

A COMMENT ON COSTS IN CONSTITUTIONAL CASES

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Professor Patrick Keyzer and Stephen Lloyd SC are both well qualified to speak to the legal principles that govern the determination of costs in constitutional cases, and I am, with respect, happy to accept their combined review of these principles. I do not think that there are any significant disagreements between them in this regard. They have, nevertheless, provided us with two usefully distinct perspectives on the topic, and offered two contrasting views as to the need for special costs rules in constitutional cases. I have only a small number of observations (perhaps it is better to say questions), which build upon some of the issues already raised. These questions relate, in particular, to the possible consequences of special costs rules in constitutional cases, the potential for such rules to increase access to constitutional justice, and whether existing principles might be sufficient as they stand to achieve this objective.¹

First of all – and Keyzer and Lloyd have already addressed this issue – might special costs rules lead to an increase in the number of vexatious litigants? To an extent, this possibility depends upon whether the indemnity rule has a deterrent effect in the first place. In general terms, it may well do.² However, Keyzer and Lloyd both

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¹ It is assumed, for the purposes of this comment, that increased access to constitutional justice is a desirable objective. As the preceding papers demonstrate, however, there is room for debate on this issue. The orthodox view is that constitutional issues should only be answered when absolutely necessary (see, eg, *Attorney-General (NSW) v Brewery Employees' Union* (NSW) (1908) 6 CLR 469, 590; *Lambert v Weichelt* (1954) 28 ALJR 282, 283 (Dixon CJ); *Cheng v The Queen* (2000) 203 CLR 248, 270 [58] (Gleeson CJ, Gummow and Hayne JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 473-4 (Gummow and Hayne)). On the other hand, as Patrick Keyzer has argued, this is not necessarily the most appropriate view in a country governed by the rule of law, and in which access to constitutional justice might be seen as an implication of the provisions of Ch III (in particular s 75(v)) that entrench a 'minimum provision of judicial review' (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513-4 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)): *Open Constitutional Courts* (Federation Press, 2010) 136-40.

² According to an empirical study undertaken by John Hause, for example, which compared the indemnity rule with the American rule (whereby each party pays his/her own costs), an 'indemnity rule reduces the attractiveness to a plaintiff of initiating a suit ... The most

question how much of a deterrent effect the indemnity rule has had in constitutional litigation. Keyzer acknowledges that abuses of process occur, but points out that nuisance litigants and punitive costs orders are nevertheless rare in constitutional cases. He also identifies various judicial opinions which question the practical and jurisprudential basis of the familiar floodgates argument (at least in public law cases).³ Lloyd does not go quite this far, but he does suggest that the deterrent effect of the indemnity rule may be less pronounced in constitutional cases than it is in other cases. Others may dispute these views, but even if the indemnity rule is an effective deterrent in constitutional cases, there is no reason to suppose that the introduction of special costs rules would interfere with the inherent jurisdiction of the courts to strike out proceedings that are frivolous or vexatious.⁴ Put differently, special costs rules and the power to dismiss nuisance litigants are not mutually exclusive. Again, this point has already been made, and I do not propose to labour it.

Is it possible, though, that the introduction of special costs rules might encourage genuine litigants to weave constitutional threads through what are, in substance, non-constitutional matters, so as to take advantage of those rules? In other words, might the introduction of special costs rules in constitutional cases lead to the 'constitutionalisation' of litigation generally?⁵ As Lloyd points out, constitutional issues rarely arise in cases by themselves. It might be added that many issues of law

obvious reason is ... because of the increase in ... prospective trial expenditures.' See John Hause, 'Indemnity, Settlement, and Litigation, or I'll be Suing You' (1989) 18(1) *Journal of Legal Studies* 157, 176.

- ³ See, eg, *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 557-8 (Murphy J); *Edwards v The Queen* (1996) 90 A Crim R 510, 515 (Gleeson CJ). See also Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 163.
- ⁴ *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J); *Re McJannet; Ex Parte Australian Workers Union of Employees (Queensland) (No 2)* (1997) 189 CLR 654, 657. See also Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *The Australian Law Journal* 449, 458. While federal courts created by statute do not possess inherent jurisdiction, they nevertheless exercise powers 'similar to, if not identical with, inherent power'. See also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 623-4 (Deane J).
- ⁵ The term 'constitutionalisation' is adopted here in intentionally narrow terms. However, this term may also be (and is perhaps more commonly) used to refer to the process or processes by which 'core principles, such as fundamental rights, the separation of powers, and democracy' are 'embedded in the ... legal order.' See also Berthold Rittberger and Frank Schimmelfenig, 'The Constitutionalization of the European Union: Explaining the Parliamentarization and Institutionalization of Human Rights' in Sophie Meunier and Kathleen McNamara (eds), *Making History: European Integration and Institutional Change at 50* (Oxford University Press, 2007) vol 8, 213.

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also connect quite naturally, in one way or another, with an issue of constitutional significance. These connections need not be fanciful, in the sense that they would (or should) be excluded as vexatious. They could be perfectly reasonable arguments; albeit peripheral to the principle issues for determination.⁶ Whether such a tactic is to be encouraged or discouraged is debatable, although Sir Anthony Mason has made clear his position on the matter: His Honour opposes changes to the rules governing costs in constitutional litigation.⁷ This possibility (or risk) ties in with another of the questions that Lloyd raises. If special costs rules are to apply in constitutional cases, how 'central does the constitutional point need to be'?⁸ The answers to both of these questions will depend upon how special costs rules are constructed in practice.

The first possibility (that is to say, the constitutionalisation of litigation generally) would not be a difficult one to manage. Provided that special costs rules are constructed in such a way that they continue to allow for the apportionment of costs between constitutional and non-constitutional issues (as occurred, for example, in *North Australian Legal Aid Services v Bradley* ('Bradley'),⁹ and *Bodruddaza v Minister for Immigration and Multicultural Affairs* ('Bodruddaza')),¹⁰ no advantage would be afforded to litigants who can frame their arguments in a way that engages a marginal constitutional issue. This is, as I understand it, the manner in which Keyzer would envisage the rules operating.¹¹ It also provides an answer, I believe, to the question how 'central' a constitutional issue would need to be to attract the costs rules.¹² This approach makes sense. If special costs rules were to indemnify applicants from all

⁶ Stephen Lloyd, in this volume.

⁷ Sir Anthony Mason, in this volume.

⁸ Stephen Lloyd, in this volume. The difficulties associated with identifying cases involving 'public interest' (of which 'constitutional' cases might be seen as a sub-category) were considered by the High Court in *Oshlack v Richmond River Council* (1998) 193 CLR 72. In that case, Gaudron and Gummow JJ described 'public interest litigation' as a 'nebulous concept', 84 [30]. Kirby J acknowledged the same, but observed that in Australia, as in other common law jurisdictions, 'a discrete approach has been taken to costs in circumstances where courts have concluded that a litigant has properly brought proceedings to advance a legitimate public interest, has contributed to the proper understanding of the law in question and has involved no private gain', 123-4 [136]. See also *Ruddock v Vadarlis* [No 2] (2001) 115 FCR 229, 235-6 [13]; *Latoudis v Casey* (1990) 170 CLR 534, 550; *Solomons v District Court (NSW)* (2002) 211 CLR 119, 170 (Kirby J).

⁹ (2001) 192 ALR 625, 647 [106]-[107] (Weinberg J).

¹⁰ (2007) 228 CLR 651, 675-6 [75]-[78] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

¹¹ Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010), Chapter 7.

¹² How 'important' a constitutional issue would need to be to attract special costs rules is another question altogether, and not addressed in this comment.

costs in cases involving one or more constitutional issue, it could have a number of unforeseen consequences (in addition to the constitutionalisation of litigation, for example, if government respondents were aware that they would be required to pay costs regardless of outcome, they may be more inclined to seek out of court settlements, thereby actually reducing the number of constitutional issues being determined by the courts).¹³

But if special costs rules were to be constructed in this way (that is to say, in a way that distinguishes between constitutional and non-constitutional issues), would they actually improve access to constitutional justice? If constitutional issues do not ordinarily arise by themselves, to what extent would the removal of financial obstacles to the determination of constitutional issues alone enable litigants (impecunious or otherwise) to pursue arguable constitutional matters in court? Taking *Bradley* as an example, would the existence of special costs rules have facilitated the claim by the North Australian Aboriginal Legal Aid Service (NAALAS) against Mr Bradley (assuming that they had not been indemnified by the Aboriginal and Torres Strait Islander Commission)? That case involved relatively discrete constitutional issues, allowing Weinberg J to apportion costs accordingly.¹⁴ Even so, NAALAS was required to pay some 70% of the respondent's costs.¹⁵ As Weinberg J explained:

[I]t is my view that NAALAS is entitled to some reduction in the costs which it must pay to the respondents having regard to the fact that it successfully resisted challenges to its standing and the justiciability of its improper purpose claims. That reduction cannot be substantial, having regard to the amount of time spent on those issues. I consider that an additional reduction is warranted by reason of the fact that some aspects of this proceeding may be characterised as "public interest litigation", including in particular, the constitutional arguments, and the attempt to invoke the principles in *Kable*.¹⁶

Even if NAALAS would have pursued its claim on the basis of special costs rules that guaranteed this reduction (and presumably, as Keyzer suggests, risked bankruptcy in the process), it is doubtful that many other litigants would have chosen to do so.

What, though, of those cases in which a majority of the court's time was spent on constitutional matters? Might a special costs rule have been more effective in these cases? In *Bodruddaza*, the substantive issue for determination occupied considerably less of the High Court's time than the preliminary constitutional issue. On this basis,

¹³ Hause, above n 2, 176.

¹⁴ *North Australian Legal Aid Services Inc v Bradley* (2001) 192 ALR 625, 647 [107].

¹⁵ *Ibid.*

¹⁶ *North Australian Legal Aid Services Inc v Bradley* (2001) 192 ALR 625, 647 [106].

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Lloyd tells us, Mr Bodruddaza was required to pay only a fraction of the Commonwealth's costs (5-10%). However, Mr Bodruddaza could not have known how much he would be required to pay prior to commencing proceedings, and even if special costs rules had been in place they would not have assisted Mr Bodruddaza in accurately forecasting how much time (and therefore how much of the cost) would have been taken up by the constitutional issue alone.

But if special costs rules might not be effective in providing greater access to constitutional justice, might existing principles be sufficient as they stand to 'preserve access where there is a constitutional argument that is to some extent meritorious'?¹⁷ After all, NAALAS and Mr Bodruddaza were both able, in the event, to secure counsel and gain access to constitutional justice without the assistance of such rules. As Keyzer and Lloyd both acknowledge, the 'public importance' of a matter is already a discretionary factor in the determination of costs.¹⁸ Courts in certain jurisdictions also have the discretion to limit in advance the maximum costs payable by the parties (a 'protective costs order').¹⁹ Unlike other aspects of the judicial process,²⁰ judicial discretion in this area is unlikely to find protection in Ch III of the

¹⁷ Stephen Lloyd, in this volume.

¹⁸ *Merribee Pastoral Industries Pty Ltd v ANZ Banking Group Ltd* (1998) 193 CLR 502; *Tran v Commonwealth* (2010) 111 ALD 111; *Solomons v District Court (NSW)* (2002) 211 CLR 119, 170 (Kirby J).

¹⁹ See, eg, *Federal Court Rules*, O 62; *Uniform Civil Procedure Rules (NSW)*, r 42.4. Protective costs orders were made in at least two relatively recent cases: *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864; *Blue Mountains Conservation Society v Delta Electricity* (2009) 170 LGERA 1.

²⁰ Legislative provisions (including rules of court) may be invalid if they undermine the 'institutional integrity' of a 'court' within the meaning of Ch III (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 132; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67-8 [41] (Gleeson CJ), 76 [63] (Gleeson CJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 367 [98] (Gummow and Bell JJ), 379 [140] (Heydon J)). Institutional integrity may be undermined if a power of duty conferred by the legislature is antithetical to the judicial process (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 107-8 (Gaudron J), 122 (McHugh J); *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 592 [19] (Gleeson CJ), 596-8 [34] (McHugh J), 617 [100], 620-1 [113]-[115] (Gummow J; Hayne J agreeing), 628 [141], 630-1 [144(5)] (Kirby J), 655-6 [219] (Callinan and Heydon JJ); *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 562-3 [50] (Kirby J dissenting); *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319, 353-4 [52] (French CJ); citing *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111]. No comprehensive definition of the judicial process has been (or is likely to be) provided, but incompatibility with the judicial process may arise if the exercise of judicial discretion is directed by Parliament or limited or narrowed beyond that required in the circumstances.

Constitution.²¹ Nevertheless, there is much to be said for an approach that avoids too prescriptive a criterion for the determination of costs orders. As Kirby J has stated, in a case to which Lloyd refers:

It would be wrong to attempt to hedge the jurisdiction about by rules or practices, even where derived from a number of instances. This is because what should be done in each case depends entirely on the circumstances of the case. The governing consideration is what is required by the justice of the matter.²²

On the other hand, as Keyzer points out, exceptions to the application of the indemnity rule have been ‘few and unpredictable’.²³ In addition, the mere possibility that a judge may take account of the public importance of a matter, and/or implement a protective costs order, is unlikely to provide potential litigants with the incentive necessary to pursue claims in the public interest. Lloyd’s ‘anecdota’ also reveals that, in some cases at least, the ‘justice of the matter’ is actually determined by the Commonwealth in its capacity as respondent (so, for example, the Commonwealth might choose not to seek costs against litigants who are impecunious or middle class).²⁴ A special costs rule would at least provide some certainty in this respect, and demonstrate to would-be litigants that the judiciary (and the High Court in particular) takes seriously its constitutional imperative to interpret the Constitution.²⁵

Whatever the force of these arguments, though, if special costs rules were introduced it is doubtful that they would seek to remove judicial discretion entirely. This is significant, because provided judges retained an element of discretion over costs, the success or failure of special costs rules (in terms of improving access to constitutional

Fardon v Attorney General (Qld) (2004) 223 CLR 575, 592 [19] (Gleeson CJ), 596 [34] (McHugh J), 656 [222] (Callinan and Heydon JJ).

²¹ Judicial discretion over costs has been successfully limited (and the indemnity rule displaced) in federal jurisdiction before. See, eg, *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78. Mandatory sentencing laws, which are comparable with costs rules insofar as they operate after judgment, have also been held valid despite the fact that they remove judicial discretion in what might be regarded as ‘an integral part of the exercise of judicial power.’ See Sir Anthony Mason, ‘Mandatory sentencing: implications for judicial independence’ (2001) 7(2) *Australian Journal of Human Rights* 21, 28. At the very least, however, the High Court’s discretion over costs in original jurisdiction is protected by Ch III: *Re McJannet; Ex parte Australian Workers Union of Employees (Queensland) (No 2)* (1997) 189 CLR 654, 657.

²² *Merribee Pastoral Industries Pty Ltd v ANZ Banking Group Ltd* (1998) 193 CLR 502, 513 [26].

²³ Patrick Keyzer, in this volume.

²⁴ Stephen Lloyd, in this volume.

²⁵ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

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justice) would depend in no small part upon how those rules were actually implemented in practice. If improved access to constitutional justice is the goal, therefore, Australian courts and judges must first be convinced that it is a worthy one.