

14 December 2006

The Hon Phillip Ruddock MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

COSTS CERTIFICATES – FAMILY LAW MATTERS

I am writing to you concerning the criteria for issuing Costs Certificates and the quantum applied under the operation of the *Federal Proceedings (Costs) Act 1981* (Costs Act) and the Federal Proceedings (Costs) Regulations.

Criteria for issue of certificates

Certificates may be issued under the Costs Act in a variety of circumstances, but all the circumstances described in the Act which empower a court to issue a costs certificate are based on the proposition that a party has been put to expense of an appeal because of an error of law made in a lower court or tribunal.

The granting of Costs Certificates is discretionary. The Costs Act contains no criteria for the granting of a certificate. In that regard it is interesting to contrast s117(2A), of the *Family Law Act 1975*, which sets out the criteria for orders for costs being made.

The only assistance which the Costs Act provides as to relevant criteria is the provision in s14, which places an embargo on certificates being granted to governments, government authorities and body corporates with paid up capital of \$200,000 or more.

The Family Law Section (FLS) was recently contacted by one of our members who indicated that a judge of the Family Court had upheld an appeal on a matter of law and remitted the matter to the Federal Magistrates Court for re-hearing, but had declined to grant a costs certificate on the following grounds that *“The husband is a wealthy person. The wife is not.”*

FLS understands that the principle behind the Costs Act is that citizens should not be financially disadvantaged because the judicial officer who heard their case made an error of law and they have to go to appeal to have it corrected.

The criterion of wealth or comparative wealth as between the parties should not be relevant to the issue of whether or not a Costs Certificate should be granted. For an appellate court to recognise that an error of law was inflicted on the parties, but to decline to provide any financial compensation for the costs to which a party has been put to correct that error, undermines the confidence of litigants in the judicial system.

Under s13 of the Costs Act there is no appeal from a refusal to grant a Costs Certificate. The granting of or refusal to grant a certificate is a somewhat arbitrary process. FLS recommends that, without diminishing the discretion of the appellate court, the legislation be amended to indicate that the financial circumstances of individual litigants is not a consideration in the determination of whether or not to grant a certificate.

Amounts payable under Certificates

When the Costs Act was enacted in 1981 the maximum amounts payable were prescribed in the Schedule to the Act. Section 18 states that there shall not be a payment under a Costs Certificate that exceeds the prescribed maximum amount set out in the Schedule. The amounts in the Schedule have not been varied since 1981.

However, in 1991 the Federal Proceedings (Costs) Regulations were made. Under regulation 4 the prescribed maximum amounts in Schedule 1 were increased. Essentially they were doubled, no doubt to reflect movement in costs between 1981 and 1991.

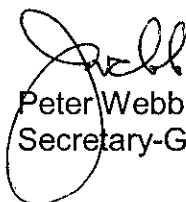
I note that the Regulations amended the amounts payable under the Schedule to the Act, a somewhat unusual course. However, of greater concern is the fact that the amounts payable under the regulations have not increased since 1991. At the present time the Regulations provide that the maximum amount recoverable under a Costs Certificate relating to proceedings in the Family Court of Australia is \$4000. It is the opinion of the Family Law Section, and the experience of lawyers in Australia who conduct appellate work, that the conduct of an appeal in the Full Court of the Family Court of Australia is realistically likely to cost \$10,000 to \$15,000. In those circumstances it is recommended that consideration be given to amending the amount set out in the Federal Proceedings (Costs) Regulations to provide for a substantial increase in the prescribed maximum amounts payable under regulation 4. In the case of an appeal to the Family Court of Australia it is submitted that the prescribed maximum amount should be \$15,000. That does not preclude a lower payment, as it is incumbent upon lawyers seeking to recover moneys under a Costs Certificate, to quantify their clients' costs and satisfy your Department that the amount claimed is properly payable. The fact that there has been only one change to the amounts payable under the Act in the last 25 years is unsatisfactory, and it is recommended that you consider making provision for indexation of these amounts.

Recommendations

The Family Law Section **recommends:**

1. That the *Federal Proceedings (Costs) Act 1981* be amended to provide that the financial circumstances of individual litigants is not a consideration in the determination of whether or not to grant a certificate.
2. That the Federal Proceedings (Costs) Regulations be amended to provide that the prescribed maximum amount payable in family law matters be increased to \$15,000 with this amount to be indexed on a regular basis.

Yours sincerely



Peter Webb
Secretary-General