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# Public interest litigation: making the case in Australia

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# Public interest litigation: making the case in Australia

## **Abstract**

Litigation is widely and appropriately recognised as an important component of the public interest advocacy 'toolkit'. Yet, little attention has been paid in Australian research and scholarship to an important question: under what circumstances is public interest litigation (PIL) an effective way to bring about progressive social change? Informed by a review of the international literature on PIL, the authors of this article argue for the importance of drawing on Australia's rich history with PIL to develop a solid empirical evidence base which can inform future decision about the strategic employment of PIL in campaigns to address the concerns and needs of disadvantaged and marginalised sections of Australian society.

## **Keywords**

interest, australia, litigation, public, making, case

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# PUBLIC INTEREST LITIGATION

## Making the case in Australia

ANDREA DURBACH, LUKE McNAMARA, SIMON RICE  
and MARK RIX

Growing government enthusiasm for alternative dispute resolution ('ADR') — motivated, at least in part, by a determination to rein in the cost of running the civil justice system — has potentially significant consequences for public interest litigation ('PIL'). The rhetoric of ADR is that it is 'friendly' to litigants and cheaper than pursuing court adjudication but, in contrast to PIL, ADR is designed to produce agreement-based outcomes that potentially compromise issues and do not give rise to public rulings or precedents.<sup>1</sup> As well, increasingly high court fees and costly pre-action protocols have the potential to impede campaigns where PIL and court involvement are important for asserting rights, declaring conduct *ultra vires*, holding officials and corporations to account via sanctions, and providing redress to those harmed by violations or breaches of the law. Such threats to using litigation as a mechanism for achieving progressive social change make it important and timely that public interest campaigners and their lawyers are aware of, and able to act in accordance with, solid empirical evidence on the optimal conditions for the effective deployment of PIL.

Public interest litigation is a well-known and well-established strategy that has been successfully used for a range of progressive social policy and law reform campaigns in Australia. However, it has not yet been the subject of detailed scholarly analysis in this country. As a result, activists and advocates for progressive social change — especially those working without the assistance of experienced organisations like the Public Interest Advocacy Centre in Sydney or the Human Rights Law Centre in Melbourne — are often required to make decisions about whether to pursue litigation without the benefit of an empirical foundation for assessing effectiveness and efficiency, and without access to accumulated wisdom about whether the conditions are 'right'. We think this gap can and should be remedied, and that the way to do so is to combine the lessons that can be drawn from international research on PIL with the insights that can be drawn from Australia's own rich history of PIL.

We have recently commenced a pilot study of Australia's experience with PIL, an issue that has not received sufficient research attention. We are asking 'under what circumstances is PIL an effective way to bring about progressive social change?'. Although the term 'public interest' has a fluctuating meaning, with different actors across the political spectrum claiming to be concerned with 'the public interest', we have

a specific focus. Our interest is the efficacy of public interest litigation in addressing the concerns and needs of disadvantaged or marginalised sections of Australian society.

Our starting premise is that litigation has the *potential* to be an effective strategy for producing real change in policy and practice. Our aim is to identify the circumstances in which, and the conditions under which, this potential is most likely to be realised.

International research from a number of jurisdictions shows that litigation can be slow, expensive, demanding and risky. It is also not always effective in helping to bring a public interest campaign to a successful conclusion, even when employed in conjunction with other strategies. So, what distinguishes a good decision to litigate in the pursuit of progressive social change from a poor one? And how can we best evaluate the influence of PIL on outcomes or social change?

### The appeal of litigation

Legal change — including change effected by PIL — is commonly assumed to play an important role in delivering progressive social policy reform. Interest groups often seek changes to law ('rule change'), but usually as one step towards bringing about more wholesale change through raising public consciousness and modifying behaviour, attitudes and expectations ('social change').

Typically, PIL is intended to achieve change to law and policy that will benefit individuals and communities beyond those directly involved in the campaign. The public interest is served, for example, where the damaging impact of an institution or legislation is remedied with potential benefits for those who are not directly involved in the campaign. Although certainly not the only strategy available to those seeking to change law and social policy (others include direct action or grass roots campaigns, political lobbying, public information campaigns, and submissions to law reform and other public inquiries), litigation can be a critical component of a broader public interest campaign. Litigation is frequently an important strategy, as either a trigger or catalyst to launch a campaign, or as a 'back-end' mechanism to secure the gains of a multi-strategy campaign.

PIL is a strategy of particular value to people who are not sufficiently resourced or powerful to be directly influential in social and economic political policy issues

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1. Andrea Durbach, 'Test Case Mediation – Privatising the Public Interest' (1995) *Australian Dispute Resolution Journal* 233.

that affect them and their communities. Even though litigation can itself be expensive, resource-intensive and time-consuming, a single court decision with significant ramifications beyond the actual parties to the dispute offers affected individuals and communities a way to achieve change that counters (and may trump) the influence exercised by self-interested groups and elites.

Environmental campaigning has followed this model of public mobilisation complemented by litigation since the days of the Tasmanian Dam case, most recently in the Hunter Valley mining campaign waged — successfully — by the community of Bulga against Rio Tinto. In the Tasmanian Dam case, litigation to challenge the constitutional validity of *Gordon River Hydro-Electric Power Development Act 1982* (Tas), introduced to support the construction of a dam on the Gordon River, was a key part of a campaign to inject environmental harm considerations into policy and law-making processes. The current campaign in Australia against the indefinite immigration detention of individuals who have been assessed as genuine refugees (eg, on security grounds) — a campaign in which litigation has played an important part — offers a contemporary example of a specific campaign which is part of a broader movement to restore humanitarian and human rights considerations into Australian immigration law and policy. The opportunity for interest groups to use law in this way is essential to a liberal democracy such as Australia, which thrives on a plurality of different views about desirable rules, directions, attitudes and behaviours in society.

### The international literature

The role of litigation and the courts in the formulation of social policy, and the related questions of the influence of law on social policy, and of social context on legal development, have been the subject of a number of studies reported in the international literature. Much of this literature emanates from the US, dating back to the 1970s.<sup>2</sup> The relationship between PIL and social policy has also been the subject of studies in a number of other common law jurisdictions, such as India,<sup>3</sup> South Africa,<sup>4</sup> Canada,<sup>5</sup> the United Kingdom<sup>6</sup> and New Zealand.<sup>7</sup>

Much of this research has questioned the assumption that litigation is necessarily a compelling strategy for effecting social policy change. The most prominent debate along these lines has been between Rosenberg and McCann<sup>8</sup> over the value of litigation and resort to the courts. Rosenberg's central thesis is that judicial strategies are usually futile in bringing about meaningful social reform; his view is that major litigation campaigns consistently fail to produce significant social change, and have even had negative effects for change, such as 'backlash reactions and the rise of reactionary social movements'.<sup>9</sup> McCann is more optimistic in assessing the strategic role that litigation can play in public interest campaigns, arguing that litigation can indirectly empower social movements and provide leverage for political mobilisation.

While Rosenberg's search is for measurable *direct outcomes*, McCann's focus is on the *mobilising effect* that litigation can have. McCann's research suggests that a public interest law campaign is most successful when it adopts a range of related tactics such as lobbying; urging, challenging or avoiding law-enforcement; educating the public; and developing public capacity to engage in what McCann calls 'legal mobilisation' — the use of litigation strategies by otherwise marginalised or disempowered groups.

In this vein, a study of the use of PIL to secure gender justice and reproductive rights in India<sup>10</sup> suggests that the potential of PIL is most likely to be realised where lawyers collaborate with 'activists working at the ground [level]', and where litigation is launched 'at the right time', such as when there is sufficient public consensus or momentum on the issue under consideration; where litigation is accompanied by an effective public relations campaign; and where litigation is pursued in the most appropriate judicial forum. The same study suggests that well-coordinated litigation strategies, combined with wider social media and educational campaigns, can put considerable pressure on the judiciary and courts to 'address ongoing rights violations by testing existing standards, enforcing constitutional provisions, incorporating international legal norms, providing judicial remedies, and exacting state accountability.'

Similarly, in their study of PIL in South Africa, Marcus and Budlander point out that,

[e]ven where legal victories result in legal change and tangible benefits for those concerned, they do not necessarily achieve sufficient social change if they are not done in conjunction with additional social mobilisation and advocacy strategies.

International research suggests, however, that advocates sometimes pursue PIL without a thorough assessment of its likely effectiveness, and that some advocates may defend their reliance on PIL by invoking particular instrumental, political and cultural 'schemas of evaluation'. Kostiner, for example, has observed that 'because law is evaluated from an instrumental lens and from a political lens simultaneously, there is always a way to counteract evidence of law's futility and to justify its use.'

In summary, we draw from the international literature a number of working assumptions showing that PIL is most likely to work when:

- it draws on existing and widespread public support for social change on a specific issue, even if this support has not been highly visible prior to preparation for the litigation phase of a public interest campaign;
- it mobilises social movements, enabling them to build a public interest campaign around a specific issue with realistic and achievable goals;
- it is conducted in conjunction with an energetic, astutely executed and far-reaching public relations and media campaigns — both pre- and post-court/tribunal adjudication; and

2. From, eg, Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, to, eg, Robin Stryker, 'Half Empty, Half Full, or Neither: Law, Inequality and Social Change in Capitalist Democracies' (2007) 3 *Annual Review of Law and Social Science* 69.

3. See, eg, Center for Reproductive Rights and Avani Mehta Sood, *Litigating Reproductive Rights: Using Public Interest Litigation and International Law to Promote Gender Justice in India* (Center for Reproductive Rights, 2006).

4. See, eg, Gilbert Marcus and Steve Budlander, *A strategic evaluation of public interest litigation in South Africa* (The Atlantic Philanthropies, 2008).

5. Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, 2002).

6. See, eg, Liberty and the Civil Liberties Trust, *Litigating the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation* (Nuffield Foundation, 2006).

7. See, eg, Rick Bigwood (ed), *Public Interest Litigation: The New Zealand Experience in International Perspective* (LexisNexis, 2006).

8. See, eg, Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press, 1994); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press, 2nd ed, 2008).

9. Idit Kostiner, 'Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change' (2003) 37(2) *Law & Society Review* 323.

10. Center for Reproductive Rights and Sood, above n 3.

*PIL is a strategy of particular value to people who are not sufficiently resourced or powerful to be directly influential in social and economic political policy issues that affect them and their communities.*

- it gives careful consideration to identifying the most appropriate court or tribunal in which to commence the litigation.

### The Australian context

Although the international literature offers a framework within which to analyse the relationship between PIL and social policy change in Australia, local research is required before we can assess whether the findings of comparable studies overseas are applicable to Australia. McCann, whose pioneering work in the field is discussed above, has cautioned against extrapolating his findings about PIL in the US to other jurisdictions.<sup>11</sup> Indeed, there is a strong recognition in the literature of the value of country-specific empirical research, built on case studies of local campaigns. Because there is inevitably a myriad of local factors at play for any given public interest campaign, it is essential to be sensitive to the impact of local conditions, encompassing legal norms, rules and procedures, 'legal culture',<sup>12</sup> political, historical, and economic factors,<sup>13</sup> as well as the unique context and specific character of the social movements involved.

There is sufficient common ground between the way in which PIL is pursued in countries such as the US and South Africa, and the way it is pursued in Australia, to make comparison feasible. For example, the optimising strategies endorsed by Marcus and Budlander (discussed above) are routinely employed by Australian community legal centres in their legal information, advice and casework activities, and in their community legal education and law reform and legal policy work.<sup>14</sup> However, a number of variables distinguish Australia from the overseas jurisdictions in which previous PIL research has been undertaken. We are researching what influence these variables have, if any, on the success of PIL in Australia.

A major 'risk' variable in procedural terms is that, as a rule (and differently from the US), legal costs in Australia are awarded against the losing party. A second important variable is that differences in legal cultures and public funding mean there are less reliable sources of support for PIL cases in Australia than in countries such as India and the US. At the same time, what reliance there is on pro bono legal practice in Australia may not lead to fundamental, systemic change because of what O'Brien refers to as the 'liberal orientation of the [Australian] legal system' and accompanying 'traditional lawyering techniques' which are not ideally suited to social change lawyering.<sup>15</sup>

A third variable is Australia's federal constitutional arrangements and the associated distribution of adjudicative and lawmaking authority across federal/state/territorial legislative, executive and judicial branches of government (eg, via Ch III of the *Australian Constitution*). Depending on the subject matter, these arrangements may permit more or less opportunity to engage the courts in the underlying policy questions.

A fourth and related variable is the maturity and strength of the jurisdiction's legal/constitutional arrangements for the assertion and protection of human rights. Many progressive public interest campaigns are underpinned, in terms of motivating norms and principles, by a discourse around 'rights'. In countries such as the US, Canada, South Africa, India, the UK and New Zealand, constitutional and/or statutory regimes for the protection of rights are an established part of the landscape, and influence both the shape and outcomes of public interest campaigns. By stark contrast, even acknowledging the steps that have been taken in the ACT and Victoria (where human rights legislation has been introduced), Australia is still uniquely defined, at the national level, by the absence of a national human rights law, and reliance on a patchy network of common law and statutory protections.

Finally, when it comes to employing strategies other than litigation in public interest and social change campaigns, lawyers' use of the media in Australia is often limited by the ethical and professional codes of conduct governing lawyer-client confidentiality and lawyers' non-disclosure obligations.

These illustrative variables strongly suggest, as McCann has warned, that findings from overseas studies on PIL cannot be generalised to the Australia context.

### The Australian literature

Extensive empirical studies in analogous jurisdictions support the view that PIL can be an effective vehicle for influencing social policy across the breadth of conservative and progressive agendas, but local research is needed to examine and explain the optimal conditions for pursuing PIL in Australia and the assumed correlation between PIL and social change. To date, the academic literature on PIL in Australia has largely addressed procedural questions, such as standing, court rules and rules of costs,<sup>16</sup> or has been conducted on a desk review basis, without examining the background documents, interviewing participants and analysing the larger social context.<sup>17</sup>

11. Michael McCann (ed), *Law and Social Movements* (Ashgate, 2006).

12. Reza Banakar, 'When do Rights Matter?' in Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home: Socio-Legal Studies on Human Rights in the National Context* (Hart, 2004).

13. Luke McNamara, *Human Rights Controversies: The Impact of Legal Form* (Routledge-Cavendish, 2007).

14. See, eg, Mark Rix, 'Legal Aid, the Community Legal Sector and Access to Justice: What has been the Record of the Australian Government?' in Asha B. Joshi (ed), *Legal Profession: Modern Approach* (The Icfai University Press, 2008-09).

15. Paula O'Brien, 'Changing Public Interest Law: Overcoming the Law's Barriers to Social Change Lawyering' (2011) 36(2) *Alternative Law Journal* 82.



16. See, eg, Christine Forster and Vedna Jivan, 'Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience' (2008) 3 *Asian Journal of Comparative Law* 1.

17. See, eg, Jane Caruana and Vince Morabito, 'Australian Unions – the Unknown Class Action Protagonists' (2011) 30(4) *Civil Justice Quarterly* 382.

18. Thomas Scheffer, 'Courses of Mobilisation: Writing systematic micro-histories on legal discourse', in Max Travers and Reza Banakar (eds), *Theory and Method in Socio-Legal Research* (Hart, 2005).

19. Mary Stratton, *Alberta Self-Represented Litigants Access to Justice Mapping Project—Final Report* (Alberta Justice/Canadian Forum on Civil Justice, 2007).

20. *Commonwealth v Tasmania* [1983] 158 CLR 1.

21. *Australian Iron and Steel Pty Ltd v Banovic* [1989] 168 CLR 165.

22. *Al-Kateb v Godwin* [2004] 219 CLR 562.

23. *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1009.

24. *Breen v Williams* [1996] 186 CLR 71.

25. *Roach v Electoral Commissioner* [2007] HCA 43.

26. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

Our research investigates the strategic choices surrounding PIL, and identifies the optimum circumstances and practices for PIL in Australia. It will provide policy makers and public interest advocates with instructive tools to assess the appropriateness and likely success of public interest campaign strategies.

### Marshalling the evidence: the research method

Our research design has been informed by socio-legal studies of public interest law campaigns outside Australia, drawing on the work of Scheffer,<sup>18</sup> for example, to scrutinise participants as 'creative and tactical' actors instead of as passive bystanders. In this way our research looks beyond what is said and done within the legal proceedings, and considers how external events shape perceptions of the success or failure of the litigation.

As has been demonstrated in international research on PIL, research into PIL in Australia is best done by way of case studies, asking questions regarding the selection of cases, focus of evidence, and procedures and strategies used, including those external to litigation, as well as looking into the omission of certain factors and approaches. For each case study, a rich mixture of data will help answer questions such as 'Why was the public interest campaign run as it was?', 'Why was litigation adopted as a strategy?', and 'To what extent was the PIL objective realised?'

A 'blended methods' approach to the case studies will analyse in-depth interviews, observations, documents and statistics, to reflect the diversity of the groups and individuals who participate in the civil justice system.<sup>19</sup> It is important that interviews encompass people central to the conduct of a PIL campaign: participants and decision-makers; people and entities whose

interests were being protected or promoted; people and entities whose interests would be adversely affected; and public officials whose functions and conduct were, directly or indirectly, the subject of the campaign. The particular strength of interviews is that they can uncover deeper information about the motives, objectives and aspirations of people making strategic decisions in the campaign, and about external factors such as cost, risk, mandate, capacity, ethics, professional limitations, participants' characteristics and organisational considerations.

Archival documentation for each campaign comes from participants directly, and from third party agencies such as courts and law reform and public policy agencies, and contemporaneous accounts of the public interest law activity (such as organisational memoranda, reports and minutes) are a 'process tracing' exercise to explain the cause-and-effect of people's ideas and conduct. News media coverage of the cases under scrutiny, classified according to factors such as type (eg, report, analysis), perspective (eg, popular, industry) and tone (eg, critical, supportive), provides social context.

Potential case studies are well-known cases where PIL was pursued in the context of a larger public campaign for change: *Commonwealth v Tasmania* ('Tasmanian Dam Case')<sup>20</sup> in the High Court, concerning environmental protection; *AIS v Banovic*<sup>21</sup> in the High Court, concerning anti-discrimination law; *Al-Kateb v Godwin*<sup>22</sup> in the High Court, and *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>23</sup> in the Federal Court, concerning power to detain non-citizens; *Breen v Williams*<sup>24</sup> in the High Court concerning access to medical records; *Roach v Electoral Commissioner*<sup>25</sup> in the High Court concerning voting rights; and *Plaintiff*

*Many progressive public interest campaigns are underpinned, in terms of motivating norms and principles, by a discourse around ‘rights’. [...] Australia is still uniquely defined, at the national level, by the absence of a bill of rights and reliance on a patchy network of common law and statutory protections.*

*M70/2011 v Minister for Immigration and Citizenship*<sup>26</sup> in the High Court concerning asylum-seeker processing.

Case studies such as these address a diversity of social policy topics, and the interests of a range of ‘vulnerable’ groups. Of course, different public interest campaigns have different ambitions for the litigation. While our focus is on cases where the goal is to exert a positive influence on progressive law and social policy reform, the precise nature of, and mechanism for, PIL will vary from campaign to campaign. For example, the goal could be to directly and positively affect the interests of citizens (beyond the litigants) through the change of a specific legal rule, government policy or administrative practice, or it could be to achieve a court-room ‘win’ that will indirectly advance the interests of citizens by raising awareness/ consciousness, motivating social movements, and influencing policy and law-makers.

The evaluation of the factors that combine to yield PIL successes (eg Tasmanian Dam Case) and those (or their absence) that lead to failure (eg *Breen v Williams*) is particularly instructive. Equally significant are campaigns for change where PIL did not proceed or where the matter was settled; a feature of PIL which may hamper its usefulness is that — like most litigation — it may not result in a court decision, let alone a reported court decision, and the ‘public interest’ dimension is not necessarily addressed in reported cases.

Case studies from an extended period recognises that the nature and potency of PIL is likely to have changed over time, influenced by factors such as the prevailing economic climate (affecting the availability of legal aid<sup>27</sup> and no win, no fee costs arrangements), relevant legal arrangements, and ascendant political values (including the party political orientation of the government of the day).

## Conclusion

Cases such as the Tasmanian Dam Case illustrate that a common law decision can be a powerful part of a larger campaign for social change. But even though the risks of litigation are high, using PIL as a strategy for change in Australia is more of a gamble than it should be. Other common law jurisdictions are relatively well served by research that explores the conditions and considerations that support efficient and effective PIL. There is a history in Australia that is yet to be explored; a better understanding of what drives PIL in Australia, and of the conditions under which litigation is most

likely to be effective, offers the prospect of enhanced decision-making about when to pursue litigation — alone or as part of a broader campaign of mobilisation — with improved outcomes for progressive social policy change and law reform in Australia.

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27. See, eg Andrea Durbach, ‘The Right to Legal Aid in Social Rights Litigation’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009).