17 September 2012

Submission to the New South Wales Law Reform Commission: Consultation Paper 13

PILCH response to request for further information

Contact: Gregor Husper
Special Counsel & Referral Service Principal Lawyer
P (03) 86364414
Public Interest Law Clearing House (PILCH)

17/461 Bourke St Melbourne VIC 3000
Tel: (03) 8636 4400 | Fax: (03) 8636 4455
www.pilch.org.su

1. Introduction

We refer to the Law Reform Commission's (**LRC**) email of 8 August 2012, in which it requests a response to specific questions about protective costs orders and public interest orders (collectively, **PCO**), pursuant to the LRC's Consultation Paper 13 (**LRC Consultation**).

We respond to those questions as follows:

2. LRC Question 1

1. Can you provide examples of public interest law cases that have arisen in NSW courts, apart from environmental matters in the Land and Environment Court, where the potential for costs orders and/or security for costs were significant issues that may have prevented the litigation?

2.1 Comment

A threshold observation is that the potential for adverse costs orders is a relevant consideration for all litigants. This is particularly the case for public interest litigants because they typically:

- have no (or limited) personal monetary interest in the matter under review;
- seek declarative or restorative justice rather than compensation; and
- act in their own individual capacity, or are organisations with limited financial means.

In our experience the risk of adverse costs is the single most significant ground for the abandonment of meritorious public interest litigation; legal merit being a pre-condition for most public interest litigation, which depends on support from layers and counsel acting pro bono.[1]

We provide below a number of case studies where the potential for adverse costs was a significant issue that may have prevented, or did prevent, public interest litigation from proceeding. The cases are drawn from the recent experiences of a number of our colleagues at Victorian Community Legal Centres (**CLCs**), and accordingly arise in the Victorian or High Court jurisdiction.

The cases are provided by the Human Rights Law Centre (**HRLC**); the Environment Defenders Office Vic (**EDO**); the Flemington & Kensington Community Legal Centre (**FKCLC**); **Youthlaw**; and **PILCH Vic**. In all cases, the public interest client was represented by the CLC (or referred by it), and mostly in conjunction with pro bono lawyers and counsel.

[1] We address this in our submission to the LRC Consultation (PILCH Vic, *Submission to the New South Wales Law Reform Commission Consultation Paper 13 - Security for costs and associated costs orders*, 19 August 2011, p12), in which we observe that matters without legal merit are unlikely to attract pro bono support, and would not likely attract a PCO under the model proposed by PILCH (except, potentially, in cases where the public interest is overwhelmingly significant).

2.2 HRLC Cases

***Castles v Secretary of Department of Justice* [2010] VSC 310**

Public interest:

This case determined the rights of prisoners to access medical treatment, which is a significant area of unmet legal need, uncertainty and inquiry for prisoners.[2]

Case note:

Ms Castles, a prisoner, began IVF treatment prior to receiving a three year sentence for social security fraud, commencing November 2009. The course of treatment was interrupted by her imprisonment and she would be ineligible for IVF from December 2010 by reason of her age.

Emerton J of the Victorian Supreme Court found that Ms Castles had a right under s 47(1)(f) of *the Correction Act* (Vic) to undergo IVF treatment. *The Corrections Act* was found to entitle prisoners to 'do more than remain in a "holding pattern" with respect to their health while imprisoned.' The Court recognised that IVF is 'a legitimate medical treatment for a legitimate medical condition'.

Costs considerations:

Ms Castles was acutely concerned about the potential for an adverse costs order, but she ultimately decided to assume the costs exposure because her window of opportunity for a successful pregnancy through IVF was so limited,

***Rowe v Electoral Commissioner* (2010) 243 CLR 1**

Public interest:

Rowe determined the legitimacy of legislation that limited the ability of Australian citizens to participate in Federal elections.

Case note:

The plaintiff went to the High Court to challenge the constitutional validity of changes to the *Commonwealth Electoral Act 1918* made by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006.* The amending legislation sought to limit the time in which a voter may seek to enrol in a Federal election (or alter their enrolment details) after the writs for such an election have been issued by the Governor General. The Court by majority ruled that such restrictions were invalid.

Costs considerations:

Rowe was not judgment proof, but the case proceeded because it was sponsored by social change group, Get Up!, which underwrote her costs by member subscription. Failing this novel approach to funding, the matter might not have come before the court for determination.

[2] Public Interest Law Clearing House, *Law Behind Bars: PILCH Report on Prisoner Legal Assistance*, (14 September 2012).

***Roach v Electoral Commissioner* (2007) 233 CLR 162**

Public interest:

This case raised issues as to prisoners' rights, Indigenous rights, voting rights, representative democracy and responsible government.

Case note:

Ms Roach was an Aboriginal prisoner at the Dame Phyllis Frost Centre in Deer Park. In 2004, she was sentenced to a total of six years imprisonment with a four-year non-parole period for convictions related to robbery and seriously injuring a man. Ms Roach challenged the amendments made in 2006 to the *Commonwealth Electoral Act 1918* that disqualified all prisoners from voting.

The High Court upheld the fundamental human right to vote, finding that the Government had acted unlawfully and unconstitutionally in imposing a blanket ban denying prisoners the vote. The Court upheld the validity, however, of the law providing that prisoners serving a sentence of three years or longer are not entitled to vote.

Costs considerations:

Roach was judgment proof and was willing to accept the risk of an adverse costs order against her future financial position, enabling this matter to proceed. However, a number of parliamentarians that considered joining the action, decided not to due to the adverse cost exposure, removing the opportunity for their participation in the matter.

2.3 EDO Cases (see also *Watershed*, at 2.6)

***Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150**

Public interest:

This case considered allegations that Delta Electricity (**Delta**) was polluting water from Cox's River which forms part of Sydney's drinking water supply.

Case note:

On behalf of the Blue Mountains Conservation Society (the **Society**), EDO NSW ran civil enforcement proceedings in the NSW Land and Environment Court against Delta under the *Protection of the Environment Operations Act 1997*(**POEO Act**). The matter was settled out of court in voluntary mediation after Delta's application to have the motion struck out was rejected. Part of the agreement to settle required that Delta admit that it polluted waters within the meaning of s. 120 of the POEO Act, without authorisation under its licence.

Costs considerations:

In affidavit evidence, the then president of the Society stated that without a PCO, the Society would not continue with the proceedings, as an adverse costs order would likely exceed its total funds and assets, and they were not willing to risk the entire Society for one court case.

Justice Pain of the Land and Environment Court made an order limiting the Society's liability to pay costs if unsuccessful at $20,000, finding the case was brought in the public interest, was likely to raise novel questions of law and that the applicant would not continue unless an order capping costs was made. Notably, the cost capping applied equally to both parties, despite their vastly disparate financial resources.

Dual Gas Pty Ltd & Ors v Environment Protection Authority **[2012] VCAT 308 (29 March 2012)**

[appeal not commenced]

Public interest:

This case had the potential to determine rights to access to information, and by extension, access to justice in environmental matters at the Victorian Civil and Administrative Tribunal (**VCAT**).

Case note:

Proceedings were taken at VCAT against a new brown coal fired power station. In that case, Dual Gas claimed that much of the information relevant to the proceedings was commercial in confidence. Consequently, most parties signed undertakings with VCAT not to disclose the information. However, Dual Gas sought an order preventing Martin Shield, an unrepresented objector, from viewing the information, in any event.

VCAT accepted Dual Gas' argument that Mr Shield should not have access to certain of the information. VCAT considered that much of it was of a technical nature and Mr Shield did not have the necessary expertise to make use of it. Mr Shield considered appealing the decision. The EDO considered the decision established a poor precedent on access to justice in environment cases, and that an appeal to the Supreme Court would raise important public interest issues.

Costs considerations:

The EDO raised with Mr Shield the possibility of obtaining a PCO, but explained that a PCO had not been granted in the Victorian Supreme Court before. The EDO further explained that he would be liable for the costs of the PCO application, if it was unsuccessful. As an individual, with a family, Mr Shield decided not to appeal because the costs risk was too great.

2.4 FKCLC cases

Haile-Michael v Konstantinidis **[2012] FCA 108 [hearing pending]**

Public interest:

Haile-Michael is an important public interest case involving a claim of racial discrimination by racial profiling against several members of the Victorian Police, the Chief Commissioner of Victoria Police, and the State of Victoria.

Case note:

The applicants were eleven (now six) young people of African descent. They claim that Victorian police have disproportionately targeted, stopped, questioned, and searched young Africans in Flemington and Kensington because of their race. In doing so, the applicants claim the respondents unlawfully discriminated against them in contravention of s 9(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**) and engaged in offensive behaviour based on racial hatred in breach of s 18C of the RDA.

Costs considerations:

The applicant's ability to prosecute their case is only possible because the parties consented to a mutual cost-cap, formalised by the Federal Court under order 62A of the *Federal Court Rules*.

***Flemington & Kensington Community Legal Centre (FKCLC) v Victoria Police* [appeal not commenced]**

Public interest:

This case had the potential to determine the 'public interest override' under the *Freedom of Information Act 1982* (Vic) (**FOI**) in an application for the release of a Victoria Police review into the culture and practice of a suburban police station.

Case note:

Victoria Police commissioned an Ethical Health Check (**EHC**) into the practices of the Flemington Police Station after numerous complaints of excessive force and racism by affected individuals and concerned community parties, including the local City Council and Youth Services. The FKCLC were shown a copy of the EHC in a meeting, but it was not otherwise publicly released. The EHC was critical of identified individual officers (including the officer in charge) and of practices and cultures within the station. The FKCLC were unsuccessful in first instance at VCAT in seeking release of the EHC under FOI.

Costs considerations:

FKCLC obtained positive advice from senior counsel as to the merits of an appeal, but it could not risk an adverse costs order, which may have closed the Centre and its work in the community. This deprived the community an opportunity to see the EHC and to test the FOI public interest override.

2.5 Youthlaw Case:

***Bare v Rai Small SCI*-4583/2010 [outcome pending]**

Public interest:

This case considered the right of an individual who raises a complaint (of police abuse) to have the matter considered by an adequate and independent investigative body, capable of resulting in prosecution and/or discipline of the perpetrators.

Case note:

Mr Bare was under the age of 18 years at the time he made a complaint of assault by the police, including that they broke his teeth against a gutter, capsicum-sprayed him while he was handcuffed and racially abused him. Lawyers assisting Mr Bare requested that the Office of Police Integrity (OPI) rather than Victoria Police's internal Ethical Standards Department (ESD) deal with the matter, because, they claimed, ESP was insufficiently transparent or independent. This OPI rejected this request, maintaining that the ESP could investigate with the matter.

Mr Bare has appealed the OPI decision to the Supreme Court of Victoria. Counsel for Mr Bare has argued that the decision by OPI failed to consider Mr Bare's rights under *the Charter of Human Rights and Responsibilities Act 2006* (Vic), because it failed to consider his right to have his complaint heard by a sufficiently transparent, independent, non-hierarchical body.

Costs considerations:

The OPI indicated it would seek costs ahead of the Supreme Court hearing. Mr Bare would be unable to pursue his complaint if subject to such prohibitive costs. The parties are negotiating a protective costs order.

2.6 PILCH referred cases:

Cobaw Community Health Services v Christian Youth Camps Ltd & Anor **[2010] VCAT 1613, &**

Christian Youth Camps Ltd v Cobaw Community Health Services Ltd **[2011] VSCA 284 [partially heard]**

Public interest:

This case tests the extent of the 'religious belief' exception to the anti-discrimination provisions of the *Equal Opportunity Act 1995* (Vic).

Case:

Cobaw, an organisation that conducts suicide prevention projects and support for same-sex attracted youth, was denied access to hiring a camping facility managed by Phillip Island Adventure Resort. The camp is operated by Christian Youth Camps Ltd (**CYC**), which refused to make the booking because of the sexual orientation of the retreat attendees.

In finding that CYC directly discriminated against the attendees, Vice President Judge Hampel of VCAT awarded $5,000 in damages and issued a declaration that CYC had unlawfully discriminated against the attendees. Justice Hampel concluded that CYC's activities in conducting their camp were not religiously motivated, despite their claim to a 'religious inspiration'. VCAT found that CYC's conduct in refusing the booking was based on their objection to homosexuality, which they were not entitled to impose them on others. CYC has appealed to the Victorian Court of Appeal, and there are two interveners to that appeal

Costs consideration:

Cobaw sought a protective cost order for the appeal, on the basis that the effect of a substantial costs order against it would put "significant aspects of its health services delivery at risk." CYC ultimately agreed, and the Court of Appeal made orders by consent, limiting the costs of both parties to $50,000.

Watershed Victoria **[appeal discontinued]**

Public Interest:

This case sought to develop PCO jurisprudence and to determine privacy rights under both privacy legislation and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**).

Case note:

Chris Heislers and Stephen Cannon, members of water conservation group Watershed Victoria Inc, sought judicial review of a decision by the Victoria Police and the Department of Sustainability and Environment (**DSE**) to enter into a memorandum of understanding (**MoU**) with a consortium building a desalination plant. The MoU allowed the Victoria Police and the DSE to transfer private information on individuals protesting the plant to the consortium.

The Victorian Supreme Court found the applicants had a prima facie case, and granted leave to commence proceedings under the *Administrative Law Act 1978* (Vic). The applicants additionally sought a PCO. The respondents sought to strike out the proceedings. The Court ordered that the PCO application was to be heard with the respondents' strike-out motion, and it listed these for a two day hearing.

Costs considerations:

By listing the PCO application with the substantive matter, the clients would not know if their PCO application was successful until after the two day hearing, at which point their costs exposure would already be considerable. This, combined with the lack of an express power for the Court to grant a PCO, was determinative in the applicants deciding to discontinue. This removed any opportunity to determine the public interest privacy issues, and to develop PCO jurisprudence.

3. LRC Question 2

2. Is the existing case law in relation to costs and security for costs in public interest cases deficient or otherwise in need of clarification? Please provide examples from your experience.

3.1 Comment

If there is any 'deficiency' in the case law on PCO, it is the lack of it. We do not consider that the case law itself requires clarification. Rather, what the case law demonstrates is that PCO are relatively novel in the Australian jurisdictions; and in those cases where PCO have been sought, the rule that 'costs follow the event' has, in the main, limited the courts' willingness to develop and apply a PCO regime in exercise of their discretion as to costs.

As stated in our earlier submission to the LRC Consultation (the **Submission**):[3]

> *The principle argument for a legislative regime is the demonstrable reluctance on the part of the courts in Australia to make PCO orders, in reliance [of] their inherent costs discretions, or indeed under the limited NSW schemes under UCPR 42.4 or the Land and Environment Court Rules 2007.*

and:

> *The situation in Australia stands in contrast to other Commonwealth jurisdictions where the courts have been prepared to introduce a more comprehensive (albeit judiciously applied) common law PCO regime.*

It is on this basis that PILCH advocates a legislative PCO model; to invest the courts with a clear mandate and framework for considering and granting PCO, in preference to a mostly ad hoc, uncertain or lacking common law application.

4. LRC Question 3

3. If litigation in the public interest were made a relevant factor in decisions about cost capping, could the costs capping provision in 42.4 of the UCPR provide satisfactorily for costs in public interest cases?

As we noted in the Submission, rule 42.4 of the UCPR (the Rule), does not sufficiently provide for costs in public interest matters. Specifically, the Rule fails to:

- establish a framework for determining whether to make a PCO;
- specify the range of orders available to the Court; and
- specify that a PCO may be made at any stage of the proceedings.

Whilst the Rule has potential to be applied flexibly,[4] PILCH submits the courts and litigants would benefit from a more certain, detailed and directive legislative PCO regime. In the Submission, we made recommendations for the key elements of a PCO regime, as follows:

[3] PILCH Vic, Submission to the New South Wales Law Reform Commission Consultation Paper 13 - Security for costs and associated costs orders, 19 August 2011, at p12.

- *A two stage approach, where the first stage is to assess whether the proceedings are 'public interest proceedings' and the second stage is to assess what PCO is appropriate in all the circumstances;*
- *In the first stage, the use of guiding factors to assist a court to determine whether a matter is a 'public interest proceeding';*
- *In the second stage, the use of guiding factors to assist a court to determine what PCO is appropriate; and*
- *The availability of a [specified] broad range of orders, including capped costs or an order that, regardless of the outcome, the public interest litigant will pay no costs.*[5]

and:

- *a regime which [specifically] enables a court to make PCO at any stage of the proceedings.*[6]

The Submission provides a list of recommended guiding factors and orders for incorporation into PCO legislation.[7]

We submit it is preferable to provide that level of detail. For example, this would address the current unpredictable approach taken by the courts in determining if a matter is in the public interest, and whether that is enough, or if something 'extra' is required for a PCO.[8] It might also address a limitation under Federal Court Rule 62A, where the courts have consistently held that an order for maximum costs must apply equally to both parties.[9] This is not a requirement of rule 62A or of the Rule,[10] but in the absence of clear guidance in the legislation, it has the potential to become the established position.

---

[4] For example, the granting a PCO at an early stage of proceedings in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263

[5] Op cit. PILCH Submission to the LRC Consultation, p13.

[6] Ibid, p14

[7] Ibid, pp14 & 15.

[8] See, for example: Oshlack v Richmond River Council, (1998) 193 CLR 72; Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts (No 2), [2009] FCA 466; Save the Ridge Inc v Commonwealth,(2006) 230 ALR 411; and Woodlands v Permanent Trustees Co Limited [1995] FCA 1388, [148].

[9] Op cit. PILCH Submission to the LRC Consultation, Attachment 2, p16.

[10] *Caroona Coal Action Group v Coal Mines Australia Pty Ltd and Another* [2009] NSWLEC165,[12]. Basten JA in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263 at [187] agreed that the language of rule 42.2 does not constrain the judge from binding only one party with a maximum costs order.

5. Conclusion

In response to LRC's preliminary view that it would have insufficient factual basis for recommending PCO orders,[11] we submit the case in favour is predicated upon:

- the desirability to facilitate public interest litigation;[12]
- the demonstrable chilling effect of potential adverse costs orders; and
- the demonstrable judicial caution and uncertainty in applying PCO criteria and in determining PCO cases.

[11] Paul McKnight, NSW Law Reform Commission, email of 8 August 2012.

[12] Public interest litigation is a mechanism for maintaining the rule of law by ensuring that uncertain or unjust laws are tested, that laws are not selectively enforced, and by increasing public confidence in the law. In particular, public interest litigation determines rights on behalf of economically and socially disadvantaged persons and addresses issues of systemic and public importance. Public interest litigation is frequently initiated by parties with little or no personal interest in the outcome, and on behalf of the voiceless, for example in animal law, environmental law, or refugee matters. To the extent that public interest involves questions of administrative law, the ability of public interest litigants to test government decisions is also an important check on the use of executive power.