

Submission No. VL/23  
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Law Reform Committee



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Executive Officer  
Victorian Parliament Law Reform Committee  
Parliament House  
Spring Street  
East Melbourne VIC 3002

Dear Sir/Madam

### **Inquiry into vexatious litigants**

On behalf of Foster's Group Limited ("**Foster's**"), I make the following submission to the Victorian Parliament Law Reform Committee's (the "**Committee**") Enquiry into Vexatious Litigants.

This submission is made on the basis of the Committee's following terms of reference:

- (a) inquire into the effectiveness of current legislative provisions in dealing with vexatious litigants; and
- (b) make recommendations which better enable the Courts to more efficiently and effectively perform their role while preserving the community's general right of access to the Victorian Courts.

#### **1 Foster's experience with vexatious litigants**

Foster's has incurred substantial legal costs and spent a considerable amount of time and resources defending claims of a vexatious nature.

Based on experience, Foster's makes the following observations:

- it is not uncommon for large organisations, such as Foster's, to be confronted by vexatious claims;
- the costs associated with vexatious claims and the related proceedings are often disproportionate to the claims. In most cases, genuine attempts to appease the concerns of vexatious litigants are pointless; litigants are often motivated by irrational personal grievances;
- vexatious claims are often personal, embarrassing and offensive. As a result, such claims require significant review and demand the contribution of expensive resources;
- claims made by vexatious litigants are often wild and exaggerated, which are likely to attract media attention. As a result, these claims must be managed at several levels throughout the organisation;

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- many vexatious litigants appear to be undaunted by the prospect of a legal costs order in the event their claim is unsuccessful. In particular, bankrupted litigants can unreservedly commence multiple actions with a "nothing to lose" mentality;
- once litigation is commenced, Courts have a tendency to bend over backwards to allow the plaintiff "his day in Court". Persistent failure to meet agreed deadlines is rewarded with successive extensions if the plaintiff, on minimal supporting evidence, can show he is "working on it";
- the current legal test in Victoria for declaring a litigant to be vexatious is difficult to satisfy. These difficulties provide comfort to the more sophisticated litigants, who routinely abuse the Court's time and resources by continually harassing their targets; and
- this is not a Victorian issue. The problem is encountered nationally. Foster's has been the target of vexatious claims in several states.

**2 Effectiveness of current legislative provisions in dealing with vexatious litigants**

**a) Commencing proceedings**

Under section 21 of the *Supreme Court Act 1986* (Vic) (the "Act"), the Supreme Court may make an order declaring a person to be a vexatious litigant if that person has habitually, persistently and without any reasonable ground instituted legal proceedings in the court, an inferior court or a tribunal against the same or different persons.

In Victoria, the Attorney-General is currently the only person permitted to make an application to the Supreme Court to declare a person a vexatious litigant. The Supreme Court has no inherent jurisdiction to prevent the commencement, except by leave, of proceedings by a particular person who in the past has instituted proceedings which are frivolous and vexatious. The inherent jurisdiction of the court is limited to controlling a proceeding which has actually commenced.

This is not the case in other jurisdictions. For example, under section 39 *Supreme Court Act 1935* (SA) an entity other than the Attorney-General can initiate proceedings to declare a litigant vexatious.

**b) Reluctance to declare**

In Victoria, targets of vexatious claims must rely on the Attorney-General to commence an action to declare a litigant vexatious. For a variety of reasons, an Attorney-General may be reluctant to commence proceedings. In South Australia, Foster's has been the target of a person that it considers to be a vexatious litigant. In that State, the Attorney-General was, for quite a considerable period of time reluctant to make such an application to the Supreme Court (despite the fact that the relevant person had already been restrained from commencing proceedings against several organisations).

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Foster's has spent significant time and money seeking to enliven the Court's inherent jurisdiction to limit the actions of litigants who frequently bring vexatious claims. In Foster's experience, Courts have been reluctant to both prevent the commencement of proceedings and to control a proceeding which has already been commenced by such a litigant, which is further evidence of an understandable bias to allow every litigant "his day in Court".

c) **Cost Orders and Bankruptcy**

Costs orders have not been effective deterrents. Foster's has suffered substantial legal bills due to unpaid cost orders against unsuccessful vexatious litigants.

d) **Jurisdiction "shopping"**

A litigant declared vexatious in one jurisdiction may transfer the proceeding to another jurisdiction. Alternatively, they may elect to move the action to the Federal Court or another State, upon which the process must recommence.

**3 Recommendations**

Foster's offers the following recommendations to the Committee:

a) **Applicants:** Section 21 of the Act should be amended to empower the Supreme Court to declare a litigant vexatious on its own motion, or on the application of:

- the target of the vexatious litigant;
- the Registrar; and
- the Attorney-General or Solicitor-General of the Commonwealth or of a State or Territory.

A judge sitting alone should have the power to determine such an application.

b) **Consideration of motivation:** Provision should be in the Act to require the Courts to consider the circumstances surrounding the litigation, the manner in which the person has conducted the litigation, the person's motive for bringing the litigation, any related interlocutory applications that the person has commenced or attempted to commence during the litigation and the actual timely conduct of the litigation.

c) **Jurisdiction:** If a person is declared a vexatious litigant in one jurisdiction, the declaration should be recognised in all Australian jurisdictions – if only via agreed Judicial Comity. A finding that a person is a vexatious litigant ought not require a complete and new hearing in each State.

d) **Register of vexatious proceedings:** A register of vexatious proceedings and the people that maintain them should be created and maintained. A Court or Tribunal should be required to determine at the end of each matter whether that matter was vexatious in nature. If a person is entered onto the register, say three times, that person should be required to obtain special leave before commencing subsequent litigation.

**4 Conclusion**

Defending baseless claims brought by vexatious litigants has proven costly and time consuming for Foster's. From experience, the options available to reduce the impact of continual vexatious claims have been limited. The laws and procedures governing the process of declaring a person a vexatious litigant have been ineffective in preventing litigants from abusing the Court's process and time.

If you have any queries regarding this submission, please contact Mr Jason Ryan of this office on (03) 9633 2645.

Yours faithfully



Martin Hudson

Chief Legal Officer & Company Secretary