Discovery for all: Submission in response to the Australian Law Reform Commission's Consultation Paper into Discovery in Federal Courts

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1. Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on access to justice

The Australian Law Reform Commission's (ALRC) current inquiry into discovery in the federal courts was prompted by the concerns raised about the process in the Access to Justice Taskforce report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (the Taskforce Report) in 2009[1].

PIAC made a submission to the Taskforce Report[2], in which it concentrated on the extent to which the proposed recommendations improved access to justice for disadvantaged clients. Similarly, in responding to the ALRC's Consultation Paper, *Discovery in the Federal Courts*

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1 Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce Attorney-General's Department* (2009), 105 -106, Rec 8.2.

2 Lizzie Simpson and Robin Banks, *Improving access through translating principles into practice: submission in response to the Attorney General's report, A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2009/12/091130-piac-sub-a2j> at 10 January 2011

(ALRC's Consultation Paper), PIAC has focussed on those questions and proposals that it considers may affect the ability of disadvantaged clients to access justice in the federal courts.

PIAC has also written papers and contributed to the debate about access to justice including making submissions to the Standing Committee of Attorneys-General (SCAG) on litigation funding in Australia[3], the National Alternative Dispute Resolution Advisory Council (NADRAC) Inquiry into Alternative Dispute Resolution in the Civil Justice System[4], the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice[5] and Australia's Judicial System[6].

PIAC also has significant experience in running test-case litigation in the Federal Court. For example, PIAC has represented clients in anti-discrimination complaints including acting for the complainant in *Ferneley v The Boxing Authority of New South Wales*[7], *Corcoran v Virgin Blue Airlines Pty Ltd*[8], *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*[9] and PIAC is currently representing Ms Haraksin in her complaint against Murrays Australia Ltd[10]. PIAC has also represented clients in freedom of information cases[11] and in a class action on behalf of Homefund borrowers[12] in the Federal Court.

Introductory comments

PIAC welcomes the opportunity to make a submission in response to the ALRC's Consultation Paper. The Consultation Paper provides a thorough overview of the existing procedures as well as raising many sensible proposals for dealing with some of the practical problems regarding discovery.

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3 Simon Moran and Gordon Renouf (CHOICE), *Litigation funding - consumer protection and access to justice* (2006) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2006091_20060913.html> at 15 October 2009.

4 Alexis Goodstone, *Alternative Dispute Resolution in the Civil Justice System* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009052_20090522.html> at 15 October 2009.

5 Alexis Goodstone, Robin Banks, Chris Hartley and Vavaa Mawuli, *Justice – not a matter of charity: Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009050_20090520.html> at 15 October 2009.

6 Alexis Goodstone, *Inquiry into Australia's Judicial System and the Role of Judges* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/PIAC%20Submission%20Judicial%20Inquiry-1.pdf> at 15 October 2009.

7 [2001] FCA 1740 (December 2001).

8 [2008] FCA 864 (17 June 2008).

9 [2007] FCA 615 (2 May 2007).

10 [2010] FCA 1133 (20 October 2010).

11 See for eg, *Hittich & Pfizer Pty Ltd v Department of Health, Housing and Community Services* (1993) 30 ALD 647.

12 See for eg, *Woodlands & Ballard v Permanent Trustee Company Ltd & Ors* (19960 58 FCR 139.

However, the challenge in reforming the discovery process is to ensure that the drive for improving the efficiency of the process does not create barriers to individuals accessing justice.

In this submission, PIAC has chosen to comment only on specific questions related to areas where it has expertise. In particular, PIAC has focussed on raising concerns, where appropriate, about issues of costs and accessibility to justice.

2. Specific Questions in the Consultation Paper

Chapter 2 - Legal Framework for Discovery in Federal Courts

Question 2-2:

Does the requirement for leave of the court effectively regulate the use of discovery in civil proceedings in the Federal Court?

See PIAC's response in relation to Question 2-4 below.

Question 2-4:

Should the *Federal Court of Australia Act 1976* (Cth) be amended to adopt the provisions of s 45 of the *Federal Magistrates Act 1999* (Cth) in relation to discovery, so that discovery would not be allowed in the Federal Court unless the court made a declaration that it is appropriate, in the interests of the administration of justice, to allow the discovery? If not, should another threshold test be adopted? What should that threshold test be?

In considering this question, the starting point should be the recognition that, although there may be practical problems with the process of discovery, it is generally recognised that discovery is a vital part of our civil justice system.[13]

Furthermore, the Federal Court already limits discovery to those cases where a party can satisfy the requirements set out in section 37M of the *Federal Court Act 1976* (Cth). In contrast, in most other Australian state courts, there is no requirement to seek the leave of the court in order to obtain discovery.[14]

Moreover, while it may be that in practice, this leave requirement is sometimes treated as a formality, seeking leave for discovery inevitably adds to the cost of litigation (because it involves at least one additional hearing and arguments).

Thus, PIAC is of the view that the *Federal Court Act* should not be amended to adopt a narrower test for discovery. PIAC is particularly concerned by the proposal that the decision to grant discovery could be based on a cost-benefit analysis. PIAC does not believe that this is the

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13 See for eg, Victorian Law Reform Commission, *Civil Justice Review,* Report 14 (2008) 5.2, 5.6.1.

14 See for eg, Supreme Court (General Civil Procedure) Rules 2005 (Vic), rr 29.01 and 29.02; Uniform Civil Procedure Rules 1999 (Qld), r 211(1)(b); Rules of the Supreme Court 1971 (WA), r 26(1)(2); Supreme Court Rules (NT) r 29.02; Rules of the Supreme Court 2006 (SA) r 136(1)(a).

appropriate test for discovery – the central focus of granting discovery (and other interlocutory procedures) should always be on the just resolution of disputes.

Recommendation

The existing test for discovery in the Federal Court Act 1976 (Cth) should not be amended as suggested in Question 2-4.

Chapter 3 - Discovery Practice and Procedure in the Federal Courts

Proposal 3-1:

Following an application for a discovery order, an initial case management conference (called a 'pre-discovery conference') should be set down, at a time and place specified by the court, to define the core issues in dispute in relation to which documents might be discovered. At the pre-discovery conference, the parties should be required to:

(a) outline the facts and issues that appear to be in dispute;

(b) identify which of these issues are the most critical to the proceedings; and

(c) identify the particular document, or outline the specific categories of documents, which a party seeks to discover and that are reasonably believed to exist in the possession, custody or power of another party.

PIAC supports this proposal, subject to the comments PIAC makes below in respect of proposal 3-2.

Proposal 3-2:

Prior to the pre-discovery conference proposed in Proposal 3-1, the party seeking discovery should be required to file and serve a written statement containing a narrative of the factual issues that appear to be in dispute. The party should also be required to include in this statement any legal issues that appear to be in dispute. The party should be required to state these issues in order of importance in the proceedings, according to the party's understanding of the case. With respect to any of the issues included in this statement and concerning which the party seeks discovery of documents, the party should be required to describe each particular document or specific category of document that is reasonably believed to exist in the possession, custody or power of another party.

Broadly speaking, PIAC supports this proposal. Although, PIAC notes that proposals 3-1, 3-2 and 3-3 require increased funding to legal service providers, such as legal aid and community legal centres to ensure that they have sufficient resources to assist litigants in complying with the requirements of pre-discovery conferences at such an early stage in proceedings.

Furthermore, if these proposals are implemented, there should be sufficient flexibility to ensure that they can be waived in appropriate cases: for example, if a party is self-represented.

Recommendation:

There should be increased funding for legal aid and community legal centres to ensure that disadvantaged or self-represented clients are able to comply with the requirements of pre-discovery conferences.

Proposal 3-3:

Prior to the pre-discovery conference proposed in Proposal 3-1, the parties should be required to file and serve an initial witness list with the names of each witness the party intends to call at trial and a brief summary of the expected testimony of each witness. Unless it is otherwise obvious, each party's witness list should also state the relevance of the evidence of each witness.

See PIAC's comments in relation to Proposal 3-2 above.

Question 3-9:

Should there be a presumption that a party requesting discovery of documents in proceedings before the Federal Court will pay the estimated cost in advance, unless the court orders otherwise?

PIAC does not believe that a party seeking discovery of documents should be required to pay the estimated cost of discovery in advance and reiterates the reservations it raised about this proposal in response to the Taskforce Report.[15]

First, the orthodox approach is that costs follow judgment, as it is clearer at the end of proceedings the appropriate orders that should be made.

Second, many litigants, particularly those who are self-represented, legally aided or otherwise disadvantaged, simply could not afford to pay the estimated costs of discovery in advance and this could mean that for many ordinary individuals such interlocutory costs orders could prevent them from vindicating their legal rights, irrespective of the merits of the proceedings.

Third, PIAC is of the view that there is a very real risk that the other party may provide an over-inflated estimate of costs and that a court will struggle without seeing the discovered documents to assess the reasonableness of this estimate.

Finally, there is also a risk that this recommendation will in practice be counter-productive: adding another layer of interlocutory disputation between the parties, therefore making the proceedings more costly, lengthy and cumbersome.

[15] Simpson and Banks, above n 2, 15-16.

Recommendation:

The cost powers of the Federal Court should not be amended to introduce a presumption that a party seeking discovery should pay the costs in advance.

Proposal 3-6:

The Federal Court should develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings, including the technologies used in the discovery of electronically-stored information.

PIAC broadly agrees with the ALRC's proposal that the Federal Court should develop and maintain a continuing judicial education program that specifically deals with judicial management of the discovery process. However, PIAC considers that the training program should make it clear that the objective of improving the efficiency of proceedings through better case management should not be achieved at the expense of the just resolution of proceedings.

Proposal 3-7:

The Australian Government should fund initiatives in the Federal Court to establish and maintain data collection facilities, to record data on the costs of associated with discovery of documents, as well as information on the proportionality of a discovery process - in terms of the costs of discovery relative to the total litigation costs, the value of what is at stake for the parties in the litigation, and the utility of discovered documents in the context of the litigation.

PIAC supports this proposal. However, PIAC is of the view that data collection about the discovery process in the Federal Court should be part of a comprehensive and ongoing review of the federal civil justice system as it is important that questions about the cost of discovery be weighed against issues such as equity and perception of justice.

In this respect, PIAC notes the Taskforce Report's recommendation about the monitoring and review of the federal civil justice system was significantly broader: it recommended that the Productivity Commission undertake a review of the efficiency of the courts and tribunals and based on this review, the Attorney-General's Department should work with the federal courts, tribunals, and other justice services to develop an overarching data collection template to inform the necessary collection of data on a comprehensive, consistent basis.[16]

Recommendation:

Proposal 3-7 should be amended to recommend that the Australian Government fund an initiative in the Federal Court (and federal tribunals) to establish and maintain data collection facilities to monitor the accessibility, justice and equity as well as the efficiency of the federal justice system.

[16] Commonwealth Attorney General's Department, above n1, recommendation 5.1

Chapter 5 - Alternatives to Discovery

Proposal 5-1:

The Australian Government and the Federal Court, in consultation with relevant stakeholders, should work to develop specific pre-action protocols for particular types of civil dispute with a view to incorporating them in Practice Directions of the Court.

In relation to the proposal to introduce specific pre-action protocols for particular civil disputes, PIAC notes the concerns that the Human Rights Law Resources Centre (HRLRC) raised in its submission to the Victorian Law Reform Commission's Civil Justice Review about the possible negative impacts of pre-action protocols on self-represented litigants.[17] PIAC considers that all pre-action protocols, whether specific or general, should be sufficiently flexible so that self-represented litigants are not unfairly penalised if they cannot comply. Also, there needs to be increased funding to legal service providers, such as legal aid and community legal centres to ensure that they have sufficient resources to assist litigants in complying with the requirements of pre-action protocols.

Furthermore, PIAC notes that in the Taskforce Report it was suggested that "human rights disputes" may be one type of matter that could be covered by a specific pre-action protocol.[18] However, the phrase "human rights cases" covers an extremely broad variety of cases, ranging from anti-discrimination cases such as *Corcoran v Virgin Blue Airlines Pty Ltd* to constitutional cases about freedom of speech such as *Lange v Australian Broadcasting Corporation.*[19] As a result of PIAC's involvement in these cases, PIAC is aware of the diversity of the issues (and evidence) required to successfully bring human rights claims and considers that it would be difficult to develop a specific pre-action protocol to cover the variety of cases that falls within the loose category of human rights cases.

Recommendation:

If the ALRC takes the view that it would be useful to develop a pre-action protocol for human rights disputes, the protocol should be sufficiently nuanced or flexible to capture the breadth of human rights cases.

3. Additional comments about costs orders

The ALRC's terms of reference to this Inquiry specifically instructs the ALRC to consider costs issues, including costs capping, the only reference in the body of the Consultation Paper to this issue is found at paragraph 3.207.

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17 Ben Schokman and Phil Lynch, *Submission in Response to the Victorian Law Reform Commission Civil Justice Enquiry. Draft Civil Justice Reform Proposals* (2007) Human Rights Law Resource Centre < http://www.hrlrc.org.au/files/CKK005HKQV/HRLRC%20Further%20Submission.pdf> at 14 January 2011, 6.

18 Commonwealth Attorney General's Department, above n1, 104.

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

PIAC takes this opportunity to reiterate the comments made by Gemma Namey, Solicitor at the Public Interest Advocacy Centre, in which she set out the case for clearer guidelines for protective costs orders, in a paper titled *Litigation costs: strategies for the public interest lawyer*, presented at the 2010 Conference of the Civil Justice Research Group in Melbourne in September 2010.[20]

In this paper, Ms Namey said:

> A specific public interest costs order rule would provide guidance to both public interest litigants and the courts as to when such an order is appropriate and on what grounds. Moreover, such a rule could provide for a power to make a costs order at any stage in the proceedings, including at an early stage, thus giving greater certainty to the public interest litigant.
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> Law reform commissions have considered the issue of costs in public interest litigation in previous report and have recommended a public interest costs order. The Victorian Law Reform Commission in its recent Civil Justice Review recommended " there should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of litigation".
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> The most comprehensive law reform commission work on the issue of public interest costs was the Australian Law Reform Commission's 1995 report *Costs shifting- who pays for litigation*.58 The ALRC recognised the real benefit to the community from public interest litigation and the significant deterrent that costs allocation rules can have in pursing such litigation. The ALRC recommended a public interest costs order be available to courts and tribunals where it is satisfied that:
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> - the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
> - the proceedings will affect the development of the law generally and may reduce the need for further litigation
> - the proceedings otherwise have the character of public interest or test case proceedings.[21]

Ms Namey concluded:

> Importantly, the ALRC recommenced that such a costs order could be made ay any stage of the proceedings, including at the start of the proceedings. As outlined above, it is important that public interest litigants have some certainty as to their position in relation to costs at the beginning of the proceedings. Relying on a costs order at the conclusion of the proceedings is inadequate as the risk of an adverse costs order is often sufficient to

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20 Gemma Namey, *Litigation costs: strategies for the public interest lawyer* (Paper presented at the Public Interest Law Opportunities and Obstacles: The 2010 Conference of the Civil Justice Research Group, Melbourne, 27-28 September 2010) < http://intranet.law.unimelb.edu.au/staff/events/files/LitigationcostsGN.pdf> at 23 December 2010.

21 Ibid, 13-14.

deter a person from commencing proceedings in the first place.

The ALRC recommendations provide a very useful template for the content of such an order. Indeed, the Northern Territory has incorporated the ALRC recommendations in Rule 38.10 of the *Local Court Rules*.[22]

Recommendation:

The Federal Court Act 1976 (Cth) should be amended to include a new public interest protective costs orders provision.

4. Summary of Recommendations

1. The existing test for discovery in the Federal Court Act 1976 (Cth) should not be amended as suggested in Question 2-4.

2. There should be increased funding for legal aid and community legal centres to ensure that disadvantaged or self-represented clients are able to comply with the requirements of pre-discovery conferences.

3. The cost powers of the Federal Court should not be amended to introduce a presumption that a party seeking discovery should pay the costs in advance.

4. Proposal 3-7 should be amended to recommend that the Australian Government fund an initiative in the Federal Court (and federal tribunals) to establish and maintain data collection facilities to monitor the accessibility, justice and equity as well as the efficiency of the federal justice system.

5. The Federal Court Act 1976 (Cth) should be amended to include a new public interest protective costs orders provision.

[22] Ibid, 15.