GREENWAY CHAMBERS

# COSTS IN WORK HEALTH AND SAFETY MATTERS BEFORE THE DISTRICT COURT OF NSW

A PAPER PRESENTED AT GREENWAY CHAMBERS
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INGMAR TAYLOR SC

Greenway Chambers
Level 10, 99 Elizabeth Street
Sydney NSW 2000
DX 165 Sydney
T | 02 9151 2999
E | ingmar.taylor@greenway.com.au

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## INTRODUCTION

1. Ordinarily at the conclusion of proceedings for breach of the *Work Health and Safety Act 2011* (NSW) the 'usual' order as to costs will be made: namely that that the unsuccessful party pay the costs of the successful party as agreed or as assessed.

2. Occasionally, however, questions arise as to whether a departure from the usual order is justified.

3. This paper seeks to summarise the applicable principles, and provide some examples of recent cases where an order other than the usual order has been made.

## LEGISLATIVE PROVISIONS

4. Part 5, Division 4 of the *Criminal Procedure Act 1986* (NSW) governs the award of costs in criminal proceedings in New South Wales.

5. Section 257B (**When costs may be awarded to prosecutor**) provides the court with a discretionary power to order that an accused person pay the prosecutor's costs upon a conviction or order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

6. Section 257C (**When costs may be awarded to accused person**) provides a corresponding discretionary power to the Court to order that the prosecutor pay costs to the registrar, for payment to the accused person "*if the matter is dismissed or withdrawn*" including where the proceedings are found to be invalid.

7. For most criminal prosecutions, pursuant to s257D, the power to award costs against the prosecutor only arises where the accused can also show some additional exceptional circumstance such as: the investigation was unreasonable or improper; or the proceedings were initiated without reasonable cause. However that additional limitation does not apply to proceedings for an offence against the *Work Health and Safety Act 2011* (NSW) or the regulations under that Act. Accordingly, the discretionary

power to award costs to an accused who succeeds at trial in WHS matters is not limited, and the usual principles (discussed below) apply.

8. Section 257F provides a separate discretionary power to award costs against a party arising from the matter being adjourned. This power can be exercised regardless of the eventual outcome of the trial. Before making the order the Court must be satisfied that the other party has incurred additional costs and that the cause of those costs is "*the unreasonable conduct or delays of the party against whom the order is made*".

9. Section 257G provides that costs ordered to be paid are to be as agreed between the parties, or as determined pursuant to legal costs legislation (as defined in s3A of the *Legal Profession Uniform Law Application Act 2014* (NSW)).

10. As can be seen, the Court's power to award costs in WHS matters is broadly akin to the broad power that civil courts have to award costs. There is one notable exception, however. The Court has no power to award costs to an accused where the *matter* was not dismissed or withdrawn. The word matter is well understood and in this context would incorporate the whole proceeding, and so would not encompass a situation where some particulars are not proved Accordingly, if the Court convicts the accused, in circumstances where the prosecutor has failed to prove some of its case there is no power to award that the prosecutor pay the defendants costs. That circumstance may well, however, cause the Court to reduce, potentially to zero, the costs that the defendant must pay to the prosecutor.

## APPLICABLE PRINCIPLES

11. The current leading authority on costs in WHS matters is the decision of the Court of Criminal Appeal in *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37 (Bathurst CJ, Hidden and Davies JJ) from [208]. From that decision the following principles can be discerned.

### *Costs are compensatory, not a punishment for failure*

12. 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: *Latoudis v Casey* [1990] HCA 59; 170 CLR 534 at 542.

13. In *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96 the Court of Criminal Appeal considered whether the trial judge had erred in refusing to award the prosecutor its costs following a successful prosecution on the stated basis that:

> … the public interest in this prosecution is exhausted by the fine imposed. It would not be fair, just or reasonable to impose a further impost upon the innocent natural person who will bear the costs of that fine.

14. The Court held that conclusion was in error, being contrary to the principles in *Latoudis v Casey* noted immediately above, and made an order that the offender pay the prosecutor's costs, other than its costs in respect of one issue, as discussed below.

### *Costs ordinarily follow the event*

15. Ordinarily, costs follow the event such that a successful litigant receives his costs, in the absence of special circumstances justifying some other order: *Latoudis v Casey* [1990] HCA 59; 170 CLR 534 at 568.

### *Costs may be discounted where there are multiple discrete issues and a party succeeds on some only*

16. Where the proceedings involve multiple issues the application of the rule that costs follow the event may involve hardship where a party succeeds on some issues and yet fails on others. Particularly is this so where, for example, a defendant succeeds on issues that occupied the bulk of the time taken by the proceedings. Nevertheless, unless a particular issue or group of issues is clearly dominant or separable, it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed: *Waters v P C Henderson (Aust) Pty Ltd* (unreported CA (NSW) Kirby P, Mahoney and Priestley JJA, 6 July 1994) per Mahoney JA.

17. Where a matter involves multiple issues and the question before the court is whether it should make some other order as to costs other than the order that costs follow the event, a distinction is commonly drawn between cases which involve clearly discrete issues for determination, and those in which all issues are inseparable, or at least sufficiently linked, with respect to the overall disposition of a particular matter.

18. In *Permanent Trustee Aust Ltd v FAI General Insurance Co Ltd* (unreported, NSWSC, 3 June 1998), Hodgson CJ in Eq noted that the obvious examples of a matter involving discrete issues is one where a plaintiff makes separate claims for different relief, or a claim by a plaintiff and a cross-claim by a defendant. Another example is where a respondent is successful in having an appeal against an earlier decision dismissed, but for reasons other than those raised in the respondent's Notice of Contention.

19. This is not to say that so-called "*discrete issues*", for the purposes of apportioning costs, only exist in cases where there are separate claims made within a single matter. As Toohey J stated in *Hughes v Western Australian Cricket Association* (1986) ATPR 40–748, it can relate to "any disputed question of fact or law" before a court on which a party fails, notwithstanding that they are otherwise successful in terms of the ultimate outcome of the matter.

20. In *Madden v Connell* [2001] NSWSC 1051, Hamilton J referred to there being a "*rule*" that where there are "*discrete issues and the time taken on each issue at the hearing can be identified or realistically estimated*", an order for costs may be made against the party which fails on such issues, or alternatively, that party may be deprived of its costs for that portion of the matter. The Court in *Bulga*, while stating that it is preferable not

to speak in terms of "*rules*", held that the underlying approach to the "*rule*" stated by Hamilton J may be an available approach to the exercise of the court's discretion as to costs in a particular case, depending upon all of the circumstances. As can be seen below, this is an approach that has found favour by the District Court in WHS matters.

21. Where there is a mixed outcome in proceedings, the question of apportionment is very much a matter of discretion for the trial judge. Mathematical precision is illusory and the exercise of the discretion will often depend upon matters of impression and evaluation: *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* (1993) 26 IPR 261.

22. In *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96 the Court of Criminal Appeal had to consider afresh the question of an appropriate costs order in circumstances where the prosecutor had decided not to rely on certain particulars prior to the trial. It was not clear to the Court whether that had led to additional costs being incurred. In those circumstances the Court determined that the appropriate course was to order that the respondent pay the appellant's costs of the proceedings in the District Court, not including any costs incurred in preparation for a trial in which the particulars withdrawn in the further amended summons were to be relied upon, such costs to be agreed or assessed.

### *Particular considerations in respect of criminal matters*

23. The Court in *Bulga* noted that the above principles, drawn from civil cases, need to be applied in a criminal matter mindful of matters identified by the High Court in *Latoudis v Casey* [1990] HCA 59; 170 CLR 534 at 544, 565, 568-569, including:

    a. 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; and

    b. 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 only of the defendant's costs.

24. Relevant in that regard is *District Court Criminal Practice Note 16*, which applies to Work Health and Safety prosecutions. At paragraph [12] it provides that a defendant is to provide to the prosecutor various information two weeks prior to a Case Readiness Hearing, including as to whether in respect of each paragraph of the prosecutor's statement of facts, that fact is an agreed fact. The Practice Note records at [14] that a failure to comply with such disclosure requirements "*may be taken into account … in determining an appropriate costs order for an adjournment and/or the proceedings"*.

25. The Court in *Bulga* at [221] noted that a particular consideration in a criminal matter is that which was emphasised by Biscoe J in *Morrison* at [20]:

> When considering apportionment of costs in civil litigation, a balance has to be maintained between not discouraging litigants from canvassing all material issues and not rewarding them for unreasonable conduct in the pursuit of issues. That balance is even more important in a criminal case

> where a prosecutor has a public duty to put all material issues before the court.

### *In circumstances where the defendant succeeds, the reasonableness of the prosecution is irrelevant*

26. As noted at the outset, costs are not awarded by way of punishment of the unsuccessful party. In *Latoudis v Casey* Mason CJ, having made that point concluded:

> 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.

27. For that reason it has been held that when considering costs, "the reasonableness of the prosecutor's conduct is irrelevant": Biscoe J in Morrison v Defence Maritime Services Ltd [2007] NSWLEC 552 at [23]. In *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [79] McHugh J commented that in *Latoudis* "*The reasonableness of the prosecutor's conduct was viewed as clearly irrelevant to the proper exercise of the costs discretion*". That, however, does not mean that the reasonableness of the conduct is necessarily irrelevant when considering whether costs ought to be awarded on an indemnity basis, as discussed below.

### *The approach to an appeal of a costs order*

28. When it comes to an appeal, since a decision to award costs is a discretionary, an appellant needs to show an error of the *House v The King* type to succeed in overturning the order: see also *Maiden v Maiden* [1909] HCA 16; 7 CLR 727 at 742.

29. The trial judge is ordinarily in the best position to make an assessment of the time and importance of different issues where a party has succeeded on some and failed on others and where costs are apportioned by the judge. It will be difficult for an appellate court to decide on matters of apportionment simply by examining a transcript or by having regard to written submissions in the court below. Hence, absent an error of law (see for example *Silver City)*, appeals from a cost order are difficult to win.

### *Whether indemnity costs can be awarded*

30. The usual order assumes what is known as 'party-party costs'. There does not appear to be a good reason, however, to consider that the power to award costs does not extend to awarding indemnity costs in exceptional circumstances. That was certainly the approach taken by the Industrial Court of NSW (previously known as the Industrial Relations Commission of NSW in Court Session) when it exercised the jurisdiction. In *WorkCover Authority of NSW v Plastachem Pty Ltd* (2001) 110 IR 351, a full court at [54] endorsed the approach taken by Hill J in *Boner v Anderson (No 2)* [1993] 50 IR 470 at 475, who held that indemnity costs could be awarded in exceptional cases:

> It is fair to say that generally speaking an order for costs on an indemnity basis is justified in a case in which there are special or unusual features of an unmeritorious or improper nature surrounding the case of one party

> (usually the loser) which make it unreasonable and unfair that the successful party should be out of pocket as a result of the proceedings.

31. The full court in *Plastachem* noted at [57] that Hill J's example of "*an unmeritorious or improper nature surrounding the case of one party*" is but one example of the special or unusual features of a case that would justify the court departing from the usual practice.

### *A final observation*

32. Finally, it is worth recalling the well-known statement of Toohey J in *Hughes v Western Australian Cricket Association In**c*** (1986) ATPR 40 – 748 at 48, 136, who, having set out the well known principles governing the awarding of costs added:

> There is no difficulty in stating the principles; their application to the facts of the particular case is not always easy.

## SOME EXAMPLES OF NON-STANDARD COSTS ORDERS MADE BY THE DISTRICT COURT OF NSW

### *Safe Work (NSW) v Activate Fire Australia Pty Ltd and Ors* [2017] NSWDC 209 (Scotting DCJ)

33. This sentencing decision involved three defendants, one of which, Hanna Plumbing Pty Ltd, had pleaded guilty, and the other two had been found guilty in a contested hearing.

34. Scotting DCJ awarded the prosecutor its costs, but on a discounted basis. First, the prosecutor had succeeded on only one of the five particulars of breach of duty that had been alleged. Second, the successful contested cases had relied on evidence that had not be contained in the brief of evidence.

35. It is notable that even in the case of Hanna Plumbing, the costs were discounted to 85%. In the case of the other two defendants, the costs were discounted to 50% of the prosecutor's costs in light of the only partial success.

### *SafeWork NSW v Freyssinet Australia Pty Ltd* [2018] NSWDC 66 (Kearns DCJ)

36. In this case the defendant was convicted in circumstances where the prosecution had amended the pleading prior to hearing by removing a particular and had amended it again in closing submissions, and had failed to prove one aspect of one the three particulars of breach of duty.

37. Kearns DCJ first rejected the claim for costs said to arise from the amendment made in closing submissions, concluding that the amendment had done no more than make clear the nature of the charge and had not given rise to any additional costs.

38. Kearns DCJ next rejected the claim for costs associated with the prosecutor's failure to establish one aspect of a particular. That was because it was only part of a particular, and because there was very little time spent in the trial on that issue.

39. That left the issue of any costs thrown away as a result of an amendment made about 7 weeks before the trial commenced. Consistent with the approach of the Court of Criminal Appeal in *Silver City* Kearns DCJ did not attempt to quantify such costs, but made the usual order that the defendant was to pay the prosecutor's costs, but excluding those costs attributable to the particular that had been withdrawn prior to hearing and

> … less any sum attributable to the defendant's costs attributable to the withdrawn allegation.

### *Orr v Perilya Broken Hill Ltd* [2018] NSWDC 131 (Kearns DCJ)

40. In this case, involving a joint trial against two defendants, the prosecutor had succeeded against one defendant, Perilya Broken Hill Ltd, but not against the other, being its holding company, Perilya Ltd. Kearns DCJ held that the holding company was not conducting a business or undertaking in respect of the operation of the mine, since it did not own the mine nor operate the mine.

41. His Honour found that having succeeded, Perilya Ltd was entitled to an order for costs. However, he ordered that the prosecutor pay only 10% of Perilya's costs. That was for the following reasons.

42. First, his Honour rejected the prosecutor's submission that Perliya was disentitled to any costs on the basis that it had known of oral evidence, not known to the prosecutor, and contrary to documentary material that the prosecutor reasonably relied upon that revealed it was not operating the relevant business (cf the first of the qualifying principles drawn from *Latoudis* noted at [23(a)] above). His Honour held the issue of which company owned and operated the mine should have been known to the prosecutor to be a live issue and on that basis it was appropriate to award costs against the prosecutor.

43. Second, his Honour determined that about 10% of the court time had been occupied on the question of whether the holding company was conducting the business of operating the mine.

44. His Honour then turned to consider the other 90% of the costs of the proceeding. He rejected a submission that he ought to apply the "rule of thumb", which provides that in a case against two defendants where the defendants are liable for their costs jointly, where one succeeds that defendant should be awarded half their costs, as applied in *Currabubula & Paola v State Bank NSW* [2000] NSWSC 232. His Honour did so on the basis that Perilya Ltd had been successful only in the part of the case that it successfully ran (amounting to 10% of the total costs) but not in respect of the balance of the case. Had Perilya Ltd been operating the mine the same findings would have been made against it as against its subsidiary. Hence it was entitled to only 10% of its costs.

45. Fourth, his Honour turned to the question of costs against the unsuccessful defendant. The prosecutor had failed in respect of a number of particulars. However, his Honour held that no discount for that fact was appropriate because they "*were not dominant or separable issues … or the time taken on these issues was so miniscule as to be ignored*." There were in addition particulars which were not ultimately determined which did give rise to separate issues in respect of which expert evidence was called, and which his Honour held occupied about 10% of the total court time. On that basis he discounted the remaining costs by that 10%, and ordered that the unsuccessful defendant pay the prosecutor 80% of its costs.

46. Finally, his Honour accepted that it did not necessarily follow that the percentage of time an issue occupied during the hearing would not necessarily equate to the percentage of overall legal costs that had been incurred in respect of that issue. But applying a "broad brush", his Honour nevertheless applied that approach.

### ***Safe Work (NSW) v Matthew Albans*** **[2016] NSWDC 125 (Scotting DCJ)**

47. The offender, a natural person, was bankrupt and had no assets. He had agreed to pay the prosecutor's costs, as agreed or as assessed.

48. In those circumstances Scotting DCJ made the agreed order as to costs, but took into account the anticipated sum of those costs ($20,000) in determining the penalty, resulting in a lower penalty.

### ***SafeWork NSW v Matthew Charles Colwell*** **[2019] NSWDC 740 (Russell DCJ)**

49. This case also involved an offender who was a natural person with a limited capacity to pay a fine.

50. In contrast to the approach taken by the Court in *Albans*, Russell DCJ made no order as to costs, given the offender's proven incapacity to pay both costs and a fine. His Honour held at [62]:

> Where there is a real issue in relation to capacity of a defendant to pay both costs and a fine, then the costs should be reduced, if appropriate to zero, so as to ensure that the fine to be imposed reflects the objective seriousness of the offence. This was the course I took in *SafeWork NSW v Mehan* [2018] NSWDC 391. I think that this is another case where that very rare course should be taken.

### ***SafeWork NSW v Poletti Corporation Pty Ltd*** **[2019] NSWDC 791 (Scotting DCJ)**

51. The defendant was found guilty in a defended hearing. The defendant sought a departure from the usual costs order on four grounds:

    a. that the prosecution had not succeeded on a section 19(1) of the Act charge;

    b. that the prosecutor did not succeed on all the particulars;

    c. that the prosecutor did not succeed on its case relating to the horizontal gap; and

d. the costs thrown away by the prosecution engaging an expert and then deciding not to lead any expert evidence at trial.

52. Scotting DCJ rejected the first three grounds.

53. As to the first, the s 19(1) charge had been pleaded in the alternative. The primary charge had been proven. No significant time was spent on the alternative charge.

54. As to the second, the prosecution abandoned three sub-particulars in closing submissions. No evidence had been led in respect of those sub-particulars. If there had been any costs associated with preparing the trial on those sub-particulars they would have been very minor.

55. Third, whilst it did take some time to resolve a factual question as to the size of a horizontal gap, and the Court ultimately did not accept the prosecution's case in that regard, his Honour did not consider that a basis to adjust the usual costs order.

56. As to the fourth issue, the decision sets out the relevant procedural history, which included the prosecutor filing an expert report out of time, which led the defendant to make a successful application to adjourn the hearing date so it could brief its own expert. The prosecutor ultimately did not rely on the expert report.

57. In reliance on s257F of the *Criminal Procedure Act 1986*, Scotting DCJ determined that the hearing had been adjourned as a result of the prosecutor's unreasonable conduct or delay.

58. That led the Court to make two costs orders, one against each party. The first was the usual order that the defendant pay the prosecutor's costs. The second was an order that the prosecutor pay the defendant's costs thrown away by the late service of the expert report, the vacation of the original hearing date and the preparation of the defendant's expert report. It is notable that the latter order went beyond just the costs associated directly with the adjournment.

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