the second respondent who is indemnified by the Commonwealth Director of Public Prosecutions[26] should pay the costs of the application.

[35] I order that the second respondent pay the applicant's costs of the application on the standard basis.

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[26] Second respondent's written submissions on costs at [16] fn 23.