

Memorandum

To: Directors
Presidents
CEOs – Constituent Bodies
Section Chairs
Chair – Access to Justice Committee

From: Arthur Moses SC, President

Date: 22 February 2019

Changes introduced by Treasury Laws Amendment (2018 Measures No. 5) Bill 2018 (Cth)

Action Request

For noting and distribution to Constituent Bodies and Section members.

Key Issues

I write to advise that on 14 February 2019, the [amendments](#) to the [Treasury Laws Amendment \(2018 Measures No. 5\) Bill 2018 \(Cth\)](#) (**the Bill**) introduced by Senator the Hon Doug Cameron were passed by the Senate (**the Senate amendments**). On 18 February 2019, the Senate amendments were agreed to by the House of Representatives and will commence the day after Royal Assent, expected to occur by the end of February 2019.

The Senate amendments to the Bill amend the [Competition and Consumer Act 2010 \(Cth\)](#) (**the CCA**) and the [Australian Small Business and Family Enterprise Ombudsman Act 2015 \(Cth\)](#) (**the Small Business Ombudsman Act**). The amendments allow judges in the Federal Court to waive liability for adverse costs to small business private litigants in cases related to restrictive trade practices under Part IV of the CCA. The amendments also allow the Small Business and Family Enterprise Ombudsman (**the Ombudsman**) to provide assistance to small businesses in preparing their applications for a no adverse costs order.

The Senate amendments were first proposed in the [Competition and Consumer Amendment \(Small Businesses and Access to Justice\) Bill 2017 \(Cth\)](#) (**the 2017 Bill**), however the 2017 Bill was not passed by the Senate.

The Senate amendments seek to address the risk for private parties litigating breaches of Part IV of the CCA of incurring significant adverse cost orders should the applicant be unsuccessful in the proceeding. The [Explanatory Memorandum](#) to the 2017 Bill (**the Explanatory Memorandum**) noted the ‘uneven playing field between large and small businesses in Australia.’¹ It stated:

¹ Explanatory Memorandum, Competition and Consumer Amendment (Small Businesses and Access to Justice) Bill 2017 (Cth), 2.

Allowing judges in the Federal Court to waive liability for costs to small business private litigants will empower private litigants under Part IV of the Competition and Consumer Act 2010 to bring litigation without the burden of prohibitive legal fees.²

The Explanatory Memorandum also noted that the [final report](#) of the *Competition Policy Review*, released in March 2015, found that ‘there are significant barriers to small businesses taking private action to enforce the competition laws.’³ It endorsed the recommendations from the Productivity Commission’s report on *Access to Justice Arrangements* relating to small business’ access to remedies, including the use of cost budgets for parties engaged in litigation in order to assist in managing the litigation costs.⁴

Changes introduced by the Bill

No adverse cost orders

The Bill introduces no adverse cost orders to the CCA. New subsection 82(3) of the CCA allows for a private litigant, at any time during a proceeding in relation to loss or damage suffered by conduct of another person that was done in contravention of a provision under Part IV of the CCA, to seek a no adverse costs order from the court hearing, or that will hear, the matter.

New subsections 82(4) and 82(5) of the CCA allow the court to make orders that the applicant is not liable for the costs of any respondent to the proceedings, regardless of the outcome or likely outcome of the proceedings, if satisfied that:

- the action has a reasonable prospect of success;
- the action raises an issue that is not only significant for the applicant, but may also be significant for other persons or groups of persons; and
- the disparity between the financial position of the applicant and the financial position of the respondent or respondents is such that the respondent or respondents could use the possibility of a costs order that does not favour the applicant.

New subsection 82(6) of the CCA requires that the court may satisfy itself of the above matters by having regard only to the documents filed with the court in the proceedings and, if satisfied, liability for the defendant’s legal fees will be waived for the applicant. However, new subsection 82(7) provides that should a person appeal the court’s finding on cost orders, that person is liable for costs in relation to that appeal.

The role of the Ombudsman

The Senate amendments amend the Small Business Ombudsman Act to allow the Ombudsman to provide assistance in advising and preparing a person’s case for a no adverse costs order in proceedings in relation to contraventions of Part IV of the CCA.

Under section 66 of the Small Business Ombudsman Act, any person may request assistance from the Ombudsman in relation to a ‘relevant action’. The Bill amends section 65 of the Small Business Ombudsman Act so that requests for assistance with applications for a no adverse costs order are covered in the list of ‘relevant actions’. The Bill also amends section 15 of the

² Explanatory Memorandum, Competition and Consumer Amendment (Small Businesses and Access to Justice) Bill 2017 (Cth), 3.

³ Ian Harper et al, Australian Government, *Competition Policy Review* (Final Report, March 2015) 407.

⁴ *Ibid* 85.

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Small Business Ombudsman Act to include in the list of ‘assistance functions’ of the Ombudsman the function of advising on and preparing a no adverse costs order.

The Bill inserts Division 3A into Part 4 of the Small Business Ombudsman Act. Under this new Division, new sections 74A and 74B of the Small Business Ombudsman Act allow the Ombudsman to provide the following assistance if the ‘relevant action’, in relation to a request to Ombudsman, is conduct that may be in contravention of a provision of Part IV of the CCA and affects, or may affect, a small business or family enterprise:

- advise the person on the arguments that might be made, and the evidence that might be adduced, to satisfy a court that an order under new subsection 82(4) of the CCA should be made; and
- prepare arguments that might be made in satisfying a court that an order under that subsection should be made.

The Explanatory Memorandum stated the purpose of these amendments to the Small Business Ombudsman Act:

While this will not be legally binding, the Ombudsman will assist small business to better understand their prospects of successful action under the CCA.⁵

In addition, new paragraph 23(h)(ii) of the Small Business Ombudsman Act ensures that the number of requests for assistance in relation to an application for a no adverse costs order are included in the Ombudsman’s annual report.

Protective costs orders

No adverse costs orders are different to existing protective costs orders (**PCOs**). PCOs set a maximum limit on costs recoverable from a proceeding.

The *Federal Court Rules 2001* allow for a party to a proceeding to apply for an order specifying the maximum costs as between party and party that may be recovered for the proceeding.⁶ The *Federal Circuit Court Rules 2011* (Cth) allow for the same, but a court may also specify on its own motion the maximum costs recoverable on a party and party basis.⁷ In both jurisdictions, PCOs apply to all parties equally, limiting the ability of a public interest litigant to recover their costs.⁸

The factors to be considered in the exercise of a court’s discretion to make a PCO are:

- the timing of the application;
- the complexity of the factual or legal issues raised in the proceeding;
- the amount of damages the applicant seeks to recover;
- whether the applicant’s claims are arguable and not frivolous or vexatious;
- the undesirability of forcing the applicant to abandon the proceedings;
- whether there is a public interest element to the case;

⁵ Explanatory Memorandum, Competition and Consumer Amendment (Small Businesses and Access to Justice) Bill 2017 (Cth), 4.

⁶ *Federal Court Rules 2001* (Cth) r21.03.

⁷ *Federal Circuit Court Rules 2011* (Cth) r40.51

⁸ Eliza Ginnivan, ‘Public Interest Litigation: Mitigating Adverse Costs Order Risk’ (2016) 136 *Precedent Australia Lawyers Alliance* 22.

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- the costs likely to be incurred by the parties in the preparation for, and hearing of, the matter; and
- whether the party opposing the making of the order has been uncooperative and/or has delayed the proceedings.⁹

PCOs are granted only in exceptional cases, generally where there is a pressing question of public interest to be determined and where it is considered that there is a real risk that an applicant would abandon the proceedings otherwise.¹⁰

Contact

In the first instance, please contact Dr Natasha Molt, Director of Policy, on 02 6246 3754 or at natasha.molt@lawcouncil.asn.au if you would like any further information.



Arthur Moses SC
President

⁹ *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [6]-[7] (Bennett J).

¹⁰ Law Council of Australia Legal Practice Section, Submission to Australian Consumer Law Review, *Consumer Affairs Australian Consumer Law Review* (30 June 2016) 13.

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