

MAGISTRATES COURT OF QUEENSLAND

REGISTRY: DALBY
NUMBER: Claim 201/06

APPELLANT: **WHYENBIRRA PTY LTD**

RESPONDENT: **DEPARTMENT OF NATURAL RESOURCES**

In October 2008 the appeal against a decision by the Respondent to give a Compliance Notice to the Appellant was upheld. At the same time the Chief Executive of the Department of Natural Resources and Water was found to have acted in contempt of the Court. The Appellant seeks orders that the Respondent pay costs on an indemnity basis for costs incurred in the proceedings for the hearing of the contempt of court and for those associated with the bringing of the Appeal.

I note that the decision upholding the Appeal was given on 3 October 2008. That decision included a finding that an order as to costs should be made in favour of the Appellant. It would appear that the Respondent has not lodged an appeal from that decision.

The Respondent does not resist the making of an order for costs in the proceedings concerning the contempt of court. The Respondent agrees to pay costs of \$1,500.00 in respect of those proceedings. The Appellant seeks costs of \$5,648.50 in respect of those proceedings.

The Appellant seeks an order that the Respondent pay costs of \$53,440.92 in respect of the appeal against the Compliance Notice. The Respondent argues that this court has no power to award costs to either party on the hearing of the Appeal against the Compliance Notice.

The Appeal was brought pursuant to Section 62 of the Vegetation Management Act 1999. That section gives power to the nearest Magistrates Court to hear the appeal provided it is lodged within 20 business days of the issue of the notice. That statutory provision is silent as to the procedure to be applied to the hearing of the appeal and as to the powers of the court upon hearing the appeal. Equally it is silent as to the question of costs. Counsel indicated that this was the first appeal to be heard under the legislation.

I have not received submissions as to whether the Integrated Planning Act or some other piece of legislation governing the Department of Natural Resources and Water contains any other relevant provision as to costs. I have been unable to find any such provision in any related piece of legislation. Each party has referred to various decisions concerning costs. This court only has power to award costs when there is a statutory power so to do.

Prior to the hearing of the appeal, preliminary arguments were heard about the procedure to be applied and the powers of the court. There are some relevant provisions contained in the Magistrates Court Act and in the Uniform Civil Procedure Rules 1999. Chapter 18 concerns appeals. Chapter 17 concerns costs of proceedings.

A preliminary determination was made that the provisions of the UCPR were to govern the hearing and determination of the appeal.

There were no fewer than eleven mentions of the appeal prior to the hearing. During several of those mentions lengthy legal argument was heard and directions made by the Court. At no time during any of the preliminary arguments did the Respondent raise the question of

costs or indicate that it intended to argue that there was no power for an award of costs to the successful party at the conclusion of the appeal.

I am satisfied that the Respondent was required to conduct itself as a model litigant in these proceedings.

I am satisfied that in this appeal Chapter 17 of the UCPR establishes an effective statutory basis for this court to make an award of costs in favour of the successful appellant.

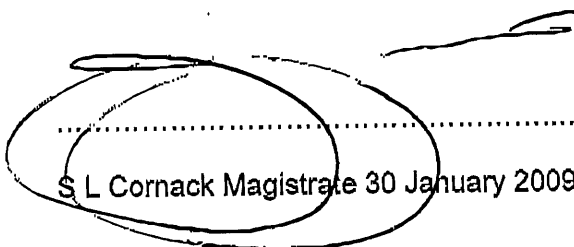
It is clear in this case that the Respondent continued with the appeal where it should have known there was no reasonable chance of success in the appeal given the obvious flaws in the compliance notice. The Respondent went so far as to draft an amended compliance notice late in the proceedings which purported to remedy the fundamental flaws in the original notice. The Respondent gave notice to the Appellant of witnesses it intended to call and then failed to call those witnesses. This led to significant and unnecessary costs being incurred by the Appellant in preparation and during the hearing. The Respondent called other witnesses and sought to rely on other material during the appeal which had not been disclosed to the Appellant.

I am satisfied additional costs should be awarded to compensate the Appellant for the unnecessary costs incurred due to the failure of the Respondent to call witnesses it had previously notified it would call and for the unnecessarily protracted length of the proceedings due to the failure of the Respondent to disclose to the Appellant in a timely way the exact nature of its case.

I am satisfied that costs on an indemnity basis should not be awarded in respect of the appeal against the compliance notice, but that an award of costs higher than that normally awarded should be given to compensate for the additional costs incurred by the Appellant.

After careful consideration of the totality of the appearances, travel and preparation required in the appeal, I order that the Chief Executive of the Department of Natural Resources and Water pay the costs of the appellant in the amount of \$42,750.00.

In respect of the application of punishment for contempt, I note that the Director General sincerely apologised for the contempt in a very timely way upon the finding that the actions taken by the department constituted contempt of an order of the court. I am not satisfied that any punishment should be imposed. However I am satisfied that the Director General of the Department of Natural Resources and Water should pay all the costs of the applicant in those proceedings on an indemnity basis. I therefore order that the Director General of the Department of Natural Resources and Water pay the costs of the applicant in the proceedings for punishment of contempt in the amount of \$5,648.50.



S L Cornack Magistrate 30 January 2009