



NATIONAL PRO BONO RESOURCE CENTRE

**Submission to the New South Wales Law Reform Commission:
Inquiry into Security for Costs and Associated Costs Orders**

February 2010

**National Pro Bono Resource Centre
Law Building, UNSW 2052 NSW
www.nationalprobono.org.au**

Maria Twomey and David Glanz
National Pro Bono Resource Centre
Law Building, UNSW NSW 2052

T: 
E: 
W: www.nationalprobono.org.au

About the National Pro Bono Resource Centre

The Centre is incorporated as a company limited by guarantee and was established at UNSW in 2002 following the recommendation by the National Pro Bono Task Force to the Commonwealth Attorney-General. The Centre exists to support and promote the provision of pro bono services. Its role is to stimulate and encourage the development, expansion and coordination of pro bono services as well as offering practical assistance in this regard.

The Centre is an independent, non-profit organisation that aims to:

- Promote pro bono work throughout the legal profession;
- Undertake research and projects to inform the provision of pro bono legal services;
- Provide practical assistance to pro bono providers (including information and other resources);
- Develop strategies to address legal need; and
- Promote pro bono law to community organisations and the general public.

The Centre receives financial assistance from the Commonwealth and States' and Territories' Attorney-General's Departments, and support from the Faculty of Law at the University of New South Wales.

The Centre has established an Advisory Council and consults widely with the legal profession, Community Legal Centres (**CLCs**), pro bono referral schemes, Legal Aid, Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) and produces resources of immediate benefit to the legal profession and community sector.

1. Introduction

This submission makes the following comments in relation to the following Terms of Reference of the Inquiry:

- i) Whether the law and practice relating to security for costs and associated costs orders:
 - a) is consistent with modern notions of access to justice;
 - b) adequately takes into account the strength of the plaintiff's case and whether the litigation is in the public interest;
 - c) applies satisfactorily in the case of incorporated plaintiffs, impecunious plaintiffs, self-represented litigants, and plaintiffs who are supported by legal aid;
 - d) operates appropriately where solicitors are acting on a speculative fee; where parties are funded by third parties; in representative proceedings; and in cross-border litigation;
 - e) contains adequate procedures for making and determining applications for relevant orders - for example, in respect of timing, and in respect to their expeditious and efficient disposition; and
- ii) Whether the Uniform Civil Procedure Rules 2005 in relation to Security for Costs and associated orders are adequate, and any related issue.

2. Recommendations

The Centre recommends as follows:

Recommendation 1- That in NSW the indemnity principle should be abrogated, to the extent necessary, to ensure that litigation costs can be awarded in pro bono cases. This should be regardless of whether or not a litigant has been referred for assistance through a court-based pro bono referral scheme.

Recommendation 2 – Any provisions which contemplate making personal costs orders against legal practitioners should exempt lawyers acting on a pro bono basis.

In particular s. 99(1) (b) of the Civil Procedure Act 2005 that authorises the court to make such an order if it appears that costs have been incurred,

(b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible

should exempt a lawyer acting pro bono for the client.

Also a lawyer acting pro bono who commences proceedings without reasonable prospects of success contrary to Division 10 of the Legal Profession Act 2004 should be exempt from personal costs orders being made against him or her pursuant to s. 348 of the Act (whilst still being subject to s.347 (that requires certification that the claim or defence has reasonable prospects of success)).

Recommendation 3 – All relevant NSW court Acts should specifically confer power on that court to declare a litigant ‘a public interest litigant’, to make protective costs orders and to set out criteria that must be taken into account in making such orders.

Recommendation 4 – If a litigant is declared a public interest litigant by a court then no security for costs orders should be made against that litigant.

Recommendation 5 – That the NSW Model Litigant Policy for Civil Litigation should be reviewed to list criteria that must be considered by government and all its agencies to decide whether to seek a costs or security for costs order against a public interest litigant and the Policy should state that costs orders will not be sought against any party declared a public interest litigant by the court. These criteria should include whether a person is being acted for on a pro bono basis.

3. Acknowledgements

The Centre recognises that numerous pro bono organisations, community legal centres and private law firms¹ are advocating for legislative reform in the area of costs in public interest and pro bono litigation. The Queensland Public Interest Clearing House (QPILCH) has prepared a comprehensive research paper entitled ‘Costs in public interest proceedings in Queensland’,² and Public Interest Law Clearing House (PILCH (Vic)) has made submissions to both the Victorian and the Commonwealth Attorneys-General on the Recovery of Costs in Pro Bono Matters³ and to the Commonwealth Attorney-General on Protective Costs Orders⁴. The Centre endorses these submissions, calls for law reform in this area and acknowledges that parts of this submission rely on those submissions and the substantial amount of research that has been made available by public interest organisations.

4. Definition of pro bono

There is no universally accepted definition on what is meant by pro bono. For the purposes of this submission the Centre defines pro bono work as time spent by lawyers:

1. Giving legal assistance for free or at a substantially reduced fee to:
 - (a) individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or
 - (b) individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or

¹ See, for example DLA Phillips Fox: *Inquiry into access to Justice: Submission to the Senate Legal and Constitutional Affairs Committee* at 31, available at:

http://www.aph.gov.au/SENATE/COMMITTEE/legcon_ctte/access_to_justice/submissions.htm.

² Queensland Public Interest Clearing House, *Costs In Public Interest Proceedings In Queensland*, (2005), available at: http://www.qpilch.org.au/_dbase_upl/Costs_pi_litigation.pdf

³ Public Interest Law Clearing House (Vic): *Submission to the Commonwealth and Victorian Attorneys-General on Recovery of Costs in Pro Bono Matters*(Lucy McKernan & Gergor Husper) April 2009, available at:

http://www.pilch.org.au/2009_submissions/#16.

⁴ Public Interest Law Clearing House (Vic): *Submission to the Commonwealth Attorney-General on protective Costs Orders* (Lucy McKernan & Gregor Husper) April 2009, available at:

http://www.pilch.org.au/2009_submissions/#16.

- (c) charities or other non-profit organisations which work on behalf of low income or disadvantaged members of the community or for the public good;
2. Conducting law reform and policy work on issues affecting low income or disadvantaged members of the community, or on issues of public interest;
 3. Participating in the provision of free community legal education on issues affecting low income or disadvantaged members of the community or on issues of public interest; or
 4. Providing a lawyer on secondment at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.

5. Modern notions of access to justice

5.1 Introduction

The issue of costs permeates the whole of the administration of civil justice. It affects access to justice because costs can place the courts beyond the reach of those who cannot afford, or cannot afford to risk, the costs implications of resolving disputes.⁵ The risk of an adverse costs order can deter litigants and their representatives from pursuing meritorious public interest matters and enforcing their rights. The deterrent is even more substantial where the matter concerns an unresolved area of law and legal representatives cannot provide a clear indication on the likely outcome of the case. As a result of these barriers, important legal issues affecting the community may not be debated and resolved.

This impediment may undermine the right to a fair hearing contained in article 14(1) of the *International Covenant on Civil and Political Rights*. Whilst Australia does not have a Human Rights Act or Charter (although two Australian jurisdictions, Victoria and the ACT, have statutory human rights Acts), the principle of a fair trial is recognised in Australian case law.⁶ An essential component of the right to a fair hearing is that a party is able to present his or her case under conditions which do not place them at a significant disadvantage compared to the other party. This right cannot be realised if access to justice for disadvantaged litigants is hindered by exposure to adverse costs orders.

Pro bono legal work is work done for the public good. This work makes legal services available to low-income and disadvantaged individuals who generally do not qualify for legal aid and organisations who work on behalf of low income or disadvantaged members of the community which would otherwise not have access to justice. Accordingly, greater pro bono participation should be encouraged. Despite this, the current law and practice relating to costs orders contains notable hindrances to pro bono participation and through it, access to justice.

⁵ Dorne Boniface and Miiiko Kumar, *Principles of Civil Procedure in New South Wales* (2009).

⁶ See *Dietrich v R* (1992) 177 CLR 292, *Jago v District Court of NSW* (1989) 168 CLR 23 and *R v Macfarlane; Ex Parte O'Flanagan* (1923) 32 CLR 518 at 541-542. Whilst these cases recognise the principle of a fair trial in criminal proceedings, the principle is also recognised in civil proceedings (requirements of procedural fairness), See: *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286.

5.2 Costs exposure as a deterrent to pro bono participation

(a) The Indemnity Principle

Section 98 (1) (a) of the *Civil Procedure Act* (2005) CPA provides that the costs are in the discretion of the court. Rule 42.1 of the *Uniform Civil Procedure Rules* (UCPR) however recognises the general law presumption that unless some other order should be made, ‘costs follow the event’⁷ and in general they are assessed on an ordinary basis.⁸ The purpose of a costs order is to compensate the successful party in litigation for those costs necessarily incurred to obtain justice (known as the indemnity principle).⁹ However, where a successful litigant is under no obligation to pay his lawyer, there is no scope for the indemnity principle to operate.¹⁰ This is a key concern in the context of pro bono representation since the successful party does not need to be compensated where no loss has been incurred.¹¹

The current structure places pro bono advocates in the compromised position of acting for free and not for personal gain while assuming a great risk for costs. The existence of limitations resulting from the principle’s compensatory structure was recognised by Kirby J in *Oshlack v Richmond River Council*.¹²

Additionally, while the indemnity principle is clear, its application is ad hoc. The extent to which the indemnity principle permits costs recovery in pro bono cases is uncertain, especially considering existing case law¹³.

In *Wentworth v Rogers*¹⁴ the New South Wales Court of Appeal has stated that “the indemnity principle continues to exist but should be applied flexibly rather than made into a rigid rule.”¹⁵ The court considered the application of the indemnity principle to a costs agreement which stated that a counsel’s services were provided on a “pro bono basis”, with an obligation to pay arising only upon “costs being successfully recovered from the other party”. The costs agreement in question also contained a residual obligation to make a payment where no such recovery was made, by way of undertaking to “pay... when and if...in a position to do so.”¹⁶

The judgements in *Wentworth*¹⁷ make it clear that where a party has no obligation to pay his solicitor, the indemnity principle cannot be applied.¹⁸ In his substantive judgement Santow JA commented:

⁷ *Ritter v Godfrey* [1920] KB 47; *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd v Lane Industries Pty Ltd)* (1993) 26 PR 261.

⁸ *Uniform Civil Procedure Rules 2005* (NSW) r42.2.

⁹ Dorne Boniface and Miiko Kumar, *Principles of Civil Procedure in New South Wales* (2009) at 87.

¹⁰ *Baker & Anor v Kearney* [2002] NSWSC 746 (total estimate of the costs to be paid by the client was furnished by counsel, but the agreement did not oblige the payment of fees).

¹¹ “Where a party to an action has an agreement with their legal adviser that they do not have to pay any costs, then the general law principle states that that party cannot recover party and party costs against their adversary”: *McCullum v Ifield* [1969] 2 NSW 329 at 330 per Taylor J citing *Gundry v Sainsbury* [1910] 1 KB 645

¹² *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 134. Hereon, *Oshlack*.

¹³ *Wentworth v Rogers* [2006] NSWCA 145 at 132.

¹⁴ *Wentworth v Rogers* [2006] NSWCA 145. Hereon, *Wentworth*.

¹⁵ *Wentworth v Rogers* [2006] NSWCA 145 at 50.

¹⁶ *Ibid* at 52.

¹⁷ [2006] NSWCA 145 at 132.

“ The ultimate application of the indemnity principle will depend on the content and proper construction of the costs agreement.”¹⁹

The judges however took a different approach on what satisfies the indemnity principle’s requirement that there be an obligation to pay an advocate. Santow JA found a conditional costs agreement met this threshold. Commenting on the policy behind this conclusion, he noted that conditional costs agreements facilitate access to justice²⁰:

“It is reasonable...to recognise in a costs agreement that the unsuccessful party who is subject to a costs order may defeat or delay recovery. Hence predicating payment on successful recovery is not unreasonable.....this gives no unjustified bonus to the successful party nor does it impose any punishment on the losing one, so as to invoke the rationale behind the indemnity principle.”²¹

A higher standard for conditional cost agreements was established by Basten JA. While both agree that a legal liability to pay costs is prima facie required, Basten JA explored the temporal nexus between the existence of the obligation to pay and when the costs order is sought.²² He held there must be a “contractual entitlement to charge fees, subject to a condition subsequent, rather than an entitlement which arises as a result of a successful outcome.”²³ This means that the obligation to pay must be created through the solicitor’s retainer and any attempts to release the litigant from his duty to pay his advocate may be effected through a condition subsequent.

In the present case, where the obligation materialised only when recovery of costs was made possible, Basten JA held there was no obligation with respect to which an indemnity could operate.²⁴ Basten JA formulated his approach on the basis that

“It is not possible to make the existence of a right to charge dependent on recovery of the moneys from which the charges would be paid.”²⁵

The judgements in *Wentworth*²⁶ reveal how the current costs framework, built on the indemnity principle, leave pro bono advocates exposed to costs in the event of a loss and precariously positioned to recoup their expenses if successful. Pro bono involvement in the community takes on different forms. While it would be ideal if all lawyers could freely contribute their time, the system needs to acknowledge the varying risks and costs a lawyer is willing to write off. Accommodating those lawyers who are willing to provide services on a speculative fee arrangement (e.g. no win/no fee basis that maintains their ability to recover costs if successful) is important for encouraging greater access to legal services in the community. And while aiming to comply with Basten JA’s more stringent threshold seems to be the prudent path for lawyers keen to keep open the possibility of recovering costs, the lack of judicial unanimity on the issue begs legislative reform.

¹⁸ Ibid at 45.

¹⁹ Ibid at 49.

²⁰ Ibid at 51.

²¹ Ibid at 54.

²² Ibid at 51, 127.

²³ Ibid at 133.

²⁴ Ibid at 112.

²⁵ Ibid at 133.

²⁶ [2006] NSWCA 145 at 132.

(b) An uneven playing field

A costs order is not meant to punish, nor is it meant to be a dividend. The possibility of having to pay one's opponent's legal costs discourages unjustified litigation. It also encourages parties to refrain from incurring unnecessary costs, and acts as an incentive for settlement.

Under the current system a litigant who is represented pro bono may not be able to recover his costs even if his claim is successful, whilst still being liable for the other party's costs if his case is unsuccessful. The reverse is that an opponent of a litigant who is represented pro bono may benefit from not having to pay his opponent's costs, even if he is unsuccessful.²⁷

Attempts have been made through the use of conditional fee arrangements to level this inequitable setup. The client is required to contractually agree to be bound to pay the advocate in the event of being successful and being awarded a costs order.²⁸ This is in line with *Griffiths v Boral Resources (Qld) Pty Ltd*,²⁹ where the court held

“the **better** view is that the practitioner is entitled to recover his or her costs from the assisted litigant for whom the practitioner acts, rather than from the party ordered to pay the costs.”

While the case of *Wentworth*³⁰ appears to have endorsed such an approach, Basten JA³¹ noted that notwithstanding any pro bono label, the terms of such a scheme may suggest it has left the realm of pro bono and is more accurately construed as a speculative fee arrangement. Thus if the legal representation is taken to be provided on a fee for service basis, albeit speculative, the client would likely be unable to take advantage of any provisions that protect a pro bono matter (for example, shielding the advocate from a costs order, as advanced in recommendation 2 above).

Certain benefits that accrue to a costs system based on the indemnity principle are also unavailable to a pro bono litigant. In regular litigation, the possibility of losing and thus being liable for a costs order forces litigants to conduct their cases expediently and functions as a deterrent against those cases comprising little merit. In some cases, the prospect of an adverse costs order encourages litigants to settle out of court. In the context of pro bono representation however, where the opposing party knows that, based on the doctrine of compensation, they will not be liable for a costs order, such cost deterrents do not exist. Thus the pro bono litigant is in the disadvantageous position of having this vulnerability exploited.³²

²⁷ *The Final Report of the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice* (“2004 Senate Report”), available at: www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/ch09.htm, referred to anecdotal information that suggested that some lawyers use delaying tactics against pro bono litigants, thus recommending that all courts consider amending their rules to allow lawyers who provide pro bono legal services to recover their costs in similar circumstances to those litigants who pay for their legal representation.

²⁸ John Corker, ‘Funding Litigation: The Challenge’ (2007) *UNSWLRS* 2.

²⁹ *Griffiths v Boral Resources (Qld) Pty Ltd (No 2)* [2006] FCAFC 196 at 31 per Collier J.

³⁰ [2006] NSWCA 145 at 132.

³¹ *Wentworth v Rogers* (2006) NSWCA 145 at 130-132.

³² The 2004 Senate Report referred to anecdotal information that suggested that some lawyers use delaying tactics against pro bono litigants, thus recommending that all courts consider amending their rules to allow lawyers who provide pro bono legal services to recover their costs in similar circumstances to those litigants who pay for their legal representation: above n 30, 178-179.

Law reform is needed to clearly distinguish between no win/no fee matters and those done on a pro bono basis. At present, there is no difference in the solicitor/client agreements as the uncertainty has forced pro bono solicitors to adopt the no win/no fee cost agreements.

The decision in the Canadian case of *PHS Community Services Society v Canada (Attorney General)*³³ provides an important counterpoint, functioning as a working example of achieving equity by going around the general costs rule. There Justice Pitfield awarded special costs on a full indemnity basis to pro bono advocates in a public interest matter, acknowledging: “The defendant should not derive a windfall because of the fact that a third party has underwritten the costs of the litigation.”

(c) Court pro bono referral schemes

In addition to inequitable outcomes that depend on who are the court participants, there is also inconsistency when recovering costs in different courts. When providing legal assistance under the Pro Bono Assistance Schemes in each of the Federal Court, Federal Magistrates Court and the Supreme Court of NSW, the advocate is entitled to recoup from the losing party the amount of any costs recovered through a costs order. However lawyers acting through other pro bono referral schemes do not share this entitlement. There is no rationale for this disparity. In both cases, legal services are extended to the community. Rectifying these discrepancies would further assist with the goal of providing greater access to justice.

Recommendation 1- That in NSW the indemnity principle should be abrogated, to the extent necessary, to ensure that litigation costs can be awarded in pro bono cases. This should be regardless of whether or not a litigant has been referred for assistance through a court –based pro bono referral scheme.

(d) The United Kingdom Approach

The United Kingdom Parliament addressed the ‘uneven playing field’ problem by introducing s 194 of the *Legal Services Act 2007 (UK)*, which provides for ‘pro bono costs orders’. These orders are available when the successful party has been represented pro bono and require the other party to make a payment to a charity prescribed by the Lord Chancellor. Since its establishment in 2008, payments have been made to ‘The Access to Justice Foundation’. This foundation enables the provision of more legal services through distributions to Regional Legal Support Trusts, national pro bono organisations, and strategic projects.³⁴

The UK approach achieves a balance between competing policy considerations. The spirit of pro bono is maintained because advocates who agree to work pro bono do not later receive a fee while unsuccessful litigants are not relieved of the obligation to compensate the successful party, thereby ensuring cost deterrents continue to have a role.

The practice in Australia, in the few cases where costs are recovered in pro bono matters has been to use those monies to pay disbursements (including barristers’ fees in some cases) and to put the balance back into a firm’s pro bono program.

³³ *PHS Community Services Society v Canada (Attorney General)*, 2008 BCSC 1453.

³⁴ Access to Justice Foundation, *Frequently Asked Questions: Section 194 ‘pro bono costs’ orders*, The Access to Justice Foundation http://www.accesstojusticefoundation.org.uk/downloads/FAQs_Section_194.pdf at 25 February 2010.

(e) Lawyers and costs

The Civil Procedure Act 2005 (NSW) (CPA) and the *Legal Profession Act 2004* (NSW) (LPA) provide for costs to be ordered against a legal practitioner personally. This legislation raises two important and competing public interests. Firstly, lawyers should not be deterred from fearlessly pursuing the interests of their client and secondly, financial consequences caused by unjustified litigation should be discouraged. The danger of making a costs order against a lawyer and the effects it might have on his or her perceived duty to his or her client were well summarised by Hamilton J in *Pinebelt Pty v Bagley*.³⁵

“There are grave dangers in the too ready imposition of personal costs orders against practitioners...A feeling of threat of personal liability arising from decisions, some rivalling in themselves and many necessarily taken in the sometimes white hot caldron of litigation, has the potential to paralyse the decisive and fearless conduct which advocates are daily called upon to engage in.”³⁶

This effect is even more marked in pro bono matters as no financial gain for the lawyer is available to be weighed in the balance. The prospect of a personal costs order has a real chilling effect.

Sections 347 and 348 of the LPA set out restrictions on commencing proceedings without reasonable prospects of success and detail a lawyer’s personal liability for costs when the court deems that reasonable prospects of success are not present. In cases where a litigant’s claim raises matters of great public interest, a lawyer may choose to represent the litigant on a pro bono basis. However, the obligation to satisfy an adverse costs order may be placed upon the lawyer if the plaintiff’s claim is deemed to be without a reasonable prospect of success. This can have a deterrent effect upon lawyers who are considering whether to undertake test cases, where the prospect of success is difficult to ascertain with certainty. Public interest litigation remains an important avenue of law reform by provoking a review of whether the legal framework is achieving the policy goals. Even though the courts have developed tests to determine whether there are “reasonable prospects of success”³⁷ and any order to make a legal practitioner pay the costs of the proceedings in which they have provided legal services must be made ‘with care and discretion and only in clear cases’³⁸ - the risk still remains.

To deal with these cost hindrances, the centre believes that ‘reasonable cause’ in *The Civil Procedure Act 2005* (NSW) (CPA) s99(1)(b) be defined as a note to s99 to include lawyers acting pro bono in the public interest and that such advocates be similarly exempted from *Legal Profession Act 2004* (NSW) (LPA) s348. The Centre acknowledges the risk of enabling increased litigation through such amendments. However, the provisions of *Legal Profession Act 2004* (NSW) (LPA) s347 would continue to have application, with the effect that the certification and professional misconduct regimes would still be in place for vexatious litigation but advocates would be exempted from the possibility of personal costs orders.

Additionally, the court in *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd*³⁹ recognised that the Act must not be construed so as to deny parties a chance to litigate those issues that are real and salient. While the development of a case may reveal issues that are not central to its resolution, the court encourages the litigation of those issues that on proper grounds show themselves to be relevant. The threat of a costs order is thus exacerbated where a pro bono

³⁵ [2000] NSWSC 665 at 28.

³⁶ Dorne Boniface and Miiko Kumar, *Principles of Civil Procedure in New South Wales* (2009) at 67.

³⁷ See *Firth v Latham* [2007] NSWCA 40.

³⁸ *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153 at 92 per McColl JA.

³⁹ *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2006] NSWSC 583 at 28-29.

advocate is involved since the personal nature of any costs order awarded would likely limit the advocate's propensity to fully litigate all issues.

Recommendation 2 – Any provisions which contemplate making personal costs orders against legal practitioners should exempt lawyers acting on a pro bono basis.

In particular s. 99(1) (b) of the Civil Procedure Act 2005 that authorises the court to make such an order if it appears that costs have been incurred,
(b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible
should exempt a lawyer acting pro bono for the client.

Also a lawyer acting pro bono who commences proceedings without reasonable prospects of success contrary to Division 10 of the *Legal Profession Act 2004* should be exempt from personal costs orders being made against him or her pursuant to s. 348 of the Act (whilst still being subject to s.347 (that requires certification that the claim or defence has reasonable prospects of success)).

6. Accounting for public interest considerations

From the perspective of a marginalised or disadvantaged litigant, the exposure to adverse costs orders and the uncertainty of this risk in test cases is a significant barrier to accessing justice. According to the Public Interest Law Clearing House Victoria, nine times out of ten the risk of an adverse costs order results in meritorious public interest matters not being pursued:

“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.”⁴⁰

Such litigation, ranging from issues of national security to the efficient administration of justice, is of significant benefit to the community through increased accountability to the public and should thus not be impeded by the costs allocation rules.⁴¹

6.1 Costs in public interest matters

A matter is generally considered to be in the ‘public interest’ if it affects a significant amount of people, raises a matter of broad public concern or has an effect on disadvantaged and marginalised members of the community. The Centre acknowledges that the concept of ‘public interest’ is broad and difficult to define. A number of criteria have been defined by the courts, including criteria such as whether the case has been brought ‘selflessly’ and conducted ‘in a manner that was wholly

⁴⁰ PILCH (Vic), *Submission to the Commonwealth Attorney-General on Protective Costs Orders*, (2009) at 4.

⁴¹ ALRC, *Costs Shifting- Who pays for litigation*, Report 75 (1995).

commendable' and whether the case raises 'a novel question of much public importance and some difficulty'⁴²

6.3 The power of courts to make costs and associated orders

The High Court in *Oshlack*⁴³ confirmed that in exceptional public interest cases it may be appropriate for a court to make no costs order. This decision restored the order of Stein J of the NSW Land and Environmental Court, in which Stein J accounted for the 'public interest' nature of the litigation among other special factors in deciding to make no order as to costs. However, this endorsement from the High Court came about through a slim majority (3:2) and the judgments offer little guidance as to how much weight a court should place on public interest considerations in making no order as to costs or granting a Protective Costs Order (PCO).

Gummow and Gaudron JJ refer to Stein J's analysis that 'something more' than mere characterisation as public interest litigation is required for a successful defendant to deny costs.⁴⁴ Kirby J suggests public interest litigation is just one category into which may be grouped particular kinds of cases that will sometimes warrant departure from the general rule.⁴⁵ His argument is based more on the breadth of the discretion conferred by the statutory power. Therefore the Centre supports PILCH (Vic)'s proposal in its submission to the Commonwealth Attorney General on Protective Costs Orders that law reform is needed to "clarify what factors are relevant to the discretion to make a PCO in public interest matters".⁴⁶

The court has noted the blurred boundaries when defining public interest. This suggests that if there is reform to offer a package of protections to public interest litigants, a more articulate framework (that maintains flexibility and allows for the expansion of what constitutes 'public interest') is required. Significantly, the United Kingdom's Court of Appeal has explicitly recognised public interest as one of the principal considerations for courts in exercising their discretion to award PCOs.⁴⁷

The Victorian Law Reform Commission's (VLRC) Civil Justice Review (May 2008)⁴⁸ the Commission proposed that:

"There should be express provision for courts to make orders protecting public interest litigants from adverse costs orders in appropriate cases, including 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." ⁴⁹

The VLRC further concluded, that express provisions should be made for courts to make orders protecting public interest litigants from adverse costs orders, when appropriate, and that it should include orders made at the outset of the litigation.⁵⁰

⁴² Victorian Law Reform Commission – Civil Justice Review: Report, at 670

⁴³ (1998) 193 CLR 72.

⁴⁴ *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 49.

⁴⁵ *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 143

⁴⁶ PILCH (Vic), *Submission to the Commonwealth Attorney-General on Protective Costs Orders*, (2009) at 10.

⁴⁷ *R (Corner House Research) v Secretary for State for Trade and Industry* [2005] 1 WLR 2600.

⁴⁸ Victorian Law Reform Commission Civil Justice Review (May 2008)

⁴⁹ Victorian Law Reform Commission – Civil Justice Review: Report, at 675

⁵⁰ Victorian Law Reform Commission – Civil Justice Review: Report, at 676

Recommendation 3 – All relevant NSW court Acts should specifically confer power on that court to declare a litigant ‘a public interest litigant’, to make protective costs orders and to set out criteria that must be taken into account in making such orders.

Recommendation 4 – If a litigant is declared a public interest litigant by a court then no security for costs orders should be made against that litigant.

Recommendation 5 – That the NSW Model Litigant Policy for Civil Litigation should be reviewed to list criteria that must be considered by government and all its agencies to decide whether to seek a costs or security for costs order against a public interest litigant and the Policy should state that costs orders will not be sought against any party declared a public interest litigant by the court. These criteria should include whether a person is being acted for on a pro bono basis.

7. Impact of costs exposure on impecunious plaintiffs

7.1 A barrier to accessing justice for natural persons

There is a fundamental rule that “a natural person who sues will not be ordered to give security costs, however poor”.⁵¹ This was further articulated in *Hession v Century 21 South Pacific*⁵² where the court commented that a claim which is not vexatious should not be disadvantaged by the litigant’s impecunious status. However this position is not absolute, and there is judicial discretion to do justice between the parties through the use of security for costs orders. Thus there is a constant tension between ensuring adequate protection to the defendant from vexatious claims and trying to avoid locking out impecunious plaintiffs from legitimate claims⁵³.

Impecunious plaintiffs are particularly disadvantaged in accessing justice due to the costs associated with litigation. The risk of a substantial adverse costs order functions as an impediment to the claimant and may result in their abandonment of the claim.⁵⁴ In *Schou v The State of Victoria*,⁵⁵ a case with issues of considerable public interest, the plaintiff was unable to apply for special leave to the High Court due to the significant risk of an adverse costs order. In these circumstances, the plaintiff’s right to pursue a legitimate claim is sacrificed in favour of the defendant’s interest in ensuring that he is not unduly exposed to the costs of defending the litigation.

(a) Legally Aided Persons

While it is true that litigants may bring claims that are merely vexatious or harassing, such abuses of court process can be effectively dealt with through dismissal of the proceedings. If a plaintiff’s case on the other hand shows good cause, and the defendant puts in issue the plaintiff’s impecuniosity and seeks a security for costs order, awarding this order is analogous to a dismissal. Thus the current framework, as reflected by Young CJ in *Melville v Craig Nowlan & Associates Pty Ltd*,⁵⁶ that

⁵¹ *Pearson v Naydley* [1977] 1 WLR 899 at 902.

⁵² *Hession v Century 21 South Pacific (in liq)* (1992) 28 NSWLR 120 at 123.

⁵³ *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at 47.

⁵⁴ PILCH (Vic), *Submission to the Commonwealth Attorney-General on Protective Costs Orders*, (2009) at 7.

⁵⁵ [2004] VSCA 71.

⁵⁶ [2002] NSWCA 32 at 136.

impecuniosity is “merely one of the factors the court takes into account when making its final assessment as to whether the proceedings, without security for costs, would be an abuse of the court's process”, needs adjustment.

Litigants who are the recipients of legal aid are currently protected from security for costs orders under the *Legal Aid Commission Act 1979* (NSW) s47 and relevant case law⁵⁷, however similar protection is not offered to pro bono litigants. There is no reasonable rationale for this distinction, particularly when the role of pro bono is often to further augment legal aid’s ability to assist the community in accessing the courts. Because security for costs creates such a formidable hurdle for the plaintiff, the Centre suggests pro bono litigants be extended the same protection as legal aid recipients against cost orders.

National Pro Bono Resource Centre
26 February 2010

⁵⁷ *Rajski & Anor v Computer Manufacture Design Pty Ltd* [1983] 2NSWLR 122