

13 June 2017

By email: meanstestreview@vla.vic.gov.au

Means Test Review
Victoria Legal Aid
570 Bourke Street
MELBOURNE VIC 3000

Dear Sir/Madam

Means Test Review – public interest exemption

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide input to Victoria Legal Aid's (**VLA**) Means Test Review (the **Review**).

Our comments are limited to one option proposed in the Options Paper published by the Review. That option is number 43 which proposes to include a public interest exemption to the means test.

Consumer Action strongly supports the option of introducing a public interest exemption to the VLA means test. To be effective in supporting public interest litigation, this should be accompanied by a review of VLA's guideline on public interest and strategic litigation as well as a willingness to provide an indemnity for a legally assisted person's costs.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Support for a public interest exemption

Option 43 of the consultation paper states that an applicant or their lawyer could apply to VLA to seek discretion on the basis that their legal matter meets a special circumstances means test guideline that would identify 'benefit to the wide public' as an exemption to the means test. This option aligns with VLA's legislative objectives, including 'to provide the community improved access to justice and legal remedies' and 'to pursue innovative means of providing legal aid directed at minimising the need for individual and legal services in the community'.ⁱ

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Particularly in relation to issues affecting economically disadvantaged people, strategic or public interest litigation can be an effective way to provide access to justice. The primary motive of such litigation is to promote the general public interest rather than to protect the private interests of specific persons. It does this by seeking to change the law or how it is applied, in a way that will affect more vulnerable groups or society as a whole.

The inability to appropriately fund public interest litigation can mean that worthwhile cases do not proceed. This can mean that other strategies such as law reform need be adopted to overcome the particular problem. Sometimes law reform is not possible because policy makers would like to see the bounds of existing law tested.

While VLA's existing guideline on public and strategic litigation is welcome, the means test can sometimes operate as a barrier to advancing such matters. This is because a client that is well-placed to be a lead applicant or to take the action may be excluded by the means test. Despite this, the matter (if advanced) could benefit priority client groups or otherwise economically disadvantaged people.

The consultation paper states that this option will impact a smaller number of people. We contest this conclusion. By its very nature, public interest litigation (even where the particular litigation is about particular private rights) can benefit significant numbers of people.

Adverse costs risks

The other barrier to commencing public interest litigation, particularly in the context of cases which relate to private rights, is the risk of adverse costs orders. In Consumer Action's experience, the prospect of adverse cost orders can act as a deterrent for our clients in pursuing legal action. This risk arises for our clients if they challenge a trader in VCAT or the Magistrates Court, and are successful but the trader then appeals to a superior court. If the trader wins the appeal, a costs order may be made against the consumer which they are unable to pay.

The risk is particularly present where the claim relates to an area of law that is unclear and, if the claimant is successful, will have implications for the viability of the relevant trader's business model.

An example relates to people who receive demands for liquidated damages from operators of private car parks when it is alleged that driver do not comply with car parking conditions. In our view, there is a reasonable claim either that there is no contract between an individual and the private car park operator and/or that the term allowing the recovery of liquidated damages is an unfair contract term under the Australian Consumer Law and so void. However, given the relatively small amounts of the claim, the likelihood a car park operator would appeal a decision adverse to it, and the risk of costs for the individual, any claim will invariably not be pursued.ⁱⁱ

To ensure any public interest exemption from the means test is effective, we would encourage VLA to consider whether it would also indemnify an assisted client from adverse costs so as to improve access to justice. We note that in New South Wales, section 47 of the *Legal Aid Commission Act 1979* (NSW) provides that Legal Aid NSW can pay the costs of legally assisted persons.ⁱⁱⁱ This may provide a model for broader adoption. It would also complement the recently announced commitment from the Victorian

Government to specify clearly the criteria to be taken into consideration by the courts in determining protective costs order applications in public interest litigation.^{iv}

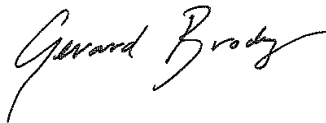
Cost of public interest exemption

The consultation paper notes that the cost of this option is relatively high. Again, we contest that conclusion. While the costs associated with each individual grant of aid made under this option may be high, it would be expected that grants made under this option would be relatively rare. Further, VLA could reduce the cost by limiting the number of grants made under this option every year. Even if grants were relatively rare, the availability of this option would facilitate much greater public interest litigation which will be of benefit to the Victorian community.

Should you have any questions, please contact us via email at info@consumeraction.org.au or call 03 9670 5088.

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

ⁱ Section 4, *Legal Aid Act 1978* (Vic).

ⁱⁱ This issue has been dealt with through law reform: *Road Safety Amendment (Private Car Parks) Act 2015* (Vic).

ⁱⁱⁱ Section 47 of the *Legal Aid NSW Act* was relied on in *Woodlands v Permanent Trustee Co Bass* (1995) 58 FCR 139 to grant a protective cost order up to the limit of the legal aid indemnity. That was a consumer law case in the public interest, and was ultimately appealed to the High Court.

^{iv} Victorian Government response to Access to Justice Review, recommendation 7.2, see:

<https://engage.vic.gov.au/application/files/1214/9542/9362/AccessToJusticeGovtResponse201705.pdf>