Protective costs orders in Australia: increasing access to courts by capping costs

Presented by The Hon Justice Nicola Pain of the Land and Environment Court of New South Wales to the Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT) 7 March 2014, Hobart[1]

The first protective costs order capping costs early in proceedings was granted in the Land and Environment Court of NSW in 2009. Such orders can play an important role in providing access to courts for those pursuing public interest environmental litigation with limited means. The availability and success rate of other similar applications in the Land and Environment Court of New South Wales and elsewhere in Australia is considered in this paper.

Litigation is costly. It has been widely recognised that for most members of the community litigation costs, that is, a party's own legal costs and another party's legal costs if an adverse costs order is made, can be exorbitant.[2] Those wishing to commence proceedings in the public interest can feel acutely this deadening effect.[3] Whether it is the best or last resort, access to courts and ultimately to justice should not be unduly impeded by high costs. One way to overcome the hurdle of a prohibitive costs order is to seek an order limiting or capping costs of proceedings before their completion, known as a protective costs order (PCO). The most common form of such orders is a maximum costs order which caps litigation costs. Such orders are specifically available under costs rules in some jurisdictions. They have been infrequently

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[2] See for example *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509; Australian Law Reform Commission "Costs shifting – who pays for litigation" (ALRC Report 75) 1995, at ch 4, 12; NSW Parliament Legislative Assembly, *Parliamentary Debates*, 3 December 2009, at p 20524 (J Hatzistergos, Attorney General).

[3] Australian Law Reform Commission, at par 13.8; *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; (2009) 170 LGERA 1 at [43] - [44].

sought or made in private or public law proceedings in most Australian jurisdictions. The discussion in this paper is particularly directed to circumstances where the "usual" costs rule that costs follow the event applies. The cases referred to are largely judicial review and civil enforcement proceedings.

Protective costs orders in NSW

Courts in New South Wales have a broad costs power under s 98 of the *Civil Procedure Act 2005* (NSW).[4] Ordinarily, costs are considered at the conclusion of court proceedings when the result is known and a successful party is awarded its costs as compensation[5] under Pt 42 r 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW)[6], if that rule applies.[7] Courts have an obligation under s 56 of the *Civil Procedure Act 2005* (NSW)[8] to facilitate the just, quick and cheap resolution of issues in civil disputes.

The *Uniform Civil Procedure Rules 2005* (NSW) were introduced in 2005 and apply in all NSW courts. Under r 42.4(1)[9] a court can make an order specifying the maximum amount of costs that one party can recover from another, whether requested by a party or on its own motion. Under r 42.4(2),[10] an amount ordered under subrule 1 may not cover costs an applicant is ordered to pay because it caused another party to incur unnecessary costs, for example, by breaching court orders or rules, seeking an extension of time to comply with orders or rules, or seeking leave to amend pleadings.[11] A PCO can be made at any time in the litigation process[12] and a court can indicate

[4] *Civil Procedure Act 2005* (NSW), s 98.
[5] *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534.
[6] *Uniform Civil Procedure Rules 2005* (NSW), r 42.1.
[7] See *Uniform Civil Procedure Rules 2005* (NSW), Sch 1.
[8] *Civil Procedure Act 2005* (NSW), s 56.
[9] *Uniform Civil Procedure Rules 2005* (NSW), r 42.4(1) formerly *Supreme Court Rules 1970* (NSW), Pt 52A r 35A which was introduced in 2000.
[10] *Uniform Civil Procedure Rules 2005* (NSW), r 42.4(2).
[11] Preston J observed in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* [2009] NSWLEC 165; (2009) 170 LGERA 22 at [14] that this ensures that there remains a cost incentive on parties to comply with the overriding purpose stated in the *Civil Procedure Act 2005* (NSW), s 56.
[12] *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; (2009) 170 LGERA 1 at [41]. Palmer J in *Sherborne Estate (No 2)* (2005) 65 NSWLR 268 at [24] said that r 42.4 could only apply

which party will benefit from the order, as it does not have to apply equally to all parties.[13] Such costs orders can therefore be unidirectional for the benefit of one party or multidirectional or reciprocal applying to all parties. PCOs made have generally been multidirectional.

This broad discretionary power in relation to costs is complemented by obligations under the *Civil Procedure Act 2005* (NSW) in addition to that imposed by s 56 which requires courts to act in accordance with the dictates of justice under s 58, and to ensure that costs are proportionate to the issues in dispute, under s 60.[14]

For completeness I note that the usual costs rule is to be contrasted with the costs rule that applies in merit appeals in the Land and Environment Court in class 1 and 2 proceedings. Rule 3.7 of the *Land and Environment Court Rules 2007* (NSW)[15] state that costs are awarded only if fair and reasonable to do so, so that each party generally pays its own costs. Such a costs rule generally applies in merit appeals under planning laws in most jurisdictions.

As the power under r 42.4 of the *Uniform Civil Procedure Rules 2005* (NSW)[16] is unconfined, the court can make an order within the proper exercise of judicial discretion. The relevant factors will depend on the circumstances of the case.[17] Until the last few years most PCOs in NSW have been made in private litigation in the Supreme Court of NSW under the *Family Provisions*

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in advance of a hearing. Basten JA (Macfarlan JA agreeing) in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 at [180] stated that r 42.4 was capable of applying at an early stage of the proceedings but at [185] did not find it necessary in that case to express a view as to whether r 42.4 only applied at an early stage of the proceedings and not at the time of making a final costs order.

[13] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* [2009] NSWLEC 165; (2009) 170 LGERA 22 at [27]; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 at [187], [189] per Basten JA (Macfarlan JA agreeing). Conversely, Beazley JA in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 (in dissent) at [68] and [83] opined that r 42.4 applies for the benefit of all parties, citing Federal Court cases, but accepted that this may be open for argument.

[14] *Civil Procedure Act 2005* (NSW), s 56, s 58, s 60.

[15] *Land and Environment Court Rules 2007* (NSW), r 3.7.

[16] *Uniform Civil Procedure Rules 2005* (NSW), r 42.4.

Act 1982 (NSW) (applying r 42.4(1)[18] or its predecessor). In cases in which PCOs have been made, expenditure was found to be disproportionate to the matters in dispute or the amount of money sought. In accordance with the court's obligations under the *Civil Procedure Act 2005* (NSW), orders were made to achieve proportionality in the sense that the costs unless capped were likely to be a disproportionate share of the fund from which they would ultimately be paid, the estate in dispute.[19]

Typically in public interest environmental litigation,[20] disparity in the parties' financial resources results as non-profit organisations or highly motivated individuals of limited means pursue cases in which complex legal issues arise, with the possibility of expensive expert evidence. Respondents are generally comparatively well resourced government ministers or departments and companies undertaking development. While an applicant's lawyers and expert witnesses in civil enforcement or judicial review proceedings may act for a reduced fee or on condition that cost recovery occurs only if proceedings are successful, the applicant may have difficulties raising funds to pay a costs order against him or her particularly where there are two respondents.[21] Owing in part to the existence of broad or open standing provisions in major environmental protection and planning legislation in NSW, public interest litigation by judicial review or civil enforcement has a lengthy history in the

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[17] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 at [186].

[18] *Uniform Civil Procedure Rules 2005* (NSW), r 42.4.

[19] For example, *Dalton v Paull (No 2)* [2007] NSWSC 803; BC200705720; *Dinnen v Terrill; Terrill v Dinnen (Estate of Dinnen)* [2007] NSWSC 1405; BC200710718; *Nudd v Mannix* [2009] NSWCA 327; BC200909764.

[20] Considerations relevant to characterising litigation as in the public interest are: the public purpose served by the litigation, whether that purpose is confined to a relatively small number of members from the group or association or concern with their own private amenity or whether the interest is wider, whether an applicant seeks to enforce public law obligations, whether the prime motivation of the litigation is to uphold the public interest and the rule of law, and whether the applicant has no pecuniary interest in the outcome of the proceedings. See *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* [2004] NSWLEC 434; (2004) 136 LGERA 365 at [15] cited with approval in *Olofsson v Minister for Primary Industries (No 2)* [2011] NSWLEC 181 at [26], [57] and *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 per Basten JA (Macfarlan JA agreeing) at [202].

Land and Environment Court.[22] That these provisions require complementary protection against high litigation costs has been well noted.[23] Rule 4.2 of the *Land and Environment Court Rules 2007* (NSW)[24] partially accommodates this concern by expressly permitting the Court not to make an order against an unsuccessful party in public interest proceedings. Making PCOs further promotes the purpose of open standing provisions.[25]

The importance of such orders is illustrated by the facts in *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; (2009) 170 LGERA 1**,** a case found to have been brought in the public interest.[26] BMCS a non-government organisation being a local conservation group in the Blue Mountains area to the west of Sydney, sought to prevent the respondent a large government owned electricity generator from polluting a river which, if made out, would have been a criminal offence. At an early stage BMCS sought an order limiting the costs recoverable by either party in the sum of $10,000. The Court considered that the case would raise complex and novel legal matters. BMCS did not have significant assets, had no financial interest in the proceedings and demonstrated that it could not continue the litigation if a PCO was not made in the amount of $20,000. Although the respondent estimated that its costs would be over $200,000, it had significant financial resources and did not demonstrate that a PCO would cause it financial hardship. An order was made capping the parties' costs liability at $20,000.

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[21] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* [2009] NSWLEC 165; (2009) 170 LGERA 22 at [35]; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 per Basten JA (Macfarlan JA agreeing) at [218].

[22] *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; (2009) 170 LGERA 1 at [44].

[23] See for example *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; (2009) 170 LGERA 1 at [43]; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 at [218] per Basten JA (Macfarlan JA agreeing).

[24] *Land and Environment Court Rules 2007* (NSW), r 4.2.

[25] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 at [197] per Basten JA (Macfarlan JA agreeing).

[26] *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; (2009) 170 LGERA 1 upheld on appeal in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424.

The Court referred at [46] - [55] to factors identified in other jurisdictions with similar statutory contexts as a useful guide in public interest proceedings. The United Kingdom Court of Appeal in *R (on the application of Corner House Research) v Secretary for State and Industry* [2005] 1 WLR 260 took into consideration the following factors: [27]

(i) the issues raised are of general public importance;

(ii) the public interest requires that those issues should be resolved;

(iii) the applicant has no private interest in the outcome of the case;

(iv) having regard to the financial resources of the applicant and respondent and the amount of costs that are likely to be involved, it is fair and just to make the order; and

(v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

Factors identified as relevant in the Federal Court by Bennett J in *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 at [6] were:

(i) the timing of the application;

(ii) the complexity of the factual or legal issues raised in the proceedings;

(iii) the amount of damages that the applicant seeks to recover and the extent of the remedies sought;

(iv) whether the applicant's claims are arguable and not frivolous or vexatious;

(v) the undesirability of forcing the applicant to abandon the proceedings; and

(vi) whether there is a public interest element to the case.

Although costs are ordinarily assessed at the conclusion of proceedings, when considering a PCO application at an early stage in the proceedings a

[27] *R (On the Application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 4 All ER 1 at [74]; *R (On the Application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209; [2009] Env LR 18 at [13] - [28].

court can determine whether the matter is in the public interest.[28] The case was found to raise several legal issues of public importance and would not continue if no PCO was made.

This decision was upheld on appeal in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 Basten JA (with whom Macfarlan JA agreed, Beazley JA dissenting). The Court of Appeal held that as the purpose of a PCO is to facilitate access to justice, courts will consider the consequences of making such an order in litigation from the point of view of both parties.[29] Significantly, the existence of private or personal interests does not prevent the making of a PCO.[30] Moreover, the existence of a public interest is not of itself sufficient to warrant an order. A court will consider whether it would be just to make an order in the circumstances of the case.[31] It was held that the combination of using an open standing provision and the existence of r 4.2 of the *Land and Environment Court Rules 2007* (NSW)[32] qualifies a respondent's expectation of being awarded its costs, if successful, to such an extent that it is a factor which supports the making of a PCO.[33]

This decision is apparently the first time that a court of appeal in an Australian jurisdiction has considered these factors in the context of the making of a PCO.[34]

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[28] *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; (2009) 170 LGERA 1 at [59]; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 at [207], [209] per Basten JA (Macfarlan JA agreeing).

[29] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 at [204] per Basten JA (Macfarlan JA agreeing).

[30] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 at [210] - [211] per Basten JA (Macfarlan JA agreeing).

[31] *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; (2009) 170 LGERA 1 at [55]; *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* [2009] NSWLEC 165; (2009) 170 LGERA 22 at [58]-[59].

[32] *Land and Environment Court Rules 2007* (NSW), r 4.2.

[33] The matter was discontinued by consent on 11 October 2011 as it settled out of court with the respondent making certain admissions including that it discharged waste waters containing pollutants between May 2007 and August 2011: EDO NSW, *Blue Mountains Conservation Society v Delta Electricity,* http://www.edonsw.org.au/blue_mountains_conservation_society_v_delta_electricity.

[34] Watters R, "Protective costs orders in Australian environmental law: an update" (2013) Australian Environment Review June 2013 at 537.

Other Land and Environment Court of NSW cases

PCOs have been sought in three further cases in the Land and Environment Court of NSW. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* [2009] NSWLEC 165; (2009) 170 LGERA 22 was a judicial review challenge to the validity of an exploration licence which enabled exploration activities in the Caroona district. The applicant intended to continue with the litigation regardless of whether a PCO was made. It had significant assets and there was a financial incentive for its members to provide financial resources to continue with the litigation. The applicant also did not establish that the respondent's estimate of costs was disproportionate to the importance and complexity of the subject matter of the proceedings. The Court found that a PCO was not necessary to facilitate access to justice for the applicant and that directions for case management were more appropriate to facilitate the just, quick and cheap resolution of the proceedings. The Court left open the possibility of making a PCO later in the proceedings if the circumstances changed. Whether the proceedings were actually brought in the public interest did not need to be determined at that stage.

Relevant factors which weighed against the making of a PCO in *John Williams Neighbourhood Group Inc v Minister for Planning* [2011] NSWLEC 100 were that the case did not raise any novel questions of law, there was no evidence to establish impecuniosity on the part of the applicant group and its members, and there was some financial incentive for the members to provide funding for the group to continue the litigation and fight the project. The Court declined to find that the applicant brought the case in the public interest because its motivation was confined to impacts on its members who were residents of the neighbourhood. This was a judicial review challenge to a Part 3A approval granted by the Minister for Planning under the *Environmental Planning and Assessment Act 1979* (NSW)[35] for construction and operation of a private hospital.

[35] *Environmental Planning and Assessment Act 1979* (NSW), Part 3A.

In *Olofsson v Minister for Primary Industries* [2011] NSWLEC 137 a former commoner sought to challenge a ministerial revocation of Camberwell Common. The proceedings were found to be brought in the public interest. The Court made a PCO capping the costs liability of all parties to $10,000 and an order that the applicant's costs liability in relation to all four respondents to no more than $10,000 was made. The case raised novel questions of statutory interpretation and concerned the proper administration of land by the Crown. The grounds appeared arguable and the applicant demonstrated that she would not be able to continue the litigation if a PCO in the amount sought was not made. The likely final costs order for two respondents was estimated as over $140,000, however, the disproportionality between the maximum amount recoverable under a PCO and a likely final costs order did not warrant much weight as this was based on the assumption that the applicant would lose. Additionally, the respondents did not suggest they would suffer financial hardship as a result of an order and no concern arose that unnecessary costs would be incurred if a PCO was made. As it was a public interest matter, the deleterious effect on access to justice principles was an important consideration. The proceedings were not commenced using an open standing provision.[36]

NSW Law Reform Commission consideration

In May 2011 the NSW Law Reform Commission published *Consultation paper 13: Security for costs and associated costs orders*,[37] seeking submissions on whether PCOs have application in private litigation and whether they should be more regularly sought in public interest litigation. In *Report 137 Security for costs and associated orders* published December 2012, the Commission concludes at [4.72] that:[38]

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[36] The applicant was ultimately unsuccessful in challenging the validity of the Minister's revocation of Camberwell Common: *Olofsson v Minister for Primary Industries (No 2)* [2011] NSWLEC 181.

[37] [37] New South Wales Law Reform Commission, *Consultation paper 13: Security for costs and associated costs order* at p 81-101, http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/cp13.pdf.

[38] New South Wales Law Reform Commission, *Report 137: Security for costs and associated costs orders* at [4.72], http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r137.pdf.

"We consider it unnecessary to recommend any amendment to r 42.4. The case law already makes it clear that an important purpose of r 42.4 is to promote access to justice and that public interest proceedings are a category of cases where protective costs orders may be made."

Protective costs orders in the Federal Court of Australia

Former *Federal Court Rules 1979* (Cth), O 62A r (1)[39] introduced PCOs in Australia in 1993, now r 40.51(1) in the *Federal Court Rules 2011* (Cth).[40] Black CJ anticipated such orders would apply mainly to simple commercial disputes not involving the recovery of large sums of money.[41] Drummond J in *Hanisch v Strive Pty Ltd* (1997) 74 FCR 384 at 387 stated that the main object of the rule was to cap costs in matters involving "less complex issues" and concerning the "recovery of modest amounts of money". A PCO made under r 40.51(5) has been interpreted as applying equally for the benefit of all parties.[42]

Compared to other jurisdictions a relatively large number of costs capping orders have been made in the Federal Court. PCOs have been made in private[43] and public interest[44] litigation in that jurisdiction. Two cases which have been referred to in other jurisdictions are *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509 and *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864. Further examples follow.

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[39] *Federal Court Rules 1979* (Cth), O 62A r (1).

[40] *Federal Court Rules 2011* (Cth), r 40.51.

[41] Letter from Chief Justice Black of the Federal Court of Australia to the President of the Law Council of Australia dated 6 November 1991, quoted in *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509 at 511.

[42] See *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, *Maunchest Pty Ltd v Bickford* (Federal Court of Australia, 7 July 1993, unreported), *Muller v Human Rights and Equal Opportunity Commission* (Federal Court of Australia, 17 July 1997, unreported).

[43] *Maunchest Pty Ltd v Bickford* (Federal Court of Australia, 7 July 1993, unreported), *Hanisch v Strive Pty Ltd* (1997) 74 FCR 384.

[44] *Woodlands and Another v Permanent Trustee Company Limited and Others* (1995) 58 FCR 139, *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, *Haraksin v Murrays Australia Ltd* [2010] FCA 1133; (2010) 275 ALR 520, *Tasmanian Conservation Trust Inc v Minister for Sustainability, Environment, Water, Population and Communities* (ACD24/2011) (order made by consent).

In *Haraksin v Murrays Australia Ltd* [2010] FCA 1133; (2010) 275 ALR 520 a PCO was made under *Federal Court Rules 1979* (Cth), O 62A r (1)[45] where the applicant, who suffered from a physical disability, was alleging direct and indirect discrimination in contravention of the Disability Standards for Accessible Public Transport 2002 (Cth) in relation to the failure to provide wheelchair accessible coaches. The application was made under the *Australian Human Rights Commission Act 1986* (Cth). The order sought limited the costs to be recovered by one party from another on a party/party basis to $15,000. The application was made promptly. Citing the factors identified in *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 as providing useful guidance, Nicholas J found there was a public interest element in the case in seeking to have the relevant transport standards observed by the respondent, the applicant was not seeking compensation and would not proceed with the litigation if no order was made. The evidence disclosed that the applicant had substantial assets. An order was made limiting the recovery of costs to $25,000 representing $15,000 available under a grant of legal aid with a further amount of $10,000 as the applicant's contribution to the payment of the respondent's party/party costs if required.

In *King v Jetstar Airways Pty Ltd* [2012] FCA 413 the applicant was appealing from a single judge decision in the Federal Court dismissing her application under the *Disability Discrimination Act 1992* (Cth) against a low-fare airline for a declaration of failing to provide her with wheelchair assistance on a domestic flight. At trial a PCO was made capping costs at $20,000. Pending the appeal, the applicant applied for a PCO limiting the liability of any party to costs of $10,000. The proceedings were identified as raising questions of public interest and that failing to make such an order would stifle the appeal. An order capping costs was made.

King v Virgin Australia Airlines Pty Ltd [2014] FCA 36 was similar litigation against another low-fare airline. A factor Foster J took into account was that

[45] *Federal Court Rules 1979* (Cth), O 62A r (1).

Mrs King had the benefit of two cost capping orders in the *Jetstar* litigation,[46] which she lost. Further matters taken into account included the wide nature of the claim being pursued despite obvious difficulties with the case pressed. Subsequent changes to the *Disability Discrimination Act 1992* (Cth) since the *Jetstar* case did not alter the similar nature of this litigation to the *Jetstar* case. The fact that the litigation was complex and raised issues already determined against Mrs King weighed against a cost capping order being made. That the litigation would come to an end if no costs capping order was made was a powerful factor generally but in this case the result of the similar *Jetstar* litigation[47] diminished the significance of that factor. No cost capping order was made.

The importance of a PCO as a means of enabling access to courts is exemplified by the discontinued Federal Court case of *Tasmanian Conservation Trust Inc v Minister for Sustainability, Environment, Water, Population and Communities* (ACD24/2011). In judicial review proceedings the applicant sought to challenge decisions made by a Commonwealth Minister in relation to a pulp mill. Consent orders were made capping costs recoverable by either party at $30,000.[48] However, after learning that Gunns Limited intended to join the proceedings and would oppose a PCO, the applicant was not willing to face the financial risk of continuing the proceedings.

Federal Circuit Court of Australia

Federal Circuit Court Rules 2011 (Cth), r 21.03(1)[49] provides for the making of cost capping orders. In *Briggs-Smith v Moree Plains Shire Council* [2012]

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[46] *King v Jetstar Airways Pty Ltd* [2012] FCA 8; (2012) 286 ALR 149, *King v Jetstar Airways Pty Ltd* [2012] FCA 413.

[47] *King v Jetstar Airways Pty Ltd* [2012] FCA 8; (2012) 286 ALR 149, *King v Jetstar Airways Pty Ltd* [2012] FCA 413.

[48] That matter was discontinued on 19 September 2011 without proceeding to a final hearing. As a result, the applicant was ordered to pay the respondent's costs fixed in the sum of $10,000. McGlone P, *Tasmanian Conservation Trust Inc* (media release, 20 September 2011), http://www.tct.org.au/media/documents/20.09.2011TCTMediaReleaseFederalPulpMillCourtCaseCeases1.pdf.

[49] *Federal Circuit Court Rules 2011* (Cth), r 21.03(1).

FMCA 304 the applicant sought an order capping costs at $5,000. The claim arose from concerns about the applicant's employment by Moree Plains Shire Council as an Aboriginal researcher and the management of an indigenous collection in the Northern Regional Library. Declarations of breaches of the *Racial Discrimination Act 1975* (Cth) and orders for the return of certain resources to the indigenous collection were sought. Smith FM accepted that the management, budgeting, staffing and location of the library resource is a matter of public interest. However the matters pleaded and the relief sought did not have such obvious public purpose. The submissions of the applicant did not show precisely what actions of racial discrimination were alleged. The future procedural course of the matter was vague and therefore the cost of the proceedings was uncertain. The application for a PCO was refused.

Protective costs orders in Victoria

A relatively recent amendment to the *Civil Procedure Act 2010* (Vic), s 65C(2)(d)[50] commenced on 24 December 2012. It states:

> (1) In addition to any other power a court may have in relation to costs, a court may make any order as to costs it considers appropriate to further the overarching purpose.
>
> (2) Without limiting subsection (1), the order may—
>
> …
>
> (d) fix or cap recoverable costs in advance.

Bare v Small [2013] VSCA 204 was delivered in August 2013. The Victorian Court of Appeal (Hansen and Tate JJA) considered the Victorian Supreme Court's power to make a PCO under s 65C(2)(d) of the *Civil Procedure Act 2010* (Vic).[51] As set out above s 65C(2)(d)[52] provides for the capping or fixing of recoverable costs in advance. Section 7 of the *Civil Procedure Act 2010* (Vic)[53] identifies that the overarching purpose of the Act and rules of court is to facilitate the just, efficient, timely and cost-effective resolution of the real

[50] *Civil Procedure Act 2010* (Vic), s 65C(2)(d).
[51] *Civil Procedure Act 2010* (Vic), s 65C(2)(d).
[52] *Civil Procedure Act 2010* (Vic), s 65C(2)(d).
[53] *Civil Procedure Act 2010* (Vic), s 7.

issues in dispute. Section 24 of the *Supreme Court Act 1986* (Vic)[54] confers a general discretionary power on the court to award costs.

The appellant was challenging the decision of a single judge of the Supreme Court not to grant him certiorari and mandamus requiring that an investigation into his treatment at the hands of certain police officers be carried out. The appellant sought a PCO in relation to the costs of the appeal. The respondents accepted the court could make a PCO under s 65C(2)(d). The respondents opposed the making of the order and submitted that authorities such as *R (on the application of Corner House Research) v Secretary for State and Industry* [2005] 1 WLR 260 a decision of the UK Court of Appeal which gave primacy to matters of public interest should not be followed. The Victorian Equal Opportunity and Human Rights Commission, which intervened in the proceedings before the first instance judge and was the fourth respondent on the appeal, supported the making of a PCO. The Attorney-General of Victoria also intervened in the proceedings below and was fifth respondent in the appeal and opposed the grant of a PCO. *R (on the application of Corner House Research) v Secretary for State and Industry* [2005] 1 WLR 260 was referred to at [23]-[26] and *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 was referred to at [28]-[29].

The Victorian Court of Appeal held that the court has a discretionary power to fix or cap a party's liability for costs in advance of an appeal as provided in s 65C(2)(d)[55] if it considers such an order is appropriate to further the overarching purpose identified in s 7 of the *Civil Procedure Act 2010* (Vic).[56] The factors identified in *R (on the application of Corner House Research) v Secretary for State and Industry* [2005] 1 WLR 260 were considered relevant but were not a "test" determining whether an order ought be made. That such orders can be reciprocal or not was canvassed with most cases noted as making an order in reciprocal terms.

[54] *Supreme Court Act 1986* (Vic), s 24.
[55] *Civil Procedure Act 2010* (Vic), s 65C(2)(d).
[56] *Civil Procedure Act 2010* (Vic), s 7.

The Victorian provisions are not identical to the UK cost provisions in *R (on the application of Corner House Research) v Secretary for State and Industry* [2005] 1 WLR 260 which require that the parties be placed on an equal footing. Whether reciprocity in a multidirectional order was warranted where a respondent does not have straitened financial circumstances was identified as an issue at [48]. As the proceedings had the quality of a test case this issue was not finally determined. Fairness dictated that the recoverable costs should be limited for all parties and capped at $5,000.

PCOs in Western Australia

Of Western Australia Dal Pont *The Law of Costs*[57] states that "in Western Australia the rule-based costs discretion, coupled with a recently amended rule requiring courts to case-manage to ensure that costs 'are proportionate to the value, importance and complexity of the subject matter in dispute' and 'proportionate to the financial position of each party', has prompted the issue of a practice direction that envisages the advance capping of costs, at least in family provision proceedings".[58] One example where an order capping costs in a family provision type case was made is *Dion Giuseppi Sergi By Next Friend Aileen Solowiej v Sergi* [2012] WASC 18.

PCOs in Northern Territory

The *Local Court Rules 1998* (NT), r 38.10 provides for the making of public interest costs orders. This rule allows a party at any stage of a proceeding including at commencement to apply to the court for such an order. The applicant must satisfy the court that the proceeding will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community, will affect the development of law generally and may reduce the need for further litigation, or otherwise has the character of a public interest or test case proceeding. If the court is satisfied that there are grounds for making an order regard is to be had to the resources of the parties, the likely cost of the proceeding to each party, the ability of each to present his or her case properly or to negotiate a fair settlement and the

[57] Dal Pont G E, *The Law of Costs,* (3rd ed, LexisNexis Butterworths, Sydney, 2013) at 7.42

extent of a private or commercial interest each party may have in the litigation. The court may make an order under this rule despite a party to the proceeding having a personal interest in the matter. Orders the court may make under this rule include, inter alia, the party making the application regardless of the outcome of the proceeding is not to be liable for the other party's costs or is to be liable to pay up to a specified amount or proportion only of the other party's costs.[59]

Final observations

Specific orders providing for the capping of costs were not found in other jurisdictions. The possibility remains that such an order could be made under the wide costs discretion generally available to state courts.[60]

Making a PCO can impact on the making of a security for costs application. In *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 193 the respondent also made a security for costs application. This was dealt with after the PCO application. A security for costs order was then made with the consent of BMCS in the amount determined in the costs capping order.[61] This approach was upheld on appeal in *Delta Electricity v Blue Mountains Conservation Society Inc* (security for costs) [2010] NSWCA 264, see also *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; (2010) 176 LGERA 424 per Beazley JA at [113].

In conclusion, PCOs such as orders capping costs are an important part of a costs framework which enables access to justice. While granting such orders must be subject to a rigorous consideration at a relatively early stage of litigation, their importance in enabling strategic public interest litigation to proceed is significant.

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[58] *Rules of the Supreme Court 1971* (WA), O 66 r 1, O 66 r 4B(e), O 66 r 4B(f).

[59] *Local Court Rules 1998* (NT), r 38.10(1), (2), (3), (5) (6)(c).

[60] Dal Pont G E, n 57, at 7.43.

[61] *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 193 at [36]-[39].