SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Sub Program 1.1.1

Question No. 124

Senator Ludlam asked the following question at the hearing on 27 May 2009:

Although the Federal Court has broad discretion over awarding costs under section 43 of the Federal Court Act (the Act), the Act currently fails to provide for consideration of 'public interest factors' in awarding costs.

Under s49 of the Queensland *Judicial Review Act 1991* the court can make a determination (on application) that once the proceedings are complete the parties will either have to bear their own costs or pay the costs of the other side if they are unsuccessful. In considering the costs application, the court is to have regard to amongst other things, the financial resources of the applicant and: *whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant.*

An example of the use of this provision is the case of *Alliance to Save Hinchinbrook Inc v Cook &Ors*, where an environmental group successfully sought an upfront costs order on the basis that they would not otherwise be able to afford to conduct the litigation. The court in that case made an upfront order under s49 that each party would bear their own costs after taking into account the public interest nature of the proceedings.

a. What is the position of the Attorney-General's Department regarding the amendment of the Act to include a 'public interest' consideration in the costs rule under section 43?

The Australian Law Reform Commission has noted that:

> '*Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation. The significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules.'*

Although some courts have indicated a willingness to depart from the usual order that costs 'follow the event'. For example, the High Court has affirmed decisions of lower courts that costs will not necessarily be awarded to the victor in public interest cases where it can be shown there are 'special circumstances' justifying a departure from the general rule. (*Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236, upheld in High Court in (1998) 193 CLR 72.) However, to date, such discretion has been seldom applied and has done little to placate concerns by public interest litigants that they will have to pay for the costs of other party if they are unsuccessful.

b. What is the Attorney-General's Department view regarding the amendment of the Act to provide specifically for pre-emptive cost orders? And the potential for such an amendment to include a 'public interest' consideration?

The answer to the honourable senator's question is as follows:

These are matters for Government policy. Civil litigation costs are being considered by the Government. The Access to Justice Taskforce in the Department is investigating and reporting to the Attorney-General on ways to improve access to justice in the federal civil justice system. As part of this process, the Taskforce is considering a range of issues relevant to the costs of justice, including costs orders.