

TYING THE THREADS TOGETHER

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Four aspects of access to constitutional justice were discussed today; it being our good fortune that the discussion of the Australian experience was informed by comments about the United States experience from Professors HW Perry and Jason Pierce.

I found especially interesting Professor Pierce's account of the way in which the United States Supreme Court came to hold that the Fourteenth Amendment of the United States Constitution had the effect of applying against the States provisions of the Bill of Rights which had been designed to regulate only the federal government. The local analogy is the doctrine enunciated by the High Court of Australia in *Kable v Director of Public Prosecutions (NSW)*¹ whereby the constraints imposed by Ch III of the Australian Constitution were held to apply to State Supreme Courts.

For some years *Kable* was routinely distinguished; it appeared the case was destined never to have progeny; but see now *International Finance Trust Company Limited v New South Wales Crime Commission*.² Imposition of higher standards on courts may, of course, constitute an aspect of access to constitutional justice; of a substantive, not merely procedural, nature.

The four aspects

The four aspects of access discussed today are:

- (i) Standing rules;
- (ii) Amici curiae (and interveners);
- (iii) Advisory opinions;
- (iv) Costs rules.

The common thread, of course, is concern that current thinking about these four subjects may unnecessarily constrain access to the courts, at least in respect of constitutional issues. The question is whether it does.

¹ (1996) 189 CLR 51.

² (2009) HCA 49.

Standing rules

This topic occupied more of our time than any other. I have to confess that the discussion induced in me a profound sense of *deja entendu*. I cannot count the number of conferences I have attended at which speakers worried about floodgates if the rules of standing were relaxed, they rarely noting what has happened under two major statutes that give standing to 'any person'.

The *Trade Practices Act 1974* (Cth) was enacted by the Commonwealth Parliament in 1974. Its provisions cover an enormous proportion of Australian commercial life. It governs the activities of, and it potentially benefits, every trading company in the country, many of them very wealthy and not afraid of litigation. In its 36 years of operation, has the open standing rule stipulated in the Act been abused? I can only say that, despite 22 years on the Federal Court, I am unaware of a single case in which it might be said that an action was brought by an inappropriate person. No such case came before me and I do not recall any colleague speaking of such a case.

Certainly some cases should not have been brought at all; they depended on an unarguable reading of relevant documents or statutes or a view of the facts that could not be sustained by the available evidence. But these things happen in cases brought by persons possessing standing even under the most stringent rule.

There were cases in which it might not have been possible for the applicant to establish material loss. One of the notable features of the *Trade Practices Act 1974* (Cth) has been its degree of private enforcement. Most businesses pay attention to their competitors' trading activities. Many of them, it seems, have little hesitation in approaching the Federal Court for injunctive relief against a competitor thought to have infringed the Act, particularly in respect of advertising. Such cases are not burdensome to the court; although numerous, they are usually short-lived. Typically, the respondent's lawyer will look at the relevant conduct, conclude it cannot be defended and advise a consent order.

Would such a claim have been permissible under a stringent standing rule? Possibly, but that would depend on the likelihood of the applicant suffering damage if the conduct was maintained. The applicant might be able to show that; it also might not. What is certain is that respondents would see the existence of such an issue as a heaven-sent opportunity to trawl through their competitor's financial records, prolonging the litigation and (usually) the period during they could profit from their wrongdoing. Open standing focuses the court's attention on the respondent's conduct—that is, whether the respondent has breached the Act—rather than the effect of that conduct on the applicant.

The New South Wales *Environmental Planning and Assessment Act 1979* (NSW) also contains a provision giving standing to 'any person'. When the statute was enacted

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the then President of the New South Wales Bar took great exception to this provision. In a public comment, he said it would enable 'a drunken Norwegian sailor, on shore leave in Sydney,' to institute a proceeding in the Land and Environment Court of New South Wales before departing Australia. The Bar President did not explain why he had selected Norway. Was it because that country has an enviable reputation for environmental protection or because Norway is about as far from New South Wales as one can get? Whatever the reason, the Bar President was, of course, correct; such a person could sue. Sadly, however, we are still awaiting his colourful appearance. Sydney is the litigation capital of Australia and is home to many keen litigants. Large sums of money sometimes turn on decisions of the Land and Environment Court. But to my knowledge, and that of judges of the Court whom I have consulted, there has not been a case of an obviously inappropriate plaintiff.

There are many reasons, apart from inebriation, why a Norwegian sailor visiting Sydney would not embark on litigation in the Land and Environment Court. The most fundamental of those reasons is that the visiting sailor would need to raise a legal issue in his suit and he would be unlikely to have a serious concern about any such issue. People do not go to court unless they care about an issue, whether it affects their hip-pocket or only their profound sensibilities. And painstakingly, as Sir Anthony Mason has narrated, our courts have developed the law to the stage where that is now considered sufficient, even where the judge-made rules of standing continue to apply.

So would it not be better for all of our Parliaments to enact a general open standing rule, in cases of alleged contravention of a statutory provision, and allow the courts to concentrate on the alleged misconduct of the respondent, rather than spending time (and racking up expense) examining the nature and extent of the plaintiff's affectation by that misconduct?

Perhaps Professor Simon Evans would say 'no'; there is always a possibility of a case being brought by a person who is not able properly to present it to the court; this might lead to a bad decision in what might be an important area of law. That is a possibility, but it exists in every type of case. It is not uncommon for people with unimpeachable standing to be unable or unwilling to give the case the attention and quality of representation it deserves. The courts manage that problem by making appropriate pre-trial directions and, if worst comes to the worst, by explicitly limiting the scope of the decision.

Experience under the *Trade Practices Act 1974* (Cth) and the *Environmental Planning and Assessment Act* (NSW) indicates Professor Evans' concern is not a problem in practice. I suggest the theoretical possibility of a problem should not be allowed to outweigh the benefit of relieving the court and the parties of having to address the question of the likely effect on the plaintiff of the impugned conduct.

Amici curiae (and interveners)

Amongst the speakers there appeared to be agreement on two propositions:

- (i) Amici curiae have a useful part to play in constitutional litigation because of the possibility of alerting the court to wider implications of the litigation than may be apparent from the cases of the parties;
- (ii) The High Court (and possibly also other courts) needs to put into place proper procedures governing participation by amici curiae.

Although the symposium program refers only to amici curiae, Mr Ernst Willheim usefully reminded us about interveners. He contrasted the incidents of the two procedures. Sometimes intervention is the more suitable course, especially at trial stage. Intervenors, unlike amici curiae, can introduce evidence.

A decision to allow participation in a case by an amicus curiae or an intervener involves an exercise of judicial discretion. In its most recent relevant decision, *Wurridjal v The Commonwealth*,³ the Chief Justice of the High Court mentioned criteria for permitting participation:

where a prospective amicus curiae can present arguments on aspects of a matter before the Court which are otherwise unlikely to receive full or adequate treatment by the parties because, (a) it is not in the interests of the parties to present argument on those aspects, or (b) one or other of the parties lacks the resources to present full argument to the Court on them.

In some cases it may be in the interests of the administration of justice that the court have the benefit of a larger view of the matter before it than the parties are able or willing to offer.

It seems the Chief Justice did not intend, by inserting paras (a) and (b), to limit the discretion to the cases mentioned in those paragraphs. They were apparently intended only as examples. This seems to be indicated by the later reference to 'the interests of the administration of justice'. Those words would seem to cover what might be the most important case of all: where the parties, and therefore possibly the court, have not tumbled to the wider ramifications of a decision the court is being asked to make.

As a practical matter, it seems to me that courts should be hesitant about allowing intervention in a case where the intervener intends to adduce additional evidence. Courts should be wary about allowing a stranger to hijack a case, possibly adding significantly to its complexity, length and cost. On the other hand, if the would-be

³ (2009) 237 CLR 309, 312 (French CJ).

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intervener wishes only to put legal argument, this may easily be accommodated by requiring the intervener's submissions to be put in writing, perhaps with a limit on length. It may be useful to allow the intervener to speak briefly to the submissions, but desirably this should not involve the parties incurring the costs of an extra hearing day.

I would adopt the same approach to applications by prospective amici curiae. If there is a reasonable prospect that the would-be amicus can assist the court, why forgo that assistance?

Procedurally, two things are clearly desirable: a requirement of early application for permission to participate as an amicus curiae (or intervener) and attendance at any directions hearing so as to ensure that everybody has, or will obtain in a timely way, copies of all relevant documents, including written submissions.

Advisory opinions

This topic gave rise to much discussion about the correctness of *In re Judiciary and Navigation Acts*.⁴ There seemed to be two main views: one, the case was wrongly decided; two, it was correctly decided but for the wrong reasons.

This whole debate is bedevilled by reference to the implications of the word 'matter' in Ch III of the Constitution. There is a danger of question-begging:

- (i) the giving of an advisory opinion is an exercise of judicial power;
- (ii) although the High Court exercises judicial power, it only has jurisdiction to determine a 'matter';
- (iii) an advisory opinion is not a determination of a matter because it does not finally determine parties' rights.

The critical question is whether 'matter' has the limited meaning suggested in step three. As both Professor Leslie Zines and Sir Anthony Mason indicate, there are reasons for concluding it does not.

There are good arguments against the High Court becoming too involved in giving advisory opinions to the government of the day. One is avoidance of any perception that the Court has become part of the executive and/or legislative arms of government. Another is the possible undesirability of a decision about the constitutionality of a statute being made on an abstract basis, without the Court being able to see how that statute operates in practice. The importance of the latter consideration may vary from case to case. That is why, as several speakers

⁴ (1921) 29 CLR 257.

maintained, it may be preferable to treat advisory opinions as falling within the jurisdiction of the Court but subject to a discretionary decision as to whether the Court will entertain the particular case.

Costs

The speakers substantially confined themselves to problems about costs in constitutional cases. This is understandable, given the topic of the day, but it should be remembered that costs problems arise in most areas of public interest litigation.

Costs problems are twofold:

- (i) the plaintiff's need to obtain adequate representation;
- (ii) the plaintiff's concern about the possibility of having to pay the costs of the defendant(s) if the case is lost.

Legal aid is rarely available to a plaintiff in public interest cases. Legal aid is designed as a form of welfare for low-income earners; to assist them, despite their poverty, to protect their private interests; whether in defending a criminal charge, resolving a family dispute or recovering a debt or damages. Legal aid applicants usually face a stringent means test. No doubt that is appropriate in cases where the would-be plaintiff seeks to uphold a private interest but it misses the point where a would-be plaintiff, with some income and assets, wishes to uphold a perceived public interest but is unwilling to become destitute in the attempt.

In some cases, assistance may be provided out of a test case fund controlled by a public authority, such as the Commonwealth Attorney-General. However, the criteria for assistance are usually narrow and the available amount rather limited.

Fortunately, and I am glad to make this acknowledgment, the Australian legal profession has a proud record in providing pro bono assistance to parties in worthwhile cases. If a proposed case raises issues of significant public importance, and the motivation of the proposed plaintiff is predominantly a genuine desire to advance the public interest, it is usually possible to find lawyers who will undertake the case on a pro bono or speculative basis—that is, no win, no fee.

So, while the first problem is a real one, it is often resolvable.

The second problem is less tractable. It is one thing for a lawyer to offer a would-be plaintiff representation without cost to that person; it is another thing for the lawyer to assure that person there is no chance that he or she will be ordered to pay the other side's legal costs. It is rarely possible for a lawyer to guarantee the outcome of a case. People may have a strong feeling about the wrongness, and legal invalidity, of a defendant's conduct, be prepared to go to much trouble taking the issue before a court and be successful in finding a lawyer who will provide representation without

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fee; but will back off once they realise they are putting their house at risk, however small that risk may seem. In practice, concern about the possibility of an adverse costs order is a massive disincentive to those thinking of embarking on public interest litigation.

The general rule in all Australian jurisdictions is that 'costs follow the event'. Although costs orders are supposedly discretionary, the case law has traditionally given judges little choice as to the order they must make: see *Latoudis v Casey*.⁵ However, in recent years, there has been a breakthrough, in public interest cases, whereby the judge may take that fact into account in deciding not to make a costs order, or at least a full costs order, against an unsuccessful litigant: see *Oshlack v Richmond River Council*.⁶

In my opinion the *Oshlack* approach is not unreasonable. Most public interest litigation is brought against a government agency; it is not unreasonable that taxpayers bear the cost of resolving any public interest claim reasonably made against that agency. There may be a non-government defendant, but this will usually be a wealthy company that stands to benefit from the impugned decision and will, in any event, be able to deduct its unrecovered costs from its taxable income.

However, the *Oshlack* approach involves a discretionary decision by the court *after* determination of the case. It does enable a practitioner, in a suitable case, to offer a little more comfort to a client about the possibility of an adverse costs order. But it does not enable the practitioner to say there is *no* risk of financial disaster. That some risk remains may be enough to dissuade the client from undertaking the case.

One answer to this is to have the client's maximum liability fixed in advance. This was done in a case currently before the Land and Environment Court of New South Wales. The case is brought by a non-government organisation, Blue Mountains Conservation Society, against Delta Electricity, a State-owned corporation that operates two large coal-fired electricity generators. The applicant's case is that effluent from one of those generators is chemically polluting the Cox's River, a major contributor of water to Warragamba Dam. Warragamba is the largest Sydney Water storage dam. The applicant's case is supported by river water samples analysis and expert scientific evidence but the respondent has raised a number of legal issues. The Society is not wealthy and would be wiped out by an unrestricted adverse costs order. Under these circumstances, and after hearing argument, Pain J made an order limiting any costs order in the case to a maximum of \$20,000. Delta has appealed this order. Judgment is currently reserved in the New South Wales Court of Appeal. If

⁵ (1990) 170 CLR 534.

⁶ (1998) 193 CLR 72.

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Pain J's order holds, the applicant will be able to proceed with the case. If it is set aside, it will not.