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Written Submissions

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00124203

TITLE OF PROCEEDINGS	
First Appellant	EFG
First Respondent	Secretary, Department of Communities and Justice
Second Respondent	State of New South Wales

FILING DETAILS	
Filed for	EFG,Appellant 1
Legal representative	Rebekah Ruth Giles
Legal representative reference	
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Appellant's appeal submissions .pdf)

[attach.]

EFG v Secretary, Department of Communities and Justice and anor

2025/00124203

Appellant's Submissions

1. This appeal is about the exercise of a discretion under s.4 of the *Costs in Criminal Cases Act 1967* (**the Act).** The appellant says that the exercise was invalid because the discretion was exercised unreasonably.

2. On its face, the Act relates to the payment by the state of costs of a person acquitted or discharged in relation to an offence. The Act refers to the person with the discretion as the Director General. That is now to be read as the Secretary. Section 4(2) of the Act confers on the Secretary a discretion to determine the amount of costs to be paid. The maximum is the amount that in the opinion of the Secretary would reasonably have been incurred for costs (s.4(3)). (That is subject to reduction by any other amount that in the opinion of the Secretary the applicant has received or is entitled to receive in relation to such costs, but that is not a factor in the present case.)

3. The entitlement to be paid costs depends on a stringent test provided by the Act, by which a trial judge may grant a certificate to an acquitted person upon being satisfied that it would not have been reasonable to prosecute if all that was known at the end of the trial had been known at the start (s.3). Such a certificate was granted in the present case.

4. It is uncontroversial that "*Every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred*." *Minister for Immigration v Li* (2013) 249 CLR 332 per French CJ at [23]. Every discretion has to be exercised according to the rules of reason and justice. *Minister for Immigration v Li* per French CJ at [24]. Review by a court of a decision made by another repository of power is concerned, inter alia, with "*whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law*." *Minister for Immigration v Li* per Gageler J at [105].

5. The rules of reason and justice would require a scheme such as that established by the Act to be administered in a way that was consistent, coherent and equitable. Though in terms unfettered, the Secretary's discretion must be exercised in a way that meets the legal standard of reasonableness.

6. The Act limits costs payable to costs reasonably incurred. (s.4(3)). That is an understandable and reasonable limitation, designed to protect against extravagance. But once that limitation

is applied, there is no apparent reason why, in a scheme designed to pay the costs of an innocent person, the reasonable costs of all such innocent people should not be paid. There is only one reference in the Act to a factor that could lead to payment of a lesser amount, that of the applicant having contributed to causing the prosecution. But that factor is taken into account in the Act's test for granting a certificate. (s.3(1)(b)). Someone to whom a certificate has been granted does not have to answer for that.

7. To assess whether the exercise of the discretion was unreasonable, it is necessary to determine the proper construction of the s.4 discretion. The construction of this section should be informed by and consistent with the purpose of the legislation. This is beneficial legislation: *Rodden v R* [2023] NSWCCA 202 at [117], [122]. In *Nadilo v DPP* (1995) 36 NSWLR 738, Kirby P. said of this legislation: "*The Act should therefore be given a beneficial construction. Its provisions should not be narrowly construed so as to defeat the achievement of the Act's general purposes*." (at 743). See also *Interpretation Act 1987* – s.33.

8. The purpose of the Act was clearly articulated in the second reading speeches by the relevant Ministers in the Legislative Assembly and the Legislative Council. It is plain that the Act was directed to the injustice caused when innocent people wrongly accused incur legal costs in defending themselves. Its purpose was to rectify that injustice.

9. In the Legislative Assembly, the Minister for Justice said: "*the punishment and prevention of crime are undertaken in the interests of the community. It is therefore appropriate that if, in the pursuit of those interests, the community puts an innocent person to the trouble and expense of rebutting a criminal charge, then the community should defray the expense. The bill is an honest and serious attempt by the government to fulfil the moral responsibility it owes to the community*…" (Legislative Assembly, 8 March 1967, page 3921, right column).

10. The Minister for Justice also said of the principles adopted by the Government: "*They will permit of justice being dispensed not only in the sense of ensuring a minimum of hardship to the deserving person, but also with adequate safeguards to identify the undeserving one*." (Legislative Assembly, 8 March 1967, page 3920, left column).

11. In the Legislative Council, the relevant Minister was explicit and direct about the purpose of the legislation: "*The aim of the bill 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 circumstances*." (Legislative Council, 14 March 1967, page 3998, right column).

12. In the Legislative Council, the Minister also said of the provisions of the bill: "*They will permit justice to be dispensed with the minimum of hardship to the deserving person, but with adequate safeguards to identify the undeserving case." He also said that the bill was "a step in the right direction in rectifying an injustice that has existed in our system for a long time*." (Legislative Council, 14 March 1967, page 3999, right column).

13. Though variously formulated, these statements all point consistently to the same clear purpose - rectifying the injustice. That must mean paying the costs, subject to the Act's limitation to costs reasonably incurred. Deserving persons cannot be protected and relieved of the responsibility of paying an indirect fine if they still have to pay half of it, justice is not dispensed with the minimum of hardship if they still have to pay half of it, their expenses are not defrayed if they still have to pay half of them, and the government does not fulfil its moral responsibility if it pays only half. The nature of the clear objective – to rectify an injustice – is such that it makes no sense to conceive of it being only partly satisfied. That in this context is a concept outside the range of possible acceptable outcomes which are defensible in respect of the facts and law.

14. In the present case, the Secretary, exercising the discretion pursuant to s.4(3), determined the amount of costs reasonably incurred by the appellant as $419,976.07. There is no dispute about that in this appeal. The Secretary then moderated those costs reasonably incurred by reference to a departmental scale known as the Attorney's rates, with the result that the amount payable was reduced by more than half to $188,172.20.

15. The appellant says that the reduction of the amount of costs reasonably incurred by reference to the Attorney's rates was unreasonable. Indeed, for a very long period, from the inception of the Act until at least 2014, the evidence shows that the amount of costs to be paid was assessed by the same approach as in civil cases, based on the recognised approach to party and party costs, and therefore necessarily in accordance with the legal standard of reasonableness.

16. In an advice of March 1996, the then Solicitor General, Keith Mason QC, recorded that applications under the Act had, since its inception, been assessed similarly to costs in civil cases. He cited a letter from the Attorney General's Department to Carmont and Grace which he said "*notes that costs have been assessed on a party and party basis since the inception of the Act*." He also cited two letters from 1993, one from the Attorney General and one from the Director General, and must have had direct knowledge that the situation remained the same at the time of his writing in 1996. He was not asked to advise on the exercise of the discretion as to payment, which at that time rested in the hands of the Treasurer. That indicates that it was not a matter of controversy or doubt. Indeed, the Solicitor General thought that the amount determined as reasonable costs would be the amount paid, and not be reduced by the Treasurer's discretion: "*Although it is within the statutory power of*

the Treasurer to pay an amount less than that appearing in the statement of the Director General, the statement fixes the maximum amount of costs payable under the Act and can be expected to be the practical determinant of the costs paid by the Crown." He would not have said this without believing that the amount of reasonable costs would not be reduced by the Treasurer in ordinary circumstances. It can be inferred that the practice of which he was aware accorded with this.

17. In 2014, the determination of the amount to be paid still followed the approach in civil cases. In *Stanizzo v Secretary of the Department of Justice of New South Wales* [2016] NSWSC 348, the Department had said: "*Costs in this matter were moderated in accordance with the Attorney General's Guidelines which require claims to be moderated as if they were a party/party assessment of costs under the Legal Profession Act*." (at [15]). Thus, the only evidence of the practice from the inception of the Act until 2014 is that it followed the approach used in civil cases for the assessment of costs.

18. The Attorney's rates is a scale used primarily for quite different purposes than the assessment of costs: "*The Attorney General's rates for legal representation (also referred to as **AG's rates** or **Attorney's rates**) are rates set by the Attorney General which are payable to legal representatives (Solicitors, Junior Counsel and Senior Counsel) engaged by and on behalf of Government departments and agencies and public officials*."

19. The Attorney's rates are intended primarily for use contractually between the state and its legal representatives to set the fees of the latter. Their prime use is for contractual arrangements, not the assessment of costs. As rates agreed to by freely contracting parties in a particular context, they may be fair and reasonable, but only in that context.

20. Their contrast with the normal costs regime is stark. At the time of the Secretary's decision, the rates for junior counsel according to the Attorney's rates specified a daily maximum of $2,295 plus GST, whereas the Costs Assessment Rules Committee Guideline for party/party costs specified $2,000 to $5,000 plus GST. For senior counsel the Attorney's rates specified a daily maximum of $5,070 plus GST, whereas the Costs Assessment Rules Committee Guideline specified $5,000 to $8,000 plus GST.

21. For reasons unknown, at some time since *Stanizzo*, the Secretary departed from the practice of determining costs by reference to the approach taken in the civil costs regime, and adopted the approach of the Attorney's rates.

22. Reliance on the Attorney's rates for this purpose produces results that are contrary to the purpose of the Act. When weighed against that purpose, they are arbitrary, capricious and irrational.

23. There is a paradox in the Secretary determining the amount of reasonable costs and then deciding not to pay it. In principle, it must be unreasonable not to pay an amount of costs already determined to be reasonable. There is an exception when the amount of costs actually incurred is smaller than the reasonable amount of costs. For this circumstance, the discretion pursuant to s.4(2) is necessary and appropriate. In such instances, the amounts paid would be less than the maximum amounts. In relation to s.4(3), the Court of Criminal Appeal said in *Rodden*: "*This provision is not looking at actual costs incurred by the applicant, but, rather, what they would reasonably have been, objectively assessed*." at [129].

24. The change by the Department of the basis for determining costs to be paid pursuant to the Act from reasonable costs as understood in the civil costs regime to the Attorney's rates was arbitrary and capricious. The original practice satisfied the purpose of the Act. There is no apparent justification for radically changing it to one that does not. The imposition of a scale which itself is not based on the accepted basis for determining reasonable costs cannot be reasonable.

25. Reliance on the Attorney's rates is contrary to the Act because the maximum that can be paid becomes the maximum according to the Attorney's rates, instead of the maximum as specified by the Act. This contradicts and undermines the operation of the Act.

26. Reliance on the Attorney's rates creates a massive difference in the recovery of costs paid by the state as between civil cases and criminal cases. To differentiate in this way between civil and criminal cases is arbitrary and capricious.

27. There will also be arbitrary differences between the levels of justice accorded to different applicants. Applicants whose reasonable costs, as determined by the Secretary, sit within the range of the Attorney's rates will be paid the whole, while those whose reasonable costs sit above that range will not. Applicants will be paid differing proportions of their reasonable costs.

28. It is clear that reliance on the Attorney's rates is systematic, a matter of routine: "*In determining the payment amount under section 4(2) of the Act, regard was given to the Department of Communities and Justice's policy in applying the Attorney General's agreed rates to applications under the Act. In accordance with this policy, the costs considered to have been reasonably incurred were moderated in accordance with the Attorney General's agreed rates.*" (Determination Letter of 26 June 2024).

29. The Department's document setting out its policy and procedures says: *"The reasonably incurred costs are moderated in accordance with the applicable Attorney General's (AGs) relevant rates for Solicitor, Junior Counsel and Senior Counsel*."

30. This is contrary to the terms of the Act in s.4(2) that the Secretary should determine the costs to be paid "*in the circumstances of the case*." That indicates individual consideration. The imposition of a scale of payments to cases in general undermines their being given individual consideration. It is no answer to say that the application of the scale is part of the exercise of discretion. That is not a decision made in consideration of the circumstances of the individual case. It cannot be a valid exercise of discretion to adopt an approach which amounts to the abandonment of the exercise of discretion as provided by the Act.

31. Section 4 of the original Act was in a different form from now, but its effect was similar. It was amended to the current form in 1998. There was no indication that any significant change was intended. Indeed, the explanatory note to Schedule 5 of the *Courts Legislation Amendment Act 1998* confirms that the purpose of the change was no more than a re-allocation of functions between different officers:

   "*This Schedule makes the decision of the Director-General of the Attorney General's Department final as to whether costs should be paid to a person under the Act and, if so, the amount that is payable. At present, the Treasurer has a discretion as to these matters*."

   Then it said "*Schedule 5[2] replaces section 4 for the purpose mentioned above*."

32. Originally, s.4 divided the functions now conferred on the Secretary between two officers, the Under Secretary of the Department of the Attorney General and of Justice (who was later replaced by the Director General) and the Treasurer. Its provisions relevant to the present appeal were:

   "(3)…the Under Secretary shall… furnish to the Treasurer a statement signed by the Under Secretary…specifying – (a)…(ii)…the amount that, in the opinion of the Under Secretary, would reasonably have been incurred for costs by the applicant in the proceedings to which the certificate relates; and (b) (practically the exact same wording as in the current Act of the provision about other recoveries).

   (5) Where the Treasurer, after receiving the Under Secretary's statement… considers that, in the circumstances of the case, a making of a payment is justified, the Treasurer may pay to the applicant his costs or such part thereof as the Treasurer may determine."

33. The original Act did not in terms specify a maximum. It left to the Treasurer a discretion to pay to the applicant "*his costs or such part thereof as the Treasurer may determine*." In so determining, the Treasurer had two separate issues to consider, first, the amounts of other

recoveries, actual or future, with any amount to be deducted on account of them, and, second, the amount ultimately to pay. The first issue may have on occasion needed nicety of judgment in the exercise of the discretion. What applicants would have received if they had exhausted all rights of action could present the need to evaluate complex factors relating to the likelihood of success and the ability of the prospective defendants to pay. Taking such matters into account could have resulted in an amount less than the whole costs being paid. As to the second issue, it was implicit, from the requirement that the Under Secretary supply to the Treasurer a statement of the amount that in his opinion would have been reasonably incurred for costs, that this should have been taken into account. The Treasurer was hardly likely to pay more, and, given the purpose of the Act, it would have required a specific justification to pay less.

34. As a consequence of assigning to the Director General alone the functions previously shared between two people, the amendments made a small structural change. Where in the original Act the Under Secretary was to furnish to the Treasurer a statement containing two amounts, that reasonably incurred for costs and separately, the amount of other recoveries, the amended Act required the Director General to determine a single amount of the costs reasonably incurred minus the other recoveries, which then became called the maximum.

35. The use of the word “maximum” can import an ambiguity. It is often used in contexts where it is contrasted with a minimum, resulting in its use suggesting that below it there is a range of possible other amounts. However, it may also carry a simpler sense, - that, whatever the circumstances, the amount involved cannot be more than the amount specified as the maximum. Used this way, it says nothing about whether an amount less than the maximum could come to exist, the circumstance in which that could occur, nor how frequently that could occur. Thus, the use of “maximum” in this way does not import anything about the existence of a minimum or intermediate amounts. In the present case it simply means: the amount paid is limited to the amount of reasonable costs.

36. Even if “maximum” implied that there was a range from which varying measures of costs could be selected, it is necessarily an aspect of reasonableness that such a system operate in a consistent, coherent and equitable manner. It would be unreasonable for no-one ever to be paid the amount of costs reasonably incurred. The Act clearly intended that some should be paid the maximum. It would be random and arbitrary if some were to receive the maximum but others not, unless there was a good reason. The only apparent such reason is when the applicant’s actual costs are less than the amount determined as reasonably incurred. Apart from that circumstance, where a payment is to be made, there can be no rational basis for not paying a person the amount determined as costs reasonably incurred. To do so is to stray outside the range of possible acceptable outcomes which are defensible in respect of the facts and law. In the end, how could a scheme intended to rectify injustice and ensure that innocent people wrongly charged did not have to pay an indirect fine, not pay all those people their reasonable costs?

37. It may be that in providing the discretion, there was also an element of precautionary thinking by the legislature, providing it in case something unpredictable happened. It appears to have been thinking this way in relation to the first discretion arising under s.4(2), which is unnecessary in the light of the broader ground covered by the third discretion pursuant to s.4(4).

GROUNDS OF APPEAL

GROUND (a)

The judgment appealed from was in error in failing to identify adequately the purpose of the Act.

38. The closest the judgment under appeal comes to a determination of the purpose of the Act is: "*No doubt, the purpose of the Act is to provide an element of indemnity in the circumstances in which a certificate is provided*." (at [65]). Providing merely an undefined element of indemnity is not consistent with the explicit purpose expressed in parliament of rectifying an injustice, relieving an innocent person of the responsibility of paying an indirect fine, or fulfilling the government's moral responsibility. The purpose of the Act is clearer and more demanding than merely the provision of a vague and undefined element of indemnity.

39. The amendment to s.4 in 1998 was due to the amalgamation of functions previously divided between two officers. There is no sign that it was intended to make a radical change to the practical effect of the operation of the Act. While in a small way it made changes to the machinery of the Act, that is very different from making a change to its purpose. There is no indication of an intention to change the purpose, and no reference to any rational basis for doing so.

GROUND (b)

The judgment appealed from was in error in its construction of s.4 of the Costs in Criminal Cases Act 1967

40. Much of the judgment under appeal is conditioned by its interpretation of s.4 of the Act. This recurs throughout:

    "*…s.4(2) cannot be construed as a power only to make the payment that, in the opinion of the Secretary, "would reasonably have been incurred for costs*." (at [13]).

    "*Once it is accepted, as it must be, that s.4(2) of the Costs Act envisages payments which do not reach the maximum amount of reasonable incurred costs, there must be some scale of fees which can be applied by the Secretary*." (at [41])

"*Once it is accepted, as a matter of statutory construction, that the Secretary was empowered to pay a lesser amount than that identified as "the maximum amount…that would reasonably have been incurred for costs," it must be accepted that, in its terms, s.4 does not identify constraints on how that lesser amount is to be determined*." (at [54]).

"*…s.4(2) expressly states that the payment not exceed the amount as determined by the Secretary, of costs reasonably incurred, thus permitting (if not expecting) payments of lower amounts*." (at [63]).

"*Nor was the purpose of s.4 to provide a full indemnity for costs "reasonably incurred": had that been intended, the power would have been conferred in terms which did not distinguish between determination of the "maximum amount", being the costs reasonably incurred, and the amount which might be provided at the discretion of the Secretary*." (at [65]).

41. These positions are all based on a false premise. Even if the establishment of a maximum implies that there can be payments below that maximum, it says nothing about the circumstances in which those lesser payments may be made. The judgment assumes that the making of any lesser payment is inconsistent with paying all reasonable costs. Contrary to the judgment, there is an obvious explanation for why it is not inconsistent. The parties at the hearing agreed that a circumstance in which a payment less than the maximum amount could be made was where the costs actually incurred were less than the maximum amount. That alone is a reason why there needed to be a discretion to pay less than the maximum. That is why the power could not have been conferred in terms which did not distinguish between the maximum amount and the amount paid, as propounded in para 65 of the judgment, with the result that the proposition there does not hold. The fact that the power cannot be construed as only to make the payment that would reasonably have been incurred for costs does not qualify or remove the requirement to exercise it reasonably if making a lesser payment.

<u>GROUNDS (c) and (d)</u>

(c) the judgment appealed from was in error in failing to determine the legal standard of reasonableness in relation to the reliance by the First Defendant on the Attorney's rates.

(d) the judgment appealed from was in error in failing to hold that the First Defendant's discretion had been exercised in a manner that fell short of the necessary legal standard of reasonableness.

42. The judgment considers the use of different scales of fees without specific discussion of the requirement to act reasonably. For example, "*There is no constraint expressed in the Costs Act which precludes the Secretary from adopting any scale which he or she, acting*

reasonably, considers appropriate." (at [41]). "Acting reasonably" recognises in compressed form the need to do so, but steps around any consideration of what is required to achieve it. Similarly, "*there can be no unlawfulness in simply varying an administrative practice applying one set of rates to apply another, where both are permissible*." (at [50]). The whole issue of reasonableness is compressed in the last four words, but not discussed. Rather, it is assumed.

43. The assumption appears to proceed from the position that because s.4 envisages some payments less than the maximum (which needs no better explanation than those costs incurred that are less than the maximum), payments less than the maximum can be made without regard to the reasonableness of the exercise of discretion.

44. The judgment says that the exercise of the discretion was legitimately informed by considerations of policy (at [35]). However, the policy in this case came from the Department itself. In imposing the rates, it claimed to be acting in accordance with its own policy. Unreasonableness in a decision cannot be cured by passing it along the internal administrative chain. If rates are unreasonably adopted by a decision-maker for application to a particular type of case, no-one has a complaint until those rates are applied in an individual case. But it is no answer then to such a complaint to say that the decision was in compliance with policy already adopted. The unreasonableness of the policy in adopting the rates affects every decision later made under it.

45. In *Minister for Immigration v Li*, Hayne, Kiefel and Bell JJ said: "*The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused*." (at [67]). "*The legal standard of reasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness that way in his judgment in Wednesbury. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified*." (at [68]).

46. On the correct construction of the statute, consistently with its purpose, there is no scope for paying an amount less than the maximum, unless the amount of costs actually incurred is less than the maximum, or, most unusually, there were some other circumstance which compelled deviation from the purpose of the Act. If that ever were to occur, it would almost certainly be an event occurring subsequent to the granting of the certificate, and which cast serious doubt on the applicant's real entitlement to a certificate. Consistently with the

precautionary approach evidently taken by the legislature in the provision of discretions, that is most likely what was in mind.

47. In principle, the situation in the present case is somewhat similar to that in *Minister for Immigration v Li.* There, the basis on which the Migration Review Tribunal had refused the adjournment sought was not clear. Hayne, Kiefel and Bell JJ said: "*It is not possible to say which of these errors was made, but the result itself bespeaks error*." (at 85]). In the present case, it is not clear why the Secretary chose to rely on the Attorney's rates, but the result itself bespeaks error; it was not an acceptable outcome which was defensible within the facts and law. Measured against the purpose of rectifying an injustice, relieving the innocent citizen wrongly accused from paying an indirect fine, dispensing justice with the minimum of hardship, and fulfilling the government's moral responsibility, it falls short of the standard of legal reasonableness to determine an amount of costs reasonably incurred, then reduce that amount by more than half by reference to another scale of costs, in doing so abandoning a practice of many years during which the amount paid was the amount determined as reasonable costs.

Tom Molomby SC
30 July 2025