

SAVE THE REEF! CIVIC CROWDFUNDING AND PUBLIC INTEREST ENVIRONMENTAL LITIGATION

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This article examines the emerging area of civic crowdfunding, a subset of crowdfunding, as a means of financing public interest environmental litigation. The literature surrounding civic crowdfunding and third party litigation funding is currently underdeveloped. The link between those areas and public interest environmental litigation takes a further step into the unknown. As a case study, the Sea Dumping Case presents exciting opportunities for civil society and access to justice, but further research is needed before any firm conclusions can be drawn.

I INTRODUCTION

Public interest environmental litigation ('PIEL') has a valuable role to play in protecting our environment. It can ensure transparency in decision making, encourage law reform and uphold ideals like the rule of law. However, financing for PIEL is a key obstacle faced by many litigants. Traditional fundraising methods often raise a fraction of the funds required, and commercial funders will not finance litigation without the prospects of significant financial return. In this article, I investigate whether 'civic crowdfunding', an emerging subset of 'crowdfunding', could provide a viable method of funding PIEL.

Part II of this paper introduces the concept of PIEL and explores the difficulties public interest litigants face in raising funds for court. The aim here is to contextualise the role of PIEL in shaping debate around environmental issues as well as highlight some of the main obstacles public interest litigants face. In Part III, I examine whether third party litigation funding, in a commercial sense, is an abuse of process or a means of improving access to justice. I acknowledge at the start of this part that access to justice is by no means a settled phenomenon. The last few decades have seen a transition away from facilitating access to formal court processes towards adopting more 'user friendly' alternative dispute resolution processes. That said, in environmental matters, I argue that access to formal institutions like the courts is still a fundamental part of access to justice. Part III examines whether the funding of litigation from a third party might be construed as an abuse of process. I conclude there is no real evidence, scholarly or otherwise, that litigation funding represents an abuse of process. In fact, in Australia there appears to be a 'strong judicial endorsement' of litigation funding as a means of accessing justice. Part IV introduces the emerging

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literature surrounding civic crowdfunding and examines a case study (*'the Sea Dumping Case'*) where \$150 000 was raised to challenge a government decision to allow the dumping of dredged material on the Great Barrier Reef. Finally, Part V concludes by making some observations about the case study and suggests areas for further research including the need to investigate the 'scalability' of crowdfunding as a means of financing litigation, and further exploring the tension between public/private support for PIEL. In the end, I conclude that civic crowdfunding appears, at least preliminarily, to provide a highly practical form of public engagement in environmental matters. In the context of PIEL, it might allow the public to test important matters of public interest which might otherwise go undisturbed for want of funds.

II THE NATURE OF PUBLIC INTEREST ENVIRONMENTAL LITIGATION

A *Public Interest Environmental Litigation*

Since the 1980s, environmental litigation has been recognised to be not merely '*inter partes*' but to also involve a significant public interest element.¹ Public interest environmental litigation can promote transparency in government decision making and community acceptance of administrative decisions with respect to the environment.² It can also help to galvanise public debate around environmental issues as well as encourage law and policy reform.³

The Australian Law Reform Commission ('ALRC') has described public interest litigation as having one or more of the following criteria: it must clarify a significant right or obligation affecting the community; it must resolve an important question of law; or it must have other characteristics that reflect a 'test case' type scenario.⁴ The ALRC's description is not widely accepted and a number of varying definitions have also been put forward.⁵ Chris McGrath canvasses the relevant literature and concludes that PIEL is simply '[any] litigation by a private individual to protect the environment'.⁶

All arms of government — the legislative, executive and the judiciary — have a responsibility to ensure the conditions for PIEL are met.⁷ Most importantly, our laws must provide a proper foundation for PIEL to occur.⁸ To a certain extent they already do this. Wide standing provisions are a key feature of many natural resource frameworks (both state and federal), allowing anyone — or at least those who can establish a sufficient interest — to challenge government decisions or

¹ Brian Preston, *Environmental Litigation* (Law Book Co, 1989) vii.

² Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 331.

³ Brian Preston, 'The Role of Public Interest Environmental Litigation' (2006) 23 *Environmental and Planning Law Journal* 337.

⁴ Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report No 75 (1995) 13.2. See also McGrath, above n 2, 326.

⁵ McGrath, above n 2.

⁶ *Ibid* 327.

⁷ Brian Preston, 'Environmental Public Interest Litigation: Conditions for Success' (Speech delivered at the International Symposium: Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective, Awaji Island, Japan, March 2013) <http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/13en_preston.pdf> 1.

⁸ *Ibid*.

even prosecute breaches of environmental law.⁹ A recent study in Tasmania found that wide standing provisions allowing anyone to challenge decisions or enforce environmental laws can result in better information for decision-makers and increased public confidence and transparency in decision making.¹⁰

B Funding for PIEL

Wide standing provisions in legislation are only part of what makes up an effective setting for PIEL. As former High Court Judge, John Toohey, famously remarked: ‘there is little point opening the doors to the Court if litigants cannot afford to come in’.¹¹ For PIEL to be within the reach of ordinary people, our laws and policies must be structured to ensure it is both legally available and cost effective. Those acting in the public interest often struggle to raise the money for experts, barristers, travel and other outlays.¹² Individuals can attempt to raise money themselves, yet such initiatives tend to raise only a fraction of the funds required.¹³ Establishing a community group can ameliorate concerns of the individual litigant, but even the biggest non-government organisations (‘NGOs’) need to make difficult decisions about whether litigation is the best way to achieve a desired environmental outcome.¹⁴

One of the more effective ways of improving access to justice in environmental matters is through specialist public interest legal centres like Environmental Defenders Offices (‘EDOs’).¹⁵ EDOs across Australia have long provided subsidised (often free) legal advice and representation to individuals and groups wanting to use the law to protect the environment.¹⁶ In addition to public interest litigation, EDOs also provide valuable legal advice, legal education and law reform services. Examples of EDOs’ successful PIEL work include acting for a conservationist to stop the illegal killing of threatened flying foxes,¹⁷ representing an environment group to halt illegal whaling activities by a Japanese company,¹⁸ and representing a local residents group opposed to the building of a regional waste facility on agricultural land.¹⁹ There are many more examples of

⁹ See, eg, *Environment Protection and Biodiversity Act 1999* (Cth) s 475; *Environmental Protection Act 1994* (Qld) s 505; *Sustainable Planning Act 2009* (Qld) s 601; *Protection of the Environment Operations Act 1997* (NSW) s 219.

¹⁰ Madeleine Figg, ‘Protecting Third Party Rights of Appeal, Protecting the Environment: A Tasmanian Case Study’ (2014) 31 *Environmental and Planning Law Journal* 210.

¹¹ John Toohey ‘Environmental Law — Its Place in the System’ in *Proceedings of the First NELA/LAWASIA International Conference on Environmental Law* June 1989, 79. See also *Oshlack v Richmond River Council* (1994) 82 LGERA 236, 238 (Stein J).

¹² McGrath, above n 2, 335. For a more specific discussion of the financial hurdles faced by citizens and community groups in PIEL, see Anne Kallies and Lee Godden ‘What Price Democracy? Blue Wedges and the Hurdles to Public Interest Environmental Litigation’ (2008) 33(4) *Alternative Law Journal* 194, 194.

¹³ Preston, above n 7, 8.

¹⁴ Richard Moules, *Environmental Judicial Review* (Hart Publishing, 2011) 17.

¹⁵ Preston, above n 7, 9.

¹⁶ Deirdre Exell Pirro, ‘Access to Environmental Justice — A National Perspective’ (2008) 38(5) *Environmental Policy and Law* 272, 275.

¹⁷ *Booth v Bosworth* [2000] FCA 1878; *Booth v Bosworth* [2001] FCA 1453; *Bosworth v Booth* [2004] FCA 1623.

¹⁸ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 36.

¹⁹ *Hub Action Group Incorporated v Minister for Planning and Orange City Council* [2008] NSWLEC 116.

EDOs' important public interest litigation work,²⁰ including as lawyers in the *Sea Dumping Case* used as a case study in this article.

Recently, there has been a tendency for governments (state and federal) and industry groups to openly criticise the work of EDOs.²¹ In December 2013, the federal government withdrew \$10 million in funding to EDOs — a move likely to have a severe impact on access to justice for landholders and conservationists, who rely on EDO for advice.²² During a Senate Estimates Hearing in February 2014, the federal Attorney-General defended the decision:

It is not as if we are prohibiting EDOs. It is not as if we are doing anything other than saying that, from the limited resources available for the access to justice budget, we are spending our money where it is most needed. EDOs can continue to operate and they can make other arrangements for funding...²³

The decision to remove funding from EDOs was made before the release of the Productivity Commission's report into access to justice arrangements in Australia in September 2014.²⁴ At the time of writing, the Commission was considering recommending the establishment of a public interest litigation fund ('PILF') to address the shortfall in funding for PIEL and other types of public interest litigation. It is proposed the PILF would operate to insure 'meritorious' litigants against adverse costs awards.²⁵ Access to the fund would be determined by set criteria evaluated by a 'panel of qualified legal experts'.²⁶ The criteria are to be based on those currently used by courts when considering whether a litigant is eligible for a protective costs order.²⁷

It is unclear how much of the PILF (if it is established) will be allocated towards PIEL and how stringent the criteria for access will be. It is possible that given the highly technical nature of PIEL, litigants may need to undertake an extra layer of preliminary work in arguing their prospects of success. This could result in a kind of 'pre-litigation litigation' requiring additional up-front costs to be spent on experts and specialist legal advice; potentially discouraging litigants and undermining the spirit of the fund. The short time frames typically involved in PIEL could also

²⁰ See, eg, the selection of case studies in McGrath, above n 2.

²¹ See, eg, Anthea Vogl, 'FOI Documents Reveal Mining Lobby's Demand For EDO Closure' (2013) 38(1) *Alternative Law Journal* 56; 'Bleijie "A Reverse Robin Hood"', *Sunshine Coast Daily* (online), 9 July 2012 <<http://www.sunshinecoastdaily.com.au/news/bleijie-reverse-robin-hood/1447080>>; Heath Aston, 'Miners Lobbied Premier to Pull Plug on Environmental Legal Centre', *Sydney Morning Herald* (online), 10 January 2013 <<http://www.smh.com.au/nsw/miners-lobbied-premier-to-pull-plug-on-environmental-legal-centre-20130110-2ci8h.html>>; Mark Dreyfus, 'Defending Justice in Australia' (Speech delivered at Queensland University of Technology, Brisbane, 3 May 2013) <<http://parlinfo.aph.gov.au>> 9.

²² Christine Trenorden, 'Environmental Legal Aid Slashed When Australia Needs It Most', *The Conversation* (online), 12 March 2014 <<http://theconversation.com/environmental-legal-aid-slashed-when-australia-needs-it-most-23988>>.

²³ Commonwealth, *Senate Estimates Hearing*, Legal and Constitutional Affairs Legislation Committee, 24 February 2014 (George Brandis, Attorney-General) Official transcript, 78.

²⁴ Commonwealth, Productivity Commission, *Access to Justice Arrangements* (2014) <<http://www.pc.gov.au/projects/inquiry/access-justice>>.

²⁵ Commonwealth, Productivity Commission, *Access to Justice Arrangements — Draft Report* (April 2014) <<http://www.civiljustice.info/cgi/viewcontent.cgi?article=1008&context=timeliness>> 42. The PILF is to be funded by cost awards from successful cases.

²⁶ *Ibid* 62.

²⁷ *Ibid*.

pose a problem. Judicial review and merits appeals usually have 28-day time frames (sometimes shorter) where case prospects need to be analysed and preliminary views of experts consulted. For the same reasons, urgent injunctions or third party enforcement actions are unlikely to seek access from the PILF. In the end, the establishment of a PILF is unlikely to be a panacea for the longer term challenges of funding PIEL. While such an initiative is encouraging, the vast majority of public interest litigants will need to look to civil society and the private sector as a means of accessing justice.

III LITIGATION FUNDING AND ACCESS TO JUSTICE

A *Access to Justice in Environmental Matters*

The last four decades have seen considerable scholarship and debate regarding access to justice, yet despite this, the concept remains elusive and vague.²⁸ The origins of the Australian movement can be traced to the early 1970s, and to the federal government's 1975 'Commission of Inquiry into Poverty', the legal component of which was headed by (then) Professor Ronald Sackville (later a Federal Court judge).²⁹ In those early years, the focus was on facilitating better access to the courts for disadvantaged individuals, primarily through legal aid schemes.³⁰ Subsequent developments shifted to addressing matters of 'organisational poverty', by providing for representative class actions and widening standing for civil society to pursue litigation.³¹ More recently, the access to justice movement has been characterised by an increase in the use of alternative dispute resolution ('ADR') mechanisms, such as tribunals, mediation and arbitration.³² As Justice Sackville recently suggested, some of the most 'promising pathways' to justice now exist outside of the court system and, in recognising that, the role for lawyers has decreased dramatically.³³

Today, it is generally accepted that access to justice involves a wide range of socio-legal measures including the provision of information, legal education (for example, workshops and guidebooks) and law and policy reform.³⁴ Despite the shift away from litigation, formal institutions like courts still remain a significant aspect of access to justice in environmental matters.³⁵ As Anne Kallies and Lee Godden remark, access to the courts is 'fundamental to [the] overarching principles of the rule of law and equality before the law'.³⁶ It is also vital for the proper functioning of the separation of powers and matters of judicial review. Moreover, many environmental disputes involve complex and technical ecological issues which necessitate a highly structured forum with strict

²⁸ Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 2012) 162.

²⁹ Ibid 160.

³⁰ Ibid 161–2.

³¹ Mary Anne Noone, 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance' (2011) 37(1) *Monash University Law Review* 57, 62.

³² Ibid 61.

³³ Ronald Sackville, 'Access to Justice: Assumptions and Reality Checks' [2002] *Federal Judicial Scholarship* 12 <<http://www5.austlii.edu.au/cgi-bin/download.cgi/au/journals/FedJSchol/2002/12>> 9.

³⁴ Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' (Report, Vol 7, Law and Justice Foundation of NSW, 2012) 207.

³⁵ Preston, above n 7, 7.

³⁶ Kallies and Godden, above n 12, 194.

rules for deliberating on evidence. Such disputes often arise in direct response to a government action, such as the approval of a mine in an environmentally sensitive area, a controversial coastal development, or a decision to cull a particular species (like white sharks or flying foxes). These types of public interest cases are unlikely to be resolved through private compensation or contractual obligations negotiated between the parties. Accordingly, ‘softer’ mechanisms like community consultation, the provision of information or even ADR are often inadequate resolution strategies.³⁷ It is thus that facilitating access to formal institutions like the courts still makes up an important part of what it means to truly ‘access justice’ in environmental matters.

B *Third Party Litigation Funding: Access to Justice or an Abuse of Process?*

There exists considerable debate about whether third party litigation funding is an abuse of process or a means of improving access to justice. The arguments against litigation funding generally fall into three main categories.³⁸ First, funders can be ‘selective’ in their case choices and can reject cases which might be ‘meritorious’ but which do not meet investment criteria.³⁹ Second, the number of funded cases is so few that ‘the impact of litigation funding on access to justice is, at best, modest’.⁴⁰ And third, the courts are no place for litigation that is started ‘only because a trader can make a profit from the exercise’.⁴¹

Given the distinct lack of data on litigation funding arrangements, these arguments are far from convincing. In 2013, David Abrams and Daniel Chen published one of the only empirical studies into litigation funding in Australia.⁴² They found that while the total number of funded cases was small, cases that were backed by third party funding received over twice as many citations than those without funding.⁴³ Due to data limitations, Abrams was tentative about his conclusions but still observed: ‘[the data] indicates that at least this particular third-party funder is funding cases that have greater legal significance than average’.⁴⁴ This suggests that the impacts of funded claims are far broader than just the parties to the case.

Arguments that litigation funding increases vexatious litigation are also not persuasive. Almost all jurisdictions have significant powers to strike out vexatious applications and issue adverse costs orders, irrespective of who is funding the litigation. In the context of Australia’s biggest projects

³⁷ However, it must be acknowledged that many litigation processes include the option of (or sometimes mandatory) Court-appointed ADR for the parties to the litigation. See, eg, the Land Court of Queensland. *Land Court Act 2000* (Qld) s 36. It is also worth noting that many ADR mechanisms, like tribunals, may be considered ‘litigation’. The *Sea Dumping Case* (the case study in this article) for instance is taking place in the Administrative Appeals Tribunal. The Land Court of Queensland which hears mining, indigenous and water disputes is also technically a ‘specialised judicial tribunal’. See *Land Court Act 2000* (Qld) s 4.

³⁸ Wayne Attrill, ‘The Future of Litigation Funding in Australia’ in Michael Legg (ed) *The Future of Dispute Resolution* (LexisNexis Butterworths, 2013) 168.

³⁹ Ibid.

⁴⁰ Attrill, above n 38, 168.

⁴¹ Ibid.

⁴² David Abrams and Daniel Chen, ‘A Market for Justice: A First Empirical Look at Third Party Litigation Funding’ (2013) 15 *University of Pennsylvania Journal of Business Law* 1075.

⁴³ Ibid 1081.

⁴⁴ David Abrams, ‘Third-Party Litigation Funding’ (2012) 34(4) *Regulation* (in brief) < <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2012/7/v34n4-5.pdf> > 5.

(mining, coal seam gas, pipelines, ports and rail developments), the Productivity Commission recently found there is no evidence of vexatious litigation and no need to revisit the powers of the courts.⁴⁵ Further, there appears to be ‘strong judicial endorsement’ of litigation funding as a means of access to justice in Australia.⁴⁶ In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,⁴⁷ the High Court rejected the argument that litigation funding was an abuse of process. Kirby J remarked:

A litigation funder ... does not invent the rights. It merely organizes those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law.⁴⁸

C Litigation Funding and PIEL

While commercial litigation funders can contribute to access to justice in some instances, predominately in the area of bank fees, insurance and consumer protection, funders will not finance cases that cannot deliver some form of monetary reward.⁴⁹ Civil enforcement or judicial review challenges by environmental litigants are likely to be overlooked by commercial funders because there is usually no ‘pot of gold’ at the end of the rainbow.⁵⁰ In fact, the only PIEL cases likely to meet a commercial funder’s investment criteria are ‘toxic tort’ cases.⁵¹

One of the more high-profile, privately-funded, toxic tort actions was the litigation brought by a community of Indigenous Ecuadorians against Chevron (*the Lago Agrio case*).⁵² Labelled the longest running and largest scale transnational environmental litigation in history,⁵³ the *Lago Agrio* case was to be funded to US\$15 million by the world’s largest litigation funder, Burford Capital.⁵⁴ But, in the PIEL funding space, the *Lago Agrio* case represents an outlier for so many reasons, not

⁴⁵ Commonwealth, Productivity Commission, *Major Project Development Assessment Processes Research Report* (2013) 277.

⁴⁶ Bernard Murphy and Camille Cameron, ‘Access to Justice and the Evolution of Class Action Litigation in Australia’ (2006) 30 *Melbourne University Law Review* 399, 437–8.

⁴⁷ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

⁴⁸ *Ibid* [468].

⁴⁹ Australia’s largest litigation funder, IMF Bentham Ltd, typically looks for ‘success fees’ of between 25 per cent and 40 per cent. IMF Bentham Ltd, *Funding* (10 August 2014) <<https://www.imf.com.au/funding>>.

⁵⁰ Preston, above n 7, 11.

⁵¹ *Ibid*.

⁵² *Aguinda v. Chevron Corp.*, No. 002-2003 (Super. Ct. of Nueva Loja, Feb. 14, 2011) (Ecuador); The *Lago Agrio* case involved issues of contamination and pollution allegedly caused by the (then) oil and gas company Texaco, which merged with Chevron in the early 2000s.

⁵³ Maya Steinitz, ‘The Litigation Finance Contract’ (2012) 54 *William and Mary Law Review* 455, 465–79.

⁵⁴ Burford Capital declined to fund the whole amount (to be paid in three instalments), alleging a breach of the funding agreement. See Declaration of Burford Capital CEO Christopher Bogart (exhibit 3687), filed on 17 April 2013 in US District Court proceedings: *Chevron Corp v Donziger*, No 11 Civ. 0691 (LAK) (S.D.N.Y., 4 March 2014) <<http://www.scribd.com/doc/136497227/Declaration-of-Burford-Capital-CEO-Christopher-Bogart>>.

the least because there were significant pecuniary damages at stake.⁵⁵ Burford Capital has even declared that the Chevron litigation was ‘outside its usual investment parameters’.⁵⁶

With the removal of government funding and the unlikelihood of commercial investment in PIEL, litigants will need to turn to novel ways of raising resources for their cause. The advent of social media (particularly Twitter and Facebook) has prompted new ways of connecting people to issues of public significance. In many areas of governance, including the environment, social media is being used not only to connect people with one another but to mobilise resources, launch campaigns and exert influence on both regulators and the *regulatees*.⁵⁷ One way civil society is beginning to mobilise resources via social media is through online crowdfunding platforms. In the next part of the article, I examine civic crowdfunding, an emerging subset of crowdfunding. I explore the emerging literature and a case study to discuss whether civic crowdfunding might provide a viable means of solving some of the access to justice issues of PIEL participants.

IV CIVIC CROWDFUNDING, ACCESS TO JUSTICE AND PIEL

A *The Emergence of Civic Crowdfunding*

There are various definitions of ‘crowdfunding’ in the literature,⁵⁸ but generally speaking, it can be described as the process of raising money from a diverse range of donors via online platforms.⁵⁹ While an in-depth investigation of crowdfunding literature is outside the scope of this article, at its best, crowdfunding represents a ‘highly organized, accessible and scalable phenomenon’ with the potential to drive important technological and social advancements that would otherwise go unfunded.⁶⁰ At its worst, crowdfunding could represent something of an unsupervised playground where fraud, corruption and misappropriation are allowed to flourish.⁶¹

Civic crowdfunding is an emerging subset of crowdfunding that looks to provide a public service to communities.⁶² ‘Civic’ necessarily incorporates an element of ‘public good’, though this in itself is a heavily contested concept.⁶³ Whereas crowdfunding is a multi-billion dollar market, at the

⁵⁵ In 2011, an Ecuadorian court ordered Chevron to pay \$18 billion in damages (later reduced to \$9.5 billion on appeal). In March 2014, a US District Court found the Ecuadorian judgment to be unenforceable in the United States: *Chevron Corp v Donziger*, No. 11 Civ. 0691, (S.D.N.Y., March 4, 2014) (Kaplan, J.); ‘US Judge Annuls Ecuador Oil Ruling Against Chevron’, *BBC News* (online), 4 March 2014 <<http://www.bbc.com/news/world-latin-america-26441836>>.

⁵⁶ Declaration of Burford Capital CEO Christopher Bogart, above n 54, 6.

⁵⁷ Peter Grabosky, ‘Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process’ (2013) 7(1) *Regulation & Governance* 114.

⁵⁸ Matt Vitins, ‘Crowdfunding and Securities Laws: What the Americans Are Doing and the Case for an Australian Crowdfunding Exemption’ (2013) 22(2) *Journal of Law, Information and Science* 92.

⁵⁹ Rodrigo Davies, *Civic Crowdfunding: Participatory Communities, Entrepreneurs and the Political Economy of Place* (Master of Science, Thesis, Massachusetts Institute of Technology, 2014) 17.

⁶⁰ *Ibid* 36.

⁶¹ See, eg, the risks identified by the Australian Government. Commonwealth, Corporations and Markets Advisory Committee, *Crowd Sourced Equity Funding Discussion Paper* (2013) 7. This article does not canvass the regulatory responses to crowdfunding or civic crowdfunding.

⁶² Davies, above n 59, 28.

⁶³ *Ibid*.

time of writing, there were only a handful of initiatives that could be described as civic crowdfunding.⁶⁴ ‘Spacehive’, a British based initiative which claims to be the world’s first crowdfunding website for civic projects, has successfully raised funds for community spaces, art performances and local gardens.⁶⁵ In a recent interview, founder Chris Gourlay spoke about the possibilities that civic crowdfunding presents:

What crowd-funding does in the civic contest is give people an activist tool, because when people vote with their wallets for the kind of change that they want to see in their neighbourhood, they are able to build a head of steam behind their ideas, they are able to build a democratic gravitas behind their ideas which allows them to drive an idea forwards which would otherwise have been rattling around below the radar.⁶⁶

Australia has already seen at least one major example of what could be described as civic crowdfunding. In 2013, the Climate Commission, an independent advisory body on climate change, was dismantled by the newly elected Australian government.⁶⁷ Not long after, the organisation was re-launched through a crowdfunding initiative.⁶⁸ The Climate Council, as it is now called, is said to be the product of Australia’s biggest ever crowdfunding initiative and has already raised an operating budget of \$1 million.⁶⁹ At the time of the Council’s launch, the Commonwealth Environment Minister remarked: ‘that’s the great thing about democracy, it’s a free country and it proves our point that the [climate] commission didn’t have to be a taxpayer funded body’.⁷⁰

With the Minister’s comments on board, there appears to be no good reason, at least on the face of it, why civic crowdfunding cannot be used to finance access to justice issues in the same way as funds are mobilised for a school hall, community garden or even an organisation like the Climate Council. There is already at least one online initiative experimenting with raising legal costs for those in need. The Canadian website ‘JustAccess’⁷¹, for instance, allows the ‘crowd’ to pick the cases they want to support. After sufficient funds are raised for a case, litigants are able to choose

⁶⁴ These include: *Citizeninvestor*, *ioby*, *Neighbor.ly*, *Spacehive*, *Catarse*, *Goteo* and *Kickstarter*. See Davies, above n 59, 45.

⁶⁵ Antony Funnell, ‘Civic Crowd-Funding’, *ABC Radio National*, 25 May 2014 <<http://www.abc.net.au/radionational/programs/futuretense/civic-crowdfunding/5464498>>.

⁶⁶ *Ibid.*

⁶⁷ Emma Griffiths, ‘Tim Flannery Defends Climate Commission after Government Scrapping’, *ABC News* (online), 20 September 2013 <<http://www.abc.net.au/news/2013-09-19/federal-government-scraps-climate-commission/4968816>>.

⁶⁸ Eliza Borrello, ‘Tim Flannery Relaunches Scrapped Climate Commission as Community-Funded Body’, *ABC News* (online), 24 September 2013 <<http://www.abc.net.au/news/2013-09-24/tim-flannery-to-relaunch-climate-commission/4976608>>.

⁶⁹ Climate Council, *About Us* <<https://www.climatecouncil.org.au/about-us>>; ‘Climate Council, Which Replaced the Axed Climate Commission, Reaches \$1 million Funding Target’, *ABC News* (online) 4 December 2013 <<http://www.abc.net.au/news/2013-10-05/climate-council-has-sufficient-funding-to-operate-for-a-year/5000822>>. It is unclear at this stage whether the Council can raise ongoing operating capital in this way.

⁷⁰ Borrello, above n 68.

⁷¹ Justice Access <<http://getjustaccess.com/>>. At the time of writing, the website had not yet become fully operational, although once up and running it would present an interesting case study.

their own lawyers.⁷² The Canadian start-up also has a way for dealing with false claims which could damage their integrity: ‘campaign creators’ never touch the funds; rather, JustAccess acts as an intermediary to ensure funds are spent ‘on legal costs and nothing else’.⁷³

In Australia, crowdfunding has also been used to finance legal costs in matters of public interest. Euthanasia advocate, Dr Philip Nitschke was suspended by the Medical Board of Australia for supporting a 45-year-old Australian man to take his own life.⁷⁴ His legal appeal against the Board’s decision was reportedly crowdfunded in excess of \$170 000.⁷⁵ In another example, West Australian organic farmer Mr Steve Marsh crowdfunded a legal action against his neighbour, who cultivated genetically-modified crops that reportedly negatively impacted on the organic status of Mr Marsh’s property.⁷⁶ The public interest behind both these cases is no doubt significant, as they relate to issues of ethics, human rights, intellectual property, ecology and human health.⁷⁷

Given the short history of crowdfunding, and even shorter history of civic crowdfunding, it is understandable that the relationship between crowdfunding and access to justice has received no significant academic attention. In the emerging civic crowdfunding literature, there has been a call for more ‘socially-grounded research’ into the ‘complexity of participant’s motivations’ for undertaking civic crowdfunding.⁷⁸ This is needed, as Rodrigo Davies remarks, because it will help in moving crowdfunding ‘beyond the bounds of financial markets’.⁷⁹ The literature is thus in need of examples which explore, in some detail, the potential of civic crowdfunding to deliver on the opportunities that it promises. Civic crowdfunding of PIEL represents something of a new landscape in this regard. The purpose of the case study that follows is to contribute to the development of that landscape.

B *The Sea Dumping Case*

The Port of Abbot Point (‘Abbot Point’) is located 25-kilometres from the town of Bowen on Queensland’s mid-north coast. Abbot Point has been a major port in Queensland for over 30

⁷² Heather Gardiner, ‘Crowdfunding Comes to Legal Services’ (2013) July *Canadian Lawyer Magazine* <<http://www.canadianlawyermag.com/legalfeeds/1592/crowdfunding-comes-to-legal-services.html>>.

⁷³ Simon Fodden, ‘Justaccess Seeks Crowdfunding to Launch Venture to Crowdfund Legal Disputes’ (2013) July *Slaw Online Magazine* <<http://www.slaw.ca/2013/07/23/justaccess-seeks-crowdfunding-to-launch-venture-to-crowdfund-legal-disputes/>>.

⁷⁴ Emma Canavan and James Dunlevie, ‘Voluntary Euthanasia Campaigner Philip Nitschke: “I Wish I Had Never Met Nigel Brayley”’, *ABC News* (online), 13 November 2014 <<http://www.abc.net.au/news/2014-11-13/philip-nitschke-says-he-wishes-he-had-never-met-nigel-brayley/5887572>>.

⁷⁵ Kate Legge, ‘Does the Right to a Peaceful Death Extend to the Young and Depressed?’ *The Australian* (online), 11 October 2014 <<http://www.theaustralian.com.au/news/features/does-the-right-to-a-peaceful-death-extend-to-the-young-and-depressed/story-e6frg8h6-1227085517898>>.

⁷⁶ Safe Food Foundation, *Steve Marsh: Help This Farmer Stop Monsanto’s GM canola* <<http://safefoodfoundation.org/what-we-do/help-this-farmer/>>.

⁷⁷ The range of legal issues (plaintiff-driven or otherwise) that could potentially be crowdfunded is diverse. This raises a broader question which this paper did not explore that is, which legal issues are in the ‘public interest’, and which are not?

⁷⁸ Davies, above n 59, 23.

⁷⁹ *Ibid.*

years,⁸⁰ and in 2012/13 it oversaw the export of some 18 million tonnes of coal.⁸¹ Abbot Point is now earmarked to become one of the largest coal ports in the world but, controversially, is located directly adjacent to the Great Barrier Reef Marine Park ('Marine Park').⁸²

The push to expand Abbot Point's capacity is to feed several major mining projects in the Galilee and Bowen Basins.⁸³ To manage the expansion, the designated port authority, North Queensland Bulk Ports Corporation Limited ('NQB')⁸⁴ requires several government approvals. This case study focuses on one approval: the 31 January 2014 decision of the Great Barrier Reef Marine Park Authority ('GBRMPA')⁸⁵ to approve the dumping of three million cubic metres of dredged material (sand, silt and clay) into the Marine Park. The dumping site for the dredged material was approximately 25 kilometres north-east from Abbot Point within a 'General Use Zone' of the Marine Park.⁸⁶ The Australian Marine Conservation Society ('AMCS'), which opposes the expansion of Abbot Point, argued that fine sediment could in fact travel up to 80-kilometres from the dump site.⁸⁷

One week after the dumping approval was given, community advocacy group GetUp established an online Reef Fighting Fund with the headline: 'we're taking it to court'.⁸⁸ With the financial backing of GetUp members,⁸⁹ the North Queensland Conservation Council Inc ('NQCC') lodged

⁸⁰ Russell Reichelt, 'Let's Dump Great Barrier Reef Dredging Myths', *The Conversation* (online), 3 March 2014 <<http://theconversation.com/lets-dump-great-barrier-reef-dredging-myths-authority-chief-22991>>.

⁸¹ Queensland Government, *Queensland Ports Strategy* (2014) <<http://www.dsdip.qld.gov.au/infrastructure-and-planning/queensland-ports-strategy.html>> 3.

⁸² See GBRMPA, *Zoning Map 8* (10 August 2014) <<http://www.gbrmpa.gov.au/zoning-permits-and-plans/zoning/zoning-maps>>.

⁸³ North Queensland Bulk Ports Corporation, *Abbot Point* <<http://www.nqbp.com.au/abbot-point/>>.

⁸⁴ NQB is responsible for the management of the port including, amongst other things, strategic port planning, port infrastructure, environmental management and marine pollution and maintaining navigable port depths for shipping. NQB is also responsible for managing the facilities at other North Queensland ports including Hay Point, Mackay, Weipa and Maryborough. See North Queensland Bulk Ports Corporation, *Organisation* (10 August 2014) <<http://www.nqbp.com.au/organisation/>>.

⁸⁵ The 'GBRMPA decision' was, at law, a decision of a senior officer at GBRMPA acting as a delegate for the Commonwealth Environment Minister under the *Environment Protection (Sea Dumping) Act 1981* (Cth).

⁸⁶ The approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to undertake the program of dredging and dumping near Abbot Point was the subject of a Queensland Supreme Court action, initiated by the Mackay Conservation Group. That litigation was also crowdfunded by GetUp members. For more information, see Environmental Defenders Office, Queensland, *Case Summary: Abbot Point Dredging* (10 August 2014) <<http://www.edoql.org.au/news/mcg-v-minister-for-the-environment-and-nqbp-dredging-case/>>.

⁸⁷ 'Green Groups Battle to Stop Reef Dumping', *The Age* (online), 14 February 2014 <<http://www.theage.com.au/national/green-groups-battle-to-stop-reef-dumping-20140214-32qnc.html#ixzz30oH4RHHI>>.

⁸⁸ GetUp, *We're Taking It to Court* (10 August 2014) <<https://www.getup.org.au/campaigns/great-barrier-reef-3/the-hunt-case/were-taking-it-to-court>>.

⁸⁹ Two court cases were crowdfunded by GetUp's supporters. The first was NQCC's challenge to the 'sea dumping permit' - which is the focus of this article - and the second was Mackay Conservation Group (MCG's) challenge of the Federal Minister's approval to dredge the seabed in the first place. See GetUp, above, n 88. For background concerning the MCG action, see Tom Arup 'Green Group Takes Legal Action Over Abbot Point Dredging' *Sydney Morning Herald* (online), 23 March 2014 <<http://www.smh.com.au/federal-politics/political-news/green-group-takes-legal-action-over-abbot-point-dredging-20140323-35c5e.html>>. For an update on the MCG litigation, see Environmental Defenders Office, Queensland, above, n 86.

an application to review the dumping decision in the Administrative Appeals Tribunal ('AAT').⁹⁰ NQCC was represented by the not-for profit legal centre, the Environmental Defenders Office, Queensland ('EDO Qld'). The basis of NQCC's case was essentially that the decision-maker failed to comply with the requirements of law in approving the disposal of spoil.⁹¹ Specifically, NQCC argued that the dumping decision was inconsistent with the *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* ('London Protocol')⁹² — an international agreement which requires the prevention, reduction and elimination of pollution caused by dumping of wastes or other matter at sea.⁹³

In June 2015, possibly as a result of the litigation and due to mounting international pressure over the management of the Marine Park,⁹⁴ the Federal Government passed regulation 88RA of the Great Barrier Reef Marine Park Regulations 1983 (Cth) which prohibited the dumping of capital dredge spoil in the Marine Park. Subsequently, the AAT ordered the cancellation of the permit with the consent of the parties involved.⁹⁵

C Preliminary Observations

For the purposes of prompting further discussion, several broad observations can be made. First, the way in which the funds were raised for the *Sea Dumping Case* appears to represent a *true* crowdfunding initiative. One of the main distinctions between crowdfunding and other types of online donation methods is that, in crowdfunding, the individual donors have a 'mutual awareness' of each other throughout the campaign.⁹⁶ This enables a greater sense of 'collective energy' and helps to break down the 'pluralistic ignorance' of donors.⁹⁷ The *Sea Dumping Case* also seems to represent an 'authentic example' of crowdfunding, given it attracted over 16 000 donors, which is evidence of broad-based participation.⁹⁸ As Davies points out:

⁹⁰ Environmental Defenders Office, Queensland, *News: Great Barrier Reef Marine Park Sea Dumping – Case Summary* (30 September 2015) <<http://www.edoqlld.org.au/news/north-queensland-conservation-council-inc-v-minister-for-the-environment/>>.

⁹¹ The decision to grant the disposal permit was made under section 19 of the *Environment Protection (Sea Dumping) Act 1981* (Cth).

⁹² *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972*, opened for signature 7 November 1996, [2006] ATS 11 (entered into force 24 March 2006) ('London Protocol').

⁹³ *London Protocol*, art 2.

⁹⁴ This pressure manifested several years earlier when the World Heritage Committee directed the Australian Government to improve its conservation efforts and limit development impacting the reef. See Committee decisions: 35 COM 7B.10 (2011); 36 COM 7B.8 (2012); 37 COM 7B.10 (2013); and 38 COM 7B.63 (2014), at <<http://whc.unesco.org/en/decisions/>>. See also the response of the Australian Government, where Environment Minister Greg Hunt stated 'The world heritage committee asked to us do level one, we've gone to level four': Lisa Cox, 'Abbott Government Moves To Ban Offshore Dumping In Great Barrier Reef Marine Park', *Sydney Morning Herald* (online), 16 March 2015 <<http://www.smh.com.au/federal-politics/political-news/abbott-government-moves-to-ban-offshore-dumping-in-great-barrier-reef-marine-park-20150316-1m06jl.html#ixzz3qT8X9UjO>>.

⁹⁵ Environmental Defenders Office, Queensland, above n 90.

⁹⁶ Davies, above n 59, 26.

⁹⁷ *Ibid.*

⁹⁸ *Ibid* 30.

Projects that claim popular ownership or consent but show limited evidence of it in terms of donation activity may be criticized justifiably as using the term crowdfunding as a gimmick rather than an indication of broad-based participation.⁹⁹

Second, the case shows that civic crowdfunding can provide opportunities for civil society to raise significant capital for high-profile litigation within a very short period of time. For a group the size of NQCC, raising \$150 000¹⁰⁰ purely for litigation would likely have either been out of reach or taken months, if not years, to raise. By that time, the 28-day period for challenging GBRMPA's decision would have long passed. In this regard, it would appear necessary that the intermediary raising the funds (in this case, GetUp) would need to have access to a broad member base which is reasonably well-informed on the issue being litigated.

Third, the significance of the legal issues in the *Sea Dumping Case* seem to be consistent with the literature on litigation funding, insofar as third party funders (in whatever form they come) are more likely to pursue litigation with high precedent value. This is not the first time NQCC have used the courts to raise awareness about environmental issues. In the late 1990s, NQCC instituted a judicial review action in the Supreme Court of Queensland in respect of a government decision to develop a harbour on Magnetic Island.¹⁰¹ That case had important implications for the question of third party standing in judicial review applications and has since been cited in several subsequent decisions.¹⁰² By a similar token, although the *Sea Dumping Case* was eventually settled, the litigation presented an important test of the principles of the *London Protocol* in an Australian context for the first time. The legal construction of the Protocol and its relevance to coastal development is likely to be a particularly significant issue in the near future given the increased intensity of dredging and (disposal) projects currently planned for Australia's ports.¹⁰³

Fourth, the case seems to show that civic crowdfunding of public interest litigation can avoid the 'ethical arguments' that commercial litigation funders tend to face. In litigation like the *Sea Dumping Case*, there is likely to be no 'pot of gold' at the end of the rainbow, thereby alleviating any concerns that crowd funders might be chasing a pecuniary end or that there might be a conflict of interest with either the litigant or the lawyers in the case.

Finally, the *Sea Dumping Case* illustrates that civic crowdfunding has a unique capacity to capture the views (or rather, the frustrations) of thousands of ordinary people in a highly targeted way. Recent arguments that dredging and dumping have relatively minor impacts on the already

⁹⁹ Ibid.

¹⁰⁰ GetUp, above n 88.

¹⁰¹ *North Queensland Conservation Council v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172.

¹⁰² Queensland Public Interest Law Clearing House Incorporated ('QPILCH'), *Standing in Public Interest Cases* (2005) <http://www.qpilch.org.au/_dbase_upl/Standing.pdf> 12.

¹⁰³ At the time of writing, the Port of Townsville Expansion Project, for instance, requires dredging to extend the existing shipping channels, and the disposal of over 5 million cubic metres of material inside the World Heritage Area and at the boundary of the Marine Park. Further, the Gladstone Port Channel Duplication Project involves 12 million cubic metres of dredging with dredged sediment to be disposed of inside the Marine Park. See Great Barrier Reef Marine Park Authority, *Current Proposals under Assessment* <<http://www.gbrmpa.gov.au/about-us/consultation/current-proposals-under-assessment>>.

declining health of the Great Barrier Reef overlook the significance of this point.¹⁰⁴ In addition to raising compelling legal issues, the *Sea Dumping Case* has allowed thousands of people to publicly voice their concern about successive government failures to halt the decline of Australia's World Heritage icon.¹⁰⁵ This observation aligns closely with civic crowdfunder Chris Gourlay's words:

I think if you think about the way that we get things done in this environment, you know, it's quite a top-down relationship that we have between the powers that be, if you like, that shape the civic environments, and ordinary people. It's quite hard for ordinary people to influence what happens. You never really get consulted at on [sic] other people's plans. You might be able to sign a petition here and there or raise your hand at a Town Hall meeting but it's not a very satisfactory form of engagement for a lot of people.¹⁰⁶

V CONCLUSION

A *Areas of Further Research*

The observations from the *Sea Dumping Case* are only preliminary and further research is needed to develop this area. Three key areas of further research seem apparent. First, the regulation of civic crowdfunding and its relationship with litigation funding needs attention. The legal frameworks for both litigation funding and crowdfunding were recently examined in Australia, albeit in separate contexts.¹⁰⁷ This article has deliberately avoided that debate, but raising funds online for litigation is no doubt likely to throw up interesting issues for regulators. Establishing the extent of the regulatory link between litigation funding and crowdfunding would illuminate the opportunities and challenges for civic crowdfunding and PIEL participants.¹⁰⁸

Second, while the \$150 000 raised for the *Sea Dumping Case* represents a clear vote of confidence in NQCC, EDO Qld and GetUp, it is likely that 'lower profile' cases, which do not, for example, concern a World Heritage area like the Great Barrier Reef, will struggle to garner enough support to proceed with the litigation. Research has shown that the vast majority of crowdfunded projects which fail do so at the early stages and at the lower levels of funding.¹⁰⁹ The potential 'scalability'

¹⁰⁴ Alison Jones, 'The Battle over Abbot Point Risks Losing the Great Barrier Reef War', *The Conversation* (online), 21 March 2014 <<http://theconversation.com/the-battle-over-abbot-point-risks-losing-the-great-barrier-reef-war-24207>>. See also Reichelt, above n 80.

¹⁰⁵ It is well accepted that the health of the Great Barrier Reef, particularly South of Cooktown, has been in decline for a number of years now. See, eg, Fanny Douvere and Tim Badman, *Mission Report, Reactive Monitoring Mission to Great Barrier Reef* (2012) <whc.unesco.org/document/117104>; Chris McGrath, 'UNESCO/IUCN Reactive Monitoring Mission Report on the Great Barrier Reef' [2012] (August) *Australian Environment Review* 253–7 <www.envlaw.com.au/unesco_reactive_monitoring_report_article.pdf>.

¹⁰⁶ Quoted in Funnell, above n 65.

¹⁰⁷ On litigation funding regulation see: Ben Butler, 'Roads to Courts Paved with Gold but There's A Crackdown Looming', *Sydney Morning Herald* (online), 26 July 2014 <<http://www.smh.com.au/business/road-to-courts-paved-with-gold-but-theres-a-crackdown-looming-20140725-3cku3.html>>. On crowdfunding regulation, see Corporations and Markets Advisory Committee, Parliament of Australia, *Crowd Sourced Equity Funding Report* (May 2014) <<http://www.camac.gov.au>>.

¹⁰⁸ There are those that argue for a more liberal approach to regulation in this area. Vitins, for instance, suggests that given the exciting social and economic opportunities crowdfunding presents, the last thing it needs is a 'hostile regulatory environment'. See Vitins, above n 58, 127.

¹⁰⁹ Vitins, above n 58, 119.

of civic crowdfunding as a means of financing public interest litigation is thus in need of further research. It might be, for instance, that the *Sea Dumping Case* represents an anomaly in the relationship between civic crowdfunding and access to justice. Examining other examples of crowdfunding access to justice issues would provide a valuable contribution to this area.

Lastly, it is possible that an increase in the use of private initiatives like crowdfunding may allow governments to excuse themselves from providing further funding for public interest legal services.¹¹⁰ The legal expenses in the *Sea Dumping Case* were raised in the aftermath of the federal government's decision to withdraw funding from specialist community legal centres like the EDO. The question arises whether governments in the future might choose to lean on the 'successes' of civic fundraising initiatives like the *Sea Dumping Case* to further sidestep their obligations to fund public interest services. This raises a further question which this paper did not explore: what types of legal services and what areas of law should governments be funding? Further research could explore this question and examine the ongoing tension between private-public support for financing PIEL.¹¹¹

B Concluding Remarks

Public interest litigants have a valuable role to play in protecting our environment and upholding the rule of law. However, funding for public interest environmental litigation is at a cross roads. Ongoing government funding is unreliable, or, worse still, possibly a thing of the past; and while commercial funders can provide access to justice in some instances, they will not finance cases without the potential for significant financial return. What the *Sea Dumping Case* shows is that civic crowdfunding can provide a cost-effective and highly practical form of public engagement in legal processes. It appears to have allowed a new generation of Australians, the next generation of public interest litigants perhaps, to connect directly with government decisions which impact our environment. This is a unique aspect of civic crowdfunding which cannot be overlooked. After all, crowdfunding is an inherently social activity,¹¹² and civic crowdfunding, all the more so. Nevertheless, the conclusions in this article are preliminary. Further research is needed, particularly into aspects of regulation and scalability, to determine if civic crowdfunding is a truly viable means of financing access to justice in environmental matters.

¹¹⁰ The Commonwealth Environment Minister's comments about the relaunch of the Climate Council in this regard are particularly on point. See above n 69.

¹¹¹ The answer to these questions may ultimately come down to politics of the day. See, for instance, the remarks of the Hon Mark Dreyfus QC (above n 21) about the differences between his approach to funding community legal centres for non-case work services, and that of the current Australian Attorney-General, the Hon George Brandis QC.

¹¹² Vitins, above n 58, 119.