DOES AUSTRALIAN LAW RECOGNISE PUBLIC LITIGATION?

*Andrea Durbach**

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In 1987, Sir Anthony Mason, in a lecture entitled "Future Directions in Australian Law", published in the *Monash University Law Review*, declared:

> ... that the courts have a responsibility 'to develop the law in a way that will lead to decisions that are humane, practical and just', to repeat the words of Sir Harry Gibbs. Judges do not carry out this responsibility in a vacuum, by shutting their eyes to contemporary conditions. They must have an eye to the justice of a rule, to the fairness and the practical efficacy of its operation in the circumstances of contemporary society. A rule that is anchored in conditions which have changed radically with the passage of time may have no place in the law of today.

Increasingly courts are being asked to analyse and decide legal questions in the context of complex social, political and economic issues. With the emergence of public interest groups which have sought to redress public harm, enforce public duties and protect hard-won political and social rights, the traditional common law view of litigation as a process of resolving individual disputes, has had to shift to accommodate the ripples of social and political transformation.

* *Andrea Durbach is Director, Public Interest Advocacy Centre.*

PIAC's role in public interest litigation

It is largely in the context of the work of my Centre, the Public Interest Advocacy Centre (PIAC), that I approach the question posed by this seminar: *Does Australian law recognise public interest litigation?* PIAC is an independent, non-profit legal and policy centre based in Sydney. It was established in July 1982 as an initiative of the Law Foundation of NSW with the primary aim of undertaking policy-orientated or test case litigation which would transcend the interests of individual litigants and promote those of members of the community at large, with particular reference to disadvantaged groups.

In pursuit of its charter of promoting the public interest and enhancing the quality of public policy-making, PIAC represents and regularly consults with a broad spectrum of groups and individuals well placed to interpret and give definition to the *public interest* and devise appropriate methods for its advancement. Invoking a multi-disciplinary approach to its work which combines legal action, policy analysis and legal reform and campaigning, PIAC's cases and projects have tended to focus on consumer protection, human rights and access to justice issues.

It is the combination of addressing a substantive public interest on the one hand and judicial support of procedures which facilitate its effective ventilation and clarification on the other, which underlies our definition of public interest litigation. There is in some quarters adherence to a narrow view which argues that a dispute which simply espouses a public interest is

sufficient to attract the classification public interest litigation; that if litigation suggests a public interest as the content of the dispute it is by implication public interest litigation. Indeed, Australian law is full of rich deliberation on the meaning of "the public interest". There is case law which offers quantitative (that a matter affects a significant sector of the public) and qualitative (that a matter has an intrinsic value or import to the wider community) assessment. Judgments go to some length in describing and evaluating competing public interests and then turn to the difficult exercise of weighing up public benefit as against public cost. And there is extensive discussion on the intention of the legislature where courts have had to construe the public interest in the context of a statutory framework.

The willingness of our courts to evaluate the public interest within the parameters of a statutory setting is however far from indicative of an acceptance of public interest litigation. The desire of the Australian courts to explore, interpret and define the public interest goes only half way to the full recognition of public interest litigation. For until the means or processes for furthering or accommodating the public interest are accorded widespread approval by our courts, the judicial reception of public interest litigation will continue to be seen as lukewarm and defensive. An important step in the route to this recognition is for courts to construe litigation as being in the public interest; what is essential is recognition of the mechanisms or strategies which allow for its effective declaration and protection. Public interest litigation therefore presupposes the existence of viable and amenable procedures within the framework of the judicial system which sustain and advance a public interest. It entails expanding the right of procedural access to judicial remedies through broadening the rules of standing, facilitating broad-based litigation with maximum conservation of cost via representative proceedings and devising appropriate costs allocation rules where the litigation is considered in the public interest.

Thus, we would argue that recognition of public interest litigation by the courts, would require their embracing both the substantive issue as one of public interest and the procedural mechanism(s) for its most effective advancement. It is perhaps in respect of the latter component, the question of facilitating access to allow for the ventilation of a public interest issue, where Australian courts have lacked largesse. The Italian-American jurist, Mauro Cappelletti, in his book *The Judicial Process in Comparative Perspective*, writes:

> The right of effective access to justice has emerged with new social rights. Indeed, it is of paramount importance among other new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement - the most basic 'human right' - of a system which purports to guarantee legal rights.

Why should public interest litigation receive judicial recognition?

Why does public interest litigation warrant special treatment as to access? What is the value to our jurisprudence for the judicial recognition and nurturing of public interest litigation and why should our courts embrace procedures which convey a public interest expeditiously and with minimum expense to both the litigant and the court system? The benefits which I summarise below are extracted from a submission by PIAC, Environmental Defenders Office and Consumer Law Centre of Victoria (CLCV) to the then Commonwealth Attorney-General, Michael Lavarch and Minister for Justice, Duncan Kerr in support of the establishment of a National Public Interest Legal Assistance Scheme. These benefits include:

- **Development of the law:** Legal rights and obligations can be developed or clarified via public interest litigation with resultant increased equity, access to the law and public confidence in its administration.

- **Economies of scale:** The pursuit of fundamental issues and outcomes via public interest litigation can affect a wide circle of people experiencing similar difficulties with reduced cost implications for legal aid commissions and the justice system as a whole.

- **Impetus for reform and structural change to reduce potential disputes:** Public interest litigation can be a major impetus for structural change and reform which reduce the likelihood of disputation, and hence litigation. Improved regulatory structures (through legislation, codes of practice, complaints mechanisms, charters of rights and industry ombudsman schemes), and changes in policy and practice by government or private corporations in fields such as banking, insurance, health care, nursing homes, chemical manufacture - can be attributed in large part to successful public interest litigation.

- **Contribution to market regulation and public sector accountability by allowing greater scope for private enforcement:** Public interest litigation can play an important role in market regulation and public sector accountability. Actions in respect of unfair practices or defective and harmful products can provide incentives to produce quality products and clean environments or safe and non-discriminatory work practices.

- **Reduction of other social costs:** Through successful resolution of civil and administrative disputes public interest litigation can prevent and stop costly market or government failures. For a small investment, public interest litigation can save the community substantial direct and indirect costs (lost taxes, health expenditure, inefficient administration).

- **Public participation in decision-making:** Public interest litigation can secure public participation in key decision-making processes and in judicial law-making. Where those potentially affected by decisions or laws have an opportunity to shape their content and form, generally greater adherence to outcome is achieved.

These benefits come under threat when a social and political climate comes into play which:

- undermines public participation in government policy-making and the capacity to inform social progress;

- removes channels for scrutiny of government decisions;

- effectively excludes entire classes of people from the judicial process through the application of the narrowed principles of standing;

- imposes cuts and limitations on legal services programs and on public interest organisations, thus curtailing their capacity to advocate in the public interest.

As these developments take hold (and I am not setting a hypothetical scene) with consequent weakening of social rights and obligations, our courts must assume an even greater responsibility to ensure that important public interests and rights do not fade from the agenda. How they do this is to demonstrate a willingness to accept that many matters of national interest are litigated in suits between private parties and to welcome judicial participation which will assist in the determination and exploration of issues of public interest raised by litigation. In a report of PIAC's first five years of operation entitled *Five*

Years in the Ring, High Court Justice Michael Kirby, then President of the NSW Court of Appeal, wrote:

> The dis-inclination of judges to conceive their role, even partly as social engineers, is itself the consequence of an unfamiliarity with public interest test cases. To some extent at least. the willingness and ability of courts to consider relevant social phenomena and to articulate general legal principles dependc upon the stimulus and assistance they receive from counsel.

Our work over the years suggests that without judicial flexibility in relation to *amicus curiae* interventions, class actions and cost rules, opportunities for the responsible and effective articulation of a public interest through litigation will be lost and the Australian common law response to public interest cases will remain uncertain with few articulated principles. Justice O'Connor in the US Supreme Court 1989 decision *Webster v Reproductive Health Services* suggests important values which should underlie our acceptance of judicial participation:

> ... the willingness of courts to listen to interveners is a reflection of the value that judges attach to people. Our commitment to a right to a hearing and public participation in ... decision-making is derived from the belief ... that we improve the accuracy of decisions when we allow people to present their side of the story ... (and) create a moral obligation (on their part) to respect the outcome.

This clarity of acknowledgment has not yet permeated judicial thinking in Australia. Indeed, attempts to participate in judicial decision-making by way of *amicus curiae* interventions, have not been met with a clear or consistent response from the courts, a lack of welcome being perhaps indicative of the confusion over what may be considered a desired level of public interest litigation in Australia and the absence of a developed principle on participation. This lack of common understanding has lead to some anomalous and unhelpful dicta.

In a test case, *Breen and Williams*, which concerned the right of a patient to have access to her medical records held by a plastic surgeon, PIAC in a coalition with Consumers Health Forum and the Health Issues Centre, intervened as *amici* before the Supreme Court of NSW to inform the Court of the wider implications of its decision, and on recent legal and policy developments regarding patient access to medical records held by private practitioners, within Australia and internationally. PIAC's work on health issues in general and access to records in particular, had been extensive, well-documented over many years. Its expertise and well-founded interest in the issue, and its ability to present to the court a novel perspective, would have sufficed as the basis for permitting leave to intervene. The intervention however was allowed reluctantly by the NSW Supreme Court who chose to focus on PIAC as an organisation, declaring:

> There is no reason for thinking of the Public Interest Advocacy Centre as in any way the guardian of or representing persons with similar interests to the plaintiff or the public interest, and notwithstanding its name it is not a public body, but a private company limited by guarantee whose members have power to decide whom they admit to membership and what causes they espouse. I should not be taken as supporting any claim of the Public Interest Advocacy Centre to be heard in the public interest.

Despite a reluctant granting of leave permitting PIAC's intervention at first instance, the NSW Court of Appeal denied PIAC "a similar privilege on appeal" (per Kirby, P). In a dissenting judgment on appeal, Kirby P commented that:

> (t)he courts should not turn a blind eye or a deaf ear to the assistance that they might receive from *amicus curiae* on matters of general principle in test cases ... to exclude the assistance of PIAC evidences in my respectful view the procedural formalism and rigidity which limits the utility of the court['s contribution] to modern dispute resolution.

Class actions

While class actions and public interest litigation are obviously not identical, class actions claims often overlap with public interest litigation in that they allow for consistent and equitable resolution of disputes arising from common circumstances, providing a more efficient and effective court procedure for dealing with numerous related claims, with benefits to the group involved, to its opponent and to the court system. (*Access to Justice - an action plan of the Access to Justice Advisory Committee* (the Sackville Report), May, 1994 at p 59, para 2.104).

Since the High Court decision in *Carnie v Esanda* two years ago, the law on class actions procedures remains unpredictable and uncertain, offering little guidance but recurrent obstacles to potential public interest litigants. The High Court in *Carnie* undoubtedly opened the way for courts to be more innovative in exercising their discretion to formulate procedural rules regulating the most efficient method of conducting representative proceedings. It seems however that the courts have been timid in taking up the High Court call to develop rules in the absence of legislative intervention. Certainly in NSW, despite the development and advocacy of appropriate models for law reform, government has been slow to put in place a structure which would eradicate current uncertainty and clarify class actions procedures. Any hopes for such clarification, now appear to sit with the courts adopting procedural rules through the Rules Committee of the NSW Supreme Court. Without such boldness, communities harmed by widespread practices, will continue to face barriers which may prevent them from enforcing their rights or involve them in costs which far outweigh the desired benefit of litigation.

Costs

Costs, the most formidable barrier to participation, remain a powerful disincentive to public interest litigation. In an address to an international conference on environmental law in 1989, Justice Toohey contended:

> There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of the case to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.

Public interest litigation will not frequently produce financial gain for the public interest litigant. Typically, public interest litigants must obtain legal aid funding to cover their own legal costs and possibly those of the other side should they lose. Legal aid resources are limited in application to both subject matter and quantum and only in NSW does an indemnity provision exist where an award of adverse costs falls to the legally aided litigant. Public interest litigation is also discouraged by the potential obligation to provide security for costs. In the 1986 NZ case *Ratepayers and Residents Action Association Inc v Auckland City Council*, Richardson J said:

> In acting in a responsible way as watchdogs of the public interest, community organisations perform a valuable service. Having in the public interest opened the court door to the airing of public law questions, the public interest in having those questions proceed to hearing and determination must be a factor for consideration in deciding whether to order security.

In the NSW Court of Appeal 1996 judgment, *Richmond River Council v Oshlack*, Sheller J refers to the case of *Kent v Cavanagh* as expressing concern that "responsible citizens who take public spirited action not for personal or selfish reasons but for the benefit of the public at large should be heavily out of pocket if they fail". He continues, quoting Fox J from the judgment:

> It seems to me undesirable that responsible citizens with a reasonable grievance who wish to challenge Government action should only be able to do so at risk of paying costs to the Government if they fail. They find themselves opposed to parties who are not personally at risk as to cost and have available to them almost unlimited public funds. The inhibiting effect of the risk of paying costs is excessive and not in the public interest.

Despite these references and the fact Mr Oshlack was acting clearly in the public interest to ensure compliance by the Council with environmental legislation, the NSW Court of Appeal held that litigation in the public interest was not a relevant factor to be taken into account when determining whether or not to make an award of costs against Oshlack with the failure of his application to court. The High Court will reconsider the soundness of this approach in early August this year. If disincentives to wider public participation continue to exist, as with the *Oshlack* ruling where legislation invited the applicant to remedy a perceived breach, it is foreseeable that those who are able to bear the costs of litigation will have an exaggerated impact on judicial decision-making.

Linked to the facilitation of public interest litigation, is the need for the sponsorship or subsidisation of public interest litigation. The words of Justice Michael Kirby, again in the PIAC report, are instructive in this regard:

> As the funds available to legal aid are strictly limited the cases which the Commission can fund tend to be concerned with individual, rather than community interests. Larger questions of public policy, if fought, arise incidentally or haphazardly. This is the principal justification of a separate and distinct body to run public interest litigation. Without the funds to support capable and imaginative lawyers, important issues may simply never be debated in court.

Conclusion

There is no doubt that Australian courts have not been oblivious to the potentially beneficial effect of public participation on the development of the law. Different degrees of curiosity in public interest litigation rather than wholesale recognition by Australian courts of public interest litigation, is the concluding answer I would suggest to the question posed by this seminar. With the changing nature of litigation, frequently implicating many individuals or organisations, corporations and governments, often not party to the dispute, courts will have to recognise the importance of expanding the information available to them and the most effective methods for its dissemination. Public interest litigants are particularly important to this information-gathering process representing interests important to society but that would not otherwise be represented in court.

Last year I attended a conference of the Public Law Project in London on *Litigating in the Public Interest* and one of the speakers, barrister Rabindah Singh, discussing the role of public interest litigants and the importance of judicial participation, drew on the President Kennedy quote stating: "Ask not what the courts can do for you, but ask rather what you can do for the courts." The courts must somehow find a place for accommodating responsible citizens who seek to prevent harm or illegalities in government which otherwise would go unchallenged. Drawing again on the paper of Sir Anthony Mason, his words offer a fitting conclusion:

> Of course the legal issues for decision in a particular case often do not correspond with the real issues underlying the case as the public sees them. A court must necessarily deal with the legal issues. But undue emphasis on formalism promotes a lack of correspondence between the legal issues and the real issues as the public perceives them. And a similar emphasis on formalism diminishes public confidence in the administration of justice in an age in which confidence in the courts and respect for the law cannot be taken for granted.