

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: The Hollow Beach Bar & Grill Pty Ltd
(represented by Mr Henry Jackson, instructed by Susan Nicholson of Cullen Macleod)

Respondents: Lavan Lawyers
(represented by Mr Dan Mossenson)

Mr Chris Garvey
(represented by Mr David Garnsworthy)

Mr Graham Coatz

Commission: Mr Michael Egan (Presiding Member)
Dr Eric Isaachsen (Member)
Mr Alex Zilkens (Member)

Matter: Application for costs pursuant to section 21 of the *Liquor Control Act 1988*

Premises: Hungry Hollow Tavern, 135 Ocean Drive, Bunbury

Date of Hearing: 6 February 2018

Date of Determination: 1 August 2018

Determination:

- 1 The applicant's costs be paid:
 - a. on a standard party/party basis from 2 December 2016 to 3 February 2017;
 - b. on an indemnity basis, from 3 February 2017 to 12 September 2017;
 - c. on a joint and several basis by Lavan, Mr Garvey and Mr Coatz, as agreed between them, from 2 December 2016 to 15 May 2017 – if not agreed within four weeks of the date of this order, the Commission will determine the respective amounts to be paid; and
 - d. on a joint and several basis by Mr Garvey and Mr Coatz, as agreed between them, from 15 May 2017 to 12 September 2017 – if not agreed within four weeks of the date of this order, the Commission will determine the respective amounts to be paid.
- 2 The applicant lodge with the Commission and serve on Mr Coatz, Mr Garvey and Lavan a bill of costs in accordance with this order within 7 days of the date of the order.

Authorities referred to in the determination:

- *Andrew Koh Nominees Pty Ltd v Great Victoria Corporation Pty Ltd* LC37/2010
- *Attorney General v Wentworth* (1988) 14 NSWLR 481
- *Cranes 'R' Us Pty Ltd v Busselton Mini Crane Hire Pty Ltd* [2012] WADC 24
- *Harry S Bagg's Liquidation Warehouse Pty Ltd & Ors v Whittaker & Ors* (1982) 44 NSWLR 421
- *Knaggs v J A Westaway & Sons Pty Ltd and Ors* [1996] 40 NSWLR 476
- *Leicester v Walton* (Court of Appeal, 22 November 1995)
- *The Commissioner of Police of Western Australia v AM* [2010] WASCA 163

Background

- 1 On 12 September 2017, the Liquor Commission (“the Commission”) dismissed an application in the name of MGA Entertainment Pty Ltd (“MGA”) to review a decision of the delegate of the Director of Liquor Licensing (“the Director”) to approve the transfer of a restricted tavern licence from MGA to Hungry Hollow Bar and Grill Pty Ltd (“the review application”).
- 2 The review application was dismissed by the Commission on the following grounds:
 - a. Mr Coatz, as a single director of MGA, had no authority to instruct Mr Garvey or Lavan to bring the application on behalf of MGA; and
 - b. even if Mr Coatz did have authority to bring the application on behalf of MGA, the Commission was not satisfied that MGA is a party “dissatisfied with a decision made by the Director”.

As a result, MGA had no standing to bring the review application (decision reference: LC 22/2017).

- 3 The respondent to the review application seeks its costs in relation to the review application (“the costs application”). Hereafter the respondent of the review application, being Hungry Hollow Bar and Grill Pty Ltd, will be referred to as the applicant for the purposes of the costs application.

Hearing

- 4 On 6 February 2018, the costs application hearing was held before the Commission.
- 5 At the hearing, the applicant, Mr Garvey and Lavan were represented by counsel. Mr Garvey did not attend the hearing. Mr Coatz attended in person and was not legally represented.

Submissions on behalf of the Applicant

- 6 On 23 and 30 January 2018, the applicant made written submissions and on 6 February 2018, made oral submissions at the hearing before the Commission.
- 7 The submissions were lengthy and detailed, but in summary the applicant sought costs on the basis that the review application was frivolous and vexatious. The order sought is that:
 - a. the solicitor acting for Mr Coatz, Mr Garvey; and
 - b. the solicitors instructed by Mr Garvey to lodge and pursue the review application, Lavan,

be required to pay the applicant’s costs, or, in the alternative, that Mr Coatz pay the applicant’s costs, on an indemnity basis.

- 8 The applicant submitted that based on the Commission's findings, namely, that Mr Coatz had no authority to instruct Mr Garvey or Lavan to bring the application on behalf of MGA, the application for review had no reasonable grounds on which to be brought and was so obviously untenable and manifestly groundless as to be utterly hopeless.

Submissions on behalf of Lavan

- 9 On 23 and 30 January 2018, Lavan made written submissions and on 6 February 2018, oral submissions at the hearing before the Commission. Lavan submitted that:
- a. the Commission lacks the power to order costs against a solicitor;
 - b. the review application was clearly arguable, and the proceedings were not instituted or proceeded with in a frivolous or vexatious manner;
 - c. the review application was brought in good faith;
 - d. the Commission is required to act in accordance with "equity, good conscience and the substantial merits of the case" and the applicant does not have sufficiently 'clean hands' and should not benefit from any costs order;
 - e. Lavan has at all times acted transparently, entirely appropriately and in accordance with instructions received from the lawyer who was acting on instructions from the director of MGA; and
 - f. costs should not be ordered against Lavan on an indemnity basis and if costs are ordered, it is appropriate for the costs order to be made on a party/party basis using the applicable State Administrative Tribunal scale.

Submission on behalf of Mr Christopher Garvey and Mr Graham Coatz

- 10 On 23 January 2018, Mr Garvey filed submissions in response to the costs application. On the face of the submissions, Mr Garvey's submissions were prepared and lodged on behalf of Mr Coatz.
- 11 At the Commission hearing, Mr David Garnsworthy, Mr Garvey's representative, explained that although the submissions lodged with the Commission stated they were prepared on behalf of Mr Coatz, that was an error and the submissions were, in fact, on behalf of Mr Garvey only.
- 12 Although highly irregular and in apparent disregard for Mr Coatz, the Commission satisfied itself, at the Commission hearing, that Mr Coatz:
- a. had received copies of all primary and responsive submissions from the representatives of the applicant, Mr Garvey and Lavan;
 - b. was aware of the nature and gravity of the proceedings; and
 - c. was willing to proceed with the hearing.

- 13 In summary, Mr Garvey's submissions stated that:
- a. the Commission lacks the power to order costs against a solicitor;
 - b. costs should only be awarded in a case which is not arguable and is without merit, and the review application was not such a case;
 - c. the proceedings in question do not meet the test of being vexatious or trivial;
 - d. even if the Commission has power to award indemnity costs, it should not do so because it would cut across the face of the overarching principles governing the operations of the Commission; and
 - e. in any event, indemnity costs should not be awarded in this case because they should only be awarded in exceptional circumstances.
- 14 Mr Coatz relied upon the submissions of Mr Garvey and Lavan as to the powers of the Commission to award costs and further submitted that he had written authority from the solicitors acting for the other directors of MGA, Mr Matteo Daqui and Mrs Angelina Daqui ("the Daquis"), to act in all respects necessary to protect the interests of MGA.

Determination

- 15 Section 21(1) of the *Liquor Control Act 1988* (WA) ("the Act") empowers the Commission, subject to the Act, with a wide discretion to award costs.
- 16 The discretion to award costs granted by section 21 of the Act entitles the Commission to determine who, in what manner and to what extent costs are to be paid.
- 17 The general practice of the Commission is not to award costs in favour of successful applicants or objectors; rather, parties bear their own costs, save that costs may be awarded against a party whose case was not arguable and was without merit. (*Andrew Koh Nominees Pty Ltd v Great Victoria Corporation Pty Ltd* (LC 37/2010), at 20).
- 18 In formulating the policy as to costs, the Commission may have regard to section 21(5) of the Act which expressly provides that costs may be awarded against a party where proceedings have been brought frivolously or vexatiously. Such an approach would be consistent with the characterisation of the functions of the Commission as administrative rather than judicial. (*Andrew Koh Nominees Pty Ltd*, supra, at 22).
- 19 The test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious. (*The Commissioner of Police of Western Australia v AM* [2010] WASCA 163 (s) at 27).
- 20 These principles can only be applied on a case by case basis within the context of the broad discretion to award costs granted by section 21 of the Act.
- 21 The ordinary meaning of 'frivolous' in relation to a claim, is, relevantly, having no reasonable grounds for the claim. The ordinary meaning of 'vexatious', in relation to a claim, is, relevantly,

instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party. It is apparent from the ordinary meaning of these words that 'frivolous' is, in substance, a subset of 'vexatious'. (AM, supra, at 29).

- 22 The test of whether litigation may properly be regarded as vexatious may be expressed in the following terms:
- a. proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;
 - b. they are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise; and
 - c. they are properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless (*Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491).
- 23 Having regard to the above definitions, the Commission considers that there are two considerations in assessing the issue of whether the review application was brought frivolously or vexatiously, namely:
- a. were the proceedings instituted or pursued without a reasonable ground; and/or
 - b. were the proceedings so obviously untenable or manifestly groundless as to be utterly hopeless.
- 24 Even if the Commission finds that the proceedings were brought frivolously and/or vexatiously it does not automatically follow that costs must be awarded – an award of costs requires the Commission to exercise its discretion.
- 25 Turning to whether the respondents commenced the review application in circumstances where there were no reasonable grounds for the claim and/or the application was obviously untenable or manifestly groundless as to be utterly hopeless.
- 26 The review application was lodged and signed by Lavan ostensibly on behalf of MGA. In Lavan's letter to the Commission enclosing the review application, Lavan stated that it acted on instruction from Chris Garvey, Lawyer & Notary Public, who acted on behalf of Graham Coatz, a director of MGA.
- 27 It is accepted that Mr Coatz could not commence the review application in his own name and, based on the decision of the Commission, he did not have the authority to instruct the solicitors in the name of MGA. It follows that the review application was commenced, not by MGA, but by one or all of the respondents.
- 28 The question then becomes, whether commencing the review application without the authority of MGA implies that there were no reasonable grounds for the claim.
- 29 In *Cranes 'R' Us Pty Ltd v Busselton Mini Crane Hire Pty Ltd* [2012] WADC 24 ('*Cranes*') it was held that proceedings instituted without the authority of an applicant are a nullity and should be struck out.

- 30 In *Harry S Bagg's Liquidation Warehouse Pty Ltd & Ors v Whittaker & Ors* (1982) 44 NSWLR 421 it was held that “where no plaintiff had duly authorised the commencement of the proceedings” the appropriate course to adopt would be to either stay or dismiss the proceedings and in each case the solicitor be ordered to pay the costs (cited with approval in *Cranes* at [172] and [176]-[177]).
- 31 The above cases indicate that proceedings commenced without the appropriate authority of the applicant are a nullity and should be dismissed. That being so, there is no need to further consider if there were reasonable grounds for commencing the proceedings as, clearly, without the authority of MGA, there was no basis, and there were no grounds, to support the proceedings.
- 32 The question then becomes whether the review application was so obviously untenable and ultimately utterly hopeless due to it being instituted without the authority of MGA.
- 33 The lack of a valid applicant invalidates an application.
- 34 In the Commission’s view, the fact that the review application was commenced and proceeded in the name of MGA, without the authority of MGA, made the review application so obviously untenable and manifestly groundless as to be utterly hopeless. The very fact that an application requires a valid applicant infers that without the same, the application is bound to be untenable and utterly hopeless. As the Commission has already determined, Mr Coatz’ claim that he had the authority of MGA to lodge the review application in the name of MGA was not supportable on the evidence, particularly having regard to the fact MGA, at the instigation of the Daquis in their capacity as the majority of directors of MGA, instituted and effected the sale of the business and consented to the transfer of the licence.
- 35 In light of these findings, the Commission must determine whether, in this instance, costs should be awarded and, if so, against whom and on what basis.
- 36 The wording in section 21(1) is clear and, in the context of the *Act* as a whole, including section 21(5), the Commission is of the view that there was no intent on the part of the legislature to limit, and the *Act* does not limit, the power of the Commission to make appropriate orders for costs against solicitors (or counsel) under sections 21(1) or 21(5) of the *Act*.
- 37 In Commission’s view, if the actions or inactions of a solicitor or counsel give rise to proceedings which should not have been commenced and which resulted in costs being incurred unnecessarily, and where the threshold test of frivolous or vexatious is satisfied, costs should be awarded.
- 38 The making of such an award of costs, should not, and would not, be to censure or penalise the solicitors’ instrumental in the launch and conduct of the proceedings. Instead, the grounds for making an order against a solicitor must be that their “*action or inaction led to the incurring of costs which would not have otherwise been incurred...*” (in *Knaggs v J A Westaway & Sons Pty Ltd and Ors* [1996] 40 NSWLR 476 (at p484) in reference to *Leicester v Walton* (Court of Appeal, 22 November 1995)).

- 39 Accordingly, the issue to be determined, in the circumstances of this case, is whether the actions or inactions of Mr Coatz, Mr Garvey and Lavan contributed to the costs incurred by the applicant in responding to, and defending, the review application.
- 40 Lavan submits that where a lawyer is 'but a vehicle through which the dispute has been conducted... it may be preferable to make orders as between the true protagonists'.
- 41 However, a costs order against MGA, whether in response to a frivolous or vexatious application, or not, would be clearly inconsistent with the Commission's finding that the review application is a nullity and the Commission's dismissal of the proceedings instigated in the name of MGA.
- 42 The Commission acknowledges and accepts that simply because an application is unsuccessful, even in circumstances where the merits of the case may be weak, that of itself is not a ground for an award of costs against a solicitor. Solicitors should not be discouraged from appearing before the Commission and robustly presenting their client's case.
- 43 On the evidence before the Commission, it appears that Lavan relied upon the instructions from Mr Garvey and made no further enquiry of significance, or at all, into the basis upon which Mr Coatz claimed to be acting on behalf of MGA to support the initiation and conduct of proceedings (particularly in light of the obvious dispute, and breakdown in the relationship, between the directors) and Mr Garvey sought no additional information or evidence to satisfy himself Mr Coatz had the requisite authority to act on behalf of MGA either generally, but more specifically in relation to the review application.
- 44 In the Commission's view, the lack of consideration of the implications of launching proceedings without appropriate authority contributed to, and resulted in, the applicant incurring costs to respond to, and defend, the review application.
- 45 The suggestion by Lavan that the applicant has been, to a large extent, responsible for the review application because of its actions is rejected, and the Commission does not accept the submissions by Lavan that the applicant should be denied an award for costs on the basis the applicant does not come with 'clean hands'.
- 46 The review application was instituted and proceeded in circumstances where:
- a. at the time Mr Garvey entered into the retainer with Mr Coatz to act on behalf of MGA, Mr Coatz was in dispute with the other directors of MGA;
 - b. at the time of filing the review application:
 - i Mr Garvey and Lavan were aware of the dispute between Mr Coatz and the other directors of MGA; and
 - ii Mr Garvey and Lavan knew, or should have known, that Mr Coatz did not have the authority to instruct them on behalf of MGA.

47 Matters relevant to a consideration of the knowledge of Mr Garvey and Lavan of the dispute between the directors of MGA and the requisite authority to initiate the review application in the name of MGA include the following:

- a On 1 December 2016, Lavan, presumably on instructions from Mr Garvey, sent a letter to the Director:
- i. providing notice of the lease dispute between MGA and Technotron Investments Pty Ltd (the lessor of the site of MGA's business premises, owned by the Daquis);
 - ii. foreshadowing the lodgement of an application to review the transfer of the licence to the applicant;
 - iii. referring to Mr Coatz' incarceration in February 2016, and his allegation that the other directors of MGA had acted without proper authority when they purported to sell the Hungry Hollow tavern business; and
 - iv. requesting that the Director suspend the licence until such time as the lease dispute was resolved and the review proceedings concluded.

- b On 2 December 2016, Lavan lodged the review application in the name of MGA with an accompanying letter stating that:

"Lavan acts on instructions from Chris Garvey, Lawyer and Notary Public. Mr Garvey acts on behalf of Graham Coatz, a director of MGA".

- c On 17 January 2017, the Director, who intervened in the review application ("the Intervenor"), raised the issue of whether the proceedings were commenced with the authority of the applicant. It is relevant to set out the Intervenor's submission in that respect:

"It appears from the application for review purportedly lodged by the applicant that the application does not have the support of Mrs Daqui and Mr Daqui (two of the three directors of the applicant). Therefore, a preliminary issue in these proceedings is whether the proceedings were commenced with the authority of the applicant."

- d On 3 February 2017, Lavan responded to requests of the Commission and commented as follows in respect of the authority of the applicant to bring the review application:

"The applicant has not addressed the issues raised by the Director (i.e., the Intervenor) ... as those are not issues that the Commission has requested the parties address by virtue of these preliminary submissions. The applicant reserves the right to address those issues if the Commission is minded to take those matters into account."

- e On 28 March 2017, solicitors acting for the Daquis, in their capacity as directors of MGA, sent a letter to the Director advising that they had not approved or authorised Mr Coatz to act on behalf of MGA. The letter was copied to Mr Garvey and, presumably, by Mr Garvey to Lavan.

- f The above letter was followed by another letter dated 31 March 2017 which stated in part:
- “It is our understanding that Mr Coatz has instructed his solicitors to commence the (review application) proceedings. Mr and Mrs Daqui have not been consulted by Mr Coatz or by his lawyer, or by any solicitor acting for MGA in the proceedings. We are instructed by Mr and Mrs Daqui that they have not approved, resolved or consented to the bringing of the proceedings or the taking of actions in relation to those proceedings, and nor have they delegated any authority to Mr Coatz or any solicitor or any other person in relation to the bringing of the proceedings, or the taking of any action in the proceedings.”*
- g On 12 May 2017, solicitors acting for the Daquis in their capacity as directors of MGA forwarded a copy of a resolution of a majority of directors of MGA to withdraw the review application (“the withdrawal resolution”).
- h At the initial hearing of the Commission on 15 May 2017 to determine the preliminary matter before it, the applicant was prepared to proceed but Lavan requested an adjournment because it was not in a position to make submissions on the capacity of Mr Coatz to authorise the institution of the review application.
- i By letter dated 22 May 2017, withdrawing its representation of MGA, Lavan advised, among other things, that:
- i. Lavan had proceeded with the review application on the basis that it was receiving valid instructions from an authorised director of MGA who, through his shareholding company Singold Pty Ltd, also owned 50% of the shares in MGA;
 - ii. despite being aware of the review application since filing, the Daquis had taken no formal steps in their capacity as directors of MGA to withdraw the review application or state they were opposed to the review until Lavan received a copy of the withdrawal resolution;
 - iii the letter of 31 March 2017 from solicitors acting for the Daquis to the Commission:
 - incorrectly states the Daquis were not consulted by Mr Coatz or his lawyer about the review application as the application was formally brought to the attention of solicitors acting for the Daquis on 2 December 2016 (the date of lodgement of the review application); and
 - importantly, does not state that the Daquis are in fact opposed to the review proceedings, that they object to the proceedings continuing or that Mr Coatz had no authority to give instructions to issue the review application;
 - iv. if Mr Coatz had not been provided with notice of the meeting, the withdrawal resolution may well be invalid; and
 - v. until Mr Garvey and solicitors acting for the Daquis resolved the impasse that exists between their respective clients, it was no longer appropriate for Lavan to continue to act on behalf of MGA in the matter.

- j Mr Garvey, in his submission of 12 June 2017 leading up to the Commission hearing, contended that “based on Mr Coatz’ previous actions as a director of the company he held authority of his two co-directors to implement these review proceedings”.
- k After Lavan withdrew its representation of MGA, Mr Garvey filed further submissions on 14 June 2017 accompanied by a statutory declaration of Mr Coatz dated 12 June 2017 (“the statutory declaration”) setting out the basis upon which Mr Coatz claimed to have authority to act on behalf of MGA to initiate the review application.

48 While the hearing of the preliminary matter has been determined, some of the submissions made by Mr Garvey at that hearing are relevant to a consideration of Mr Garvey’s understanding of the basis of the authority he and Mr Coatz were exercising on behalf of MGA – the following submissions provide some insight into that understanding:

- a. *I had a retainer agreement which is a fairly stock standard legal form of retainer....it is dated 14 July 2016...the client is known as the directors of MGA...the scope of works is envisaged as acting for the client in relation to ‘Hungry Hollow Tavern licence and lease issues’ that retainer has been signed by Mr Coatz,*
- b. *never at any stage have I received notice from the applicant terminating that retainer...neither the directors nor anyone acting on their behalf has terminated that retainer,*
- c. *(in response to the Commission’s question about the authority to act on behalf of MGA, as distinct from Mr Coatz) I appreciate the point you are making is from where did Mr Coatz get the authority of the company to issue – to sign the retainer and give these instructions... I would be seeking to refer to the statutory declaration which traces over the extensive period of approximately 10 years...(and) that the Daquis and Mr Coatz formed an agreement between them... they were all appointed directors but essentially the job of being an executive director, if you like, was all dumped on Mr Coatz,*
- d. *there was no shareholder’s agreement put in place unfortunately, but nonetheless there was an oral agreement,*
- e. *so if we look at the history of dealing between them, and, indeed, the acquiescence or the ratification of all the actions, how can it now be said he (Mr Coatz) did not have the necessary authority to instruct me to act for the company;*
- f. *(acknowledging there was no oral agreement specifically in relation to the review application) there was no, certainly no formal resolution ... and I am not aware if there was even any discussion about it to be honest, I doubt that, there may have been, but I am simply not aware of it,*
- g. *the implied authority was never scoped, so Mr Coatz was entitled to take the view that in protecting the company’s assets and acting in the best interests of the company to protect the asset, he was authorised to bring these proceedings; and*
- h. *he (Mr Coatz) was entitled to assume that (the implied authority) continued until it would have formally stopped or (been) terminated through resolution of the directors.*

- 49 The applicant submitted that it is plain from the facts that Mr Coatz was acting in his own interests in a dispute with the other directors, and these circumstances were known to Mr Garvey and Lavan.
- 50 Having withdrawn as solicitor on the record, Lavan filed submissions on 6 June 2017 in response to the costs application by the applicant. The submissions are extensive and include submissions on Mr Coatz' authority to act on behalf of MGA, referencing, in large part, the contents of the statutory declaration.
- 51 Lavan characterises Mr Coatz' authority as an "unfettered authority" to personally conduct the day to day operations of MGA's business (as evidenced by the statutory declaration) and that this "extended to protecting or preserving the principal asset, namely the applicant's tavern licence, by arranging for the review application to be made".
- 52 More specifically, in relation to the proper and requisite authority to act on behalf of MGA, Lavan submits:
- "Mr Coatz' implied authority is established by virtue of his position as the director responsible over 10 years for the day to day operations of the business and, he, therefore, had the authority to engage Mr Garvey to instruct Lavan to prepare and file the review application on behalf of the applicant; and as the Daquis' "acquiesced" by taking no action on receipt of the review application to challenge it or the authority of Mr Coatz, Lavan was, therefore, properly authorised and entirely justified in acting on the instructions of Mr Coatz, via Mr Garvey, on behalf of the applicant."*
- 53 Lavan contended that the "impasse" or dispute between directors of MGA was not apparent until the Daquis filed the withdrawal resolution.
- 54 The Commission does not accept Lavan's submission that the dispute between the directors was not apparent until the Daquis' filed the withdrawal resolution. Further, the Commission does not accept Mr Garvey's characterisation of the retainer he apparently entered into with Mr Coatz as a retainer in respect of which 'the client [was] known as the directors of MGA'.
- 55 The Commission accepts the applicant's submissions that it is plain from the evidence that Mr Coatz was acting in his own interests in a dispute with the other directors of MGA.
- 56 Moreover, the review application was commenced, not by MGA, but by the actions of Lavan, Mr Garvey and Mr Coatz.
- 57 As a consequence, the applicant unnecessarily incurred costs in relation to the review application. Accordingly, the Commission is of the view that, Lavan, Mr Garvey and Mr Coatz should be liable for those costs.
- 58 It has been submitted that even if the Commission does have the power under section 21 of the Act to award costs against a solicitor, that power does not extend to the payment of costs on an indemnity basis because the complexity associated with identifying and determining costs payable would be contrary to the requirement in section 5(2)(e) of the Act for the Commission to act with as little informality or technicality as practicable.

- 59 The Commission does not accept this submission. Determining costs is not beyond the capabilities of the Commission, and prevention from doing so may lead to an unjust outcome in certain circumstances, such as where a person has incurred financial costs as a result of responding to, or defending, frivolous or vexatious proceedings.
- 60 Further, the Commission is satisfied that the wide discretionary power in section 21 of the *Act* for the Commission to determine costs extends to the payment of costs on an indemnity basis, although it accepts that in normal circumstances the Commission would limit its consideration to an award of costs on a standard basis.
- 61 Having found the proceedings to be vexatious and that Lavan, Mr Garvey and Mr Coatz are collectively responsible for the bringing and conduct of the unauthorised proceedings, the Commission accepts that it must carefully consider and exercise caution in making any order on an indemnity basis, particularly having regard to the nature of the jurisdiction and the informality of proceedings.
- 62 However, in the Commission's view, the inaction by Mr Garvey and Lavan to address and respond to the issue of Mr Coatz' authority to act on behalf of MGA in bringing the review application, having been put on notice on 17 January 2017 by the Intervenor in the review application and, again, on 3 February 2017 by the applicant that the authority lacked any sound evidential basis and was disputed, is so manifest as to warrant an order for costs on an indemnity basis.

Orders

- 1 The applicant's costs be paid:
- a. on a standard party/party basis from 2 December 2016 to 3 February 2017;
 - b. on an indemnity basis, from 3 February 2017 to 12 September 2017;
 - c. on a joint and several basis by Lavan, Mr Garvey and Mr Coatz, as agreed between them, from 2 December 2016 to 15 May 2017 – if not agreed within four weeks of the date of this order, the Commission will determine the respective amounts to be paid; and
 - d. on a joint and several basis by Mr Garvey and Mr Coatz, as agreed between them, from 15 May 2017 to 12 September 2017 – if not agreed within four weeks of the date of this order, the Commission will determine the respective amounts to be paid.
- 2 The applicant lodge with the Commission and serve on Mr Coatz, Mr Garvey and Lavan a bill of costs in accordance with this order within 7 days of the date of the order.



MICHAEL EGAN
PRESIDING MEMBER