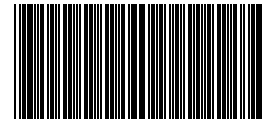




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Written Submissions

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	
Telephone	1300163662

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 (Appellants Reply Submissions - 10 September 2025_-.pdf)

[attach.]

EFG v Secretary, Department of Communities and Justice and anor
2025/00124203

Appellant's Reply Submissions

1. The second respondent cites *AB v Independent Broad-based Anti-Corruption Commission* (2024) 278 CLR 300; [2024] HCA 10 at [29] for the proposition that the task of statutory construction must begin with a consideration of the text of the statute as a whole. [Second Respondent's Written Submissions, "**SRWS**" 26]. Immediately following that proposition, the judgment of the High Court continues: "*That said, ascertaining the meaning of the text requires a consideration of its context, which includes the general purpose and policy of a provision and, in particular, the mischief it is seeking to remedy.*"
2. The mischief that the *Costs in Criminal Cases Act 1967* (NSW) is seeking to remedy is the situation of an innocent person who has had to spend money on legal services to secure an acquittal. It is not stretching ordinary language to describe that as an injustice.
3. The appellant has always acknowledged that the limitation to costs reasonably incurred 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.*" [Appellant's Written Submissions, "**AWS**" 6]
4. The second respondent argues that s.4(2), in providing that the determination of costs is not to exceed the "maximum amount," and that phrase itself, imply that the decision maker might decide that an amount of costs lower than the "maximum amount" might be paid. [SRWS 18]. The appellant does not agree. (see AWS 34).
5. The second respondent cites the Court of Criminal Appeal in *Rodden v R* (2023) 112 NSWLR 162; [2023] NSWCCA 202 at [129] referring to the purpose of s4(3) as to express "*a cap by reference to an objective criterion of reasonableness.*" [SRWS 15] The interpretation of this aspect of the legislation was not in issue in *Rodden*, and presumably not argued. There is no basis to conclude that by "cap" the Court meant anything other than "limit." The possible differences in interpretation between "cap" and "limit" were not relevant in *Rodden*.

6. However, the appellant accepts that the provision of the discretions themselves in s.4(2) necessarily leads to the conclusion that on occasions amounts less than “reasonable costs” may be paid.
7. The whole question is on what basis and in what circumstances that may be done. The second respondent supports the view that the conclusion that lower amounts may be paid imports a scale of fees which can be applied. [SRWS 45(a)].
8. The use of “scale” suggests a range of amounts from which a choice may freely be made in each application. The appellant disagrees, and says that the rules of reason and justice require that there be a rational basis for the selection of the amount. That is the essential requirement of reasonableness in this context. The essential question is whether there is a rational basis for selecting the amount, that is, preferring it over others. Without a rational basis, the choice of an amount would be capricious, random or arbitrary.
9. The second respondent says (at SRWS 19) that the appellant is reading words of limitation into s.4(2) which are not there. The appellant says that they are the result of an analysis of the statute as a whole, and the limitations required by the rules of reason and justice. The fact that the power is conferred in unconstrained terms does not exclude that.
10. The second respondent maintains that both the amount determined pursuant to the Attorney General’s rates and the amount of reasonable costs, more than twice as much, were permissible. [SRWS 52] It is not possible, taking account of the rules of reason and justice, for two such disparate amounts to be acceptable outcomes defensible within the facts and law. This shows the fallacy of a position based on the idea that there is a scale, in the sense of a range from which a choice may freely be made.
11. Further, the very same argument would support other scales containing other amounts. There is an illusion, but only an illusion, of reasoning. The amounts would be accepted without any rational basis, simply because they were based on a scale.
12. If an amount selected is permissible when based on a scale, the same amount should also be permissible when not based on a scale. In short, the second respondent’s argument permits the selection, willy nilly, of any amount.
13. As the result of the provisions of the Act, in the material before the decision maker, there are two rational bases for the determination of an amount – the amount of actual costs, and the amount of reasonable costs. There is no suggestion in the

legislation of any other rational basis on which an amount might be determined. Nor is there any other apparent rational basis for preferring any other amount. The fact that other amounts exist in a scale of fees designed for another purpose does not provide a rational basis for relying on them. Why that scale and not another? The choice is arbitrary.

14. In this case, the amounts used as the basis for the moderation of fees were single fixed amounts prescribed in the Attorney General's rates. The whole notion of determining reasonable costs by reference to a fixed rate is difficult to justify. See *NSW Crime Commission v Fleming and Heal* (1991) 24 NSWLR 116 per Gleeson C.J. (with whom Hope AJA agreed) at 126D-G, 127C-E, Kirby P. at 141E - 142A.
15. There is no doubt that for many years after the introduction of the legislation, the Department's approach to determining the amount to be paid was on the same basis as generally recognised in the legal profession for the assessment of costs in civil cases. Any one of the three letters referred to by the then Solicitor General, in the absence of any contrary evidence, would prove that to a high level of satisfaction. At an unknown time, that approach was changed to reliance on the Attorney General's rates. That was a radical change. Even if both approaches were permissible, it introduced a sharp inconsistency into the determination of the amount to be paid. The appellant says that the former approach was permissible, but the latter was not. Applications coming after the change were treated very differently from those preceding it. Such an inconsistency, apart from other factors, leads to a question over the lawfulness of the change.
16. The second respondent says that one of the matters that may be relevant to the discretion in s.4 is the appropriate expenditure of public funds. [SRWS 26, 33, 49] That may be so for many of the Department's operations. But that consideration could not operate as a distinguishing factor between amounts to be determined, because it would apply to all, and offer no means of distinguishing between them. One would easily infer that concern for appropriate expenditure of public funds was the motivation for the creation of the statutory duty to determine reasonable costs. Equally, however, one would infer that by allowing that applicants could be paid their reasonable costs, the legislature was not intending the amount of payment to be otherwise inhibited by that concern.
17. The second respondent argues [SRWS 23], that the conferring of the discretions on the Secretary of the Department of Communications and Justice suggests that one of the matters relevant to the exercise of the discretion is the appropriate expenditure of public funds. That is a very tenuous connection given that the performance of the

duties of the Secretary and the Department's officers would include such a concern in any event.

18. The second respondent then argues [SRWS 24] that if the Parliament had intended an entitlement to costs reasonably incurred, the power would have been conferred on an appropriate officer. But because there is a statutory duty to determine reasonable costs, such a determination is an essential part of the exercise whatever view is taken about Parliament's intention. The Parliament may well have thought that the Secretary would do exactly what the Secretary in fact did during at least the first 30 years of operation of the legislation, and seek the advice of an appropriate officer as to the amount of costs on the normal civil basis.
19. The second respondent says: *"Had the legislation intended that there be one (and only one) circumstance in which the discretion under s.4(2) could be exercised to make a payment less than the "maximum amount," the provision could readily have been drafted in such a way"* [SRWS 40, see also 22]. The appellant has never suggested that there is only one such circumstance (as acknowledged by the second respondent at SRWS 19 and 38). The appellant has argued that in providing the discretion, the legislature was taking a precautionary approach, in case something unpredictable happened. That appears to be the reason for the over-supply of discretions, with the first discretion arising under s.4(2) being unnecessary in the light of the ground covered by the discretion pursuant to s.4(4) [AWS 36]. In those circumstances, the second respondent's suggestion about how the section could have been drafted cannot apply.
20. The second respondent relies [SRWS 29-32] on aspects of the parliamentary debate to support the proposition that Parliament was conscious of the possibility that an applicant might be left significantly out of pocket. So it was. But it is clear that this concern arose from the possibility of the legal representatives charging high fees. In this context, in decrying the idea that a certificate should order the payment of all costs, the Minister was simply taking an attitude consistent with limiting payment to reasonable costs.
21. The second respondent reproduces a citation from Gleeson C.J. in *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47 at [5] to the effect that the general rule of construction promoting the purpose of the Act: *"...may be of little assistance where a statutory provision strikes a balance between competing interests..."* [SRWS 36]. The present case is not one where a statutory provision strikes a balance in that sense. In *Carr*, the issue was the interpretation of a statute relating to the admissibility of evidence of a confession, where the scope for competing interests of the individual

and the community can readily be seen. There are no such competing interests in the present case.

22. The second respondent makes the point that it is permissible for a decision maker to develop criteria for the exercise of a discretionary power, and to take account of policy in doing so. [SRWS 59]. The Attorney General's rates are not policy in that sense, though the Department uses that word to refer to them. Policy in this context is used in a different sense in the authorities. For example, in *Drake v Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634 at 641, Brennan J. spoke of "*an appropriate policy which guides but does not control the making of decisions, a policy which is informative of the standards and values which the decision maker usually applies.*" The Attorney General's rates are a prescription for how the amount to be paid is to be determined. They are as near as one could come, without having the precise detail of a particular application, to dictating in advance what the amount should be. They do not provide information about the standards and values applied by the decision-maker to determine the amount, they simply state what the basis of the amounts will be. There is a complete absence of information about the basis of the rates themselves or the basis on which they are applied to applications under the Costs in Criminal Cases Act.
23. What the Secretary did in determining the amount which would reasonably have been incurred is not entirely clear. The second respondent says: "*The primary judge observed at J[25] and [28] that the Secretary did not attempt at this stage to determine whether the rates at which solicitor and counsel charged were 'reasonable.'*" [SRWS 65] In fact, the primary judge did not say that. He said that it was not clear whether the Secretary had done that. J[25].
24. In determining the amount which would reasonably have been incurred, the Secretary did not identify items approved, only items rejected. The natural inference is that everything not rejected was approved as reasonably incurred, including the amounts of the fees. The Secretary had the relevant fee agreements and thus was in a position to do that.
25. The position is confused by the statement in the Department's letter of 14 August 2024: ..."*Senior Counsel's fees that were considered to have been reasonably incurred were allowed at the Attorney General's rate applicable to Junior Counsel.*" It is difficult to see how the fees of Senior Counsel could have been considered to have been reasonably incurred without consideration of their amount. It seems most likely that the amount was considered for that purpose, but that consideration of whether the retention of Senior Counsel was reasonable was imported into the issue of moderating fees. The Department's policy documents, including the then Factsheet

for Costs in Criminal Cases Applications (**Costs in Criminal Cases fact sheet**) (Blue Book, tab 6, p166-171) or the fact sheet in relation to the Attorney General rates for legal representation (**Attorney General Rate fact sheet**) (Blue Book, tab 17, p264) dated 1 August 2021 do not include that question as an aspect of what is to be determined in applying the Attorney General's rates, and it thus falls outside the policy.

26. The Costs in Criminal Cases fact sheet states that an assessment comprises the following steps after a determination that payment is justified, those being:
- a. determination as to the costs that have reasonably been incurred; and
 - b. moderation of the reasonably incurred costs, in accordance with the Attorney General's rates applicable at the time.
27. That same fact sheet provides examples of costs which may be considered unreasonable, including:
- a. Excessive preparation;
 - b. Excessive client conferences, particularly during the trial;
 - c. Court attendance where there is no court listing for that date;
 - d. Court attendance for breach of bail proceedings;
 - e. Full day's court attendance when the matter was only before the court for a short period of time on that date;
 - f. Trial cancellation fees;
 - g. Tasks of an administrative nature; and
 - h. Disbursements which are not substantiated by receipts or other evidence.
28. It further notes, "*The reasonably incurred costs are moderated in accordance with the applicable Attorney General's (AGs) relevant rates for Solicitor, Junior Counsel and Senior Counsel.*" (emphasis added). There are further guidelines about further things they moderate, specifically, travel time, paralegal work, accommodation and travel and photocopying costs.
29. The Attorney General Rate fact sheet provides that "*The AG's rates apply to Senior Counsel approved under C2018-06.*" C2018-06 sets out the guidelines that apply to NSW government agencies when engaging Senior Counsel. The fact sheet confirms "*The AG's rates in respect of Senior Counsel governed by C2018-06 apply to all government departments and agencies unless approval has been granted by the Attorney General to apply higher rates in accordance with Premier's Memorandum 2009-17.*"

30. The same fact sheet also states, *"In respect of Junior Counsel and Solicitors the rates apply to matters such as costs associated with certificates under the Suitor's Fund Act and with the Costs in Criminal Cases Act"*. It lists the then current rates for "Solicitor", "Junior Counsel" and "Senior Counsel".
31. Therefore, nowhere in either the Costs in Criminal Cases fact sheet or the Attorney General Rate fact sheet is there any suggestion that the Secretary is entitled to characterise the briefing of Senior Counsel as unreasonable, or to substitute the Junior Counsel Attorney General's rate in such circumstances. Once there has been a decision that the costs were reasonably incurred (which a proportion of Senior Counsel's fees were found to be), the costs are required to be moderated.
32. The Secretary did not simply apply a scale of fees. Rather, the Secretary first determined that it was not reasonable to brief Senior Counsel. On that basis, the Secretary applied Junior Counsel rates, notwithstanding the existence of an asserted established and acceptable scale of fees for Senior Counsel after costs have been found to be reasonably incurred. What has been done is capricious, random and or arbitrary.
33. With respect to the Attorney General Rate fact sheet, it is clear the applicant had no opportunity to seek advance approval for the engagement of Senior Counsel. It is unreasonable for the Department to apply the reasoning contained in C2018-6 concerning the engagement of Senior Counsel by government agencies:
- a. The expertise or skill of the Senior Counsel proposed;
 - b. The probable total cost of Senior Counsel's fees in the matter;
 - c. The specific request of an agency that a particular person be briefed and the reasons for that preference;
 - d. The importance of the matter, including any special sensitivity; and
 - e. The normal market daily fee at which the relevant Senior Counsel is briefed;

to defendants who have engaged Senior Counsel in criminal proceedings and subsequently been awarded a costs certificate, whose circumstances are entirely distinct.



Tom Molomby SC
10 September 2025