SUPREME COURT OF QUEENSLAND

CITATION:	*The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors (No 2)* [2020] QSC 174
PARTIES:	**THE AUSTRALIAN INSTITUTE FOR PROGRESS LTD** ACN 101 843 396 (applicant) **v** **THE ELECTORAL COMMISSION OF QUEENSLAND** (respondent) and **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (intervener) and **QUEENSLAND HUMAN RIGHTS COMMISSION** (intervener)
FILE NO:	BS 2246 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	15 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Applegarth J
ORDER:	**The applicant pay the respondent's costs of and incidental to the proceedings to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – DEPRIVING SUCCESSFUL PARTY OF COSTS – NATURE OF PROCEEDING – PUBLIC INTEREST OR DUTY – where an application for declaratory relief was dismissed as the declarations sought did not comply with the principles for granting declaratory relief and lacked utility – where the unsuccessful applicant seeks an order that the respondent pay the applicant's costs – where the applicant submits that the proceedings concerned the proper construction of the *Electoral Act* 1992 (Qld) – where the applicant submits that there are special or exceptional circumstances warranting a departure from the general rule that costs follow the event – where the applicant submits that the litigation was public

interest litigation – whether the respondent should pay the unsuccessful applicant's costs of the proceedings

Electoral Act 1992 (Qld), s 274
Human Rights Act 2019 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 681, r 684

BHP Coal Pty Ltd & Ors v O & K Orenstein & Koppel AG & Ors (No 2) [2009] QSC 64, cited
Bucknell v Robins [2004] QCA 474, cited
Cretazzo v Lombardi (1975) 13 SASR 4, cited
In the matter of ACN 005 408 462 Pty Ltd (formerly TEAC Australia Pty Ltd) (No 2) [2008] FCA 1184, cited
Interchase Corporation (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, cited
Lonergan v Stilgoe & Ors (No 2) [2020] QSC 146, cited
Monie v Commonwealth of Australia (No 2) [2008] NSWCA 15, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Parker v Minister for Sustainability, Environment, Water, Population and Communities (No 2) [2012] FCA 263, cited
Re Quality Blended Liquor Pty Ltd (No 2) [2014] QSC 307, cited
Ruddock v Vadarlis (No 2) (2001) 115 FCR 229; [2001] FCA 1865, cited
Sharples v Council of the Queensland Law Society Incorporated [2000] QSC 392, cited
Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection (No 2) [2017] QSC 159, cited
Wildnerness Society Inc v Turnbull, Minister for the Environment and Water Resources (2007) 98 ALD 651; [2007] FCA 1863, cited

COUNSEL: P J Dunning QC, with A Hellewell, for the applicant
S A McLeod QC, with D E F Chesterman, for the respondent

SOLICITORS: O'Donnell Legal for the applicant
Crown Law for the respondent

[1] Success, like beauty, is in the eye of the beholder. Therefore, it is not uncommon for parties to concluded civil litigation to both claim success.

[2] The *Rashomon* effect describes how parties describe an event in a different and contradictory manner, which reflects their subjective interpretation and self-interested advocacy, rather than an objective truth.[1] The *Rashomon* effect is evident

1 *Zalutsky v Kleinman* 747 F. Supp. 457 at 458 (N.D. Ill. 1990).

when the event is the outcome of litigation.[2] One should not be surprised when both parties claim to have won the case.

[3] The law, however, seeks an objective truth when it comes to awarding costs. In general, costs are awarded to the successful party.

[4] The AIP's application for declaratory relief was dismissed by me.[3] It fell at the first hurdle. I concluded that the declarations sought did not comply with the principles governing the granting of declaratory relief and lacked utility.

[5] As the Electoral Commission's submissions on costs point out, I found:

(a) "there is … no precision as to the facts upon which the proposed declarations would be based';[4]

(b) "the proposed declarations refer to the 'activities' of any such third party, without stating in even a general way what those activities are … those activities are not stated with any precision and are said to include activities 'in relation to political communications or concerning an election for the Legislative Assembly'. The activities which are 'in relation to' those matters are unstated and ill-defined";[5]

(c) "the proposed declarations do not specify the particular conduct of the AIP or of unspecified prohibited donors which would be declared, in effect, lawful…";[6]

(d) "the absence of details of the precise activities of the AIP to which the declaration would apply is a reason to decline to make a declaration in the form proposed. A declaration in that or a similar form would be uncertain for that reason';[7]

(e) "in the circumstances, the proposed declarations are not based on 'a concrete and established or agreed situation'. There is a lack of precision as to the activities of the AIP and the specific conduct of the prohibited donor to which the declarations are to apply";[8]

(f) "the proposed declarations are not expressed in precise and clear terms and, accordingly, lack utility.";[9] and

(g) "as to the threshold issues, the AIP has failed to establish that declarations in the form sought should be made. Declarations in the form sought do not

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2 *In the matter of ACN 005 408 462 Pty Ltd (formerly TEAC Australia Pty Ltd) (No 2)* [2008] FCA 1184 at [3]; *Queensland Construction Materials P/L v Redland City Council & Ors* [2010] QCA 248 at [14].

3 *The Australian Institute for Progress Ltd v The Electoral Commission of Queensland* [2020] QSC 54 ("Reasons").

4 At [46].

5 At [48].

6 At [49].

7 At [51].

8 At [52].

9 At [53].

accord with the principles governing the circumstances in which the court will grant declaratory relief'."[10]

[6] Despite this unpromising start and the dismissal of its proceeding, the AIP seeks an order that the Commission pay its costs for one of more of the following reasons:

(a) the event of the proceedings was the proper construction of an important provision of the *Electoral Act* 1992 (Qld), which was determined on the basis of an interpretation asserted by neither the Commission prior to the hearing, and still to a lesser extent during the hearing, nor the AIP;

(b) even if the event was treated as against the AIP, there are special or unusual circumstances warranting the Commission as regulator paying the AIP's costs; and

(c) it was public interest litigation providing useful commentary on the *Human Rights Act* 2019 (Qld) and the *Electoral Act* 1992 (Qld).

[7] The Commission, on the other hand, submits that the AIP should pay its costs. It observes that:

(a) it defeated the application in its entirety on the basis noted above, being a basis that was foreshadowed well before the hearing in correspondence dated 5 March 2020 and in submissions filed ahead of the hearing; and

(b) the AIP's arguments about the construction of the *Electoral Act* were rejected.

[8] As to (b), the Commission notes that the Court rejected the AIP's arguments about the construction of s 274(1)(b) of the Act at:

(a) paragraphs 80, 81 and 82 (text);

(b) paragraph 93 (context);

(c) paragraph 94 (meaning of "campaign");

(d) paragraph 101 (the surplusage argument);

(e) paragraphs 102 to 106 (the legality argument); and

(f) paragaphs 110 and 111 (the purposive arguments).

[9] The Court's summary of its conclusions on the proper construction of the Act at [139] – [145] of its reasons is said to conveniently display, contrary to AIP's argument on costs, the AIP's *lack* of success on the construction issues.

Relevant principles

[10] The general rule stated in r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) is that costs are at the discretion of the Court but "follow the event, unless the Court

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10 At [55].

orders otherwise". This reflects the general rule that a party who on the whole succeeds in the action receives the general costs of the action.

[11] The "event" may not be confined to the result or outcome of the proceeding. Where there were two or more issues or questions in the proceeding, each of which gave rise to an "event" on each separate issue, costs may be ordered according to the outcome of that issue.[11] The term "issue" in this context is not to be construed as a precise issue in the technical pleading sense, but to a disputed question of fact or law.[12]

[12] Good reason is required to depart from the general rule that costs follow the event. The general rule is intended to compensate a successful party and, as between parties, "fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation".[13] The general rule is also grounded in reasons of public policy.[14]

[13] Good reason may exist if there are special or exceptional circumstances,[15] in the event of an award of nominal damages, or if the conduct of the successful party disentitles it to such an order.[16]

[14] I should note that r 684 provides an exception to the general rule that costs should follow the event. It provides that the Court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding. The general rule remains, and necessarily the circumstances which would engage r 684 are exceptional.[17] I mention r 684 only in passing because the AIP does not rely upon it. Instead, it relies upon r 681 and contends that, upon a proper analysis of the "event" it should have its costs.

[15] Finally as to governing principles, the fact that the word "event" in r 681 is not confined to the final result of the proceeding, but may refer to the outcome of a separate issue where there are two or more issues in the proceeding, should not be thought to encourage a proliferation of issue identification. Instead, it recognises the injustice that may be produced if the word "event" was confined simply to the result or outcome of the proceeding. Moreover, the fact that a party has been unsuccessful on a particular issue, but successful on others, does not necessarily justify the awarding of costs on an issues basis. Courts may on occasions apportion costs in a way which fairly reflects both the outcome, and the costs associated with, the determination of different questions.[18] However, ordinarily the fact that a successful party fails on a particular issue does not mean that it should be deprived of some of its costs. Also, a court will generally only deprive the successful party

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11 *Interchase Corporation Ltd (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60-61 [83].

12 *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12.

13 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97.

14 Ibid.

15 *Bucknell v Robins* [2004] QCA 474 at [17].

16 The circumstances that may justify depriving a successful party of costs are discussed in Professor Dal Pont's work, *Law of Costs*, 4th ed [8.26] – [8.63] ("Dal Pont").

17 *BHP Coal Pty Ltd & Ors v O & K Orenstein & Koppel AG & Ors (No 2)* [2009] QSC 64 at [7].

18 *Re Quality Blended Liquor Pty Ltd (No 2)* [2014] QSC 307 at [16].

of the costs relating to an issue on which it was unsuccessful where that issue was clearly dominant or separable.[19]

Events and issues

[16] Having regard to the submissions of the AIP and the Commission filed before and made at the hearing before me on 16 March 2020, the matter was broadly divided into two parts.

[17] The first part was an important preliminary issue, namely whether the declarations sought raised hypothetical questions, divorced from any facts, so that the questions were not suitable for judicial resolution by way of declaration.

[18] That gave rise to what I described as two related preliminary issues about the availability of the declaratory relief sought in the originating application:

> "1. Do the declarations raise hypothetical questions, divorced from proven or agreed facts about the activities of the unspecified "Third Party" (or even the AIP) and the intentions and activities of unspecified prohibited donors whose conduct would, in effect, be declared lawful if the declarations were made?
>
> 2. Are the declarations bad in form in the absence of findings about the "activities", and do they lack utility because of the absence of specific details of the particular conduct of the prohibited donor and the unspecified "Third Party" (or even the AIP) which would, in effect, be declared lawful?"[20]

[19] The second part of the case, if the AIP established that the matter was an appropriate one for the Court to exercise its discretion to grant declaratory relief, was an issue of statutory construction. I formulated the issue as follows:

> "Should s 274(1)(b) be read as confined to a gift to enable the entity to incur electoral expenditure on behalf of any one of the entities mentioned in s 274(1)(a)?"[21]

[20] The AIP failed and the Commission succeeded on the preliminary issue. The preliminary issue involved substantial argument in writing and occupied a substantial part of the hearing before me. If the resolution of the preliminary issue is treated as an "event" then the outcome of that event favoured the Commission.

[21] As to the issue of statutory construction, the Commission is correct to submit that I rejected the AIP's arguments about the construction of s 274(1)(b).

[22] The AIP submits that it was necessary for it to come to Court "to vindicate an entitlement to be able to receive donations from prohibited donors for research and advocacy for certain policies". However, the proceeding was not concerned with the AIP's conduct of research and advocacy in general. The declaratory relief sought by it was not confined to those activities. The declaratory relief sought by it

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19 *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [64]-[66].
20 Reasons at [20].
21 Reasons at [21].

concerned the activities of any third party, and insofar as it was concerned with the activities of the AIP, effectively sought a declaration that all of its activities fell outside of the operation of the relevant statutory provisions.

[23] The AIP points to correspondence between the parties prior to the initiation of the proceeding. However, in that correspondence the Commission did not assert that the AIP was precluded from engaging in research and advocacy on issues unrelated to "electoral expenditure". The AIP submits that it has "vindicated an entitlement to conduct research and advocacy programs in a way that does not engage the prohibition on donations from prohibited donors", and that this is different from the position taken by the Commission in its correspondence. However, the AIP's entitlement to conduct research and advocacy unrelated to "electoral expenditure" was not contested by the Commission in correspondence or in submissions. Moreover, it was not the subject of the relief sought.

[24] The fact that I accepted some of the AIP's submissions on issues of construction, for instance, that the Act uses the composite expression "campaign for an election", not simply a campaign, is not significant in the overall scheme of things.[22] Incidentally, I accepted the Commission's definition of "campaign" rather than the narrower definition advanced by the AIP.

[25] In summary, the Commission enjoyed complete success on the substantial, preliminary issue which resulted in the application being dismissed, and also enjoyed very substantial success on the issues of statutory construction that were argued. The AIP failed on the essential issue of statutory construction which I have earlier identified.

[26] If costs were to follow the event or the two events which I have identified, then the order for costs would be in favour of the Commission.

Are there special or exceptional circumstances which warrant the Commission paying the AIP's costs?

[27] The AIP submits that the following are special or exceptional circumstances which justify a departure from the general rule that a successful party is entitled to its costs:

> "• it is imperative that the ECQ regulates and promotes compliance with electoral funding and disclosure requirements based on a correct interpretation of the Electoral Act. Prior to the decision it was not;
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> • the basis of the challenge of ECQ's interpretation of the statute was arguable and had raised significant issues with the ECQ's interpretation of the statute; and
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> • the challenge to the ECQ's interpretation impacted the way in which the ECQ provides advice to the public as to prohibited donor's donations in Queensland. It is reasonable to assume that, had the Application not been commenced by AIP, the EQC

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22 Reasons at [147].

> would still be improperly informing the public of the rights of prohibited donors from donating under the Electoral Act."

[28] The Commission contests these submissions, and argues that my reasons do not support the AIP's submission that the Commission was incorrectly interpreting the *Electoral Act* or improperly informing the public of its rights under that legislation. I agree. The Commission's Fact Sheets, which formed part of the evidence, attempted to explain in simple layman's terms the meaning of "political donation" and "electoral expenditure". It is no easy task to describe in simple terms the complex provisions of the Act which govern such matters. In any case, the AIP did not seek relief in respect of this material. The relief sought in its originating application was much broader and sought to insulate all of its activities (not to mention all of the activities of unidentified third parties) from the reach of relevant provisions of the Act.

[29] Insofar as the application is said to have been brought in order to challenge the Commission's interpretation of the statute, as conveyed in the Commission's letter to the AIP dated 20 February 2020, the letter expressed in simple terms the effect of the provisions on gifts from a property developer to another entity to enable the entity to incur electoral expenditure. It did not express any firm view as to whether the AIP had committed an offence. It did not advise the AIP that any form of research and advocacy by it would involve incurring "electoral expenditure" for the purposes of the Act.

[30] I accept the importance of the Commission promoting compliance with the Act based on a correct interpretation of it. However, I am not persuaded that the Commission was not doing so.

[31] The fact that the AIP raised contentions that were arguable concerning the proper interpretation of the statute does not, in my view, constitute special or exceptional circumstances.

Public interest and public interest litigation

[32] An associated argument is that the Commission, as regulator, benefited from a judicial interpretation of the Act and was thereby assisted. As appears above, I am not persuaded that the Commission adopted in its submissions an incorrect view of the provisions and thereby benefited from any correction. Most of the Commission's arguments on statutory interpretation were accepted by me.

[33] The AIP submits that the public, as well as the Commission, has benefited from the clarification of the law. The public may have benefited from my interpretation of how the relevant provisions operate. However, that interpretation was given and necessitated by the AIP pressing submissions about the Act which I rejected. Still, I accept that the public, as well as the parties, may have benefited in some way by whatever clarification my judgment gave on issues of statutory interpretation.

[34] Terms such as "public interest" and "public interest litigation" may lack precision in a context like this.

[35] In *Wilderness Society Inc v Turnbull,*[23] Marshall J stated that the "public interest" is a legitimate basis for departing from the usual order if it can be shown that, upon further examination, there are sufficient reasons connected with or leading up to the case or special circumstances that would warrant departure from the usual rule. There must be sufficient public interest related reasons to warrant a departure from or outweigh the important consideration that a wholly successful respondent ordinarily is awarded its costs.

[36] In *Oshlack v Richmond River Council*, McHugh J addressed the concept of "public interest litigation" and stated that if discretions concerning costs are to be exercised consistently and rationally, it is essential that the courts formulate principles and guidelines that can be applied with precision in most cases.[24] If characterisation as "public interest litigation" is a factor to be considered when making costs orders, courts should be able to define the term with precision.[25] His Honour continued:

> "Without an organising principle to apply or a set of criteria to guide, there is a real danger that, by invoking the 'public interest litigation' factor in cases that affect the public interest or involve a public authority, an award of costs will depend on nothing more than the social preferences of the judge, a dependence that will be masked by reliance on the protean concept of public interest litigation."[26]

[37] As appears in other public law contexts, such as judicial review, any proceeding which seeks to review the decisions or conduct or a public authority will involve a public interest element and usually there must be some broader public interest than is usual in order to justify a special costs order.[27]

[38] The term "public interest litigation" suggests that the public, or at least a section of it, has an interest in the litigation which is being pursued. It also invites the distinction between the public interest and interests of a private nature which the litigant may be seeking to advance. It prompts an inquiry whether the unsuccessful litigant did indeed pursue the interests of the public, rather than its own private interests, in bringing the litigation.[28]

[39] In this case, while the AIP's objects include a commitment to political freedom, the stated purpose of the proceedings was to ensure that property developers were not unnecessarily deterred from making donations to it and to avoid the risk that this may inhibit the AIP's participation in forthcoming elections. Therefore, the litigation had both a public interest element and a concern to protect the applicant's own private interests.

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23 *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* (2007) 98 ALD 651; [2007] FCA 1863 at [30].

24 (1998) 193 CLR 72 at 98-100.

25 At 99 [72].

26 At 100 [75].

27 *Lonergan v Silgoe & Ors (No 2)* [2020] QSC 146 at [10]; *Sharples v Council of the Queensland Law Society Incorporated* [2000] QSC 392 at [30]; *Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection (No 2)* [2017] QSC 159 at [8] – [10].

28 Dal Pont [9.15].

[40] I recognise that there is a public interest that parties not be unduly inhibited from pursuing challenges to official conduct by the fear of an adverse costs order. However, that consideration must be weighed against the compensatory character of costs orders. As McHugh J stated in *Oshlack v Richmond River Council*, as between the parties, "fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation."[29] His Honour continued:

> "As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice."[30]

[41] For this reason, the potential inhibition on persons pursuing cases that challenge official conduct is not a sufficient justification as to why persons who pursue such challenges should not ordinarily be subject to the usual order as to costs.

[42] The fact that the proceeding produces a public benefit in clarifying the law is not, in itself, a sufficient ground to deny costs to a successful respondent.[31]

[43] The fact that the proceeding may concern human rights is not sufficient.[32] Instead, the fact that a case involves the liberty of individuals and raises matters of public importance may warrant a departure, or partial departure, from the usual rule.

[44] The AIP's submissions include the proposition that the proceeding was public interest litigation providing useful commentary on the *Human Rights Act* 2019 (Qld) ("*HRA*") and the *Electoral Act*. I have also addressed the extent to which it provided a commentary on the *Electoral Act*. If the decision provided any useful commentary on the *HRA*, then that was not of the AIP's making. It expressly did not rely upon the *HRA*.[33]

[45] Ultimately, the "public interest" submission turns upon whether there are a range of circumstances which, upon examination, justify in the public interest a departure from the ordinary rule that costs follow the event.[34]

[46] The proceeding may incidentally have provided some clarification of relevant provisions of the *Electoral Act* and aided the general public (and the parties) to appreciate that the application of s 274(1)(b) requires:

(a) identification of activities that would constitute a "campaign for an election"; and

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29 (1998) 193 CLR 72 at 97 [67].
30 At 97 [68].
31 *Parker v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 263 at [8].
32 Dal Pont [9.28]-[9.30].
33 Reasons at [112].
34 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 236 [14].

(b) an inquiry into whether a gift was made to enable the entity to incur expenditure for the purposes of that campaign.[35]

[47] Insofar as the proceeding sought to challenge the views or conduct of a public authority by seeking a judicial interpretation of statutory provisions, this is a common feature of litigation against government entities which involve issues of statutory interpretation. While the litigation may have served some broader public interest, it was pursued so as to advance the private interests of the AIP. Any clarification of the statute for the benefit of the public was a consequence of the AIP's unsuccessful pursuit of a declaration that sought to insulate all of its activities from the reach of the relevant provisions. The proceeding was not confined to the issue of statutory interpretation which I proceeded to decide. It was unnecessary to decide that issue. The proceeding might have been dismissed simply because the AIP sought relief which was not available to it.

[48] Any incidental public benefit achieved by rejecting most of the AIP's arguments on issues of statutory interpretation (as summarised in [8] above) is not, in my view, a sufficient reason to depart from the ordinary rule that costs follow the event.

Conclusion

[49] The Attorney-General, who intervened, did not seek her costs. The Queensland Human Rights Commission also does not seek costs. Therefore, the only order as to costs will be:

> "The applicant pay the respondent's costs of and incidental to the proceedings to be assessed on the standard basis."

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35 Reasons at [150].