A public interest approach to costs: submission to the NSW Law Reform Commission inquiry into security for costs and associated orders

19 August 2011

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation. PIAC 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;
- 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 (then) 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 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 welcomes the opportunity to make a further submission to the inquiry of the NSW Law Reform Commission (the Commission) into security for costs and associated orders (the Inquiry).

Public interest and protective costs orders

4.1 Is there a need for new legislation to give courts the power to make public interest costs orders, or is the current law adequate?

Public interest costs orders are very rarely made in NSW. This is because of the absence of relevant legislation and/or rules providing for public interest costs orders, and the apparent strong reluctance of courts to depart from the usual common law rule that costs follow the event. The current law encapsulates the principle that a successful party should be indemnified against the

expense to which it has been put, and the current law also stresses that departure from the usual rule is exceptional and that the court has a broad discretion in relation to costs.[1] Whether litigation has been brought in the public interest is only one of a number of factors that courts consider in exercising their discretion regarding costs.[2] Courts seem reluctant to provide prescriptive rules as to when it might be appropriate to depart from the usual costs rule. Justice Heerey, for example, has emphasised that the courts have a broad discretion and has intimated that it would be inappropriate to allow the common law to fetter that discretion simply by the accumulation of cases that might bear on that general discretion.[3]

In these circumstances, public interest litigants, like all litigants, must be prepared to take on a significant costs risk in order to proceed with their case. As explained below, PIAC's litigation experience indicates that this risk to costs exposure is the greatest deterrent to public interest litigation.

Public interest litigation is a difficult term to define, but some of the key indicia, from PIAC's perspective, are that:

- the matter raises an issue of public importance;
- the matter will have an impact beyond the rights of the individual parties to affect a larger group of people. It heightens the public interest dimension of a matter if that larger group of people includes, in particular, disadvantaged or marginalised people; and
- important rights or obligations will be determined or enforced.

In order to remove some of the barriers to public interest litigation in Australia, we need to introduce coherent and distinct costs rules and jurisprudence in public interest matters. It is true that cases like *Oshlack v Richmond River Council*[4] and *Ruddock v Vadarlis*[5] show that the ambit of traditional exceptions to the usual costs rule has widened in recent times in Australia to include, in some cases, consideration of the public interest. However, this development is limited. Without new legislation, the courts are unlikely to make significant advances in this regard – change will be slow (if at all), and the development of guiding principles haphazard.

Since its inception in 1982, PIAC has obtained instructions from hundreds of clients with public interest matters that have reasonable prospects, but who do not proceed specifically because of the risk of an adverse costs order. Naturally, PIAC recognises the many inherent limitations and disadvantages of litigation – not least, its cost to all parties involved and to the state. It is also clear that, in many situations, effective alternative dispute resolution can lead to more efficient and less costly resolution to a dispute. These propositions, which are now so well accepted that they might be described as trite, mean that there should be strong inducements for parties to

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1 G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) 263, [9.2].

2 *Oshlack v Richmond River Council* (1998) 193 CLR 72.

3 *Fetherson v Peninsula Health (No 2)* [2004] FCA 594.

4 (1998) 193 CLR 72.

5 [2001] FCA 1865.

resolve their disputes, where appropriate, via alternative dispute resolution mechanisms, and there should be barriers to the commencement of unnecessary litigation.

However, not all litigation is unnecessary. Especially in areas that we have categorised for the purposes of this submission as being within the scope of 'public interest litigation', there is in fact a strong public policy imperative to remove barriers to litigation. That is, even with its limitations, litigation can perform a vital role in clarifying novel or contentious areas of law. This, in turn, can make alternative dispute resolution a much more viable option for the bulk of disputes that arise in the same area as a public interest case that has been decided by a court.

By way of illustration, PIAC has recently sought to bring proceedings in the Federal Court to improve access to transport for people with disability. PIAC obtained instructions from clients who cannot secure equal access to buses, trains and aeroplanes. Some of these clients have strong disability discrimination claims against large transport operators pursuant to the *Disability Standards for Accessible Public Transport 2002* (*Disability Standards*) made under the *Disability Discrimination Act 1992* (Cth).

However, there has been almost no litigation brought under the *Disability Standards*. This, in turn, means that there is very little curial guidance as to the meaning of the *Disability Standards* or their practical operation. There would clearly be a public benefit in an appropriate case being brought to test this legislation, so as to provide greater clarity about how the *Disability Standards* operate to facilitate access to transport by a significant sector of the community. An appropriate case could also enforce important rights (in this case, to access public transport) for a significant sector of the community. For example, enforcing the *Disability Standards* in relation to audio announcements on trains and buses would assist tens of thousands of people with vision impairment who travel or seek to travel on public transport.

However, the risk of adverse costs remains an almost insurmountable barrier. Potential applicants of moderate means are understandably reticent to expose themselves to financial ruin. The low number of cases in this area represents a loss to all people with disability who cannot access public transport, as well as to the entire community.

In an attempt to address these barriers, PIAC has made a number of successful applications to have costs capped pursuant to Order 62A of the *Federal Court Rules* (Cth).[6] This rule is in similar terms to Rule 42.2 of the *Uniform Civil Procedure Rules* (NSW). 'Public interest' is one of a number of factors which the court takes into account in granting costs caps. PIAC has also obtained Legal Aid grants, where possible, sometimes in combination with costs caps, in order to insulate our clients from costs risks. However, costs capping only goes so far and Legal Aid is only available in a limited number of cases.

The precise meaning and operation of key provisions of the *Disability Standards* will remain uncertain unless the main barriers to public interest litigation are removed. In our submission, that goal will only be achieved by establishing a regime for public interest costs orders that

6 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

ensures they are more readily available, and used appropriately by parties and the courts. Until then, litigation is just too financially risky for clients. On the whole, *Disability Standards* cases tend to be brought by individuals of limited financial means who are in dispute with government agencies or large corporations. One of the beauties of public interest costs orders is that they can provide help to address this 'inequality of arms'.

Public interest costs orders have developed in comparable overseas jurisdictions, including the UK and Canada. In both jurisdictions, developments have been made primarily via the common law, with court rules providing a broad discretion as to costs and not specifically addressing the issue of 'public interest litigation'.

In the UK, the case of *R (ex parte Cornerhouse Research) v Secretary of State for Trade and Industry*[7] (*Cornerhouse*) developed some principles for consideration in granting public interest costs orders. The Court of Appeal stipulated that public interest costs orders must be made in only the most exceptional circumstances. The *Cornerhouse* criteria for granting a public interest costs order, outlined at paragraph 74 of the judgment, are as follows:

- the issues raised are of general public importance;
- the public interest requires that those issues should be resolved;
- the applicant has no private interest in the outcome of the case;
- having regard to the financial circumstances of the parties, including the likely amount of costs in issue, it is fair and just to make the order; and
- without a protective costs order, the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.[8]

English and Irish courts have attached weight to whether the matter truly requires elucidation on a point of law, raises a novel point of law or raises a novel interpretation of the law. Where applying familiar principles to new facts, they have been unlikely to grant a protective costs order.[9]

In Canada, in the case of *British Colombia (Minister of Forests) v Okanagan Indian Band*,[10] the Supreme Court set guidelines for the exercise of the judicial discretion to award costs in advance to public interest litigants. An applicant must establish that a case is 'special enough' by demonstrating that:

- it cannot afford to pay for the litigation and there is no other realistic option for bringing the issues to trial;
- its claim is prima facie meritorious;

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7 [2005] EWCA Civ 192.

8 *R (ex parte Cornerhouse Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 at para 74.

9 Public Interest Law Alliance, *Public Interest Litigation: The Costs Barrier & Protective Costs Orders*, Free Legal Advice Centres Ltd Report, 2010, p14.

10 (2004) 233 DLR (4th) 577.

- the issues raised are of public importance and have not been resolved in previous cases; and
- the order would not be contrary to the interests of justice (for example, where the order would be unfair to private litigants caught in the cross-fire of the dispute).[11]

Public interest litigation promotes greater equity, access and confidence in the legal system, creates economies of scale, enhances public sector accountability and reduces the costs associated with market and governmental failure. Existing costs rules thwart the realisation of these benefits in NSW. There has been increasing judicial and legislative acceptance that the indemnification rationale, which has traditionally driven costs determinations in Australia, is simplistic and is not suitable for all forms of litigation. However, this acceptance needs to be followed through to its logical conclusion in public interest litigation, and new legislation is required to achieve this.

4.2 Should any proposed legislation establishing public interest costs orders define public interest proceedings? If so, what should the definition be?

A legislative definition of the term 'public interest proceedings' would be useful. The courts have not developed a consistent, let alone a settled, definition. Courts have varied in their approach and the factors taken into consideration. PIAC considers that it would be desirable for Parliament to provide greater clarity as to the scope of 'public interest' proceedings.

As stated in our previous submission, PIAC supports the definition of public interest proceedings developed by the Australian Law Reform Commission (ALRC)[12]. However, rather than providing a broad discretion to grant public interest costs orders, PIAC proposes that if a matter meets the statutory definition of public interest proceedings, there should be a rebuttable presumption in favour of making a public interest costs order.

That is, PIAC submits that there should be a presumption in favour of granting a public interest costs order in proceedings that:

- will determine, enforce or clarify an important right or obligation affecting a significant sector of the community;
- involve the resolution of an important question of law and may reduce the need for further litigation; or
- otherwise have the character of public interest or test case proceedings.[13]

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11 Tollefson C, Gilliland D & DeMarco J, *Towards a Cost Jurisprudence in Public Interest Litigation*, The Canadian Bar Review [2004] 83, p 478-484.

12 Australian Law Reform Commission, *Cost Shifting – Who Pays for Litigation*, Report No 75 (1995) [13.19].

13 Ibid.

PIAC is concerned to ensure that any new public interest costs rule is widely used in appropriate matters. Without a presumption in favour of a public interest costs order in matters that meet the definition, courts may be reluctant to make such orders because of longstanding and difficult to shed common law costs principles. The new legislation must be clear in promoting the use of public interest costs orders, and a presumption is one way of achieving this.

It may be that the ALRC's definition could be further refined by including within the scope of public interest proceedings cases that raise issues of 'general public importance'. This term ('general public importance') is used in the funding criteria of the Commonwealth Public Interest and Test Case Scheme. It is an imprecise term, but it may provide an appropriate vehicle for narrowing the category of cases that would meet the definition of 'public interest'.

4.3 Should the legislation establishing public interest costs orders provide that courts may make an order at any stage of the proceedings, including at the start of the proceedings?

Any legislation establishing public interest costs orders should provide that courts may make orders at any stage of the proceedings, including at the start. In fact, it should encourage such orders to be made early, perhaps by way of a presumption or clear guidance to the courts. Absent this, judges may prefer the usual course, which is to decide costs at the conclusion of the matter.

Public interest costs orders will be of greatest benefit to litigants if they are made at the earliest possible stage of proceedings. As stated in our previous submission, the later an order is applied for and made, the higher an applicant's liability for costs incurred before the order was granted. Undue delay or reluctance by judges to make early orders could render public interest costs rules useless. Therefore, PIAC considers that the new costs rule should specifically facilitate the granting of orders at the outset of litigation. For example, in the case of *Corcoran v Virgin Blue Airlines Pty Ltd*,[14] the applicant would most likely have not proceeded with the litigation had a costs cap pursuant to Order 62A of the *Federal Court Rules* (Cth) not been granted early in the proceedings. The client, a person with disability complaining of discrimination in the provision of services by Virgin Blue Airlines, was greatly concerned by his unlimited exposure to costs, particularly against a respondent with significant resources.

This also benefits respondents who can then better appreciate their financial risk in relation to the proceedings and may have the benefit of encouraging the parties to narrow the matters in dispute at an early stage. It may also have the benefit of encouraging litigants to ask the court to consider the court appointment of experts, as is permitted for example under Rule 31.46 of the *Uniform Civil Procedure Rules 2005* (NSW), as a means to reduce the parties' costs of litigation.

[14] [2008] FCA 864.

However, if the applicant proceeds without applying for such an order initially, and then seeks to apply, this should also be possible. This may occur in cases where, for example, the public interest in a matter only becomes apparent some way into the proceedings or the applicant obtains legal representation after the commencement of proceedings.

4.4 Should the legislation giving courts power to make public interest costs orders contain a list of discretionary factors that courts may take into account when determining whether to make a public interest costs orders? If so, what should these factors be?

As stated above, PIAC considers that if a matter meets the statutory definition of 'public interest' put forward by the ALRC, there should be a presumption in favour of making a public interest costs order. The legislation should provide an additional list of factors that the court may take into account in determining whether to make such an order. This will be particularly helpful as the definition of 'public interest' put forward by the ALRC and supported by PIAC is quite broad.

If a list of discretionary factors is adopted, the financial circumstances of the applicant and any private or pecuniary interest they have in the outcome of the proceedings should not be included.

PIAC considers that the financial circumstances of the applicant should be a relevant factor in determining whether to make a protective costs order. Similarly, the question whether the applicant would continue the proceedings without a protective costs order should be taken into account. The rationale behind the making of protective costs orders should be to reduce the barriers faced by the applicant in proceeding with public interest litigation. As their financial situation is a relevant barrier, this should be considered.

Further, any definition of public interest should not exclude applicants with a private interest in the proceedings. In many cases conventionally regarded as public interest litigation, the applicant will have a direct, personal, proprietary and pecuniary interest in the outcome, the existence of which in no way diminishes the public interest value presented by the issues or circumstances of the case. Lack of private interest should not be a prerequisite for a public interest costs order. In fact, such an approach would be somewhat unworkable, considering that litigants must generally have a private interest in order to have standing to bring proceedings. Again, PIAC's suggested approach would depart from developments in the UK and Canada.

Lastly, the merit of the case may be a relevant discretionary factor. The test should be whether there is a 'serious question to be tried', the same test used by the court in considering whether to grant other interlocutory orders.[15]

[15] *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

4.5 If a court is satisfied that there are grounds for making a public interest costs order, what are the types of orders that it should be able to make?

The court should be able to make a wide range of orders, including:

- the applicant will pay no costs if it loses but will recover costs if it wins;
- there will be no order as to costs;
- the losing party will be liable for capped costs; and
- the applicant's costs will be paid by the other party, regardless of the outcome.

In some cases, it may be appropriate that the applicant pay no costs if they lose but recover costs if they win (first dot point, above). This position recognises the need to facilitate representation for applicants in public interest matters (solicitors and counsel may recover their costs if they win, a more attractive prospect for many than acting strictly *pro bono*), while at the same time removing the risk of adverse costs from the applicant's shoulders. While such an order may appear onerous from a respondent's point of view, it may be appropriate in cases where, for example, a public interest applicant has a strong case against a government agency or wealthy corporation and the potential benefit of the case proceeding is significant.

Factors that PIAC submits may be relevant for the court to take into account in determining what type of order to make include:

- the extent of the public interest;
- the likely cost of the proceedings;
- the resources of the respondent;
- the legislative intent behind any statutory provisions at issue, and broad standing entitlements;
- the strength of the case; and
- any effect upon disadvantaged or marginalised people.

In relation to capped costs, PIAC considers that orders should be able to be made in relation to both parties (not just the party applying for the public interest costs order) and should set a capped amount, not a proportion or percentage of costs.

4.6 Should the provisions giving courts power to make public interest costs orders be located in statute or in the *Uniform Civil Procedure Rules 2005* (NSW)?

PIAC considers that the provisions relating to public interest costs orders should be located in legislation. The relevant statute or division/part of the statute should have an objects clause that

clearly states its intention is to assist the initiation and conduct of litigation that affects the community or a significant section of the community or that will develop the law.

Locating the provisions in statute would make them more difficult to amend, and would demonstrate a commitment to public interest proceedings by the legislature.

4.9 Should New South Wales establish a public interest fund that will provide financial assistance to cover the legal costs of, and any adverse costs orders against, persons or organisations whose litigation raises issues that are in the public interest?

PIAC supports the establishment of a fund that could partially or wholly indemnify applicants in public interest cases. As stated in our previous submission, this would have the effect of alleviating barriers faced by applicants in public interest matters who have limited means, while reducing the impact of alternative reforms (such as public interest costs orders) on respondents. Public interest costs orders mean respondents cannot recover part or all of their costs, whereas the implementation of an indemnity fund means such costs are paid from the fund.

If a fund were established simultaneously with a public interest costs regime, claims on the fund would be reduced in cases where applicants successfully obtained public interest costs orders and conversely, such orders would not be sought by successful claimants to the fund. This raises the question whether the rules relating to the obtaining of public interest costs orders and the fund's rules should specify the order in which applicants should seek assistance, or have different definitions and criteria, so as to complement each other and fill different gaps. Alternatively, the Law Reform Commission or the NSW Government may wish to consider implementing only one proposal, ie the public interest costs orders or the fund. The former would be less costly, though there would be increased legal costs for government respondents. The latter would cost, though its income could be based partly on obtaining legal costs in successful cases - the fund could pay costs if the applicant lost, but secure costs if the applicant won.

In relation to the fund, decisions about whether or not to provide financial assistance and/or an indemnity should be made prior to or early in the proceedings to ensure that applicants know the risk or otherwise that they face. There are several litigation funds available at present, for example the Commonwealth Public Interest and Test Case Scheme, that do not necessarily determine applications quickly and this can mean that applicants are unable to proceed because they are waiting on a decision. While this may not have a detrimental effect in all proceedings, statutory time limits on commencing proceedings can mean that applicants must make a decision on whether or not to take the risk of litigation, without having a decision on the availability of funding. PIAC has had a case such as this, where the client's application was considered only after the claim had been decided.[16]

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16 *Access for All Alliance (Hervey bay) Inc v Hervey Bay City Council* [2007] FCA 615.