



pilch

promoting law in the public interest

SUBMISSION TO THE COMMONWEALTH ATTORNEY- GENERAL ON PROTECTIVE COSTS ORDERS

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1. Introduction

1.1 Introduction

The Public Interest Law Clearing House (PILCH) (Victoria) proposes that the High Court, Federal Court and Federal Magistrates Court be specifically conferred with power to make protective costs orders in relation to 'public interest matters'. A protective costs order (**PCO**) is a court order that protects a party to a proceeding from an adverse costs outcome. PCOs may include orders that:

- a party will not be exposed to an order for costs if it loses at trial;
- the amount of costs that a party will be required to pay if it loses at trial will be capped at a certain amount; or
- that there will be no order for costs whatever the outcome of the trial.

PILCH believes that the conferral of power on the Federal courts to make PCOs will significantly improve access to justice for marginalised and disadvantaged Australians and is necessary to promote and fulfil the rights contained in article 14(1) of the *International Covenant on Civil and Political Rights* (the **ICCPR**).

A similar proposal has been made to the Victorian Attorney-General in relation to the Victorian Courts.

PILCH proposes that the conferral of power on the Federal Courts be effected by amendment to each of the *Judiciary Act 1903* (Cth), the *Federal Court Act 1976* (Cth), and the *Federal Magistrates Act 1999* (Cth).¹ The proposed amendments are attached at Annexures A and B, and are based upon a proposed amendment to the *Supreme Court Act 1986* (Vic) drafted by Mr John Manetta of counsel and Mr Ron Merkel QC (both acting pro bono).

1.2 About PILCH

PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

PILCH coordinates the delivery of pro bono legal services through six schemes:

- (i) the Public Interest Law Scheme (PILS);
- (ii) the Victorian Bar Legal Assistance Scheme (VBLAS);
- (iii) the Law Institute of Victoria Legal Assistance Scheme (LIVLAS);
- (iv) PILCH Connect (Connect);

¹ PILCH notes that the proposed amendments will have limited application to proceedings commenced under the *Family Law Act 1975* (Cth) given the general position under that Act is that each party should bear his or her own costs: see *Family Law Act 1975* (Cth), section 117.

- (v) the Homeless Persons' Legal Clinic (HPLC); and
- (vi) Seniors Rights Victoria (SRV).

PILCH's objectives are to:

- (i) improve access to justice and the legal system for those who are disadvantaged or marginalised;
- (ii) identify matters of public interest requiring legal assistance;
- (iii) seek redress in matters of public interest for those who are disadvantaged or marginalised;
- (iv) refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- (v) support community organisations to pursue the interests of the communities they seek to represent; and
- (vi) encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

In 2007-2008, PILCH assisted over 2000 individuals and organisations to access free legal and related services. Without these much needed services, many Victorians would find it impossible to navigate a complex legal system, secure representation, negotiate a fine, challenge an unlawful eviction, contest a deportation or even be aware of their rights and responsibilities.

2. Evidence of need

2.1 Costs as a disincentive

In its role as a pro bono referral service for public interest matters, PILCH has observed many meritorious public interest matters that are not ultimately pursued because of the risk of an adverse costs order. In this way, the costs regime in Australia acts as a disincentive to public interest litigation, particularly for marginalised and disadvantaged people. This is especially the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a disadvantaged or marginalised applicant will pursue the important test case.

The Victorian Law Reform Commission in its Civil Justice Review Report of May 2008 also considered that the risk of adverse costs orders was a significant deterrent to public interest litigation and concluded:

The commission believes that there should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases. They could include orders made at the outset of the litigation. The fact that a litigant may have a

pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.²

Similarly, the Australian Law Reform Commission has recommended that 'if private citizens are to be able to [initiate public interest litigation], any unnecessary barriers erected by the law of costs should be removed'.³

2.2 Case Studies

Below are 4 case studies of matters where the risk of an adverse costs order acted as a disincentive to litigants pursuing meritorious public interest litigation.

Case Study 1:

PILCH referred the *Tampa*⁴ matter and undertook much of the preparatory work for the proceedings. Since the appropriate applicants (the asylum seekers) could not be contacted, PILCH spent considerable time attempting to identify an alternative applicant to bring the claim on behalf of the asylum seekers. PILCH had real difficulties locating an applicant that would be prepared to bring the claim because they were concerned about the costs exposure. Ultimately Liberty Victoria was prepared to institute proceedings as the applicant despite this risk. In making a 'no costs' order in this matter, Black CJ and French J of the Federal Court said:

This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights.⁵

Case Study 2:

In the case of *Roach v Electoral Commission*⁶ the plaintiff, Vickie Roach, brought a Special Case before the High Court challenging the validity of amendments made in 2006 to the *Commonwealth Electoral Act 1918* (Cth) that disqualified all prisoners from voting (the **blanket ban**). Ms Roach, an indigenous Australian, brought her case with the assistance of the Human Rights Law Resource Centre (the **HRLRC**). Similarly to the *Tampa* case referred to above, the HRLRC experienced significant difficulty locating an applicant with sufficient standing who was prepared to bring the challenge because of the potential costs exposure.

In that case, the majority (Gleeson CJ and Gummow, Kirby and Crennan JJ) upheld the Ms Roach's challenge to the blank ban but held that the legislation in place prior to the 2006 amendments, which prohibited prisoners serving a sentence of three years or longer from voting, was valid and continued to apply.

On the question of costs, the majority of the High Court recognised that Ms Roach had brought the proceeding as a test case, raising important questions of constitutional

² Victorian Law Reform Commission, *Civil Justice Review Report* (2008), 676.

³ Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation* (1995), 78.

⁴ *Ruddock v Vardalis (No. 2)* (2001) 115 FCR 229.

⁵ *Ruddock v Vardalis (No. 2)* (2001) 115 FCR 229, at [29].

⁶ [2007] HCA 43 (26 September 2007).

principle. Therefore, as her case had succeeded in part, the majority held that it would be just for her to receive half her costs of the Special Case.⁷ The minority judges (Heydon and Hayne JJ) upheld the validity of the 2006 amendments and, as a result, would have ordered Ms Roach to pay the costs of the case.⁸

Case Study 3:

PILCH is aware of a matter in which an elderly woman with an acquired brain injury had a very strong discrimination and administrative law claim in respect of a failure to provide adequate medical treatment. Proceedings were not instituted by the person's guardian, appointed under the *Guardianship and Administration Act 1986* (Vic), because the guardian was concerned about his personal exposure to a costs order. Guardians appointed under the Act can be personally liable for costs in proceedings that they bring on behalf of a person with an impairment. This costs risk acts as a significant disincentive to meritorious claims being pursued on behalf of very vulnerable and disadvantaged persons.

Case Study 4:

In the case of *Schou v The State of Victoria*,⁹ the plaintiff, a single mother, made a complaint against her employer for indirect discrimination in contravention of section 9 of the *Equal Opportunity Act 1995* (Vic), in relation to her request to work from home to enable her to care for her ill son. The plaintiff succeeded at first instance but lost at the Court of Appeal. She was unable to make a special leave application to the High Court because of the significant risk of an adverse costs order. The decision of the Court of Appeal raised issues of importance for the development of the law in Victoria on indirect discrimination. Given that the majority and dissenting judgments in the Court of Appeal applied the High Court authority on indirect discrimination differently, it was a matter of considerable public interest that an application be made to the High Court to determine the issues of the *Schou* case.

These case studies demonstrate that reform of the costs regime is necessary to ensure that impecuniosity is not a bar to the vindication of peoples' rights or the pursuit of meritorious claims in the public interest.

2.3 Access to Justice and the ICCPR

Article 14(1) of the ICCPR, which Australia has ratified, states that everyone is entitled to a fair hearing. In essence, the right to a fair hearing requires a party to be able to present his or her case and evidence to the court under conditions that do not place him or her at a substantial disadvantage when compared with the other party.

International jurisprudence on the right to a fair hearing has established that the basic elements of the right are:

- (a) equal access to, and equality before, the courts;
- (b) the right to legal advice and representation;

⁷ *Ibid* at [103].

⁸ *Ibid* at [176].

⁹ [2004] VSCA 71 (30 April 2004)

- (c) the right to procedural fairness;
- (d) the right to a hearing without undue delay;
- (e) the right to a competent, independent and impartial tribunal established by law;
- (f) the right to a public hearing; and
- (g) the right to have the free assistance of an interpreter where necessary.

An important aspect of ensuring equal access to, and equality before, the courts is the applicant's ability to pay the associated costs and the discriminatory effect that a liability to pay costs has on disadvantaged members of the community.

Article 2(2) of the ICCPR sets out the responsibility of Australia, as a signatory, 'to take necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant'.¹⁰

By protecting a litigant from an adverse costs order in appropriate public interest matters, PILCH believes that the proposed amendment will increase access to justice in such cases, thereby giving effect to the right to a fair hearing.

In *Aarela v Finland*,¹¹ the United Nations Human Rights Committee (**HRC**) held that a rigid application of a policy to award costs to the winning party may breach the right of access to justice contained in the right to a fair hearing. The imposition of substantial costs against a disadvantaged claimant may prevent them from bringing a proceeding at all and therefore hinder their ability to remedy a breach of their rights. The HRC held that there should be judicial discretion to consider individual circumstances on a case-by-case basis and that, without such a discretion, the imposition of indiscriminate costs acts as a strong deterrent to the whole community, particularly its disadvantaged members, in exercising their right to have their complaint heard.

It is also well established that costs and disbursements associated with litigation impact disproportionately on indigent persons and may be regarded as a restriction on the right of access to a court contrary to the right to a fair hearing.¹² Both the HRC and the European Court of Human Rights have relevantly stated that the right to a fair hearing may require positive action by the state to ensure effective access to the courts, including the waiver of court fees and the abolition of any rigid principle that costs be borne by the unsuccessful party.¹³

¹⁰ While the ICCPR has not been directly incorporated into domestic law, the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* held that ratification of a covenant shows Parliament's intention, prima facie, to give effect to Australia's obligation under international law.¹⁰ Thus, a ratified covenant such as the ICCPR can influence the construction of a statute, the development by the courts of the common law, and the exercise of a statutory discretion.

¹¹ See *Anni Aarela and Jouni Nakkalajarvi v Finland*, UN Doc CCPR/C/73/D/779/1997.

¹² See, eg. *Kreuz v Poland* [2001] ECHR Application No 28249/95; *Kijewska v Poland* [2007] ECHR Application No 73002/01.

¹³ See, eg. *Airey v Ireland* (1979) 2 EHRR 305.

3. Current law on protective costs orders

In common law jurisdictions, whilst the courts retain a discretion as to costs, the general costs rule in civil proceedings is that costs follow the event. This means that the successful party can expect a costs award in his or her favour. Although Australia does not have any specific public interest costs regime, some courts have been prepared to make orders protecting public interest litigants against adverse costs orders.

3.1 Australia

(a) The High Court

The High Court of Australia's power to award costs is set out in section 26 of the *Judiciary Act 1903* (Cth):

The High Court and every Justice thereof sitting in Chambers shall have jurisdiction to award costs in all matters brought before the Court, including matters dismissed for want of jurisdiction.

In *Oshlack v Richmond River Council* (***Oshlack***)¹⁴ the High Court indicated that, in exceptional cases, it may be appropriate to make no order as to costs in public interest cases.

In *Oshlack* the plaintiff challenged the validity of a development consent granted by the Council in respect of a residential development on the basis that it contravened the *Environmental Planning and Assessment Act 1979* (NSW). Stein J of the NSW Land and Environment Court dismissed the plaintiff's challenge but made no order as to costs on the basis that special circumstances existed in the case justifying a departure from the usual order as to costs.

The special factors that Stein J took into account included:

- the 'public interest' nature of the litigation;
- the relaxation of standing pursuant to section 123 of the *Environment Planning and Assessment Act 1979* (NSW) (awarding costs might deny Parliament's intention to relax standing requirements);
- the fact that the plaintiff had nothing to gain personally from the litigation but rather sought to preserve the environment;
- the considerable public opposition to the development and hence public interest in the outcome of the litigation; and
- the fact that the plaintiff's challenge, although dismissed, was arguable.

The Court of Appeal overturned Stein J's decision on costs, but the High Court (Gaudron, Gummow & Kirby JJ, with Brennan CJ and McHugh J in dissent) restored Stein J's decision.¹⁵ Kirby J was the only judge who made express reference to public interest matters, holding that public interest litigation is a

¹⁴ (1998) 193 CLR 72.

¹⁵ *Oshlack v Richmond River Council* (1998) 193 CLR 72.

category 'into which may be grouped particular kinds of cases that will sometimes warrant departure from the general rule'.¹⁶ However, in upholding Stein J's costs decision, the majority of the High Court implicitly approved his reasoning.

(b) The Federal Court

The Federal Court's power to award costs is set out in section 43 of the *Federal Court Act 1976* (Cth):¹⁷

- (1) ...the Court or a Judge has jurisdiction to award costs in all proceedings before the Court ... other than proceedings in respect of which any other Act provides that costs shall not be awarded.
- ...
- (2) Except as provided by any other Act, the award of costs is in the discretion of the Court or Judge.

The Federal Court has made 'no costs' orders, but these are rare.¹⁸

3.2 United Kingdom

The courts of England and Wales have developed rules for the granting of 'protective costs orders'. The leading decision is that of the Court of Appeal in *R (Corner House Research) v Secretary for State for Trade and Industry*¹⁹ (**Corner House**). In that case the Court of Appeal set out the principles governing the award of PCOs and described their purpose as follows:

...the overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made.²⁰

In summary the principles identified by the Court of Appeal were that:²¹

- the issues raised are of public interest and require determination by the court;
- the applicant has no private interest in the outcome of the case;

¹⁶ *Oshlack v Richmond River Council* (1998) 193 CLR 72, 126.

¹⁷ The Federal Magistrates Court has a similar power to award costs under s 79 of the *Federal Magistrates Act 1999* (Cth).

¹⁸ See *Ruddock v Vardalis (No.2)* (2001) 114 FCR 229; *Australia Securities and Investments Commission, in the matter of GDK Financial Solutions Pty Ltd (in liq) v GDK Financial Solutions Pty Ltd (in liq) (No 4)* [2008] FCA 858; *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8; *Friends of Hinchinbrook Society Inc v Minister for Environment & Ors* [1997] FCA 295. For instances in which a 'no costs' order has been refused, see: *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 1108; *Save the Ridge Inc v Commonwealth of Australia* [2005] FCA 355; *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 900.

¹⁹ [2005] 1 WLR 2600. The House of Lords has not yet explicitly considered protective costs orders in public interest matters.

²⁰ *R (Corner House Research) v Secretary for State for Trade and Industry Ibid* [2005] 1 WLR 2600, [76].

²¹ *R (Corner House Research) v Secretary for State for Trade and Industry Ibid* [2005] 1 WLR 2600, 2625.

- it is fair and just, having regard to the resources of the parties and the costs likely to be incurred; and
- the applicant will probably discontinue the proceedings if the order is not made, and will be acting reasonably in doing so.

However, the Court refused to make a pre-emptive costs order²² on the basis that to do so would be an impermissible use of judicial power and a 'trespass into judicial legislation'.²³

It is noteworthy that the Court of Appeal observed that it anticipated that the principles set out in *Corner House* would be formalised and placed in the Civil Procedure Rules in the future. This does not appear to have occurred to date.

3.3 Other jurisdictions

The Canadian Supreme Courts have approved the making of PCOs in public interest matters. In South Africa, the specialist courts²⁴ adopt a rule that no costs orders will be made in public interest matters.

3.4 Need for law reform

The law in Australia in relation to PCOs in public interest matters requires confirmation and clarification. The Australian Courts have differed in their willingness to make PCOs in public interest matters and whilst the High Court has confirmed the courts' jurisdiction to do so, case law provides little guidance on what will constitute appropriate circumstances for making a PCO. Therefore, there is a need for law reform to:

- (a) confirm the courts' jurisdiction to make PCOs and thereby overcome any reluctance to make such orders due to concerns about 'judicial legislating'; and
- (b) clarify what factors are relevant to the discretion to make a PCO in public interest matters.

4. Explanation of the proposed amendment

4.1 Explanation

The proposed amendments²⁵ empower the relevant courts to make a PCO in a proceeding at any time prior to judgment. The court would be empowered to make orders that:

- a specified party will not be liable for costs, whether or not it is successful;
- one party's costs will be paid in whole or part by the other, regardless of the outcome of the proceeding; or
- the amount of costs for which a specified party may be liable will be capped.

²² A pre-emptive costs order is an order that a party will have its costs paid by another party or out of a fund whatever the outcome of the proceeding.

²³ *R (Corner House Research) v Secretary for State for Trade and Industry* [2005] 1 WLR 2600, 2626.

²⁴ Such as the Land Claims Court, Constitutional Court and the Labour Court.

²⁵ See Annexures A and B.

These orders can be made on such terms and conditions as the court deems fit.

The PCO amendment then prescribes 5 matters that the court must take into account when considering making a PCO. These 5 matters are derived from the *Corner House* decision (discussed at 3.2 above) and from Australian case law (which generally follows *Corner House*).

The PCO amendment does not fetter the court's discretion to make orders as to the costs in a proceeding. However, it does empower the court and guide the exercise of its discretion. It is intended that this will allay the type of concerns expressed by the Court of Appeal in *Corner House* that the making of a pre-emptive costs order would amount to the court engaging in 'judicial legislating' (see 3.2 above).

4.2 Safeguards

As the purpose of the provision is to protect public interest litigants, the proposed amendment contains mechanisms that guard against its misuse by guiding the court to relevant factors (sub-section 2 (a)-(e)). For instance, proposed sub-section (2)(d) enables the court to consider the nature and extent of any private or pecuniary interest that the applicant may have in the outcome of the proceeding, so that matters that are solely compensatory and which do not have implications for a broader group will be unlikely to attract a PCO.

Subsection 3 of the proposed amendment ensures the court retains flexibility in creating and amending a PCO. At any time the parties can return to the court to have the PCO reviewed. This ensures a balance is always maintained between the parties, and that a plaintiff who is protected by a PCO cannot unfairly vex a defendant by, for example, causing them to incur unnecessary costs, or delaying proceedings.

4.3 Other impacts

The proposed amendments may also have the effect of discouraging frivolous or vexatious claims. Prudent legal advice would dictate that any potential public interest litigant should seek a PCO at an early stage in the proceeding. If the court refuses to grant a PCO in a particular case, this refusal may indicate the likelihood of an adverse costs order ultimately being made against the party who sought the PCO and thus act as a disincentive to continuing the claim.

5. Conclusion

In PILCH's experience the risk of adverse costs orders is a significant impediment to access to the courts for disadvantaged and marginalised litigants with meritorious public interest claims. This impediment to access to the courts is contrary to article 14(1) of the ICCPR. The HRC has found that a rigid application of a policy to award costs to the winning party may breach the right of access to justice contained in the right to a fair hearing. Therefore in order to ensure effective access to the courts in accordance with the right to a fair hearing, it is necessary that the courts are specifically conferred with power to make orders protecting public interest litigants from adverse costs awards in appropriate cases.

ANNEXURE A – Proposed legislative amendment to confer power on the High Court to make protective costs orders

Section 26 of the *Judiciary Act 1903* (Cth) be amended by inserting the following sub-sections:

- (2) The power of the Court to make an order in respect of costs shall include a power to make any of the following orders in a proceeding at any time prior to judgment:
 - (a) a party will not be liable to pay costs, whether or not that party is unsuccessful in the proceeding;
 - (b) there be no orders made as to the costs of the parties to the proceeding;
 - (c) a party's costs will be paid in whole or in part by another party, whether or not the first party is successful in the proceeding;
 - (d) the costs for which a particular party may be liable are not to exceed an amount specified in the order.
- (3) Without limiting the matters the Court may take into account in determining whether to make an order under sub-section (2) the Court must take into account the following matters:
 - (a) whether it is in the public interest that the issues raised, or likely to be raised, in the proceeding be determined by the Court;
 - (b) the evidence before the Court as to the financial resources of the parties to the proceeding;
 - (c) the costs that are likely to be incurred in the usual course by the parties to the proceeding;
 - (d) the nature and extent of any private or pecuniary interest that the applicant for the order has in the outcome of the proceeding;
 - (e) any prejudice any other party to the proceeding may suffer if the order is made.
- (4) An order made under sub-section (2):
 - (a) may be made on such terms and conditions as the Court deems fit;
 - (b) is subject to any further or other order of the Court.

ANNEXURE B – Proposed legislative amendment to confer power on the Federal Court to make protective costs orders

Section 43 of the *Federal Court Act 1976* (Cth), and section 79 of the *Federal Magistrates Act 1999* (Cth) be amended by inserting the following sub-sections:

- (3) The power of the Court to make an order in respect of costs shall include a power to make any of the following orders in a proceeding at any time prior to judgment:
 - (c) a party will not be liable to pay costs, whether or not that party is unsuccessful in the proceeding;
 - (d) there be no orders made as to the costs of the parties to the proceeding;
 - (e) a party's costs will be paid in whole or in part by another party, whether or not the first party is successful in the proceeding;
 - (f) the costs for which a particular party may be liable are not to exceed an amount specified in the order.
- (4) Without limiting the matters the Court may take into account in determining whether to make an order under sub-section (3) the Court must take into account the following matters:
 - (g) whether it is in the public interest that the issues raised, or likely to be raised, in the proceeding be determined by the Court;
 - (h) the evidence before the Court as to the financial resources of the parties to the proceeding;
 - (i) the costs that are likely to be incurred in the usual course by the parties to the proceeding;
 - (j) the nature and extent of any private or pecuniary interest that the applicant for the order has in the outcome of the proceeding;
 - (k) any prejudice any other party to the proceeding may suffer if the order is made.
- (5) An order made under sub-section (3):
 - (l) may be made on such terms and conditions as the Court deems fit;
 - (m) is subject to any further or other order of the Court.