

Policy in relation to court operating cost incurred through Direct Referral of matter to the Environment Court

Introduction

Purpose

The Resource Management (Simplifying and Streamlining) Amendment Act 2009 (RMAA 09) enables the Environment Court to recover (for the benefit of the Crown) any part of the Court's costs and expenses in relation to matters referred directly to the Court by the Minister for the Environment or from a consent authority. The purpose of this document is to state the Ministry of Justice policy in directing the Registrar of the Environment Court to seek to recover the cost of such direct referrals through application to the Environment Court.

Background

Cost recovery by territorial authorities

Pursuant to section 36 of the Resource Management Act 1991 (RMA) consent authorities are entitled to recover the reasonable costs they incur when providing services or exercising functions under the RMA. Where there is a significant private benefit, by and large consent authorities operate a 100 per cent cost recovery policy. Such cost recovery is normally directed to the applicant for resource consent etc.

Direct referral to the Court with agreement of local authority

The package of measures introduced¹ by the RMAA09 included the ability for applicants for resource consents and notices of requirement to request that their application be determined in the Environment Court without the need to first go through local authority consenting processes, provided that the local authority has first agreed. This direct referral process is complementary to the 'proposals of national significance' process, providing an alternative streamlined process path for those applications that may not fit the criteria of being nationally significant.

An applicant for resource consent or a requiring authority or heritage protection authority, with the agreement of the consent/territorial authority, may proceed to lodge the following matters directly on the Court for decision:

- an application for resource consent that has been notified
- an application to change or cancel a condition of a resource consent that has been notified
- a notice of requirement for a designation that has been notified
- a notice of requirement for a heritage order that has been notified

¹ The Resource Management (Simplifying and Streamlining) Amendment Act 2009 came into force on 1 October 2009.

Ministerial call in of matters of national significance

Where the Minister for Environment, following recommendation of the EPA, considers the following are or part of a proposal of national significance, he may call in the following matters and refer directly to the Court for decision (or refer to an independent Board of Inquiry):

- applications for resource consent
- applications for changes to or cancellations of resource consent conditions
- local authority plan changes or variations
- requests for plan changes or variations
- requests for preparation of regional plans, and
- notices of requirement for a designation or for a heritage order
- notice of requirement to alter a designation or heritage order

Cost recovery

Where a matter is referred to the Court (with the agreement of the local authority or by the Minister), the majority of costs are likely to be sought for recovery from the applicants, as is the case with applications before consent authorities or called-in by the Minister for the Environment and sent to a Board of Inquiry.

To whom cost recovery will be directed

In terms of this policy and in accordance with section 285(5) of the RMA actual Court costs and expense incurred in relation to direct referrals will generally be sought to be recovered from:

- applicants whom are seeking resource consent, changes to or cancellations of resource consent conditions
- The requiring authority or heritage protection authority seeking designation
- The individual, organisation or local authority seeking a plan change or variation.

The Ministry of Justice and the Environment Court

The administration of the Environment Court is supported by the Ministry of Justice. The costs incurred by the Ministry of Justice and by the Environment Court Registries/Ministry staff in supporting the Environment Court in the exercise of its jurisdiction in relation to direct referrals and the recovery of those costs, will be subject to this cost recovery policy.

Time and disbursements

In addition to any lodgement fee required by statute, this cost recovery policy will focus on actual cost and time taken to undertake tasks associated with the administration,

case and hearing management and final determination of a direct referral and any associated disbursements².

Establishing an understanding

No policy can give an ideal cost recovery position in every situation. To provide predictability as to how costs will be recovered in particular instances, it may be good practice to establish an understanding with the applicants etc as to how this policy will be applied in a specific instance and a guide to typical actual cost incurred made available by way of published hourly or daily rates (note as these would include judicial rates then consideration may need to be given to the fact that is a Court setting and is it appropriate to publish this information generally).

Appendices

Appendix A provides the approach to the calculation of charge-out rates for Ministry of Justice staff time and a description of how they are derived. Additionally, detail of the rates for recovery of Judge and Commissioner time are provided.

Appendix B reproduces parts of the RMA so that references in footnotes can be readily accessed.

As rates will change over time, please contact the Registrar for detail of the current rates.

Chapter 2: Principals

Introduction

The principles set out below provide the basis for the cost recovery policy and guide the application of these policies in specific instances. The use of principals can also be useful for informing applicant about likely costs.

Charging must be lawful

The key section providing authority is section 285(3)³ which states that the Environment Court may order any party to proceedings before it to pay to the Crown all or any part of the Court's costs and expenses.

Section 285(5) states that in proceedings being undertaken on direct referrals (sections 87G, 149T, 198E, or 198K) the Court must apply a presumption that costs under subsection (3) are to be ordered against the applicant.

² Such disbursements may include evidence transcription costs, the appointment and costs associated with Interpreters, Special Advisors, Court appointed experts, temporary staff appointed to assist the Court in relation to the direct referral, travel, accommodation, venue hire costs and expenses

³ See Appendix B

The cost recovery policy set out in this document takes the approach that a cost incurred in connection with certain direct referral court activity will be sought to be recovered from the applicant unless the Court has determined otherwise.

Establishing actual Ministry of Justice costs and expenses

To meet the test of Ministry of Justice costs and expenses, the following will apply:

- Ministry of Justice costs will be actual and reasonable and such costs will need to have been established as having been incurred.
- For expenses and disbursements, the cost will be based on invoices paid or the fixed rates as set out in appendix A.

Establishing reasonable costs

The cost to be met by the applicant should be made up from the task, the time for the task and the charge applied to that time. It normally should be recovered at 100 percent. It is the task and time for the task that are key to the decisions on cost recovery.

The task must be suitably described so that a decision on who should carry the cost of the time involved can be made. If the task relates to the case processing, case management activity, hearing management and the exercise of judicial time in relation to the direct referral, those cost may be recovered. If the task falls outside of this scope, it is not able to be recovered under this policy.

Reasonable costs are appropriate costs incurred when dealing with the matter and that reflect accurately the work being undertaken. Administrative tasks need to be carried out efficiently. This includes using appropriately trained and competent staff for any tasks. It would not for example include costs incurred by, for example, on-the-job training where that training resulted in tasks being carried out inefficiently from a time perspective.

Charging costs that are actual does not by itself make them reasonable. Costs that are considered to be governance are generally not recoverable⁴.

Costs should be transparent and predictable

This principal is easily met if:

- This cost recovery policy is publically available
- There are clear descriptions for each invoiced task or related direct referral activity
- An estimate of indicative cost is supplied on request⁵

⁴ This may include the cost associated with the management of staff whom have responsibility for undertaking tasks associated with direct referrals.

- Revised estimates of costs are provided before major previously unidentified costs are incurred or there are to be significant changes in the quantum of a major previously identified cost.

However, it is recognised that all future cost levels may not always be able to be estimated in advance as the need for and the scope of tasks and length of hearings involved in determining a matter are likely to emerge or change during the process.

Application of the Policy

The Registrar will be guided by the policy when seeking an order for costs recovery in a way that allows for the specific circumstances of each case. The Environment Court has discretion about cost recovery in that the RMA provides that the Court **may** order any party to before it to pay costs.

Presently, the wording of section 285(5) suggests that costs recovery will be retrospective or post-hearing as it was pre-RMAA 09. The wording of section 285 does not imply that the Registrar may invoice for the Court's services or require payments for services up-front (other than the \$200.00 lodgement fee).

To recover the Court costs the Registrar will require an order from a Judge awarding costs in its favour. This implies that the Registrar, like any other party applying for costs, will need to provide evidence in advance to the applicant of the actual costs incurred and allow opportunity for comment before seeking an order for cost recovery from the Court.

⁵ To enable the receivers of the estimate to fully understand it and its implications for their budgets, the estimates should provide a total, information on the key large tasks, the rates for those tasks and the assumptions behind the estimate for each key cost/task

Appendices

Appendix A: Charge out rates for Ministry of Justice staff time

Allocation basis

The charge out rates are based on the average salary for each category of employee, plus overhead costs (comprising personnel costs for the Judiciary, Ministry support staff, plus corporate overhead costs apportioned across all non-support staff), divided by an average of 1500 working hours per staff member per annum⁶

Rates

The rates will be adjusted periodically based on the published financial information prepared for annual financial reporting purpose. Cost recovery will include fixed fees for photocopying, courier, postage etc. Disbursements will be recovered at cost and rates exclude GST.

Appendix B: Relevant section of the Resource Management Act.

Section 285 Awarding costs

- (1) The Environment Court may order any party to proceedings before it to pay to any other party the costs and expenses (including witness expenses) incurred by the other party that the Court considers reasonable.
- (2) Subsection [\(1\)](#) does not apply if the Environment Court makes an order under section [308H\(2\)](#).
- (3) The Environment Court may order any party to proceedings before it to pay to the Crown all or any part of the Court's costs and expenses.
- (4) Subsection [\(3\)](#) does not apply if the Environment Court makes an order under section [308H\(3\)](#).
- (5) In proceedings under section [87G](#), [149T](#), [198E](#), or [198K](#), the Environment Court must,—
 - (a) when deciding whether to make an order under subsection [\(1\)](#) or [\(3\)](#),—
 - (i) apply a presumption that costs under subsections [\(1\)](#) and [\(3\)](#) are not to be ordered against a person who is a party under section [274\(1\)](#); and

⁶ 1500 based on 37.5 weeks at 40 hours per week - Where working hours excludes leave, sick leave, training and time required for administrative and miscellaneous tasks.

(ii) apply a presumption that costs under subsection (3) are to be ordered against the applicant; and

(b) when deciding on the amount of any order it decides to make, have regard to the fact that the proceedings are at first instance.

(6) The Environment Court may order a party who fails to proceed with a hearing at the time the Court arranges, or who fails to give adequate notice of the abandonment of the proceedings, to pay to any other party or to the Crown any of the costs and expenses incurred by the other party or the Crown.]