Order 62A of the Federal Court Rules: an untapped resource for human rights cases

Jo Shulman, Solicitor, Public Interest Advocacy Centre

The risk of an adverse costs order is a significant impediment to individual litigants, as legal costs in litigation are substantial. It is not uncommon in a Federal Court discrimination matter for the legal costs of a respondent to exceed $15,000 per day. The risk of substantial adverse costs orders is often the reason many complainants decide not to pursue complaints beyond the Human Rights and Equal Opportunity Commission.

Order 62A rule 1 of the *Federal Court Rules* (Cth) provides that the Court may, by order made at a directions hearing, specify the maximum costs that may be recovered on a party and party basis. To date, this provision has not been successfully used in human rights litigation. It is a provision that, if used prudently, could facilitate human rights litigation.

The importance of Order 62A is that it is a pre-emptive costs decision. This contrasts to standard costs orders that are made after the event and usually 'follow the event', that is, are ordered against the unsuccessful party in the proceedings. An Order 62A costs order has the potential to remove the uncertainty of the level risk of an adverse costs order from the applicant's shoulders.

The object of the Rule

Order 62A was introduced by *Statutory Rule 421 of 1992*. In its original form, Order 62A Rule 1, enabled the Court to specify the maximum costs that may be recovered on a party and party basis by way of order made at a directions hearing *and* of its own motion, or on the application of a party. On 23 March 2004, Order 62A Rule 1 was amended by part 90 of Schedule 1 to the *Federal Court Amendment Rules, 2004* (No 1) (Cth) such that there is no longer any reference in Rule 1 to the Court having the power to make such orders of its own motion or at a directions hearing.

The rationale for the introduction of Order 62A is set out in a letter dated 6 November 1991 from the (then) Chief Justice of the Federal Court to the (then) President of the Law Council of Australia. In that letter, which is quoted from at length by Beazley J in *Sacks v Permanent Trustee Australia Limited*[1] (***Sacks***), the Chief Justice states:

> At the request of a meeting of the judges of the court, I am writing to invite your comments about possible options for changes to the costs rules.
>
> There is concern within the court, reflecting that within the wider community and the legal profession, that the cost of litigation, particularly for person of

[1] (1993) 118 ALR 265 at 268-269.

> ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice.
>
> A deterrent to the assertion or defence of rights in civil litigation is a fear of the ultimate exposure in terms of the legal costs to which an unsuccessful party may be subjected. One suggestion that has been made proposes a change to the rules so as to empower a judge, early in the proceedings, to make an order fixing a ceiling on the amount of costs recoverable from the unsuccessful party in the litigation. This ceiling could be defined by reference to both the party and party costs and by reference to the solicitor/client costs. It should be pointed out that this proposal does not involve the court in regulating the costs recoverable by a solicitor from his or her client but rather, where the costs are ordered to be paid on a solicitor/client basis, the maximum that would be recoverable would be the fixed amount.
>
> The fixing of such a maximum would not preclude recovery over and above that limit where a party had, by its own conduct, caused a successful party to incur additional and unnecessary costs. There would, of course, be a general provision to allow for the variation of a maximum figure so fixed, but the object of such a rule would be to define a budget so that the management of the case might be tailored according to its economic limits. It is anticipated that such a rule, if introduced, would be primarily applied to commercial litigation at the lower end of the scale in terms of complexity and the amount in dispute, although it could be applied in other cases as appropriate.

In *Hanisch v Strive Pty Ltd*[2] (***Hanisch***), Drummond J states, at 387, that the:

> … principal object of O 62A is to arm the Court with power to limit the exposure to costs of parties engaged in litigation in the Federal Court which involves less complex issues and is concerned with the recovery of moderate amounts of money.

It is generally recognised that any limit set for recoverable costs under Order 62A Rule 1 should apply equally to all parties. Thus, in *Sacks*, Beazley J rejected a submission by one party that the Court was empowered to make an order under Order 62A that would fix the maximum costs recoverable by one party, should that party succeed, but leave it open to the other party to recover its full costs, should it succeed. In *Hanisch,* Drummond J stated:

> I do not think that O 62A, r2, and in particular r2(d), provides any ground for thinking that O 62A empowers the Court to limit the costs recoverable by one party only. Rule 2, in my opinion, proceeds on the assumption that the order made under r1 will apply equally by fixing the maximum costs recoverable by the successful party in the action, but recognises that such a limit would operate unfairly where the ultimately unsuccessful party has acted in a way which has unjustifiably increased the costs incurred by the ultimately successful party and provides that, to the extent, the successful party can recover party and party costs additional to those it may ultimately be able to recover under the order made under r 1.[3]

---

2 (1997) 74 FCR 384.

3 Ibid 390.

Cases considering Order 62A

To date, orders limiting costs pursuant to Order 62A Rule 1 have been considered by the Court in the following cases:

- In *Sacks v Permanent Trustee Australia Limited*[4], Beazley J denied the applicant's notice of motion to limit costs to $6,000 on the basis that the extent of the evidence was not known, that potentially complex issues were involved and the applicant was seeking to limit his liability only for costs.

- In *Maunchest Pty Ltd v Bickford; Noosa Hub Pty Ltd (In Liquidation) and Jefferson*[5] (***Maunchest***), Drummond J ordered that the maximum costs that may be ordered in the proceedings before the Court on a party and party basis be limited to a maximum of $5,000.

- In *Woodlands v Permanent Trustee Co Ltd*[6] (***Homefund***), a case that involved claims by a large number of people who obtained 'Homefund' loans, Wilcox J made orders under Order 62A specifying $12,500 as the maximum recoverable party and party costs against the applicants by any one respondent with a separate interest for a representative proceedings and $10 for other proceedings.

- In *Hanisch v Strive Pty Ltd & Ors*[7], a case involving a copyright infringement, Drummond J ordered that the maximum costs that may be recovered on a party and party basis by either the applicant or the respondents to those recoverable under the District Court scale.

- In *Dibb v Avco Financial Services Ltd*[8] (***Dibb***), Mr Dibb—an unrepresented litigant in a case involving allegations of breach of fiduciary duties—was unsuccessful before Sackville J in his application to limit costs as the case had large legal and factual issues, there was no public interest component and there was nothing to suggest that Mr Dibbs was prevented or prohibited from conducting his case by the prospect of an adverse costs order.

Order 62A has not been successfully used in the unlawful discrimination jurisdiction of the Federal Court. In *Muller v Human Rights and Equal Opportunity Commission*[9], an application for an order pursuant to Order 62A was made to the Federal Court prior to the commencement of the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) (**HRLA Act**) in the context of judicial review of a decision by the Human Rights and Equal Opportunity Commission (**HREOC**). In that case, the order was not granted on the basis, inter alia, that it was sought in terms that limited costs payable by the applicant if unsuccessful, but did not limit costs payable by the respondent.

There have also been no decided cases in the unlawful discrimination jurisdiction in relation to the equivalent provision in the *Federal Magistrate's Court Rules*.[10]

---

4 (1993) 118 ALR 265.
5 [1992] FCA No NG808 of 1992 FED No 465 Practice (Unreported, Drummond J).
6 (1995) 58 FCR 139.
7 [1997] 74 FCR 384.
8 [2000] FCA 1785.
9 [1997] 634 FCA.
10 *Federal Magistrates Court Rules 2001* (Cth), r 21.03.

Relevant Considerations for the Court in making an order under Order 62A, Rule 1

Non-complex legal issues

In general, it appears that the Court will be more inclined to make an order limiting costs under Order 62A in cases involving consideration of legal issues of a less complex nature: see *Hanisch v Strive Pty Ltd*.[11]

In *Sacks,* Beazley J found that it was not appropriate to make an order under Order 62A as the case was not one at the lower end of the scale of legal complexity and potentially complex issues (including the identification of proper respondents) were involved.

Similarly, in *Dibb*, Sackville J declined to make an order under Order 62A on the basis, inter alia, that the proceedings, which involved alleged breaches by the respondents of fiduciary duties, the *Trade Practices Act 1974* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth), 'cannot be described as simple commercial litigation which should be subject to a 'budget costs regime'".

Moderate financial compensation sought

The amount of financial compensation sought to be recovered in the substantive proceedings is also a relevant factor, such that orders under Order 62A are more likely to be made where the amount in question is 'moderate': per Drummond J in *Hanisch* at 387.

In *Maunchest,* Drummond J alluded at [13] to his concern 'about the costs of this litigation which the applicant has instituted and which involves a sum of considerably less than $20,000.00'.

Where there is a significant public interest element in a case

The existence of a significant public interest element in a case has been regarded as a reason for departing from the usual costs rule: *Oshlack v Richmond River Council*.[12]

In *Homefund,* Wilcox J emphasised the 'public interest' aspect of the litigation in question in deciding to make an order under Order 62A Rule 1. His Honour stated at [24]:

> Although there is not settled rule to that effect, the existence of a public interest element has often been regarded as a reason for departing from the usual costs rule.

After referring to a number of authorities in support of this proposition, His Honour stated further at [31]:

> Although I accepted that fear of exposure to costs acts as a deterrent to litigation to many people who feel that they have a legitimate grievance (or defence), it would be particularly unfortunate if that factor caused the abandonment of

---

11 (1997) 74 FCR 384 at 387.

12 (1998) 193 CLR 72.

> litigation that made claims having the potential, if successful, to benefit many thousands of people, most of them likely to be of limited means.

Further considerations referred to by Wilcox J in *Woodlands* included the poor financial position of the applicants, the importance of the preliminary issues and that fact that 'the cases that the applicants desired to advance appeared at least seriously arguable' and the disadvantages that would ensue if fear of exposure to costs were to prevent such cases being advanced.

What is the Public Interest?

The term 'public interest' is not judicially defined.[13] However, it is clear that not all human rights cases will satisfy the public interest test.

Driver FM observed in *Xiros v Fortis Life Assurance Ltd*[14] (***Xiros***) at [24] that:

> All human rights proceedings contain some element of public interest in that the legislation is remedial in character, addressing the public mischief of discrimination… There will be many human rights proceedings where no sufficient public interest can be shown.

An analysis of decisions on costs in other jurisdictions, and decisions on the making of post-event costs orders in the Federal Court, indicate the following are relevant factors in discrimination cases being found to be in the public interest:

Whether the proceedings will clarify an important point of law

It has been recognised that cases that clarify an important point of law may be characterised as having a public interest element.

In *Ferneley v The Boxing Authority of New South Wales*[15], Wilcox J, in making an order that the usual costs order not apply, took into account (at [97]) the fact that 'the case has served the public interest in clarifying important issues of discrimination law'. This issue was the application of the *Sex Discrimination Act 1986* (Cth) to state authorities.

In *Xiros,* a case also involving allegations of unlawful disability discrimination in the provision of insurance services, Driver FM characterised the case as being one in which there was significant public interest. He stated at [25]:

> In the present case the proceedings have called for the interpretation and application of s 46(2) of the *Disability Discrimination Act,* a provision on which I have found no previous judicial consideration.
>
> The decision of this Court will have some precedent value and will have implications for other insurance policies; and possibly a large number of similar

---

13 See *Ruddock v Vadarlis* [2001] FCA 1865.
14 (2001) 162 FLR 433.
15 (2001) 115 FCR 306.

> policies. The proceedings therefore contain a public interest element of substance.[16]

Whether the Applicant has a pecuniary interest in the proceedings

In *Xiros,* Federal Magistrate Driver stated:

> But the legislation confers private rights of action for damages. There will be many human rights proceedings where no sufficient public interest element can be shown: *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815.

Further, in *Minns v New South Wales (No 2)*[17] Raphael FM stated at [13]:

> There must be a public interest in the subject of the proceedings and once some exclusively personal benefit is sought the prospects of the proceedings having the necessary quality of public interest is much diminished.

However, the fact that an applicant has no pecuniary interest and that a case has precedent value does not always result in a finding that the case is in the public interest. In the case of *Hurst Devlin v Education Queensland (No 2)*[18], in making a costs order against an unsuccessful applicant, Lander J held that it was not relevant that an applicant had nothing to gain personally from the proceedings and that she may be become bankrupt as the result of the costs order. He continued at [33] that 'legal proceedings are not the appropriate medium for the purpose of examining the ambiguities in an education policy'. In *Devlin v Education Queensland (No 1)*[19] it was unsuccessfully argued that the respondent's failure to provide the applicant with an Auslan interpreter as part of its education policy amounted to indirect discrimination.

Other relevant 'public interest factors' include whether numerous people sought to gain from the litigation: see *Homefund.*

How to seek the Order

As this is a relatively untested area of the law, it is difficult to recommend a template for an application under Order 62A.

It is clear that the earlier the application the better, as the parties can then make pragmatic decisions about the conduct of the case: see *Minns v State of NSW (No 2).*[20]

The most appropriate point to seek to the order would be at the same time as the filing of the application commencing proceedings. The application for an order, made by way of notice of motion, should state the costs limit sought. In relation to the costs sought it is clear that the courts do not look favourably on a differential amount between applicant and respondent. However, there is little guidance on how to determine the amount sought. The amount could be one that is closely related to the

---

16 *Xiros* above n14 at [24]. See also, *Jacomb v The Australian, Municipal, Administrative, Clerical & Services Union* [2004] FCA 160*0* and *AB v NSW* (No 2) [2005] FMCA 1624.

17 [2002] FMCA 197.

18 [2005] FCA 793.

19 [2005] FCA FCA 405.

20 [2002] FMCA 197 at 9.

estimated actual costs. Alternatively, it could bear no relation to the costs, but rather be a nominal amount as the case has considerable public interest.

If an Order 62A cannot be obtained by consent, orders will be made in relation to the service of submissions and evidence to support the notice of motion.

The submissions seeking the order should address:

1. That there is at least an arguable case.
2. The public interest element of the case.
3. That moderate financial compensation is sought.
4. That the legal issues involved are limited in complexity, for example, by pointing to precedents that will determine the legal issues in this case. Alternatively, show that more complex issues can be addressed in a way that will limit their complexity, for example, through a court-appointed expert or through forfeiting aspects of the case.
5. That denial of the order sought may effectively deny the applicant access to the Court. For example, address the applicant's limited means *vis à vis* those of the respondent.

The submissions should set out how the estimate of costs will cover the costs and disbursements in running the case.

An affidavit by the solicitor with carriage for the case setting out the evidentiary basis for the submissions should also be filed, along with any other evidence to indicate the complexity of the matter or the public interest elements of the case. Such evidence could include an affidavit from an expert detailing the level of complexity of the matter and providing a costs estimate for a report.

Conclusion

It is clear that Order 62A is potentially of major significance to public interest human rights cases. As such it is an important weapon in any public interest litigator's armoury.