CITATION:	*Phillips & Ors v Chief Health Officer and Anor (No 2)* [2022] NTSC 72
PARTIES:	PHILLIPS, Ray And HAMMETT, Conan Thomas And ANSTESS, John And OBLESCUK, Maria Lucille And CAMPBELL, Cobie v CHIEF HEALTH OFFICER And NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2021-03787-SC
DELIVERED:	29 August 2022

HEARING DATE: 15 June 2022

JUDGMENT OF: Brownhill J

CATCHWORDS:

CIVIL PROCEDURE – Costs – Plaintiffs discontinued proceedings following enactment of the *Public and Environmental Health Legislation Amendment Act 2022 (NT)* which validated the Directions, the validity of which were challenged in the proceedings – Presumption that the party who discontinues a proceeding must pay the costs of the party to whom the discontinuance relates – Defendants agreed not to make an application for costs – Plaintiffs sought that defendants pay their costs – Plaintiffs' case was not almost certain to have succeeded – Not otherwise possible to determine prospects of success of plaintiffs' case without conducting hypothetical trial – Defendants had not acted unreasonably – Plaintiffs' application dismissed – Each party to bear their own costs.

CIVIL PROCEDURE – Admissibility – s 6 *Legislative Assembly (Powers and Privileges) Act 1992* (NT) – Whether that Act prevents the court receiving evidence and hearing submissions as to the motive, intention or good faith of the Legislative Assembly, the Member who introduced a Bill into the Assembly or the executive government in order to show unreasonableness on the part of the second defendant – The acts of the Legislative Assembly cannot be attributed to the second defendant – Using Hansard or other materials disclosing the proceedings of the Assembly to establish the Minister for Health or executive government were motivated to introduce the *Public and Environmental Health Legislation Amendment Act 2022* (NT) because of the plaintiffs' proceedings is precluded by s 6.

Boscaini Investments Pty Ltd v City of Kensington [1999] SASC 327, applied.

Amann Aviation Pty Ltd v Commonwealth of Australia (1988) 19 FCR 223; *Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194; *Australiawide Airlines Ltd v Aspirion Pty Ltd* [2006] NSWCA 365; *Bawn Pty Ltd v Metropolitan Meat Industry Board* (1970) 72 SR (NSW) 466; *Big Money World Pty Ltd v Red Hair Entertainment Pty Ltd* [2019] NSWCA 29; *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWCA 32; *Fordyce v Fordham* (2006) 67 NSWLR 497; *Garwolin*

Nominees Pty Ltd v Statewide Building Society [1984] VR 469; *Gribbles Pathology Pty Ltd v Health Insurance Commission* (1997) 80 FCR 283; *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1; *IMO Fehring Livestock Pty Ltd* [2012] VSC 326; *Jones v Jones* [2012] QSC 342; *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341; *Kiama Council v Grant* (2006) 143 LGERA 441; *McNamara v Consumer, Trader and Tenancy Tribunal* (2005) 221 CLR 646; *Northern Territory v Sangare* (2019) 265 CLR 164; *NT Pubco Pty Ltd v DNPW Pty Ltd* [2011] NTSC 51; *ONE.TEL Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548; *Phillips & Ors v Chief Health Officer & Anor* [2022] NTSC 29; *R v Turnbull* [1958] Tas SR 80; *Ralph Lauren 57 Pty Ltd v Byron Shire Council* (2014) 199 LGERA 424; *Rann v Olsen* (2000) 76 SASR 450; *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622; *RTZ Pension Property Trust Ltd v ARC Property Developments Ltd* [1999] 1 All ER 532; *South East Queensland Electricity Board v Australian Telecommunications Commission* (unreported, FCA, 10.2.1989); *State of Victoria v Grawin Pty Ltd* [2012] VSC 157; *Sue v Hill* (1999) 199 CLR 462; *True Conservation Association Inc v Minister administering the Threatened Species Conservation Act 1995* [2008] NSWLEC 221; *Tymbook Pty Ltd v State of Victoria* (2006) 15 VR 65, referred to.

Bill of Rights 1688

Crown Proceedings Act 1993 (NT), s 5(2)(a)

Interpretation Act 1978 (NT), s 17

Legislative Assembly (Powers and Privileges) Act 1992 (NT), s 6

Northern Territory (Self-Government) Act 1978 (Cth), s 5

Parliamentary Privileges Act 1987 (Cth)

Public and Environmental Health Act 2011 (NT) Div 2A, Part 10A, s 107

Public and Environmental Health Legislation Amendment Act 2022 (NT)

Racial Discrimination Act 1975 (Cth)

Supreme Court Rules 1987 (NT), r 63.03(1), 63.11(6) and (9)

REPRESENTATION:

Counsel:

Plaintiffs:	D Kelly
Defendants:	N Christrup SC with L Peattie

Solicitors:

Plaintiffs:	Kelly & Partners
Defendants:	Solicitor for the Northern Territory

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Phillips & Ors v Chief Health Officer and Anor (No 2) [2022] NTSC 72
No. 2021-03787-SC

BETWEEN:

RAY PHILLIPS

AND

CONAN THOMAS HAMMETT

AND

JOHN ANSTESS

AND

MARIA LUCILLE OBLESCUK

AND

COBIE CAMPBELL

AND:

CHIEF HEALTH OFFICER

AND

NORTHERN TERRITORY OF AUSTRALIA

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered 29 August 2022)

[1] The issues in this matter are: (1) whether s 6 of the *Legislative Assembly (Powers and Privileges) Act 1992* (NT) ('*LAPPA*') prevents the Court receiving evidence and hearing submissions as to the identity of the Member of the Legislative Assembly who introduced a Bill into the Assembly; and (2) whether the defendants should pay the plaintiffs' costs of the proceedings when the plaintiffs discontinued after the enactment of the *Public and Environmental Health Legislation Amendment Act 2022* (NT) ('*Amendment Act*'), which validated the Directions made by the Chief Health Officer the validity of which were challenged in the proceedings.

Procedural background

[2] The procedural background to this matter is set out in *Phillips v Chief Health Officer* [2022] NTSC 29 at [1]-[6].

[3] By way of update to that procedural background, on 11 April 2022, a further amendment was made to the originating motion, the fifth plaintiff was added, and further programming orders were made. The trial was relisted for eight days commencing on 14 June 2022.

[4] By 30 May 2022, much of the evidence-in-chief, including expert evidence, had been filed and served.

[5] On 30 May 2022, the plaintiffs filed a notice of discontinuance of the proceeding. The defendants consented to the discontinuance, and indicated

they would not seek their costs against the plaintiffs. The notice permitted the plaintiffs to bring an application in respect of their costs.

[6] On 30 May 2022, the plaintiffs filed a summons seeking an order that the defendants pay the plaintiffs' costs of the proceedings on an indemnity basis or such other basis the Court thinks fit pursuant to rule 63.03(1) of the *Supreme Court Rules 1987* (NT) ('SCRs').

Relief sought

[7] The relief sought in the proceedings were declarations that various Directions made by the Chief Health Officer were contrary to law and of no effect, and an order in the nature of certiorari 'setting aside' those Directions. The challenged Directions were: (a) the COVID-19 Directions (No 55) 2021: Directions for Mandatory Vaccination of Workers to Attend the Workplace made on 13 October 2021, as amended by the COVID-19 Directions (No 81) 2021: Amendments to COVID-19 Directions (No 55) 2021 made on 10 November 2021 are contrary to law and of no effect; (b) the COVID-19 Directions (No 52) 2022: Directions for Additional Vaccination Requirements for Certain Workers to Attend the Workplace made on 13 March 2022; (c) and the COVID-19 Directions (No 41) 2022: Directions for High Risk Places made on 14 February 2022.

[8] The Directions referred to in (b) and (c) were additional to those the subject of challenge referred to in *Phillips v Chief Health Officer* [2022] NTSC 29 at [1]-[2] and [7]. Essentially, Directions (No 52) 2022 operated as the

earlier Directions had done, but extended the requirements to require the affected workers to have been vaccinated three times against COVID-19 with an approved vaccination. A person vulnerable to infection with COVID-19 was a person under five years old, a person issued with a certificate that they have a contraindication to all approved vaccines; or a person at risk of severe illness from COVID-19 for medical reasons, including having comorbidities such as chronic kidney, heart, liver or lung disease. A note stated that the prevalence of comorbidities is higher in Aboriginal people. Essentially, Directions (No 41) 2022 applied to hospitals, residential facilities for people with disabilities, custodial correctional facilities, detention centres, aged care facilities, renal hostels, family violence shelters, sobering up shelters and homeless shelters. Workers were not permitted to enter those 'high risk places' unless they had received at least three doses of an approved COVID-19 vaccine or they were exempt.

[9] There were 10 grounds of relief, the first 8 related to Directions (No 55) 2021 as amended by Directions (No 81) 2021 ('First Directions') and the last 2 related to Directions (No 52) 2022 and Directions (No 41) 2022 ('Second Directions'). The grounds in relation to the First Directions are set out in *Phillips v Chief Health Officer* [2022] NTSC 29 at [7]. The grounds in relation to the Second Directions pressed the same grounds as pressed in relation to the First Directions, save for ground 6 as regards Directions (No 52) 2022 and save for grounds 3, 6 and 7 as regards Directions (No 41) 2022.

[10] By Directions made on 24 March 2022, the First Directions were revoked with effect from 22 April 2022.

Amendment Act

[11] The Amendment Act commenced operation on 27 May 2022. It made various amendments to the *Public and Environmental Health Act 2011* (NT) ('PEHA'). Notably, it inserted 'Div 2A – Post-emergency powers: COVID-19 pandemic' into Part 5, and inserted 'Part 10A – Validation of Chief Health Officer Directions'. Div 2A conferred on the Chief Health Officer various powers and obligations, having effect for two years after the revocation of the declaration of the COVID-19 pandemic as a public health emergency.

[12] Part 10A contains ss 133A to 133F. The purpose of Part 10A is to confirm the validity of the provisions of the Directions specified in s 133C and ensure their effectiveness (s 133B(1)).

[13] Section 133C refers to five directions made by the Chief Health Officer, including the First Directions and the Second Directions challenged in these proceedings. In relation to each of those Directions, s 133C provides that the directions (and their provisions) given or purported to have been given: (a) were, and are taken to always have been, valid under the PEHA; and (b) had, and are taken always to have had, full force and effect on and from when they were given by the Chief Health Officer.

[14] Section 133D provides that, without limiting the effect of s 133C, the following are not invalid or unlawful on the ground that a validated direction was not valid or did not have full force and effect: (a) any right, privilege, power, duty or function given or imposed or purportedly given or imposed under the validated direction; (b) any exercise of, performance of or action taken under the things mentioned in (a); (c) the making or purported making of any decision under the validated direction; (d) the granting or purported granting or issuing or purported issuing of any order or other document under the validated direction; (e) any action taken to enforce the validated direction; (f) any infringement notice, payment of fine, prosecution, conviction or sentence for alleged contravention of the validated direction; (g) any dismissal or other action taken by an employer for non-compliance with the validated direction; and (h) any refusal of entry to, or removal from, premises or other action taken by an owner or occupier of premises for non-compliance with the validated direction.

[15] Section 133E provides that Part 10A has no effect on anything done before its commencement. Section 133F provides that a validated direction is, and is taken to always have been, capable of being amended and revoked by another direction.

Passage of *Amendment Act*

[16] The Public and Environmental Health Legislation Amendment Bill 2022 (NT) was introduced into the Legislative Assembly on 23 March 2022. The

Bill was read a first and second time on that date. At that stage, the Bill contained only the amendments to insert Div 2A of Part 5 and consequential amendments (and other minor amendments not relevant here).[1] Part 10A was not contained in the Bill. Debate on the Bill was adjourned on 23 March 2022.

[17] Debate on the Bill resumed on 19 May 2022. At the end of the second reading speech, amendments to the Bill were put before the Assembly, including to add Part 10A to the Bill.

[18] In this application for costs, the plaintiffs' grounds on which an order should be made that the defendants pay their costs include: (a) that the defendants did not act reasonably in defending the proceedings in that the Amendment Act was passed because the defendants accepted that the Directions were invalid; (b) that the defendants 'belatedly rectified the contentions of the plaintiffs prior to trial by making the' Directions lawful through the Amendment Act; and (c) that the defendants 'perversely encouraged the Plaintiffs to continue their action by knowingly concealing the fact that it was soon to become futile by' the Amendment Act.

[19] Those grounds rested, in various ways, on the identity of the Member of the Legislative Assembly who introduced the Bill and the amendments of it into the Assembly, when that occurred, and the motives or intentions of the second defendant. Those matters were sought to be proved, including by

1 See Second Reading Speech, Legislative Assembly Hansard, 23 March 2022, pp 14-16.

inference, from what appeared in the Legislative Assembly's Hansard on 23 March and 19 May 2022. The defendants submitted that these arguments and the evidence in support of them were precluded and inadmissible by s 6(3) of the LAPPA.

The LAPPA

[20] Section 6(3) of the LAPPA provides that, in proceedings in a court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in the Assembly, by way of, or for the purpose of: (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in the Assembly; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of a person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in the Assembly.

[21] Section 6 of the LAPPA is in the same terms as s 16 of the *Parliamentary Privileges Act 1987* (Cth). Authorities about the latter are of assistance in relation to the former.

[22] 'Proceedings in the Assembly' must be taken to refer to all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of the Assembly or of a committee.[2]

[23] The plaintiffs argued that the scope of s 6(3) is narrow and 'does not include the establishment of a fact' because if it did, the use of second reading speeches in courts to engage in statutory construction would not be possible, and that is done as a matter of common practice. The plaintiffs referred to s 6(5) as confirmation of this.

[24] Section 6(5) provides that, in relation to proceedings in a court or tribunal so far as they relate to the interpretation of an Act of the Territory or the Commonwealth, neither s 6 nor the *Bill of Rights 1688* prevent or restrict the admission in evidence of a record of the proceedings in the Assembly published by or with the authority of the Assembly, or the making of statements, submissions or comments based on that record.

[25] The plaintiffs' argument is counter-intuitive. If the plaintiffs' construction of s 6(3) were correct, s 6(5) would be unnecessary and otiose. Section 6(5) is not expressed to be for the avoidance of doubt. Contrary to the plaintiffs' argument, s 6(5) is present because, without it, receiving Hansard and

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2 Section 6(1) of the LAPPA provides that article 9 of the *Bill of Rights 1688* applies in relation to the Legislative Assembly, and that, as so applying, article 9 shall be taken to have, in addition to any other operation, the effect of the other provisions of s 6. Article 9 of the Bill of Rights provides that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. Section 6(2) provides that, for the purposes of article 9 of the Bill of Rights as applying in relation to the Assembly, and for the purposes of s 6, 'proceedings in Parliament' means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of the Assembly or of a committee. It must follow that, when s 6 refers to 'proceedings in the Assembly', the intention is to apply the definition in s 6(2) of the words 'proceedings in Parliament'.

making submissions about what it contains regarding a Bill for a statute in court for the purposes of statutory construction would be precluded by s 6(3). Section 6(5) clearly carves out from the broader operation of s 6(3) receiving Hansard and hearing submissions about it in courts for the purposes of statutory construction.

[26] Furthermore, the plaintiffs' position that 'facts' are not caught by s 6(3) is untenable. The motive, intention or good faith of a thing forming part of proceedings in the Assembly are all facts, as are the motive, intention or good faith of a person. Inferences and conclusions can also be inferences and conclusions of fact.

[27] The plaintiffs argued that s 6(3) does not prohibit the use of parliamentary material for a 'non-contentious purpose'. Reliance was placed on the observation of Beaumont J in *Amann Aviation Pty Ltd v Commonwealth of Australia* (1988) 19 FCR 223 at 231 to the effect that, if what is involved is simply not capable of being contentious, it is difficult to see how the right of free speech could be affected. It is important to understand that observation in context. The case was an action for damages brought against the Commonwealth for breach of contract by unlawful termination, and the applicant sought to argue the Commonwealth had entered into an agreement with another company to provide the services and, just before the termination, the responsible Minister (Senator Evans) had discussed the matter with the competitor's director. The applicant sought to tender an answer given by the Minister to a question in the House about a telephone

call with the competitor's director just prior to the termination. Beaumont J held (at 230-231) as follows:

> On behalf of the applicant it is submitted that the tender of the extract from Hansard does not offend s 16(3) [the Commonwealth equivalent of s 6(3)] because it is for the limited purpose of proving that the Senator made a statement in Parliament in which he admitted having the conversation alleged. It is true that, before the enactment of s 16, it was permissible to use Hansard for the limited, but non-contentious, purpose of proving that a member of the Parliament was present in the House on a particular day. According to the memorandum explaining the operation of s 16(3)(c), this is still a legitimate approach. This would accord with the language of s 16 and with its apparent purpose, that is to say, that a member of Parliament should be able to speak in Parliament 'with impunity and without any fear of the consequences': per Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1 at 35. Where, as here, the subject-matter of the passage from Hansard is contentious in that it is sought to be used to impugn the conduct of the Senator, in the context of a denial by the respondent of any impropriety, it is almost inevitable that the tender of Hansard would lead to an examination of the circumstances in which the Senator came to make the statement and that this would further lead to an attempt to assess the credibility of this evidence and to compare it with other evidence already given. Such an examination, in a contentious area, cannot be reconciled with the complete freedom of speech envisaged by the Bill of Rights and the Act. It would be otherwise if the tender were for a non-contentious purpose, for instance, to prove that certain documents were tabled in Parliament, without disclosing who tabled them (see *Sankey v Whitlam* (supra) at 35-37); or, as in *Turnbull*[3], to prove the time of proceedings. If what is involved in a tender of evidence from Hansard is simply not capable of being contentious, it is difficult to see how the right of free speech could be affected.
>
> But what is sought to be done here is to use Hansard to justify an inference that Senator Evans was influenced by [the competitor's

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3 In *R v Turnbull* [1958] Tas SR 80, on the trial of charges of official corruption, the Crown sought to lead evidence of statements made in the Tasmanian House of Assembly by the accused in his capacity as Treasurer of the State of Tasmania. Gibson J upheld an objection to the tender by reference to article 9 of the Bill of Rights. However, at (84), Gibson J disallowed an objection to evidence of the times of certain proceedings in the House, saying that there was no need to protect this information from disclosure. It must be borne in mind that the terms of s 6 of the LAPPA are different to the terms of article 9 of the Bill of Rights. As Doyle ACJ observed in *Rann v Olsen* (2000) 76 SASR 450 at [113], it is one thing to accept that preserving the freedom of speech in Parliament underpins the statutory provision, but another to read into the provision a gloss which would exclude what would otherwise fall within the terms of the provision dependent on a judicial determination that freedom of speech is impaired.

> director] in the context of the respondent's decision to terminate the applicant's contract. This is a highly contentious matter. In my view, the present tender is by way of or for the purpose of questioning the motive, intention or good faith of the Senator and is thus proscribed by s 16(3)(b). Also, in my opinion, the tender is by way of, or for the purpose of, inviting the drawing of inferences or conclusions from what was said in the Senate and is thus made unlawful by s 16(3)(c). The tender must be rejected accordingly.

[28] Whether a matter is contentious or not does not helpfully identify whether a matter falls within s 6. What matters is the purpose for which the parliamentary evidence is to be led and the way in which the evidence would be used in the determination by the court of the issues before it.

[29] Whether the plaintiffs' submissions and the evidence relied on in support of them contravenes s 6 of the LAPPA will be addressed when considering the plaintiffs' arguments in detail below.

[30] It should be noted that there is no difficulty with this Court referring to and considering the proposed evidence and submissions for the purpose of determining whether s 6 of the LAPPA applies.[4]

Effect of the Amendment Act on the plaintiffs' case

[31] The plaintiffs submitted that Part 10A of the Amendment Act rendered its action against the defendants futile. A difficulty with that submission was that s 133B(3)(a) of the Amendment Act provides that, to avoid doubt, if a validated direction is inconsistent with a law of the Commonwealth, the law

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4 See *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 at 232 per Beaumont J; *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341 at [52] per Rares J, [227]-[229], [251] per Wigney J, and [364], [372], [381] per Abraham J.

of the Commonwealth prevails to the extent of the inconsistency. The plaintiffs grounds of review included Ground 6, which was that paragraph 3(c) 'and the operative effect of' the First Directions were inconsistent with ss 9 and/or 10 of the *Racial Discrimination Act 1975* (Cth). Counsel for the plaintiffs accepted that Part 10A of the Amendment Act did not render legally futile Ground 6, but to run that Ground on its own was not worth the costs of having a trial. It was argued that the Ground was rendered futile when the plaintiffs weighed up the costs of a trial and the prospects of success on that Ground alone.

General principles as to costs where the proceedings are discontinued

[32] The power to award costs is in the discretion of the Court.[5] It is well established that the power to award costs is a discretionary power, which must be exercised judicially, by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation.[6] Principles guide the exercise of the discretion.[7] One of the most important guiding principles is that the successful party is generally entitled to their costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party.[8]

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5 *Supreme Court Rules 1987* (NT), r 63.03(1).

6 *Northern Territory v Sangare* (2019) 265 CLR 164 at [24] per the Court.

7 Ibid.

8 Ibid [25].

[33] Subject to an order of the Court, a party who discontinues a proceeding must pay the costs of the party to whom the discontinuance relates to the time of the discontinuance.[9] Here, the defendants agreed not to pursue the plaintiffs for their costs upon the discontinuance. The plaintiffs seek an order that the defendants pay their costs.

[34] There must be some proper justification, sound positive ground or a good reason for departing from the ordinary position.[10]

[35] The plaintiffs are the moving party for an alternative costs order than that prescribed by the Rules and, if it is necessary to establish a factual basis for such an order, or to draw particular inferences from primary facts, the plaintiffs bear the onus of proving the relevant facts and the burden of establishing that the inferences should be drawn.[11]

[36] Generally speaking, where a proceeding has been discontinued because the action has become futile by settlement or some extra-curial action, the proper exercise of the costs discretion will usually mean that the Court will make no order as to the costs of the proceeding.[12] Where there is no hearing on the merits, the Court is necessarily deprived of the factor that usually

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9 *Supreme Court Rules 1987* (NT), r 63.11(6) and (9).

10 *Fordyce v Fordham* (2006) 67 NSWLR 497 at [3] per Santow JA; *Australiawide Airlines Ltd v Aspirion Pty Ltd* [2006] NSWCA 365 at [54] per Bryson JA (McColl and Basten JJA agreeing); *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWCA 32 (‘*Bitannia v Parkline’*) at [54] per Hodgson JA (Tobias JA agreeing).

11 *Bitannia v Parkline* at [70] per Basten JA, cited with approval in *Big Money World Pty Ltd v Red Hair Entertainment Pty Ltd* [2019] NSWCA 29 at [32] per the Court; *Jones v Jones* [2012] QSC 342 at [44] per McMeekin J; *IMO Fehring Livestock Pty Ltd* [2012] VSC 326 at [30] per Gardiner AsJ.

12 *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 (‘*Lai Qin*’) at 625 per McHugh J and the authorities there referred to; *NT Pubco Pty Ltd v DNPW Pty Ltd* [2011] NTSC 51 at [39] per Luppino M.

determines whether or how it will make a costs order. In deciding on the question of costs in such cases, the Court cannot try a hypothetical action between the parties, as to do so would burden the parties with the costs of a litigated action which, by settlement or extra-curial action, they had avoided.[13] However, in some cases the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action.[14]

Degree of certainty of success

[37] The plaintiffs rely on the following observation in *Lai Qin* (at 625, after the observations just cited above):

> Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried. This is perhaps the best explanation of the unreported decision of Pincus J in *South East Queensland Electricity Board v Australian Telecommunications Commission*[15] where his Honour ordered the respondent to pay 80 per cent of the applicant's taxed costs even though his Honour found that both parties had acted reasonably in respect of the litigation. But such cases are likely to be rare.

[38] In *Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194, Hill J held (at 201) that it will rarely, if ever, be appropriate, where there has been no trial on the merits, for a Court determining how the costs of the proceeding should be borne to endeavour to determine for itself

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13 *Lai Qin* at 624.

14 Ibid.

15 *South East Queensland Electricity Board v Australian Telecommunications Commission* (unreported, FCA, 10.2.1989). Pincus J reached the decision on the bases that the applicant for costs had 'a fairly strong case – one more promising than the respondent' and the reason the matter did not go to trial is that the respondent in a judicial review of an administrative decision 'changed its mind'.

the case on the merits, i.e. to determine the outcome of a hypothetical trial, particularly where that would have involved complex factual matters where credit would be an issue.

[39] The number and complexity of the plaintiffs' grounds of judicial review is set out above and was addressed to some extent in *Phillips v Chief Health Officer* [2021] NTSC 29 at [50]-[51], in which some of the grounds were described as arguable and not frivolous or vexatious. It is a large leap from there to conclude the plaintiffs' case was almost certain to have succeeded.

[40] The plaintiffs submitted that the Court could reach that conclusion because: (a) the Legislative Assembly passed the Amendment Act; and (b) the Amendment Act validated only the Directions the subject of the proceeding and none of the other 200 or more Directions made by the Chief Health Officer in relation to the declared public emergency comprised of the COVID-19 pandemic. These facts were said to found the inference that the second defendant held the view that the plaintiffs case was likely to succeed, which would be a sufficient basis to conclude that the plaintiffs' case was almost certain to have succeeded.

[41] There are a number of difficulties with this argument.

[42] First, the plaintiffs (initially, at least) sought to equate the second defendant, the Northern Territory of Australia, with the Legislative Assembly or to attribute to the second defendant the conduct of the Legislative Assembly. The plaintiffs sought to do so by reference to the

establishment of the Northern Territory of Australia as a body politic under the Crown by s 5 of the *Northern Territory (Self-Government) Act 1978* (Cth), the definition of the words 'the Territory' as the body politic so established in s 17 of the *Interpretation Act 1978* (NT), the introduction of the Bill into the Legislative Assembly by the Minister for Health as 'a Minister of the Northern Territory body politic' and the passage of the Bill into law by the Legislative Assembly 'in its capacity as a branch of the Government'. As a party to these proceedings under s 5(2)(a) of the *Crown Proceedings Act 1993* (NT), the Crown in right of the Northern Territory of Australia is the executive government of the body politic, represented by the Ministry and the administrative bureaucracy which attends to its business, as distinct from the legislative branch of that body politic, represented by the Legislative Assembly.[16] It cannot, therefore, be said that the second defendant passed the Amendment Act, or that the purpose of the Legislative Assembly in doing so can be attributed to the second defendant. So much was conceded by the plaintiffs in oral argument.

[43] Secondly, in pursuit of the above argument, the plaintiffs relied on the Hansard from 23 March and 19 May 2022 to establish the fact that the Bill and the amendments to the Bill which inserted Part 10A into the Amendment Act were presented to the Assembly by the Minister for Health. The

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16 See *Sue v Hill* (1999) 199 CLR 462 at [84]-[93], particularly [87], per Gleeson CJ, Gummow and Hayne JJ; *McNamara v Consumer, Trader and Tenancy Tribunal* (2005) 221 CLR 646 at [22] per McHugh, Gummow and Heydon JJ; *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at [75] per Kiefel CJ, Bell, Gageler and Keane JJ; *Tymbook Pty Ltd v Victoria* (2006) 15 VR 65 at [59] per Maxwell P and Charles JA. These authorities demonstrate that references in statutes to 'the Crown in right of' the Commonwealth or the relevant State are references to the executive and not the legislative branch of the body politic.

defendants argued that this is precluded by s 6(3)(c) of the LAPPA because it comprises tendering and receiving evidence, and making a submission, concerning proceedings in the Assembly for the purpose of drawing, or inviting the drawing of, inferences or conclusions from anything forming part of those proceedings. As I understood the defendants' submission, the inference or conclusion sought by the plaintiffs was that the motivation for validating the Directions originated in the executive arm of government. To avoid this, the defendants were prepared to concede, for the purposes of this costs application, that the motivation for validating the Directions originated in the executive arm of government.

[44] To my mind, there is little difference in substance between drawing an inference that the motivation for validating the Directions originated in the executive arm of government from the facts, evidenced by the Hansard, that the Bill and the amendments to it were presented to the Assembly by the Minister for Health, and the defendants conceding that inference or conclusion, which concession can only be based on those facts as evidenced by the Hansard or other materials disclosing the proceedings of the Assembly.

[45] In my view, to receive the Hansard to establish the facts that the Bill and the amendments to it which inserted Part 10A into the Bill were presented to the Legislative Assembly by the Minister for Health in order to draw the inference that the Bill and the amendments originated in the executive arm of government is not precluded by s 6(3)(c) of the LAPPA. That inference is

uncontentious (in the sense used by Beaumont J in *Amann Aviation*) and patent on the face of the printed version of the Bill and its Explanatory Statement.

[46] What is precluded by s 6(3) of the LAPPA is to receive the Hansard to establish the facts that the Bill and the amendments to it which inserted Part 10A into the Bill were presented to the Legislative Assembly by the Minister for Health for the purpose of establishing that the Minister for Health, or by extension the executive government, was motivated to present the amendments to the Bill to the Assembly because they or it held the view that the plaintiffs' case was likely to succeed. That would be to rely on the truth, motive or intention of the words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of the Assembly (i.e. the proceedings in the Assembly) within s 6(3)(a), to establish the motive or intention of the Minister for Health within s 6(3)(b) and to draw or invite the drawing of an inference from anything forming part of those proceedings within s 6(3)(c). Consequently, the proposition in the plaintiffs' argument that the Minister for Health and, by extension, the executive government were of the view that the plaintiffs' case was likely to succeed is not established or open.

[47] Thirdly, the facts relied on (the passage of the Amendment Act and only the challenged Directions being its subject) do not sustain the inference, on the balance of probabilities, that either the legislative or the executive branch of government held the view that the plaintiffs' case was likely to succeed. An

at least equally likely possibility is that the Amendment Act was passed simply to avoid any doubt or uncertainty about the validity of the Directions and the consequent acts done in reliance on their validity, particularly in the minds of the public and those who took acts consequent on the Directions (given that the plaintiffs' challenge to the Directions was widely publicised). Those consequent acts may have included the exclusion of people from their workplaces, the termination of people's employment or other employment disciplinary action, the issuing of infringement notices or the conduct of prosecutions for breaches of the Directions, and the refusal of entry to or removal of persons from premises. These consequent acts potentially have significant or serious consequences for the people affected. That none of the other Directions made by the Chief Health Officer were also validated does not tip the balance because the subject matter, content and terms of those other Directions are not before the Court. It is not possible to say whether there was any uncertainty about their validity. It may also be that the magnitude of the risks to government associated with invalidity (including the effects of the consequent acts), such as litigation or challenged prosecutions, was of a higher order for the challenged Directions than for any other Directions. Perhaps they impacted a larger number of people than the other Directions or were more likely to have consequent effects that might sound in damages if the Directions were invalid. Perhaps the government of the day is risk averse in this regard. These are all

reasonable possibilities which deny the drawing of the inference sought by the plaintiffs' argument.

[48] Fourthly, even if the Amendment Act was passed because the legislative and/or executive branches of government considered that the plaintiffs' case was likely to succeed, it does not follow that this Court should conclude, on that basis, that the plaintiffs' case was almost certain to have succeeded. There is a large difference between a case which is, in the opinion of some, likely to succeed and one which is, in the view of the Court, almost certain to succeed. The evidence filed by the parties in the proceeding comprised thousands of pages of affidavits, documents and reports from four experts. Even the *ultra vires* and statutory construction grounds pressed by the plaintiffs (which were probably the least complex of their grounds and did not involve any factual evidence) could arguably have gone either way. The plaintiffs' decision not to press on with Ground 6 was an acknowledgement that it was not almost certain to have succeeded. None of the plaintiffs' grounds was so obvious or clear that it could be said to be almost certain to have succeeded.

[49] Finally, a finding that one party was almost certain to have succeeded if the matter had been fully tried is rare. It can occur in effect where one party has effectively surrendered to the other, giving the plaintiff the relief it sought by the proceedings. For example, where a party that initially opposed a plaintiff's claim ultimately consented to the relief sought because their case

met evidentiary difficulties,[17] or where an administrative decision maker remakes the challenged decision in the plaintiff's favour such that the validity of the challenged decision becomes moot.[18] In cases such as these, the plaintiff obtains, by means other than the proceeding, the relief they sought by the proceedings. This case is not one of effective surrender by which the plaintiffs obtained, essentially, the relief they sought.

[50] In a variation on this theme, the plaintiffs argued that a costs order should be made in their favour because the defendant had, by the Amendment Act, rectified the contentions of the plaintiffs prior to trial and thereby nullified the plaintiffs' claims. Reliance was placed on the decision of Kaye J in *Garwolin Nominees Pty Ltd v Statewide Building Society* [1984] VR 469 ('*Garwolin*'). In that case, the plaintiff lessor sought an injunction and an order for possession against the defendant lessee for breach of the terms of the lease, specifically, for failing to occupy the premises and use it for a building society. Prior to the trial, the defendant lessee assigned the lease, with the consent of the plaintiff, to another entity which operated a building society. The plaintiff sought leave to discontinue the action, which was not resisted by the defendant. The plaintiff sought its costs on the basis that it had achieved what it set out to obtain by the proceedings. Kaye J awarded the plaintiff its costs. At 472, Kaye J observed that where a plaintiff has achieved what they set out to obtain by the issue of proceedings, it would be

17 See *ONE.TEL Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548 ('*ONE.TEL'*) at [7] per Burchett J.

18 See the authorities referred to by Burchett J in *ONE.TEL* at [6], one of which was *Lai Qin*.

quite unjust and unfair if the plaintiff were denied their costs incurred in achieving the relief they sought by the commencement of the action, and unnecessary to force the plaintiff to continue on to trial for the purposes of obtaining substantive orders and costs. His Honour said the procedure for obtaining leave to discontinue enables a party to bring to an end their litigation when the relief sought has been obtained.

[51] In the present case, the Amendment Act did not achieve for the plaintiffs what they set out to obtain by the proceedings. It resulted in quite the opposite. The plaintiffs argued that this was immaterial, what mattered was that the plaintiffs' case was nullified. I disagree. The rationale for awarding a discontinuing plaintiff their costs when their case has been nullified and they have achieved their outcome is because they have, in effect, won. If they have, in effect, lost because their claims can no longer be pursued, the case is on the same footing as the authorities referred to under the next heading below.

[52] This basis for making a costs order in the plaintiffs' favour is not made out.

The Amendment Act as a supervening event

[53] A distinction is drawn between the cases involving an effective surrender, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it cannot be said that one side has simply won, no issue remains between the parties except that of

costs.[19] In the former case, there will commonly be lacking any basis for an exercise of the court's discretion otherwise than by an award of costs to the effectively successful party.[20]

[54] Even where the supervening event constitutes or is caused by the defendant's action, unless there was some unreasonableness in the defendant so acting, the proper exercise of the costs discretion may still be to make no order as to costs.[21]

[55] It has been observed that legislative amendment which removes the plaintiff's hopes of success can be readily characterised as a supervening event.[22] In *True Conservation Association Inc v Minister administering the Threatened Species Conservation Act 1995* [2008] NSWLEC 221, the applicant sought judicial review of an order of the respondent conferring biodiversity certification on a planning policy. The respondent joined issue with the grounds of challenge and the matter was listed for trial. Before the trial, legislation was passed which conferred biodiversity certification on the policy. The applicant sought its costs on the basis that the respondent promoted the Bill passed by the Parliament which practically rendered the proceedings inutile. Preston CJ held (at [17]) that the appropriate costs order was that each party should bear their own costs. His Honour found (at [15])

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19 Ibid.

20 Ibid.

21 *Ralph Lauren 57 Pty Ltd v Byron Shire Council* (2014) 199 LGERA 424 at [31] per Preston CJ (Beazley P and Ward JA agreeing), citing *Kiama Council v Grant* (2006) 143 LGERA 441 at [72]-[77] per Preston CJ and the authorities there referred to.

22 See *Bitannia v Parkline* at [80] per Basten JA.

that both parties acted reasonably in commencing and defending the proceedings and that conduct continued to be reasonable until the proceeding became inutile by the passing of the legislation. His Honour also held that there was no relevant disentitling conduct by the respondent, the Parliament was not to be equated with the respondent, the passing of that legislation was not unreasonable conduct and it could not be said that the applicant would almost certainly have succeeded if the matter had been tried.

[56] For the reasons set out in paragraph [42] above, the Legislative Assembly cannot be equated with the second defendant.

[57] Nor do I accept that the mere passing of the Amendment Act, even initiated by the executive government, comprised unreasonable conduct. On this point, the plaintiffs argued that retrospective legislation works unfairness or injustice. The plaintiffs referred to the observations of Mason JA in *Bawn Pty Ltd v Metropolitan Meat Industry Board* (1970) 72 SR (NSW) 466 at 487, to the effect that where retrospective legislation operates on rights which have not only accrued but are the subject of pending proceedings, 'an added element of injustice may arise in the form of a liability to costs in circumstances in which the award of costs lies not in the discretion of the court, but follows automatically the result of the litigation'. The case was a case stated to the Court of Appeal to answer the question whether retrospective legislation denied to the plaintiff its claim for damages for conversion of certain property. The case stated provided that if the Court has

an affirmative answer to the question, then judgment for the defendant, with an order for the plaintiff to pay the defendant's costs, was to be made. The case was not about costs; it was about construction of a statute and its retrospective operation. The only thing which can be taken from the case is the general recognition that laws with retrospective operation can disturb and alter substantive rights to the detriment of the rights holder(s) affected, including where the rights are the subject of pending proceedings. Even if that can, in the present context, be labelled 'injustice', it does not follow that the mere passage of the Amendment Act, without more, was unreasonable such as to entitle the plaintiffs to an order for costs. The authorities referred to in paragraphs [53] to [55] above make that clear.

[58] This basis for making a costs order in the plaintiffs' favour is not made out.

***Boscaini* principle**

[59] The plaintiffs argued that they should be awarded their costs on the basis of the observations of Debelle J in *Boscaini Investments Pty Ltd v City of Kensington* [1999] SASC 327 ('*Boscaini*') at [22], as follows:

> The fact that a party has not conducted himself reasonably may disentitle him to costs. But, beyond that, the reasonableness of the conduct of the parties is not likely to assist in determining whether the applicant should recover his costs. The real question is whether the applicant had reasonable prospects of success. …
>
> Depending on circumstances, where the applicant has acted reasonably in commencing proceedings, has an arguable case, and it is reasonable to conclude that the respondent has acted in consequence of the commencement of the proceedings, the court may be prepared to make an order as to costs in favour of the applicant.

[60] In that case, the plaintiff had applied for orders invalidating and setting aside certain resolutions of the defendant Council. Before the applications were heard, the Council rescinded the resolutions with the consequence that no issues remained for determination. The plaintiff sought its costs. Debelle J refused the application, holding (at [23]) that the court usually will make an order for costs only where it is possible to form a clear view of the merits of the case, and (at [24]) that there were a number of reasons why it was not possible to determine the likely prospects of success of the applications, including: (a) that the case could not be determined on the documents and witnesses would have been called; (b) there would be issues of credit; (c) there would be conflicting evidence to be resolved; (d) there were legal difficulties with the plaintiff's case; (e) the plaintiff's case involved the detailed consideration of a large number of documents; and (f) the issues were relatively complex. His Honour held that all of these factors rendered it impossible to determine whether the plaintiff would have succeeded and to make any order as to costs would be to presume the outcome.

[61] The plaintiffs in this case argued that: (a) they acted reasonably in commencing the proceedings; (b) they had an arguable case; and (c) the defendants acted, by the Amendment Act, or its introduction into the Legislative Assembly, in consequence of the commencement of the proceedings.

[62] As to proposition (a), I accept that the plaintiffs acted reasonably in commencing the proceedings, notwithstanding the entitlement given by

s 107 of the PEHA to appeal against the making of the Directions within 24 hours after the Directions were made. In relation to the First Directions, which were of wide and far-reaching effect and operation, that extremely short timeframe denies characterisation of the plaintiffs' failure to exercise that right as unreasonable.

[63] As to proposition (c), again, the Amendment Act was passed by the Legislative Assembly and this argument sought to equate the second defendant with the Legislative Assembly. For the reasons set out in paragraph [42] above, the Legislative Assembly cannot be equated with the second defendant. It is worth noting that a further reason why Debelle J refused the plaintiff's costs application in *Boscaini* was (at [25]) that there was an act of a third party which had significant consequences for the plaintiff's applications and the relief sought. Given the distinction between the Legislative Assembly and the second defendant, the passage of the Amendment Act is more akin to the act of a third party than the act of, or caused by, the second defendant.

[64] Recognising the difficulties with that argument, the plaintiffs argued orally that the presentation by the executive government to the Legislative Assembly of the amendments that introduced Part 10A was the relevant conduct, because the executive government held the majority of seats in the Legislative Assembly and the passage of the amendments was a *fait accompli*. In *Victoria v Grawin Pty Ltd* [2012] VSC 157, the defendant sought a costs order against the plaintiff upon the plaintiff seeking to

discontinue its action after legislation was passed which rendered the proceeding nugatory. Costs were ordered against the plaintiff, but in rejecting the claim for costs on an indemnity basis, Croft J held as follows at [34]:

> If, in the course of considering its position [after the proceedings commenced], the Executive decided to introduce legislation to affect the rights of the parties to the dispute between them, then it is constitutionally within its power to do so. The argument advanced by [the defendant] appears to me to be based upon the premise that the Executive's decision to introduce legislation was as good as or, in practical terms, equivalent to the legislation actually being passed. In my view, this is to confuse Executive action with the actions and discretions of the Legislature, which is at odds with numerous authorities which reject the notion that it is open to the Executive to fetter the Legislature in the exercise of its powers and discretions, by contract or otherwise.

[65] The plaintiffs' argument on this point suffers the same defect. The Legislative Assembly is not the 'rubber stamp' of the executive government and the passage of legislation introduced by the executive government cannot be treated as a *fait accompli*.

[66] As to proposition (b), considered in context, I do not accept that, in making the observations set out in paragraph [59] above, Debelle J was suggesting that, to secure a costs order in their favour, all the plaintiff had to do (on this proposition) was show they had an arguable case, that is, not a hopeless case. In the decision, Debelle J referred to various authorities (including a number already referred to above) and (at [21]) agreed with the observations of Finkelstein J in *Gribbles Pathology Pty Ltd v Health Insurance Commission* (1997) 80 FCR 283 at 287 that what was intended to be covered

by this issue was where the court is in fact able to form a clear view about the merits of a case without a trial. In oral submissions, counsel for the plaintiffs qualified this somewhat, referring to 'an arguable case with reasonable prospects of success'. Even so, given the decision of the High Court in *Lai Qin* (a case not referred to in Debelle J's reasons), the proposition that the plaintiffs need only show they had an arguable case, or even one with reasonable prospects of success, is untenable. It is untenable because it would mean that a discontinuing plaintiff would be entitled to their costs, not because the defendant's conduct was unreasonable, but because the plaintiff had a case that was not hopeless and the defendant did something in consequence of the proceeding, not unreasonably and which was not a surrender. That would be inconsistent with the observations in *Lai Qin* and the principle espoused by the New South Wales Court of Appeal in *Ralph Lauren 57 Pty Ltd v Byron Shire Council* (2014) 1999 LGERA 424 referred to in paragraph [54] above, and the cases cited therein.

[67] In *Phillips v Chief Health Officer* [2022] NTSC 29, I held (at [50]) that some of the plaintiffs' grounds were 'arguable and not frivolous or vexatious standard jurisdictional error grounds'. I also held (at [51]) that the proceedings can reasonably be described as a very broad, extremely complex and, in some respects, novel administrative law challenge. The plaintiffs submitted that I could determine their prospects of success, of at least Ground 1, by reading their draft written submissions, which were put in evidence before me and which, it was said, I would find persuasive. To do

so would be to undertake a hypothetical trial of the matter (which is impermissible), without the benefit of any argument from the other side (which is unfair). I do not accept that is an appropriate way to proceed.

[68] In my view, the factors identified by Debelle J in *Boscaini* as leading to the conclusion that it was not possible to determine the likely prospects of success apply equally to this case, perhaps more so given the complexity of the plaintiffs' grounds of review.

Unreasonable conduct by the defendants?

[69] The plaintiffs argued, in support of this basis for their costs application, that the defendants did not act reasonably in defending the proceedings. The first point to make about this submission is that, in *Boscaini,* Debelle J observed that the fact that a party has not conducted themselves reasonably (in the litigation) may disentitle them to costs, but beyond that, the reasonableness of the conduct of the parties is not likely to assist in determining whether the applicant should recover their costs. On the basis of the principle the plaintiffs sought to invoke, the argument is largely irrelevant.

[70] The plaintiffs argued that the defendants acted unreasonably, causing the plaintiffs 'undue delay and expense' by revoking the First Directions and replacing them with Directions (No 52) 2022, 'that were substantially the same', rather than simply amending the First Directions. The plaintiffs argued that they were led by a note for item 7 in the First Directions which provided that it was expected that a third dose would be required for the

workers in 2022 and that the Directions would be amended to add that requirement when the medical advice is more definite. The plaintiffs argued that the revocation and replacement caused them considerably greater expense and delay than would have been the case if the First Directions had simply been amended, because they had to amend their originating motion to add references to Directions (No 52) 2022, prepare further grounds of review and supplement their evidence.

[71] The plaintiffs did not explain how, or lead evidence to establish that, there was greater expense and delay than would have been the case if the First Directions had simply been amended. In the absence of that explanation or evidence, I find that the plaintiffs would have had to amend their originating motion anyway, that the new grounds in the amended originating motion simply repeat some of the original grounds in relation to the Second Directions, and that the evidence would have had to be supplemented anyway to address matters associated with a third vaccination requirement. There is therefore no basis on which to find that the plaintiffs suffered greater expense and delay from the fact of revocation rather than amendment. Consequently, there is no basis on which to conclude that the defendants acted unreasonably in this course.

[72] The plaintiffs also argued that the defendants acted unreasonably in: (a) introducing the amendments to the Bill which inserted Part 10A on the last day of sittings of the Legislative Assembly before the trial (19 May 2022), when they could have been introduced at earlier sittings in February, March

and May 2022, being the sittings that occurred after the proceedings were commenced; and (b) failing to give the plaintiffs prior notice of the proposed inclusion of Part 10A into the Bill.

[73] As to proposition (a), there is no evidence before the Court to establish or permit an inference that the amendments to the Bill could have been introduced into the Legislative Assembly earlier, except that there were earlier sitting days in 2022. There is no evidence about the Legislative Assembly's program of business for those sitting days, when the executive government decided to amend the PEHA, when the Bill was drafted, when the executive government decided to make amendments to the Bill, or when the amendments to the Bill were drafted. Nor is there any evidence to suggest that the executive government stood to gain anything from choosing to delay the introduction of the amendments to the Bill until the last sitting day before the trial. Indeed, the more likely scenario is that the executive government stood to gain from introducing the amendments as soon as possible so that no unnecessary legal work was done and costs incurred in preparing its case for trial. There is evidence that the solicitor with carriage of the matter on behalf of the defendants was unaware, as at 24 March 2022, of any intention to include validating provisions in the Bill. Further, until 11 April 2022, the matter was listed for trial to commence on 19 April 2022, but the Amendment Act was not introduced at sittings immediately prior to that time. The evidence does not permit the drawing of an inference that the

amendments to the Bill could have been introduced into the Legislative Assembly earlier than when they were.

[74] As to proposition (b), the defendants gave notice to the plaintiffs of the passage of the Amendment Act, including the insertion of Part 10A, the day after it was passed by the Legislative Assembly. To establish that this was unreasonable, the plaintiffs would have to establish when the executive government decided to pass validating amendments, and that the delay between the making of that decision and informing the plaintiffs about it was unexplained and unreasonable. The plaintiffs fall at the first hurdle. There is no evidence before the Court to establish when that decision was made. It is not sufficient to say that that is not evidence in the plaintiffs' hands, but in the defendants'. The onus is on the plaintiffs to establish the evidence necessary to found their arguments in support of their application for costs, and it is not for this Court or the defendants to fill any gaps.

[75] The defendants submitted that s 6(3)(c) of the LAPPA prevents reference to Hansard and other materials forming part of the proceedings of the Assembly to establish that, when originally introduced, the Bill did not include the amendments to insert Part 10A, and that the amendments were made to the Bill in the Legislative Assembly on 19 May 2022, to draw the inferences that at that time the executive government had not decided to make validating amendments, and did not decide to do so until after 23 March and before 19 May. I accept that submission in this context, where the purpose of the inference is to establish or refute whether the executive

government acted unreasonably.[23] I consider this course to also fall within s 6(3)(a), particularly the references to motive, intention and good faith.

[76] This basis for making a costs order in the plaintiffs' favour is not made out.

Failure to disclose a defence?

[77] In *RTZ Pension Property Trust Ltd v ARC Property Developments Ltd* [1999] 1 All ER 532, Potter LJ made observations (at 541) that the court's discretion as to costs should not be constrained in the prevailing climate in which the court seeks ways to prevent unnecessary costs and delay in the resolution of disputes, and gave an example of a situation in which the court might make such an order, namely where 'a defendant who perversely encourages a plaintiff into action by concealing the existence of a defence although reasonably invited prior to proceedings to make disclosure'. The plaintiffs referred to that passage and then argued that a costs order should be made in their favour, citing a further observation by Potter LJ (at 541), that it was necessary to demonstrate misconduct of the defence in the sense of some act, omission or course of conduct on the part of the defendant that is unreasonable or improper.

[78] This argument was misconceived. Firstly, Potter LJ's first observation was clearly stated to be *obiter dicta*. Secondly, Potter LJ was not purporting to lay down a principle, but simply giving an example of the reason why the

23 Annexures DTK-47 and DTK-49 to the Affidavit of Danial Terence Kelly made on 10 June 2022 are inadmissible because they comprise the Bill as introduced to the Legislative Assembly and the schedule of amendments to the Bill, which are part of the proceedings in the Assembly within s 6(3) of the LAPPA.

court's discretion should be considered to be wide and unconstrained. Thirdly, the decision and the proposition relied on does not appear to have been followed or cited in any Australian authority. Fourthly, Potter LJ referred to a plaintiff being perversely encouraged *into* action, not *to continue* an action, and there was no 'defence' until the Amendment Act was passed. Fifthly, for that reason, there was nothing to be notified of until the Amendment Act was passed and the defendants notified the plaintiffs of its passage the day after that occurred. The plaintiffs submitted that what should have been disclosed was the intention to pass, or at least introduce in the Legislative Assembly, the validating amendments. However, there is no evidence that the plaintiffs would have: (a) accepted that validating amendments could be effectively made, or that they would close off the plaintiffs' case, without seeing the terms of them; and/or (b) ceased their preparations for trial on the basis of notification of that intention. Sixthly, the Amendment Act was not a 'defence' to all of the plaintiffs' case – it did not deny Ground 6 asserting inconsistency with the *Racial Discrimination Act 1975* (Cth). Seventhly, there was no invitation by the plaintiffs *prior to the action* seeking disclosure of any defence.

[79] This basis for making a costs order in the plaintiffs' favour is not made out.

Indemnity costs

[80] In reliance on arguments already referred to, the plaintiffs argued that the costs awarded to them should be awarded on an indemnity basis. Given the above conclusions, there is no basis on which to make such an award.

Disposition

[81] The plaintiffs' application for an order that the defendants pay their costs, whether on an indemnity basis or the standard basis, is refused and the summons seeking that order is dismissed.

[82] Given that the defendants did not seek any costs order in their favour, and in all the circumstances of this case, I order that each party bears their own costs.
