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Litigating human rights and public interest cases

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Research Paper 11: Litigating human rights and public interest cases

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> *The threat of an adverse costs order is a large deterrent to litigants seeking to bring public interest litigation. Open standing provisions are of little utility if the plaintiff will be bankrupted should the proceedings fail. Public interest litigants must shoulder their own cost burdens, but, unlike private interest litigants, do not have a prospective financial gain. Therefore, without legal aid funding (where an indemnity is provided by the Legal Aid Commission) the risk of an adverse costs order is a greater deterrent for public interest litigants than for private interest litigants.*[1]

This paper reviews a number of the practical, economic and procedural issues that arise for those who seek to litigate human rights[2] and public interest cases. In terms of facilitating such litigation, we address the issues of legal representation, funding and financial support available for different types of litigation. We also examine means of mitigating adverse costs risks through protective orders at the inception of litigation and principles applicable in considering the exercise of judicial discretion at the conclusion of unsuccessful 'public interest' cases. There is some comparative reference to the position in other jurisdictions, particularly the United Kingdom and Canada.

In addition to discussion of the various ways in which costs issues may constitute an impediment to human rights and public interest litigation, we look at practical barriers, including confidentiality constraints, that may prevent or inhibit access to relevant factual and evidentiary material.

We also discuss the use of non-litigious strategies as an adjunct to - or as an alternative to - court proceedings.

1. Financial support and funding

There are a variety of means through which funding or other financial support may be able to be obtained for human rights and public interest litigation in Australia.

Although there are a number of legal aid and independent not-for-profit organisations providing legal services in human rights cases in Australia, such as the Public Interest Advocacy Centre and the Human Rights Law Centre, complex, expensive and protracted civil cases, including class actions, are often conducted by private law firms. Such firms will usually also engage barristers from the private bar to handle most of the advocacy in court.

Many human rights and public interest cases have been facilitated through private lawyers agreeing to act on either a pro bono or 'no win no fee' basis. Although a deterrent to many potential public interest litigants, the 'costs follow the event' rule has served as a commercial incentive for private law firms and barristers to take on the conduct of meritorious cases. Also, community legal centres may supplement their public funding through costs orders in favour of their clients.

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[1] *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning (No 2)* [2008] NSWLEC 272, [23] (Biscoe J).

[2] On the procedural aspects of human rights litigation, the Federal Court provides a 'Guide to Human Rights Cases' <https://www.fedcourt.gov.au/law-and-practice/guides/human-rights>. See also the (then) Hon Chief Justice James Allsop, 'Administrative Law and Constitutional Law and Human Rights Practice Note (ACLHR-1)' (20 December 2019) <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/aclhr-1>.

In order to ensure that costs are recoverable in successful public interest cases, it is desirable that both private lawyers and lawyers working in not-for-profit legal centres have fee and retainer agreements with such clients, in appropriate cases.[3] This issue is discussed further below.

1.1 Fees in civil litigation

In most cases, Australian lawyers enter into costs agreements with clients whereby charges are calculated on the basis of specified hourly rates, or by reference to the fee scales set out in the applicable court rules. In class actions conducted in the Supreme Court of Victoria application may be made to the Court for approval of a Group Costs Order, whereby the costs may be calculated as a Court approved percentage of the amount recovered.[4]

1.1.1 *Costs agreements*[5]

In civil litigation generally, and in human rights and public interest cases in particular, it is usually desirable (for both the party and the lawyer) for the agreed financial arrangements for the conduct of the litigation to be set out in writing.

Where fees and expenses incurred in conducting the litigation are to be charged to the client, the method of calculating such fees and expenses should be clearly set out. This should encompass: (a) fees payable to the solicitors conducting the case; (b) out of pocket expenses incurred; (c) barristers fees; and (d) any other fees payable, including to any expert witnesses. An estimate of the likely legal costs should also be provided.

For cases conducted on a 'no win no fee' basis, the method of calculating fees payable in the event of success, and the circumstances when such fees will be payable, should be clearly set out in writing. As noted below, failure to do so may prejudice the recovery of legal costs in the event of success, or reduce the recoverable amount, in cases conducted on a 'pro bono' basis.[6]

Solicitors undertaking litigation on a 'no win no fee' basis should also consider whether counsel will be engaged on the same basis and apply the same considerations when adopting costs agreements with counsel.

1.1.2 *Permissible speculative fees*

In most Australian jurisdictions, where civil litigation is conducted on a 'no win no fee' (or speculative) basis, lawyers (solicitors and counsel) and clients may agree to the lawyer's entitlement to receive a 'success fee' in the event of a successful outcome. In particular jurisdictions, the availability of these fees may be restricted to certain types of cases and only allow the success fee to be calculated as a percentage uplift (not to exceed 25%) on the otherwise applicable normal or base fee. It is important to ensure that the circumstances said to amount to 'success' be specified clearly in a costs agreement.

1.1.3 *The prohibition of percentage fees*

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[3] See, e.g., *Fast Access Finance (Beaudesert) Pty Ltd and Anor v Charter and Anor (No 2)* [2012] QCATA 172, [7]; *Menzies & Bruce v Owen* [2015] QCAT 326; *Desmond Francis Lewis v Telstra Corporation* [1995] AATA 94 at [12]; *Mainieri v Cirillo* (2014) 47 VR 127; *Wentworth v Rogers* [2002] NSWSC 709.

[4] Section 33ZDA *Supreme Court Act 1986* (Vic).

[5] Legal profession legislation in most Australian jurisdictions prescribes various requirements in relation to costs agreements. A detailed consideration of these requirements is outside the scope of the present paper.

[6] In its Access to Justice Report, the Productivity Commission recommended that parties represented on a pro bono basis should be entitled to seek an award of costs, subject to the costs rules of the relevant court: Productivity Commission, *Access to Justice Arrangements* (Report No. 72, volume 1, 5 September 2014) 55, recommendation 13.4.

Although lawyers are permitted to act on a 'no win no fee' basis in Australia, until recently, percentage contingent fees have been prohibited across Australian jurisdictions, notwithstanding (a) that they are permitted in the other comparable common law jurisdictions, and (b) the recommendations for reform arising out of various law reform commission reports and inquiries.[7]

In 2020, percentage contingent fees were introduced in the State of Victoria in relation to group proceedings,[8] over the objection of parts of the business community and the legal profession. The impact of this change remains to be seen although it is clear that the transaction costs borne by the group members are likely to be substantially less in cases conducted on the basis of a group costs order compared with cases conducted on the basis of hourly rates and commissions sought by commercial funders.[9]

1.2 Litigation expenses

Apart from the question of legal fees, civil litigation can be very expensive and human rights litigation is no exception. Court filing and hearing fees have increased significantly in recent years.[10] The costs of obtaining transcripts from hearings can be considerable. Expert witnesses often charge commercial hourly rates for time expended on the case. Discovery of documents can be time consuming and expensive, particularly where third-party commercial firms are engaged to assist with documentary review.

1.3 Legal aid for public interest litigation

Most legal aid commissions undertake important litigation involving human rights, both through individual casework and strategic matters relating to discrimination, mental health, immigration, tenancy and social security. However, in most instances, legal aid through established legal aid organisations is not available for major civil litigation. In some public interest or strategic cases, financial assistance may be available from legal aid organisations for people represented by either private firms or community legal centres. However, this will not always extend to coverage of any adverse costs order that may be made against a party receiving legal aid.

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[7] See: Australian Law Reform Commission (ALRC), I*ntegrity, Fairness and Efficiency-An inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, 2018); Victorian Law Reform Commission (VLRC), *Access to Justice-Litigation Funding and Group Proceedings* (2018). Productivity Commission, *Access to Justice Arrangements* (Report No 72, volume 1, 5 September 2014) 61, recommendation 18.1. See also Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008), chapter 11, 684-688.

[8] *Justice Legislation Miscellaneous Amendments Act 2020* (Vic) s 5, amending s 33ZDA of the *Supreme Court Act 1986* (Vic).

[9] A decision by Justice Nichols was handed down in the first two cases in which law firms sought judicial approval of percentage fees: *Fox v Westpac Banking Corporation*; *Crawford v Australia and New Zealand Banking Group Limited* [2021] VSC 573. Her Honour declined to approve the proposed 25% group costs order given that the law firm had already entered into a no win no fee costs agreement with fees to be calculated in accordance with hourly rates. In the circumstances and having regard to the statutory test, she was not satisfied that it was either 'appropriate' or 'necessary' in the interests of justice to approve of a group costs order that would have given the solicitors a (provisional) entitlement to 25% of the amount of any compensation or damages recovered. See also see also *Fuller v Allianz; Wilkinson v Allianz* [2021] VSC 581. In a more recent case Nichols J granted an application, notwithstanding opposition from the contradictor appointed by the Court: *Allen v G8 Education* [2022] VSC 32. The plaintiff's solicitors sought approval of a fee calculated at 27.5%, inclusive of GST, of any award or settlement. Her Honour made an order approving this amount, subject to any further order of the Court, and subject to an undertaking from the plaintiff's solicitors that they would not seek a higher percentage at a later date. More recently, group cost orders have been approved up to 30% and 40% of the amount recovered, subject to re-consideration and possible variation by the Court at the conclusion of the case. For a recent review of empirical evidence see Vince Morabito, *Group Costs Orders and Funding Commissions*, January 2024 available at https://ssrn.com/abstract=4699815.

[10] Exemptions from or reductions to court fees are available in some jurisdictions for applicants who are detained, are minors, are in receipt of legal aid or are experiencing financial difficulty.

In many Australian jurisdictions, some protection against adverse costs is conferred by statute on legally aided parties.[11] Such provisions usually provide for the legal aid body to pay an amount in respect of costs ordered against a legally aided party. This may be pursuant to statutory edict, in the exercise of discretion by the legal aid body, or (in the case of Western Australia) by order of the court.

However, such protections *may* not be applicable in respect of proceedings in federal courts. The Full Court of the Federal Court held in *Woodlands*[12] that the protective provision in s 47 of the *Legal Aid Commission Act 1979* (NSW) was inconsistent with s 43(1) of the *Federal Court of Australia Act 1976* (Cth) and therefor inapplicable under s 109 of the *Constitution*.

In a discrimination case in the Federal Magistrates' Court (as it was then known) Raphael FM concluded that there were insufficient 'public interest' elements in the case to mitigate the 'usual' order as to costs and that s 47 of the *Legal Aid Commission Act 1979* (NSW) did not apply.[13]

However, as Perry J has noted the decision in *Woodlands* must now be regarded as overruled[14] insofar as it held that s 47(1) of the *Legal Aid Commission Act 1979* (NSW) was not applied as a federal law by operation of s 79 of the *Judiciary Act* on the basis that s 79 of the *Judiciary Act* applied only to *procedural* laws. As she proceeded to note, that does not determine the question of whether s 79 operates to apply s 47(1) as a surrogate federal law. In her view: 'That question remains open'.[15]

There is no corresponding statutory protection for legally aided plaintiffs under federal legislation.[16] However, most legal aid commissions retain the discretion to provide protection against adverse costs in federal proceedings. Apart from the statutory provisions that provide some measure of protection for legally aided plaintiffs against adverse costs orders, a number of state and territory legal aid bodies have policies that provide for assistance, including protection in relation to adverse costs, in public interest or human rights cases or other strategic litigation.[17] However, legal aid is usually limited to those who satisfy rigorous means tests and threshold merit requirements. Assistance is also subject to the availability of funds.[18]

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[11] See, e.g., *Legal Aid Commission Act 1979* (NSW) s 47; *Legal Aid Act 1977* (ACT) s 34; *Legal Aid Act 1990* (NT) s 33; *Legal Aid Queensland Act 1997* (Qld) s 32; *Legal Aid Commission Act 1978* (Vic) s 48*; Legal Aid Commission Act 1976* (WA) s 45.

[12] *Woodlands v Permanent Trustee Co Ltd* (1996) 68 FCR 213.

[13] *Minns v State of NSW (No. 2)* [2002] FMCA 197 [7] referring to the decisions of the Full Federal Court [1996] FCA 1090 and the High Court (1999) 198 CLR 334 at 360-362 in *Bass v Permanent Trustee Limited.*

[14] See *Wilson v Alexander* (2003) 135 FCR 273 [2003] FCAFC 272 at [19]-[20].

[15] *Nigam v Minister for Immigration and Border Protection* [2017] FCA 106 [93].

[16] A provision to facilitate payment of costs awarded in favour of a successful unassisted person was incorporated in the *Legal Aid Bill 1975* (Cth), introduced into Parliament by the Whitlam Government. Clause 34 of the Bill dealt with costs awarded against assisted persons, making provision for the payment of the costs of the successful unassisted party (See Australia, *Parliamentary Debates*, House of Representatives, 5 June 1975). The Bill was reviewed by Ronald Sackville ('Legal Aid Bill 1975' *Legal Service Bulletin* July 1975, 235). However, the Bill did not pass the Senate and was not re-introduced after the Whitlam Government lost office.

[17] See for example: Victoria Legal Aid, 'Handbook for lawyers, 8- Public Interest and strategic litigation' https://handbook.vla.vic.gov.au/handbook/8-public-interest-and-strategic-litigation; Legal Aid NSW, Online policies, ' 6.14 Public interest human rights matters' https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.14.-public-interest-human-rights-matters.

[18] In NSW the Legal Aid Commission has a Human Rights Committee which assists Legal Aid NSW in providing assistance for the protection and promotion of human rights. The Committee has a limited budget and makes recommendations about the types of public interest human rights matters that should be considered for financial assistance.

Funding for selected test cases may be available through government agencies or departments, such as the Commonwealth Attorney General's Department.[19] For example, the challenge to the patenting of human genes in the Federal Court and related appeals (referred to in paper 10) was partially funded through this scheme. The Australian Taxation Office will fund suitable test cases which will assist in clarifying the law.[20] Funding for test cases may be provided if the matter satisfies three criteria:

- There is uncertainty or contention about the operation of areas of law
- The issue is of significance to a substantial segment of the public or has significant commercial implications for an industry segment
- It is in the public interest for the issue to be litigated.

Commercial litigation funders have provided financial assistance, by way of indemnities in respect of adverse costs, in a number of public interest and human rights cases.[21]A number of commercial litigation funders have also contributed funds to the Adverse Costs Order Guarantee Fund established by the Public Interest Advocacy Centre.

1.4 Public interest cases conducted by community legal centres

Community legal centres (CLCs) throughout Australia (reliant on a mixture of public funding and charitable donations) have been very active in pursuing public interest litigation and test cases through their own salaried lawyers or in partnership with private law firms.

CLCs such as the Fitzroy Legal Service in Melbourne, the Redfern Legal Centre in Sydney and the Caxton Legal Centre in Brisbane, together with specialist bodies such as the Environmental Defenders' Offices throughout Australia, the Human Rights Law Centre and the Public Interest Advocacy Centre, have undertaken numerous human rights and public interest cases with considerable success.

1.5 Pro bono cases undertaken by private law firms

In many instances private solicitors and barristers agree to undertake human rights cases, either on an entirely *pro bono* basis or in the expectation that they may be paid pursuant to a costs order against the defendant/respondent in the event that the case is successful. Proactive pro bono programs to facilitate human rights and public interest cases are ubiquitous in large commercial law firms in Australia.[22] Conflicts of interest between potential pro bono clients and existing clients of private firms (such as government departments, fossil fuel corporations or prison and detention services providers) can sometimes limit the matters that private firms are able to run.

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[19] See Attorney-General's Department, 'Commonwealth public interest and test cases' <https://www.ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance/commonwealth-public-interest-and-test-cases>.

[20] The Australian Taxation Office has a test case litigation program and other arrangements for the funding of certain cases litigated under Part IVC of the *Taxation Administration Act 1953* (Cth). Potential test cases are reviewed by an advisory test case panel. The ATO maintains an online register of test cases which it has funded, or to which it has declined funding, which sets out brief reasons for decisions of the panel: 'Test case litigation register' <http://law.ato.gov.au/atolaw/view.htm?docid=TCR/TestCaseRegister/00001>. The operation of the scheme was reviewed by the Inspector-General of Taxation: see chapter 6 of the report to the Minister for Revenue and Assistant Treasurer: *Review of Tax Office Management of Part IVC litigation* (28 April 2006).

[21] See part 2 of this paper.

[22] In order to encourage this assistance, commonwealth and state governments include pro bono requirements for law firms in tender arrangements for government legal work.

In some instances, pro bono programs operate in conjunction with clinical legal education programs conducted by law schools. Large, well-resourced plaintiff law firms also frequently undertake human rights and public interest cases.

The co-ordination of the referral of cases with a public interest component to law firms and barristers is carried out by Justice Connect in a number of states.[23]

1.6 **Other sources of funding**

As mentioned above, in an increasing number of complex civil cases and class actions, financial assistance is being provided by commercial litigation funders.

In human rights and public interest cases some financial assistance, including by way of indemnity in respect of adverse costs, may be provided by not-for-profit bodies such as the Public Interest Advocacy Centre and the Grata Fund.[24]

Commercial litigation funders have also occasionally provided pro bono funding for public interest cases, including adverse costs indemnities. Since 2016 the Grata Fund has provided adverse costs indemnity or funding in a range of matters, including in the Federal Court and the High Court, in cases against government and corporate entities brought by legal centres, including the Public Interest Advocacy Centre, the Human Rights Law Centre, the Fitzroy Legal Service, the EDO and Australian Lawyers for Remote Aboriginal Rights.

In addition, in one matter the Full Court of the Federal Court strongly advised that the lawyers for the Minister seek the Minister's approval to fund senior counsel for the applicant, an Iranian man who had sought asylum, in a habeas corpus case concerning medical evacuation laws for those who had been detained offshore.[25] Approximately 100 people were reported to be affected by the laws.[26]

In Federal Court cases r 4.12 of the *Federal Court Rules* makes provision for legal assistance to be provided on a pro bono basis. Lawyers acting on such a pro bono basis must not seek or recover professional fees from an assisted party unless the pro bono lawyer and the assisted party have entered into a costs agreement. Any such costs agreement must provide that the pro bono lawyer be entitled to charge and the assisted party is liable to pay professional fees only:

(a) if an order for costs is made in favour of the assisted party; and

(b) to the extent that the party against whom the order for costs is made in fact pays the costs.[27]In some important test cases in litigation against a government entity the relevant Minister may agree to pay the costs of the proceeding or an appeal regardless of the outcome.[28]

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[23] On 1 July 2013 PILCH (NSW) merged with PILCH (Victoria) to create a new pro bono organization, Justice Connect. It has been instrumental in facilitating important public interest litigation.

[24] See Grata Fund, 'Our work' <https://www.gratafund.org.au/our_work>. See also Eliza Ginnivan, 'Public interest litigation: mitigating adverse costs order risk' (2016) 136 *Precedent* 22.

[25] See Nino Bucci, 'Peter Dutton to be asked to fund lawyer for asylum seeker's medevac challenge' (The Guardian, 5 February 2021) <https://www.theguardian.com/australia-news/2021/feb/05/peter-dutton-to-be-asked-to-fund-lawyer-for-asylum-seekers-medevac-challenge>. This was an appeal from a Federal Circuit Court decision: *DXT20 v Minister for Home Affairs & Anor* [2020] FCCA 3437. There has been no judgment from the Federal Court in the appeal, despite a hearing in Feb 2021, which suggests that it was likely discontinued.

[26] See also: *Minister for Immigration and Border Protection v BJN16* [2017] FCAFC 197, [83], in which the Minister gave an undertaking to pay costs in an appeal which was a test case, irrespective of the outcome in the litigation.

[27] Rule 4.19 (2) *Federal Court Rules 2011*.

[28] See e.g., *Minister for Home Affairs v G* [2019] FCAFC 79 for an example of the Minister agreeing to pay costs in an appeal regardless of the outcome.

In some jurisdictions, legislation in respect of costs has been utilised to increase funding available for legal aid. For instance, in the United Kingdom, s 194 of the *Legal Services Act 2007* entitles parties being represented on a purely pro bono basis to recover costs if successful. However, the costs must be paid to a prescribed charity (the *Access to Justice Foundation*) which distributes funds to organisations and projects providing free legal assistance to persons in need.[29]

There have been other proposals for public funding of certain types of litigation and appeals. As noted by the English Court of Appeal in *R (Corner House Research) v Secretary for State and Industry* (*Corner House*):[30]

> 'This early stirring of the germ which was to become known as a protective costs order did not feature in the suggestions about costs which were canvassed by the Law Commission in its Consultation Paper No 126, Administrative Law: Judicial Review and Statutory Appeals (1993) at paras 11.1 – 11.14. The consultation process threw up suggestions that judges should have power to award costs out of central funds in civil cases, particularly where there was no other source from which they could be paid and the interests of justice so required, and that the court should be empowered to grant legal aid for the application for leave or for the substantive hearing. The Commission contented itself by recommending that costs should be available from central funds (a) in favour of a successful party, at the judge's discretion or (b) in favour of an unsuccessful applicant where a case had been allowed to proceed to a substantive hearing on the basis of either a public interest challenge or for the purpose of seeking an advisory declaration.
>
> *The Government did not accept either of these recommendations…'*

In its submission to the NSW Law Reform Commission inquiry into costs and security for costs, the NSW Law Society stated that the relevant Committee(s) did not support the establishment of a pro bono litigation fund to receive costs orders for the coordination and distribution of funds to national pro bono organisations and strategic projects. However, the Committee:[31]

> 'would support the establishment of a public interest fund administered by the New South Wales Government, subject to further consultation with the Law Society. It takes community minded litigants more than funding to attempt to claim rights in the public interest. It also takes much time and effort. The benefit is extended to the wider community even if the claim is also motivated to some degree by private gain. If funding is available and widely publicised, such spending is to be commended. The Committee would also support the indemnity for any adverse costs orders'.

In its final report, the NSW Law Reform Commission did not support the establishment of a special fund to receive and re-allocate pro-bono costs to general community legal needs, along the lines of the UK model, preferring instead to recommend further investigation into a model for the direction of such funds into pro bono litigation.[32]

In the report arising out of its 2008 *Civil Justice Review,* the Victorian Law Reform Commission proposed that a new funding body should be established (provisionally titled the *Justice Fund*) to provide financial assistance to parties with meritorious civil claims, provide an indemnity in respect

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[29] See: Access to Justice Foundation, 'Pro bono costs' <http://www.accesstojusticefoundation.org.uk/funds-in/pro-bono-costs/>.

[30] [2005] 1 WLR 260, [32]-[33].

[31] The Law Society of NSW, Submission No 17 to the NSW Law Reform Commission, *Security for Costs and Associated Costs Orders* (23 August 2011) 15.

[32] NSW Law Reform Commission, *Security for costs and associated orders* (Report No 137, December 2012) [3.63] <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_securityforcostsandassociatedcostsorders/lrc_securityforcostsandassociatedcostsorders.aspx>.

of adverse costs and meet any requirements imposed by the court in respect of security for costs. In return for providing this financial support, the fund would (subject to judicial approval) receive an agreed percentage of the amount recovered in successful cases. The body would seek to become self-funding through income derived from success fees in funded cases, costs recovered from unsuccessful parties and *cy-près* type payments into the fund as ordered by the court (the express power to order such remedies was also recommended by the VLRC).[33] These recommendations have not been acted upon by successive Victorian governments.

More recently, the philanthropic and charitable entities set up by Australian billionaire Dr Andrew Forrest and his (former) wife Nicola, including the Minderoo Foundation and the Intergenerational Justice Fund limited, provide financial assistance in public interest cases.

2. Protective costs orders or costs limiting orders

The risk of an adverse order for costs is undoubtedly the single biggest disincentive or deterrent to civil litigation generally and public interest litigation in particular. However, costs orders in favour of successful public interest litigants serve as an important means of financing public interest cases and act as an incentive for lawyers to take on meritorious cases on a 'no win no fee' basis.

Courts have a broad discretion with regard to costs. In public interest cases, it may be desirable for a public interest litigant to obtain from the court, at the outset of the litigation, an order limiting the amount of costs that may be ordered in favour of a successful opponent at the conclusion of the case.[34]

To date, many test cases and public interest cases conducted on a pro bono or 'no win no fee' basis by large law firms have been conducted without cost capping orders being sought. By way of contrast, a number of cases brought by legal centres (e.g., PIAC and EDO) became viable for the plaintiff only once cost capping orders were obtained.

In a number of public interest cases conducted by the Public Interest Advocacy Centre in Sydney, the need for cost capping orders has been avoided by having an indemnity against adverse costs provided by a commercial litigation funder, IMF Bentham (now known as Omni Bridgeway). As the funder had no commercial interest in the outcome of the cases, this was done on a pro bono basis.

In its 2014 report, the Productivity Commission recommended that courts should grant protective costs orders to parties in matters deemed to be of public interest that, in the absence of such an order, would not proceed to trial.[35]

Even where an impecunious public interest litigant is not deterred from bringing the case in the absence of a cost capping order, this may give rise to an application by the respondent for an order for security for costs (which, if made, may preclude the continuation of the case).

Additionally, it has been noted that the discretion as to costs may, in exceptional circumstances, extend to the making of an advance order for one party to pay the costs of the other party.[36] This

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[33] Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008), chapter 10.

[34] The parties may, of course, enter into an agreement so as to limit the amount of recoverable costs at the conclusion of the proceeding. See, e.g., *Christian Youth Camps Limited v Cobar Community Health Services Limited (No. 2)* [2014] VSCA 112.

[35] Productivity Commission, *Access to Justice Arrangements* (Report No. 72, volume 1, 5 September 2014) 56, recommendation 13.6.

[36] See the judgment of Edelman J (in dissent as to the central question for the Court's consideration of the availability of common fund orders) in *BMW Australia Ltd v Brewster* [2019] HCA 45; 94 ALJR 51, [217]: 'Factors of convenience can also favour a pre-emptive award of costs. In Chancery, where costs were a general law creation, a pre-emptive costs order could be made where a payment of costs was needed by the plaintiff to fund the proceeding. This power to order payment of some or all of the costs of an action that has not been finally determined is so exceptional that the power has rarely been exercised. However, this does not deny the existence of the power.' See also [111] (Gageler J, also in dissent). Such an order was made by Finkelstein J

type of order can be traced back to an early English case in which the Lord Chancellor found that 'the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the meantime'. Invoking the equitable jurisdiction of the court, an order was made for costs to be paid to the plaintiff 'to empower her to go on with the cause.'[37]

It remains a matter of controversy whether a cost capping order made in favour of a public interest litigant necessarily limits the quantum of the costs that may be recovered in the event that the public interest litigant is successful. The divided judicial views on this question and difference in approaches taken in the application of New South Wales and federal laws are discussed below.

In a number of jurisdictions, civil procedure rules confer an express power for the court to make an order limiting the amount of costs that a party is required to pay in the event of an adverse costs order at the conclusion of the proceedings.[38]

In Victoria, section 65C(2A) of the *Civil Procedure Act 2010* (Vic) provides that in making an order to fix or cap recoverable costs in advance, the court may consider:

(a) the timing of the application;

(b) the complexity of the factual or legal issues raised in the proceeding;

(c) whether the party seeking the order claims damages or other form of financial compensation;

(d) whether the claim of the party seeking the order has a proper basis and is not frivolous or vexatious;

(e) the undesirability of the party seeking the order abandoning the proceeding if the order is not made;

(f) whether there is a public interest element to the proceeding;

(g) the costs likely to be incurred by the parties;

(h) whether the other party has been uncooperative or delayed the proceeding;

(i) the ability of the party seeking the order to pay costs;

(j) whether a significant number of members of the public may be affected by the outcome of the proceeding;

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in *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (In liq) [No 4]* (2008) 169 FCR 497 at 500 [7]. See [7]-[21], and in particular, [15], where Finkelstein J noted that the jurisdiction 'may be exercised in any civil proceeding'.

[37] *Jones v Coxeter* 2 Atk. 400, 26 Eng. Rep. 642 (Ch. 1742) at 642, cited by Dwight Stewart, 'Advance Costs in Public Interest Litigation 'The Relationship Between Democracy and Individual Rights in a Society of Limitless Need and Limited Resources' (Seminar paper, CLE British Columbia, September 2008) <http://www.millerthomson.com/assets/files/article_attachments/Advance_Costs_in_Public_Interest_Litigation_--_The_Relationship_Between_Democracy_and_Individual_Rights_in_a_Society_of_Limitless_Need_and_Limited_Resources.pdf>. Some relevant Canadian cases are discussed below at part 2.8.

[38] E.g., *Uniform Civil Procedure Rules 2005* (NSW) r 42.4; *Federal Court Rules 2011* (Cth) r 40.51; *Federal Circuit Court Rules 2011*, r 21.03(1); and in Victoria *Civil Procedure Act 2010* (Vic) s 65C(2)(d). For a useful overview, see: the Hon Justice Nicola Pain, 'Protective costs orders in Australia: increasing access to courts by capping costs' (Conference Paper, Australasian Conference of Planning and Environment Courts and Tribunals, 7 March 2014). See also *Bare v Small* [2013] VSCA 204, 47 VR 255.

(k) whether the claim of the party seeking the order raises significant issues as to the interpretation and application of statutory provisions.[39]

These factors reflect those identified in connection with the application of the *Federal Court Rules* in respect of protective costs orders.[40]

Whether such an order may be made in the absence of an express power is a vexed question. Similarly, the question of whether the court can exercise its discretion not to order costs against a *public interest* litigant in certain circumstances (discussed below) at the *outset* of the litigation is problematic.

The court's discretion to make cost capping orders at an early stage of litigation may be exercised in order to ensure that access to justice is not frustrated by the impecuniosity of the plaintiff, or to address an unwillingness to proceed because of the risk of an adverse costs order.[41] Moreover, section 9(2)(g) of the *Civil Procedure Act 2010* (Vic) provides that a factor to be taken into consideration by the Court in making any order is 'the public importance of the issues in dispute and the desirability of a judicial determination of those issues.'

The Court of Appeal for England and Wales identified the purpose of a protective costs order as being:

> to allow a claimant of limited means access to the court to advance his case without the fear of an order for substantial costs being made against him, a fear which would inhibit him from continuing with the case at all.[42]

Whether such an order will be made will depend on the relevant facts and evidence in the case (e.g., that in the absence of such an order the case will not be continued) and the applicable law governing the exercise of judicial discretion in relation to costs.[43] Relevant principles can be extracted from a number of cases, particularly in the area of environmental law, in which protective costs orders have

[39] The Act was amended by the *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic). See *Environment East Gippsland Inc. v VicForests (No 3)* [2022] VSC 141.

[40] See *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 [6] (Bennett J).

[41] See the decision of the Victorian Court of Appeal in a human rights case: *Sophie Aitken & Ors v State of Victoria, Department of Education and Early Childhood Development* (2013) 46 VR 676.

[42] *R (Corner House Research) v Secretary for State and Industry* [2005] 1 WLR 260, 2607 [6] cited by Hansen and Tate JJA in *Bare v Small* (2013) 47 VR 255 [23].

[43] A number of cases are referred to in the Hon Justice Nicola Pain, 'Protective costs orders in Australia: increasing access to courts by capping costs' (Conference Paper, Australasian Conference of Planning and Environment Courts and Tribunals, 7 March 2014).

been made.[44] Such orders have been made in first instance proceedings and appeals in respect of alleged unlawful discrimination and breaches of human rights.[45]

One important consideration is whether there is evidence that, in the absence of a protective costs order, the case will not proceed.[46]

Another consideration is the vexed question (mentioned above) of whether the making of such an order operates (either as a matter of law, or discretion) to limit the costs that may be recovered in the event that the case is successful. This may turn on the precise wording of the procedural rule in question.

This second consideration is of some significance in human rights and public interest litigation, particularly in cases conducted by private lawyers on a quasi pro bono basis, given that a 'two way' cap on recoverable costs will severely limit recoverable professional fees and out of pocket expenses, which may deter private lawyers from taking on such cases.

In the Federal Court, the orders have been treated as reciprocal. For example, in *Corcoran*,[47] Bennet J was of the view that an order under the *Federal Court Rules* would limit the recoverable costs by both parties and made an order in reciprocal terms. In *King*, the order made by Perram J was also in reciprocal terms.[48] As noted by Hansen and Tate JJA in *Bare v Small:*

> [T]he power under Order 62A being construed in *Sacks v Permanent Trustee Australia Ltd*[49] and in *Manchester Pty Ltd v Bickford*[50] as not permitting the fixing of maximum costs recoverable by one party, should it succeed, but leaving it open to the other party to recover its full costs should it succeed.[51]

In *Delta*,[52] with reference to the NSW *Uniform Civil Procedural Rules,* Beazley P (in dissent) was of the view that if a protective costs order is made, it extends to both parties.[53] Basten J (with whom Macfarlan J agreed) came to a different view. After referring to the construction of the *Federal Court Rules* as requiring that any order made bind both (or all) parties to the litigation, he expressed the

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[44] Cases in which such orders were made include: *Nerringillah Community Association Inc v Laundry Number Pty Ltd* [2018] NSWLEC 157; *Smith v NRMA Insurance Limited* [2016] NSWCA 250; *Olofsson v Minister for Primary Industries* [2011] NSWLEC 137; See also *Christian Youth Camps Ltd v Cobar Community Health Services Ltd* [2011] VSCA 284; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 193; *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864; *Australian Securities and Investments Commission, in the matter of GDK Financial Solutions Pty Ltd (in liq) v GDK Financial Solutions Pty Ltd (in liq) (No 4)* [2008] FCA 858. The courts have refused to make protective orders in a number of cases, including: *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission* [2020] NSWLEC 38; *Michos v Eastbrooke Medical Centre Pty Ltd (Ruling No 2)* [2019] VSC 13; *Michos v Eastbrooke Medical Centre Pty Ltd* [2019] VSCA 140; *Maletic v Comcare* [2016] FCA 1111; *King v Virgin Australia Airlines Pty Ltd* [2014] FCA 36; *Gramotnev v Queensland University of Technology (No 4)* [2013] QSC 249; *Briggs-Smith v Moree Plains Shire Council* [2012] FMCA 304; *John Williams Neighbourhood Group Inc v Minister for Planning & Murlan Consulting Pty Limited* [2011] NSWLEC 100; *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165.

[45] See *Haraksin v Murrays Australia Ltd* [2010] FCA 1133; (2010) 275 ALR 520; *King v Jetstar Airways Pty Ltd* [2012] FCA 413; *Bare v Small* (2013) 47 VR 255.

[46] See *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165 (Preston CJ).

[47] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

[48] *King v Jetstar Airways Pty Ltd* [2012] FCA 413.

[49] (1993) 45 FCR 509, 513 (Beazley J).

[50] Unreported, Supreme Court of Queensland, 7 July 1993 (Drummond J).

[51] *Hanisch v Strive Pty Ltd* (1997) FCR 384, 390.

[52] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263.

[53] Ibid, [68].

view that 'the language of the UCPR imposes no such constraint'.[54] These comments were obiter as the order made at first instance was in reciprocal terms and the applicant did not press for a 'one way' order, either at first instance or on appeal.

An application for a protective costs order was made pursuant to s 65C of the *Civil Procedure Act 2010* (Vic) in *Aitken.*[55] Neave and Priest JJA refused leave to appeal and , in those circumstances, considered that it was not necessary to decide whether the Court was empowered to grant a PCO under s 65C or the Court's general discretion as to costs.[56] In obiter, they commented that they would have declined to make such an order even if it were available and leave was granted, as '[a]lthough questions of discrimination undoubtedly raise questions of public importance, the public interest element in the case has largely been resolved by changes to departmental policy which have resulted in SRI now being provided on an opt-in basis.'[57]

In *Bare v Small,* the Victorian Court of Appeal, in considering the provisions of the *Civil Procedure Act 2010* and the application for a protective costs order for an appeal in a human rights case, referred to the various abovementioned decisions concerning whether a protective order should be reciprocal and noted that the order of the Court of Appeal in England and Wales in *Corner House* was not reciprocal. The Court concluded:

> The issue of reciprocity of any PCO does raise the question of whether a respondent, who does not share the straitened financial circumstances of the applicant, should be similarly entitled to the benefit of a costs cap. Putting aside whether or not the applicant's legal representatives act on a pro bono basis, why should not a successful impecunious party be entitled to recover his or her entire party and party costs? In the end, it is a question of where the financial burden should lie in bringing litigation such as this. Arguably, the effect of granting the respondents a reciprocal order may be to expose a successful impecunious party - or his or her legal representatives - to the burden of shouldering the difference between the cap and the amount that could have been recovered [on] a party and party basis. We have already noted in [24] above that the Victorian provisions are not concerned, as were the ones applicable in *Corner House*, with ensuring that the parties are on an equal footing. It could also be said that the power under s 65C(2)(d) of the CPA is not limited in the same way as that under O 62A of the *Federal Court Rules*, where the principal object was to enable the court to limit all parties' costs exposure when the issues raised are less complex and the amounts to be recovered are moderate. However, the question of whether a PCO made in this Court should invariably be made in reciprocal terms is a question that need not be answered on this occasion. It suffices to say that, as this proceeding has the quality of a 'test case' about it, fairness dictates here that the recoverable costs should be limited for all parties. The applicant should have the protection of knowing that the respondents collectively can recover from him a maximum of $5000 for their costs of the appeal, and the respondents, collectively, can know, likewise, that the applicant can recover from them a maximum of $5000 for his costs of the appeal.[58]

In *Nerringillah,*[59] a unidirectional protective costs order was sought in the NSW Land and Environment Court under r 42.4 of the *Uniform Civil Procedural Rules* 2005 (NSW). Pepper J noted that although courts commonly make bidirectional maximum costs orders they need not be, there

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[54] Ibid, [187].

[55] *Sophie Aitken & Ors v State of Victoria, Department of Education and Early Childhood Development* (2013) 46 VR 676. In the proceedings, the applicants sought leave to appeal from a tribunal decision that the teaching of Special Religious Instruction in State primary schools constituted discrimination against their children.

[56] Ibid, [76].

[57] Ibid, [77].

[58] *Bare v Small* (2013) 47 VR 255 [48] (footnote omitted).

[59] *Nerringillah Community Association Inc v Laundry Number Pty Ltd* [2018] NSWLEC 157.

being nothing contained in the language of r 42.4 to the contrary.[60] She proceeded to note[61] the observations made by Preston CJ in *Caroona*:

> As the Report notes, therefore, maximum costs orders that take the form of imposing bidirectional or multidirectional capping orders and requiring only modest legal representation, may disadvantage a public interest litigant. The public interest litigant may be deprived of access to lawyers and experts that might otherwise have been prepared to act on a contingency basis (the incentive for the lawyers and experts being that they would recover their full professional fees and not be restricted to only a modest proportion). Restricting the nature and extent of legal representation may also deprive the public interest litigant of the benefit of experienced and able senior counsel and give rise to an unjust disparity in the quality of legal representation between the plaintiff (who is restricted in its legal representation) and the defendants (who are unrestricted in their legal representation). The public interest litigant may also be deprived of funds that might otherwise have been provided by a litigation funder (the incentive for the litigation funder again being recovery of full fees and usually some proportion of any monetary judgment sum). The public interest litigant who is ultimately successful in the proceedings also suffers because the costs cap may prevent full recovery of legal costs, causing either the public interest litigant or their lawyers and experts to subsidise access to justice. For non-governmental organisations, lawyers and experts, who act in the public interest, such subsidisation is not sustainable.[62]

Whilst accepting that a unidirectional costs order can be made Pepper J noted that the court should be cautious in making such an order.[63]

There may be a further hurdle to obtaining a costs capping order in proceedings in which damages are sought. This has received judicial consideration in a number of federal cases[64] and is a factor required to be considered under Victorian legislation.[65]

2.1 Cost limiting orders in the Federal Court

Cost capping orders have been made in a number of Federal Court cases, including in class action proceedings. For example, in *Woodlands v Permanent Trustee Co Ltd*,[66] Wilcox J placed a cap on the costs recoverable from the applicants in three related proceedings. The cases involved claims by and on behalf of persons (many of whom were elderly) who had experienced financial difficulties through membership of the Homefund scheme. There was doubt as to the applicability of a section of the NSW legal aid legislation, which limited the costs recoverable from unsuccessful parties in receipt of legal aid, to Federal Court proceedings. In the absence of protection against adverse costs, it was likely that the proceedings would be abandoned, particularly given that the representative party was at risk of an adverse order for costs whereas the class members had statutory immunity. While Wilcox J did not consider the public interest nature of the proceedings as decisive in his decision to make the orders, it was of some significance.[67]

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[60] Ibid, [186].
[61] Ibid, [187].
[62] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165 [30]. The 'Report' referred to is the United Kingdom Report from the Working Group on Access to Environmental Justice, *Ensuring access to environmental justice in England and Wales* (9 May 2008).
[63] *Nerringillah Community Association Inc v Laundry Number Pty Ltd* [2018] NSWLEC 157, [188], referring to the views expressed by Beazley P in *Delta* [83].
[64] See e.g., *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 [6].
[65] Section 65C(2A) *Civil Procedure Act 2010* (Vic). *See Khalid v Secretary, Department of Transport, Planning and Local Infrastructure* [2014] VSCA 115 [32].
[66] (1995) 58 FCR 139.
[67] (1995) 58 FCR 139, [31] (Wilcox J).

Cost capping orders have also been an occasional feature in public interest cases.[68] In the *Corcoran* proceedings, it was alleged that the respondent airline had engaged in direct and indirect discrimination by requiring that certain disabled passengers fly with a carer. Bennett J set out a number of the factors to be taken into account in the exercise of the court's discretion to grant a cost limiting order.[69] These encompassed: (a) the timing of the application; (b) the complexity of the legal and factual issues; (c) the remedies sought; (d) whether the applicant's claims appeared to have merit or were frivolous or vexatious; (e) the undesirability of the proceedings being discontinued if a costs limiting order was not made; and (f) the public interest dimensions of the case.

In *King,* it was alleged that the failure to provide wheelchair assistance on budget airlines involved discrimination in contravention of the *Disability Discrimination Act 1992* (Cth). A cost capping order was made but the substantive proceedings were ultimately unsuccessful. In subsequent proceedings brought by the same applicant, Foster J noted the two cost capping orders in the earlier unsuccessful litigation and, after taking into account a number of other considerations, declined to make a cost capping order.[70]

A cost limiting order was made in a more recent discrimination case against a private bus company arising out of its failure to provide adequate arrangements for the transport of persons in wheel chairs in alleged non-compliance with statutory disability access standards.[71] Nicholas J acknowledged the public interest issues involved, the absence of any pecuniary interest on the part of the applicant, the fact that other people with disabilities were disadvantaged by the lack of wheelchair accessible buses and the prospect that the matter would not proceed unless a cost limiting order was made. The applicant subsequently succeeded at trial.[72]

In *McVeigh*[73] Perram J declined to make a protective cost order in proceedings against the applicant's superannuation fund for alleged breaches of statutory and equitable duties in respect of climate change risks. The applicant had obtained a limited indemnity from Friends of the Earth in respect of an adverse costs order. The applicant sought to limit any adverse costs order to the amount of the indemnity ($310,450). In declining to make the order sought Perram J took into account the failure of the applicant to unequivocally indicate that the case would not proceed if the order sought was not made; the failure to adduce evidence about his own financial position and because it was unclear how the indemnity funds had been raised and whether further funds could be raised.[74]The proceeding ultimately settled on 2 November 2020 prior to going to trial.[75]

In a number of recent cases cost capping orders have been considered by the Federal Court.[76]

2.2 **Cost limiting orders in the Federal Circuit Court of Australia**

[68] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (Bennett J);*King v Jetstar Airways Pty Ltd* [2012] FCA 431.
[69] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 [6]-[7].
[70] *King v Virgin Australia Airlines Pty Ltd* [2014] FCA 36.
[71] *Haraksin v Murrays Australia Ltd* [2010] FCA 1133.
[72] *Haraksin v Murrays Australia Limited (No 2)* [2013] FCA 217.
[73] *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14
[74] Ibid, [14][15][16].
[75] See *McVeigh v Retail Employees Superannuation Pty Ltd* [2020] FCA 1698 [1].
[76] See e.g., *Sayed v National Disability Insurance Agency (No 2)* [2022] FCA 1591 where the refusal to make a costs capping order (*Sayed v National Disability Insurance Agency* [2022] FCA 1494) led to an application for recusal on the grounds of reasonable apprehension of bias.

The Federal Circuit Court is expressly empowered to make cost capping orders in relation to party and party costs.[77] As in the Federal Court, such orders will not necessarily be made in public interest or human rights cases; every case will be determined according to its particular circumstances.[78] For example, in *Briggs-Smith v Moree Shire Council,* a case involving alleged racial discrimination, the application for a cost capping order in relation to discovery was refused. [79] The Court considered that the proceedings were 'hopelessly constituted' and were not a 'suitable vehicle for pursuing the public interests' concerned.[80]

In *Hudson v Australian Broadcasting Corporation,*[81] the applicant (represented by PIAC) sought an order under r 21.03. Public interest considerations were significant in the making of the order.[82] However, in an effort to account for the countervailing factors of the complexity of the proceedings, the consequent high costs the respondent would incur in their defence, and the prejudice to the ABC if it were not able to recover most of those costs in the event of its success, the cap imposed was more than double the amount originally sought by the applicant.[83]

2.3 Cost limiting orders in the NSW Land & Environment Court

The first case in the NSW Land & Environment Court in which a cost capping order was made was *Blue Mountains Conservation Society Inc v Delta Electricity.*[84] In that case, the Plaintiff commenced civil enforcement proceedings seeking declarations and orders in relation to possible breaches of s 120 of the *Protection of the Environment Operations Act 1997* (POEO Act) between May 2007 and April 2009. The proceedings were brought pursuant to an open standing provision.[85] The plaintiff sought a declaration that the defendant polluted the Cox's River near Lithgow between May 2007 and April 2009. Orders were also sought that the defendant stop polluting the Cox's River and mitigate harm caused to the Cox's River.

The Plaintiff sought a protective cost order pursuant to the unfettered discretion to award costs under r 42.4 of the *Uniform Civil Procedure Rules 2005* (NSW).

Pain J noted that there had been three cases in the NSW Supreme Court where cost limiting orders had been sought in ordinary civil litigation. One involved a family dispute under the *Family Provisions*

[77] *Federal Circuit Court Rules 2011* (Cth) r 21.03(1). On the slightly different calculations made in the Federal Circuit Court with regard to caps on costs, see *Flew v Mirvac Parking Pty Ltd* [2006] FMCA 1818, [42]; *Hudson v Australian Broadcasting Corporation* (2016) 311 FLR 134 [16]-[18].
[78] *Flew v Mirvac Parking Pty Ltd* [2006] FMCA 1818, [47]-[48], [55].
[79] *Briggs-Smith v Moree Shire Council* [2012] FMCA 304.
[80] Ibid, [26]-[30].
[81] (2016) 311 FLR 134 (proceedings relating to an allegation of discrimination contrary to s 24 of the he *Disability Discrimination Act 1992* (Cth) because of the failure of the ABC to provide audio-description services for its television programs).
[82] (2016) 311 FLR 134, [73], [80].
[83] (2016) 311 FLR 134, [85].
[84] [2009] NSWLEC 150 (Pain J).
[85] Section 252 of the POEO Act provides that any person can seek an order in the Land & Environment Court to remedy or restrain a breach of the POEO Act.

Act 1982.[86] Another involved a dispute over a small estate.[87] The third involved a dispute between children over their late mother's will.[88]

As Pain J noted:

> 'These cases emphasise that the power in r 42.4 is directed to the need to ensure that costs are proportionate to the issues the parties are raising so that a Court may put a brake on intemperate and disproportionately expensive conduct of proceedings. '[89]
>
> It is not a tool in the armoury of well-intentioned public interest litigants but it is to be applied in the context of s 60 of the CP Act to ensure proportionality of costs relative to the complexity of the issues.
>
> It is not to provide risk minimisation to protect other activities of BMCS.
>
> The rule is not intended as a lever for those who do not want to risk too much money in litigation.'

As Pain J proceeded to note, a public interest argument for the making of a protective costs order needs to be weighed against 'the public interest in the Defendant being able to fully defend its reputation and preserve its business as a state-owned corporation.' [90] In that case, the defendant was a large public authority engaged in the supply of electricity for the benefit of the public. Thus, any costs it incurred in defending the proceedings which were not recoverable would impose a financial burden on part of the public.

In the view of Pain J, the proceeding was not clearly in the public interest. Only part of the water catchment area was affected and the alleged pollution occurred only at one discharge point. Moreover, the area was governed by various other public authorities who were aware of the problem raised by the applicant. The fact that the proceedings might be characterized as being in the public interest was not, in itself, sufficient to displace the presumption that costs would follow the event.

A further complication in this case arose out of the fact that most of the members of the society taking the action were local residents of the area where the offence was alleged to have occurred and, in this sense, had an 'interest' in the matter.

At the time of the making of the application, no defence or evidence had been filed by the defendant. Thus, the prospects for the litigation were not known and the issues in dispute had not been clarified.

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[86] *Re Sherborne Estate (No 2); Vanvalen v Neaves* (2005) 65 NSWLR 268. Palmer J declined to make any special or capping order where the application was by an unsuccessful party following four days' hearing and judgment in the substantive proceedings.

[87] *Dalton v Paull (No 2)* [2007] NSWSC 803. This was in the context of Supreme Court Practice Note SC Eq 1, announced 17 August 2005, which provided that in cases where the estate is under $500,000, the court may cap the costs of a successful claim. Macready AJ made a capping order providing that the plaintiff's costs on the ordinary basis be capped at the amount of $25,000 and the defendants on an indemnity basis be paid or retained out of the estate of the deceased.

[88] *Tobin v Ezekiel* [2008] NSWSC 1108. The plaintiffs had served 49 affidavits and reports (with more to come) and served 71 subpoenas on third parties to produce documents. The defendants had served 20 affidavits and reports and issued two subpoenas. The defendants who were the executors of the estate sought the Court's permission to mortgage the estate for more than a third of its value to pay their lawyers to conduct their case. Palmer J noted that "Both sides have already incurred enormous legal costs, grossly disproportionate to the amount in dispute and to the issues involved" He foreshadowed an order capping costs.

[89] *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150, [32] (Pain J).

[90] Ibid, [38].

Pain J referred to judicial and extra-judicial statements concerning the making of protective costs orders, together with a report of the Australian Law Reform Commission. The ALRC had noted that such orders were relatively uncommon given that, in most cases, courts had taken the view that a successful party should not be deprived of a costs order merely because the litigation was considered to be in the public interest.[91]

As Pain J noted, the Land & Environment Court had a long history of public interest litigation, particularly given the broad third-party standing provisions in many environmental statutes.[92] The Court had handed down numerous decisions on security for costs and appropriate orders for costs at the conclusion of public interest litigation. Also, the rules of the Land & Environment Court made express provision for costs in certain proceedings brought in the public interest.[93]

After considering the importance of access to the court and the need to avoid unduly inhibiting public interest litigation, Pain J proceeded to consider whether a protective costs order should be made.

Although this was a matter for the exercise of judicial discretion, in the context of applicable statutory considerations,[94] a review of other cases[95] led her to formulate certain criteria which were said to be relevant.

Relevant factors included: (a) the timing of the application; (b) whether the claim(s) appeared to be arguable; (c) whether the litigation was in the public interest; (d) whether the plaintiff had any private interest in the matter; (e) whether the proceedings were likely to continue in the absence of a cost limiting order; (f) whether the lawyers were acting on a pro bono basis; (g) the financial means of the parties; (h) whether the making of an order would reward inefficient litigation; and (i) the need to ensure that an order should not be lightly made at an early stage before the issues were clear and the result determined.

Taking these various considerations into account Pain J proceeded to make an order capping costs at $20,000. An important consideration appears to have been evidence to the effect that in the absence of a cost limiting order the litigation would not have proceeded. An appeal from the decision was dismissed by a majority of the NSW Court of Appeal.[96]

In a subsequent Land and Environment Court case, Preston CJ refused an application for a cost capping order.[97] In that case there was no evidence to the effect that the litigation would not proceed if a cost capping order was not made. Moreover, the applicant was an association formed by landholders to oppose coal mining on local lands. The proceedings sought to challenge the

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[91] The decision of Wilcox J in *Woodlands*; Toohey J's address to the International Conference on Environmental Law in 1989 cited by Stein J in *Oshlack* at 238; and Chapter 13 of Australian Law Reform Commission, *Costs Shifting – Who Pays For Litigation?* (Report No. 75, 1995).

[92] *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150, [44].

[93] *Land and Environment Court Rules 2007* (NSW) r 4.2.

[94] See *Civil Procedure Act 2005* (NSW) ss 56, 58 and 60.

[95] *R (On the Application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 WLR 2600; [2005] 4 All ER 1 (UK Court of Appeal); *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

[96] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263. The decision on appeal is discussed below. The proceedings were discontinued by consent on 11 October 2011 following a settlement and admissions by the respondent that it had discharged waste waters containing pollutants between specified dates (the Hon Justice Nicola Pain, 'Protective costs orders in Australia: increasing access to courts by capping costs' (Conference Paper, Australasian Conference of Planning and Environment Courts and Tribunals, 7 March 2014) note 33).

[97] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* [2009] NSWLEC 165. An application was also refused in *John Williams Neighbourhood Group Inc v Minister for Planning & Mural Consulting Pty Ltd* [2011] NSWLEC 100, 183 LGERA 327.

exploration license and authorisation granted to the first respondent which was a mining company. The second respondent was the Minister for Mineral Resources.

Preston CJ referred to the factors outlined by Pain J in *Delta Electricity* and observed:

> These factors may, in appropriate cases, provide guidance but they should not be elevated to become fixed criteria governing the exercise of the discretionary power to make a maximum costs order. All of the factors will not be relevant in all of the cases. Some factors may take on different importance depending on the circumstances. For example, the complexity or simplicity of the factual or legal issues may take on different significance depending on the nature and subject matter of the proceedings and the aspect of access to justice that is relevant, such as achieving proportionality of costs or alleviating the deterrent effect of the fear of an adverse costs order. Some of the factors have the potential for misdirecting the court from considering the critical issue of access to justice. Examples are whether there is any private interest in the proceedings or whether the plaintiff's counsel is acting pro bono. In the end, the critical question for the court is whether or not making a maximum costs order facilitates or impedes access to justice in the particular case.[98]

The case proceeded to trial notwithstanding the refusal of the application for a cost capping order. The applicant was unsuccessful[99] and the court refused the application for a no costs order at the conclusion of the proceedings.[100]

The NSW Land & Environment Court has refused to make cost capping orders in a number of other cases.[101] In some cases, cost capping orders have been made by consent.[102] In others, costs have been capped over the objections of respondents.[103]

In a 2012 report, the New South Wales Law Reform Commission concluded that any amendment to r 42.4 of the *Uniform Civil Procedure Rules* was not necessary.[104]

Significantly, in New South Wales there is also statutory provision for limits on recoverable costs by order at any stage of the proceedings or after the conclusion of the proceedings.[105]

2.4 **Cost protective orders in Victoria**

One of the most prominent Victorian cases in which a cost limiting order was sought in respect of the costs of the appeal is the human rights case of *Aitken*.[106] As discussed above, the Court refused leave to appeal and stated that it was unnecessary to decide whether the court had power to make

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[98] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* [2009] NSWLEC 165, [36].

[99] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 2)* [2010] NSWLEC 1.

[100] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59; 173 LGERA 280.

[101] See e.g., *John Williams Neighborhood Group Inc v Minister for Planning* [2011] NSWLEC 100 where the impact of the case was confined to a local neighborhood where the members of the group were residents.

[102] For example, in 2011 in Federal Court proceedings between the Tasmanian Conservation Trust Inc and the Commonwealth Environment Minister seeking to challenge a decision concerning a proposed pulp mill in the Tamar valley in Tasmania the Commonwealth Government consented to a protective costs order that capped the liability of the Trust in the event that the action failed and an order for costs was made against it.

[103] See e.g., *Olofsson v Minister for Primary Industries* [2011] NSWLEC 137. This was a public interest matter, brought under an open standing provision, involving questions of statutory interpretation and the right of the Minister to revoke Camberwell Common. The Applicant stated that she would be unable to proceed with the matter if a cost capping order was not made. She was ultimately successful at the final hearing: *Olofsson v Minister for Primary Industries (No 2*) [2011] NSWLEC 181.

[104] NSW Law Reform Commission, *Security for costs and associated orders* (Report No 137, December 2012) [4.72].

[105] *Civil Procedure Act 2005* (NSW) s 98(3). See *Nicholls v Michael Wilson & Partners Ltd (No 2)* [2013] NSWCA 141.

[106] *Sophie Aitken & Ors v State of Victoria* [2013] VSCA 28.

a protective costs order under the general law but that, if the jurisdiction did exist, the court in the extant case would have declined to exercise it.

Also, as noted above, in *Bare v Small*, the Victorian Court of Appeal capped the recoverable costs of all parties at $5,000.[107]

In the 2014 decision of *Khalid v Secretary, Department of Transport, Planning and Local Infrastructure,*[108] the Court refused to grant a protective costs order in a discrimination appeal. The applicant had been unsuccessful at first instance. The case was said not to have contained elements of public interest of the magnitude of those raised in the earlier case of *Bare v Small*.[109] No issue arose as to whether any such order would extend to both parties as the applicant for the protective costs order agreed that any such order should be 'mutual'.

Of interest is the fact that the Court rejected the contention that the principle of 'equality of arms' was relevant to the application of Victorian civil procedural rules.[110] The Court stated that:

> The reports that led to civil procedure reform both here and in the UK, including those that led to the introduction of the CPA do not identify a principle of equality of arms as informing the CPA's purpose, or as being necessary to the just determination of a dispute more broadly.[111]

In the absence of clear words to the contrary, the Court did not accept that s 7 of the *Civil Procedure Act 2010* (Vic) incorporates such a principle.

This is in contrast to the explicit recognition of 'equality of arms' as one of the desirable goals of the civil justice system by the Victorian Law Reform Commission in 2008, which recommended that courts and procedures should seek to minimize the effects of resource inequalities on outcomes.[112] As noted by Richards J, equality of arms is also an aspect of the right to a fair hearing in s 24(1) of the Victorian *Charter*.[113] In the authors' view, the Court's rejection of the principle of equality of arms in the application of the CPA in *Khalid* is problematic.

Doubt as to the power to make such an order was subsequently resolved by amendment of the *Civil Procedure Act 2010* (Vic) to clarify that the court may make any order as to costs it considers appropriate to further the overarching purpose, including to 'fix or cap recoverable costs in advance'.[114]

As noted above, in making an order to fix or cap recoverable costs in advance the Act provides that the court may consider the following matters:

> (a) the timing of the application;

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[107] *Bare v Small* (2013) 47 VR 255 (Hansen and Tate JJA). The Court gave detailed consideration to the s 65C, as well as to the decisions in *Corner House*: *R (on the application of Corner House Research) v Secretary of State and Industry* [2005] 1 WLR 260 and *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

[108] *Khalid v Secretary, Department of Transport, Planning and Local Infrastructure* [2014] VSCA 115 (Warren CJ and Santamaria J).

[109] Ibid, [32].

[110] Ibid, [30].

[111] Ibid, [30] with footnote reference to the Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008), and the report of Lord Woolf, *Access to justice: final report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO, July 1996).

[112] Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008), [4.1.3].

[113] *Michos v Eastbrooke Medical Centre Pty Ltd (No 2)* [2019] VSC 437, [42]. Richards J considered that she was bound by the decision in *Khalid* that there is no requirement to apply the principle of equality of arms in deciding whether a protective costs order should be made in furtherance of the overarching purpose of the statute, at [44].

[114] S 65C (2)(d), which commenced on 24 December 2012.

(b) the complexity of the factual or legal issues raised in the proceeding;

(c) whether the party seeking the order claims damages or other form of financial compensation;

(d) whether the claim of the party seeking the order has a proper basis and is not frivolous or vexatious;

(e) the undesirability of the party seeking the order abandoning the proceeding if the order is not made;

(f) *whether there is a public interest element to the proceeding*;

(g) the costs likely to be incurred by the parties;

(h) whether the other party has been uncooperative or delayed the proceeding;

(i) the ability of the party seeking the order to pay costs;

(j) *whether a significant number of members of the public may be affected by the outcome of the proceeding*;

(k) whether the claim of the party seeking the order raises *significant issues as to the interpretation and application of statutory provisions.*[115]

An order may be made at any time in the proceeding and in relation to any aspect of the proceeding, including an interlocutory application.[116]

As noted by Richards J,[117] Section 65C(2A) was inserted into the *Civil Procedure Act* by the *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic), with effect from 1 July 2018. It codified the factors relevant to an application for a protective costs order identified in *Corner House*[118] and applied in Victoria by the Court of Appeal in *Bare v Small*.[119]

Considerations relevant to the making of a cost capping order in environmental litigation in Victoria were referred to by the Supreme Court in considering an application by the defendant for an order for security for costs.[120] Of interest is the following observation by Richards J[121]:

> I have been unable to find any instance of a corporate plaintiff seeking, let alone obtaining, a protective costs order under s 65C of the *Civil Procedure Act*. All of the published decisions of this Court concern individual plaintiffs.[122] The practical reality is that a corporate plaintiff with limited liability is less likely to be deterred by the prospect of an adverse costs order than an individual plaintiff who stands to lose the family home. This is sufficient to explain why EEG and KFF have not applied for protective costs orders in these proceedings.

2.5 **Do costs protective orders operate to protect all parties?**

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[115] S 65C (2A) (emphasis added).
[116] S 65C (3).
[117] *Environment East Gippsland Inc. v VicForests (No 3)* [2022] VSC 14.
[118] *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, [74]–[75]. The decision is discussed below.
[119] (2013) 47 VR 255, [37].
[120] *Environment East Gippsland Inc. v VicForests (No 3)* [2022] VSC 141 at [18] and [20].
[121] At [21].
[122] Referring (at n 21) to: *Michos v Eastbrooke Medical Centre Pty Ltd (Ruling No 2)* [2019] VSC 13; *Michos v Eastbrooke Medical Centre Pty Ltd (No 2)* [2019] VSC 437; *Michos v Eastbrooke Medical Centre Pty Ltd* [2019] VSCA 140; *IJW v Swinburne University of Technology* [2021] VSC 846; *Markiewicz v C*rnjac [2021] VSCA 290, [133]–[135]. There is also reference to *Bare v Small* (2013) 47 VR 255 and *Aitken v State of Victoria* (2013) 46 VR 676, which, as Richards J notes, were decided before the commencement of s 65C(2A).

Where a cost capping order is made at the request of the public interest plaintiff an important question arises as to whether this necessarily also limits, to the same amount, the costs that may be recovered by the public interest litigant if the case is successful.

As noted above, there are divided judicial views on this question which may, in part, reflect differences in the wording of the applicable NSW and Federal Court rules.

In the Federal Court, Order 62A of the *Federal Court Rules* has been interpreted, at first instance, as cutting both ways. In *Corcoran v Virgin Blue Airlines Pty Ltd,*[123] Bennett J held that an order made pursuant to O 62A r 1 of the *Federal Court Rules* applies equally to all parties to the proceedings.[124] This is consistent with a line of earlier decisions at first instance. For example, in *Maunchest*,[125] Drummond J doubted whether he had power to limit only the costs recoverable by one party and noted that there was no (express) indication in O 62A that a one-way cost limiting order could be made. However, he proceeded to note that:

> '… unequal exposure to costs as between parties in a case in which an order under O. 62A is made must depend upon the court's jurisdiction to order, pursuant to O. 62A, r.2, that one party pay costs beyond those limited by order under rule 1.' [126]

Drummond J adhered to his view that the rule only provided for orders applicable to both parties in *Hanisch*,[127] fortified by the decision of Beazley J in *Sacks*.[128] In the latter case, Beazley J referred to the genesis of the rule and a letter from the Chief Justice of The Federal Court to the Law Council of Australia, expressing concern that the costs of civil litigation meant that access to the courts was denied particularly to persons of ordinary means thus effectively denying them justice. It was suggested that there was a need for a change in the rules to allow judges to fix the maximum recoverable costs and that any such rule would be applied principally to commercial litigation at the lower end of the scale in terms of complexity and amount in dispute, although it could be applied in other cases as appropriate. Thus, Beazley J was of the opinion that the resulting rule that had been introduced (O 62A) was designed for the benefit of both parties and '*designed to treat both parties equally*'.[129] On the facts of that case, her Honour declined to make the order sought.

In *Muller,*[130] an application was made to the Federal Court for judicial review of a decision of the Human Rights and Equal Opportunity Commission to recommend payment of an amount of approximately $16,000 to a person found to have been discriminated against by being denied allowances by his employer because he was living in a homosexual relationship. An order was sought under O62A by the applicant to limit any costs awarded against him to $10. According to Moore J, O62A was:

> 'framed in terms which indicate that at least its principal purpose is to invest the court with a power to limit at the outset of litigation the potential liability of all parties flowing from a costs order made after the proceedings had been heard and determined.'[131]

The amounts at issue in the litigation were relatively modest in each of the abovementioned Federal Court cases.

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[123] [2008] FCA 864.
[124] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 [5]. The authority cited for this view was *Hanisch v Strive Pty Ltd* (1977) 74 FCR 384, 389 (Drummond J).
[125] *Maunchest Pty Limited v John Lindsay Bickford; Noosa Hub Pty Ltd (In Liquidation) and Philip Gregory Jefferson* [1993] FCA 318.
[126] Ibid, [14].
[127] *Graeme Arthur Hanisch v Strive Pty Ltd & Ors* [1997] FCA 303.
[128] *Sacks v Permanent Trustee Australia Ltd* [1993] FCA 502; (1993) 45 FCR 509.
[129] Ibid, [13].
[130] *Roger Muller v Human Rights & Equal Opportunity Commission & Anor* [1997] FCA 634.
[131] Ibid.

The issue of whether a cost capping order applies to both parties in Federal Court proceedings was re-visited in *Shurat Hadin, Israel Law Center v Lynch (No 2)*.[132] Robertson J declined to make an order limiting the costs of one of the parties only, noting that previous decisions (referred to above) have held that an order made '*pursuant to that rule* must apply in favour of both parties and could not be made solely for the benefit of one party to the proceedings'.[133]

In his deliberations on whether an order should be made in that case, Robertson J stated:

> I take into account, but place little weight on, any public interest element or complexity in the case because a maximum costs order should, in the circumstances of this case, focus on the position of the parties themselves. As I will later develop, public interest provides an elusive principle to apply in matters of costs.[134]

With respect, difficulties in the application of the principle of public interest (including arguably valid concerns that the court may not always be best placed to judge the *sufficiency* of a public interest aspect of cases in this context) should not be used as a reason for affording it little weight.

As has been noted at various times by the Court, 'the principal purpose of the provision (and its predecessor, order 62A) was … [to address] concerns as to access to justice, public interest, and a desire to limit the costs of all parties, particularly in less complex and shorter cases.'[135]

Notwithstanding the decisions examined above, on one view the Federal Court could make an order limiting the costs payable by a public interest litigant in the event of an unsuccessful outcome, without limiting the costs recoverable by the public interest litigant in the event that the case succeeds. On its face, the rule referred to in the abovementioned cases merely provided that the Court may specify the maximum costs that may be recovered as between party and party and is silent as to whether this applies to one or all parties. The relevant rule is now r 40.51 *Federal Court Rules 2011*.

Order 62A r 1 formerly in the *Federal Court Rules* provided that:

> The Court may, by order made at a directions hearing, specify the maximum costs that may be recovered on a party and party basis.

Rule 40.51 of the *Federal Court Rules 2011* (Cth) is in similar terms and provides that:

> (1) A party may apply to the Court for an order specifying the maximum costs as between party and party that may be recovered for the proceeding.[136]

As recently as 2019, Beach J noted that 'a number of first instance decisions of this Court have held that r 40.51 does not permit a unilateral costs capping order'.[137] After reviewing various authorities and relevant statutory and other matters, he proceeded to conclude that 'although there are no fixed criteria or constraints for the making of a cost capping order under r 40.51 save that it should

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[132] [2014] FCA 413.

[133] [2014] FCA 413, [10] (emphasis added). In the event, it was ordered that the maximum costs as between party and party that could be recovered would be $300,000.

[134] [2014] FCA 413, [14].

[135] *Houston v State of New South Wales* [2020] FCA 502 [19] (Griffiths J).

[136] Sub rule (2) provides that an order made under subrule (1) will not include an amount that a party is ordered to pay because the party:

(a) has failed to comply with an order or with these Rules; or
(b) has sought leave to amend pleadings or particulars; or
(c) has sought an extension of time for complying with an order or with any of these Rules; or
(d) has not conducted the proceeding in a manner to facilitate a just resolution as quickly, inexpensively and efficiently as possible, and another party has been caused to incur costs as a result.

[137] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 2)* [2019] FCA 215; 135 ACSR 278 [70].

be bilateral'.[138] Beach J also expressed the view that, in the exercise of discretion, the fact that a proceeding was complex and lengthy may militate against the making of such an order.[139] This view has been endorsed by a number of other Federal Court judges.[140] In the class action context, in a number of instances, costs capping orders have been sought by respondents when they have been faced with duplicate or overlapping class actions.[141]

There is a question as to whether other powers of the Federal Court would facilitate unidirectional orders? For instance, s 43 of the *Federal Court of Australia Act 1976* (Cth) confers very general powers in relation to the making of orders for costs[142] and *Federal Court Rules 2011* (Cth) r 1.32 provides that the Court may make *any order* that the Court considers appropriate in the interests of justice.[143]

2.6 **Cost protective orders in NSW**

In NSW, the position appears to be that a cost capping order can apply to one party or both parties, depending on the exercise of judicial discretion.

Rule 42.4 of the *Uniform Civil Procedure Rules 2005* (NSW) provides as follows:

> (1) The court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.
>
> (2) A maximum amount specified in an order under subrule (1) may not include an amount that a party is ordered to pay because the party:
>
> (a) has failed to comply with an order or with any of these rules, or
>
> (b) has sought leave to amend its pleadings or particulars, or
>
> (c) has sought an extension of time for complying with an order or with any of these rules, or
>
> (d) has otherwise caused another party to incur costs that were not necessary for the just, quick and cheap:
>
> (i) progress of the proceedings to trial or hearing, or
>
> (ii) trial or hearing of the proceedings.
>
> (3) An order under subrule (1) may include such directions as the court considers necessary to effect the just, quick and cheap:
>
> (a) progress of the proceedings to trial or hearing, or
>
> (b) trial or hearing of the proceedings.
>
> (4) If, in the court's opinion, there are special reasons, and it is in the interests of justice to do so, the court may vary the specification of maximum recoverable costs ordered under subrule (1).

In *Caroona Coal* (No 1) Preston CJ expressed the view that:

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[138] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 2)* [2019] FCA 215; 135 ACSR 278 [76].
[139] Ibid, [74].
[140] *Houston v State of New South Wales* [2020] FCA 1099 [14] (Jagot J); *Houston v State of New South Wales* [2020] FCA 502 [20] (Griffiths J). See also *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 2)* [2019] FCA 1061, [48] (Yates J).
[141] Such as in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 2)* [2019] FCA 215. The refusal by the primary judge to make a costs capping order was the subject of an unsuccessful application for leave to appeal: *Bellamy's Australia Limited v Basil* [2019] FCAFC 147.
[142] See also *Federal Court of Australia Act 1976* (Cth) s 23.
[143] See also ss 23 and 28 of the *Federal Court of Australia Act 1976* (Cth).

'…a maximum costs order may be unidirectional, bidirectional or multidirectional. That is to say, the court may specify any one or more of the parties as being protected by a maximum costs order. A unidirectional order would be where the court specifies that only one party is protected by a maximum costs order, most commonly the applicant in the substantive proceedings. The consequence would be that the respondent, if a costs order subsequently were to be made by the court in its favour, would only be able to recover costs from the applicant up to the maximum amount specified in the order. Such an order is unidirectional, in that it only operates to cap costs in one direction, capping the costs the respondent can claim from the applicant. The cap does not operate in the other direction. Hence, if a costs order is made in favour of the party who is protected by a maximum costs order, such as the applicant, that party can still recover costs from the other party or parties without limitation by the maximum costs order.

The court may also make a maximum costs order that is bidirectional (where there are only two parties) or multidirectional (where there are more than two parties). This is where the cap on the costs operates on both or all of the parties. Each party may only recover from any other party costs up to the maximum amount specified in the order. Hence, just as the respondent may only recover from the applicant costs up to the maximum amount specified in the order if the respondent were to be successful in the proceedings and was awarded costs, so too the applicant may only recover from the respondent costs up to the maximum amount specified if the applicant were to be successful and was awarded costs. The cap operates in both directions.'[144]

In the appeal[145] from the decision of Pain J to make a cost limiting order in *Delta Electricity,* consideration was given (albeit obiter) to whether or not such an order limited costs recoverable by both parties.[146]

Based on Federal Court authorities, Beazley JA (in dissent) was of the view that an order under UCPR r 42.4 extends to both parties.[147] However, according to Basten JA (with whom Macfarlan JA agreed) the UCPR 'imposes no such constraint'.[148] In his view, the language of the NSW rule is different from that of the Federal rule and decisions as to the operation of the latter have no necessary application in the NSW jurisdiction.[149]

2.7 **Cost protective orders in other Australian jurisdictions**

In most Australian jurisdictions courts have power to make orders for costs at any stage of the proceedings. Whether such powers extend to the making of cost protective orders at an early stage of proceedings is a vexed question. There is no express power to make costs protective orders

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[144] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165, [12]-[13].

[145] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; 176 LGERA 424. The appeal was dismissed, by majority (Basten JA and Macfarlan JA, with Beazley JA in dissent).

[146] However, the appeal was by the respondent only and the applicant did not appear to be concerned about whether the cost capping order had the effect of limiting costs recoverable by it in the event of a successful outcome.

[147] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263; 176 LGERA 424 [68]. Beazley JA cited the following cases as authority for the two-sided application of the rule: *Sacks v Permanent Trustee Australia Limited* [1993] FCA 502 (an earlier decision of Beazley JA whilst a Federal Court judge); *Maunchest Pty Limited v Bickford* FCA 318 and *Muller v Human Rights and Equal Opportunity Commission* (Federal Court of Australia 17 July 1997; unreported). However, as her Honour proceeded to note, the issue did not arise in the present appeal and thus she accepted 'that this may be a matter that remains open for argument', at [83].

[148] Ibid, [187].

[149] Ibid, [190].

conferred on the Supreme Court of the ACT, the Supreme Court of Queensland, the Supreme Court of the Northern Territory, the Supreme Court of South Australia or the Supreme Court of Tasmania.

In Western Australia Order 66 rule 25 of the *Supreme Court Rules 1971* (WA) provides that the Court may make an order that each party is to bear its own costs at any time during a proceeding in respect of certain specified claims for relief after having regard to various matters, including whether the proceeding raise an issue of general importance, the financial resources of the defendant and the merit of the claim.

In a recent case Brownhill J of the Northern Territory Supreme Court noted:

> In other jurisdictions, the Supreme Court has express power to make protective costs orders.[150] There is no such express power conferred on the Supreme Court in this jurisdiction. Whether a court without any such express power may make protective costs orders does not appear to have been considered in Australia, but courts in England have accepted that a general discretion as to costs permits the making of a protective costs order.[151]

2.8 **Cost limiting orders in Canada**

In civil proceedings in most Canadian courts, costs may be ordered against an unsuccessful party.[152] Applications for protection from adverse costs have been made in a number of public interest cases and Canadian decisions are often referred to by Australian courts in cases concerning cost limiting orders.[153] Of particular interest is the consideration of *advance* cost orders by the Canadian courts.[154]

One of the leading cases involved the Okanagan Band of First Nations people. Members of the Band had commenced logging on Crown land (to obtain lumber to build housing on their reserve) without authorisation under relevant forestry legislation. The Minister of Forests sought to enforce a stop work order. The Band commenced legal proceedings contending that they had aboriginal title to the land and that the forestry legislation was unconstitutional.

Application was made for an interim costs order on the grounds of their financial impecuniosity. Rather than an order limiting the costs payable by them in the event of an unsuccessful outcome, they sought an order that the Minister *pay* the group's costs of the litigation in advance of the outcome.

At first instance the trial judge refused to make an order. This was overturned by the British Columbia Court of Appeal and resulted in an appeal to the Supreme Court of Canada. Le-Bel J (with whom a majority of the Court agreed) referred to the special characteristics of public interest litigation and the need to distinguish it from traditional private litigation.

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[150] *Phillips v Chief Health Officer* [2022] NTSC 29 [8], referring to: s 65C(2)(d), *Civil Procedure Act 2010* (Vic), Rule 42.4, *Uniform Civil Procedure Rules 2005* (NSW), Rule 40.51, *Federal Court Rules 2011* (Cth).

[151] Referring to: *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [68], [74], and the cases referred to in that decision at [44]-[52]; *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749; *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250; *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107.

[152] For a useful summary, see *Re Regional Municipality of Hamilton-Wentworth v Hamilton-Wentworth Save the Valley Committee, Inc* (1985) 51 O.R. (2d) 232 at 32.

[153] *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 S.C.R. 371; 2003 SCC 71 at 313 N.R. 84 (at [40]–[41] per LeBel J); *Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Review Agency)* 2007 SCC 2, J.E 2007–211 at [36]–[41] per Barstarache and LeBel JJ;

[154] Referred to as a 'pre-emptive costs order' by Finkelstein J in *Australian Securities and Investments Commission, in the matter of GDK Financial Solutions Pty Ltd (in liq) v GDK Financial Solutions Pty Ltd (in liq) (No 4)* [2008] FCA 858. See also the comment of Edelman J in *BMW v Brewster* (above at part 2 of this paper).

The Court identified criteria which must be satisfied in order to justify an award of interim costs. Such an order could be made where (a) the party could not genuinely afford to pay for the litigation and there is no other realistic means by which the issues could be brought to trial, (b) the claim was prima facie meritorious and (c) the issues were of public importance and had not previously been resolved.[155] However, it was noted that the court needed to be mindful of the position of the defendant and ensure that an order would not impose an unfair burden upon them.[156] Moreover, the satisfaction of these criteria was not sufficient to warrant the making of an order. The court needed to exercise its discretion in light of all relevant considerations.

The appeal against the making of an order in the British Columbia Court of Appeal was dismissed (by majority).[157]

The Canadian Supreme Court revisited the issue of costs in public interest litigation in a case brought by *Little Sisters Book and Art Emporium*. At first instance, the applicant was substantially successful in its action concerning alleged discriminatory conduct by Customs Canada.[158]

In 2002, the same applicant commenced further proceedings as a result of the ongoing seizure of certain publications by customs authorities. An advance costs order was sought and granted by the case management judge. This was overturned by the British Columbia Court of Appeal. An appeal to the Supreme Court of Canada was dismissed.[159] In the Supreme Court, Justices Bastarache and LeBel (concurred in by Deschamps, Abella and Rothstein JJ) distinguished the circumstances in the present case from the 'exceptional convergence of factors in *Okanagan*'.[160] The Court proceeded to clarify (and to some extent amplify) the parameters of its earlier decision in *Okanagan*.

According to the headnote summarizing the opinion of the majority:

> 'Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential costs treatment. Public interest advance costs orders must be granted with caution, as a last resort, in circumstances where their necessity is clearly established. The standard is a high one: only the "rare and exceptional" case is special enough to warrant an advance costs award. Accordingly, when applying the three requirements set out in *Okanagan,* a court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application. The injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. Since an advance costs award is an exceptional measure, the applicant must explore all other possible funding options, including costs immunities. If the applicant cannot afford the litigation as a whole, but is not

[155] *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 S.C.R. 371; 2003 SCC 71 [40].
[156] Ibid, [41].
[157] This case and other Canadian public interest cases are discussed in Chris Tollefson, 'Costs and the Public Interest Litigant: *Okanagan Indian Band* and beyond' (2006) 19 *Canadian Journal of Administrative Law and Practice* 39.
[158] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice*)[2000] 2 S.C.R. 1120. In this first case a bookstore catering to lesbian and gay clientele alleged that Customs Canada had engaged in arbitrary and discriminatory treatment in detaining books and magazines shipped from suppliers in the United States. The applicant contended that certain provisions of the customs legislation were unconstitutional in that they violated rights of freedom of expression and equality under the Canadian *Charter of Rights and Freedoms*. The trial court found that the legislation was discriminatory but that this discrimination was justified under section 1 of the *Charter*. The decision of the trial court was upheld by the British Columbia Court of Appeal. An appeal to the Supreme Court was allowed in part.
[159] *Little Sisters Book and Art Emporium v Canada (Commissioner for Customs and Revenue)* [2007] 1 S.C.R 38; 2007 SCC 2.
[160] Ibid, [33]. On the exceptional nature of the grant of an order, see [36]-[37]. See also *Fontaine v Canada (Attorney General)*, 2015 ONSC 7007, at [62]: 'The jurisdiction to award advance costs is an extra-extra extraordinary jurisdiction'.

> completely impecunious, the applicant must commit to making a contribution to the litigation. No injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. If advance costs are granted, the litigant must relinquish some manner of control over how the litigation proceeds. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed. Accordingly, courts should set limits on the rates and hours of legal work chargeable and cap advance costs awards at an appropriate global amount. The possibility of setting the advance costs award off against damages actually collected at the end of the trial should also be contemplated.'[161]

Although noting that there were significant problems arising from a lack of equality of arms between litigants, the Court indicated that this was too large a problem to be solved purely by judicial intervention.[162] It endorsed the view, also expressed by other courts,[163] that interim costs awards of this nature are exceptional.

In a subsequent case, the Canadian Supreme Court unanimously upheld a decision of the Alberta Court of Appeal affirming the jurisdiction of a superior court to award interim costs in public interest litigation before a provincial court.[164] The case arose out of a legal challenge to the constitutionality of the failure of the Province of Alberta to enact its laws in both English and French. The litigant was unable to finance the litigation himself, legal aid was not available, and an initial source of funding was terminated following the cancellation of the relevant funding program.

As might be expected, the granting of such an order is rare and it is not considered to be a tool readily available for the use of public interest litigant.[165]

In the course of granting leave to appeal a decision to make an advance costs order, Wakeling J of the Alberta Court of Appeal stated:[166]

> *Okanagan Indian Band* and its progeny have not created by judicial order a new pool of public funds that impecunious litigants pursuing actions with a public-interest dimension may access on an as-needed basis.

In the event, the Court of Appeal allowed the appeal and the advance costs order was set aside. That the Beaver Lake Cree Nation faced 'challenges as an impoverished community with pressing social

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[161] Ibid, [35]-[43] (Bastarche, Le Bel, Deschamps, Abella and Rothstein JJ).

[162] Ibid, [44].

[163] See e.g., *Abdelrazic v Minister for Foreign Affairs and international Trade* [2008] FC 839; *Metrolinx (Go Transit) v Canadian Transportation Agency* [2010] FC 45; *Joseph v Canada* [2008] FC 574.

[164] *R v Caron,* 2011 SCC 5.

[165] See, e.g., *Lessard-Gauvin v Canada (Attorney General),* 2016 FC 418 (LeBlanc J) at [33]: 'This is a stringent test. In particular, [the applicant] basing his recourse on the Charter is not, in itself, sufficient to meet this test. In fact, the courts must see to it that the justice system does not become a proxy "for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups"' (citing *Little Sisters*, at [39]). Note that advance costs are awarded in contexts other than public interest and human rights cases, such as Family Law matters under applicable court rules. In those circumstances 'the award should be made to level the playing field': *Zeineldin v Elshikh,* 2020 ONSC 1160, [37], citing *Stuart v Stuart,* 2001 CanLII 28261. This can be contrasted with conflicting Australian approaches to the purposes of cost capping orders.

[166] *Anderson v Alberta*, 2020 ABCA 22, [17]. Given that an award may be made in the form of an amount to be paid for, say, a year of the litigation, an application for an order should usually include a litigation plan, setting out a timetable for the conduct of the litigation, as well as cost estimates which will be subject to scrutiny by the court.

needs' was not disputed in the litigation.[167] Nevertheless, the Court found that the Beaver Lake Cree Nation was not 'impecunious', as it had access to funds. The Court emphasised that:

> merely having legitimate and reasonable "pressing infrastructural and social needs" is not sufficient … The test is whether there are funds available, not whether there would be funds left over once all other preferred expenditures of the applicant have been met. The test is not met if the applicant has funds, but chooses or prefers to spend the funds on other priorities, regardless of how reasonable those other priorities may be … Setting priorities for spending on desirable improvements to community infrastructure and standards of living is not the same thing as being "genuinely unable to afford" to fund the litigation. As noted, discretionary spending on desirable improvements to community infrastructure and standards of living can, for this purpose, be distinguished from spending on basic necessities. However, an applicant that has funds but prefers to spend them on other priorities is not impecunious. Between necessity and discretion there is a point at which the applicant "genuinely cannot afford" to fund the litigation.[168]

2.9 **Cost limiting orders in the United Kingdom**

Australian courts have also made reference to various authorities in the United Kingdom concerning cost limiting orders.

In one of the leading cases in this area,[169] the applicant sought to challenge the decision of a UK Government department to alter its anti-corruption procedures, arguing that there had been inadequate public consultation prior to the decision. An order was sought to immunise the applicant against liability for any costs order. Such a protective costs order (PCO) is to be distinguished from an order capping the amount of costs that may be ordered to be paid by the applicant (known as a cost capping order or CCO).[170] A PCO is only available in public interest or public law cases[171] whereas a CCO may be made in private litigation.

There is no express provision for protective costs orders in the *Civil Procedure Rules*.[172]However, there are various caps on costs in respect of environmental judicial review cases.[173]

In *Corner House,* the Court of Appeal restated the governing principles for a PCO:

> '1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> (i) the issues raised are of genuine public importance;
>
> (ii) the public interest requires that those issues should be resolved;

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[167] *Anderson v Alberta (Attorney General),* 2020 ABCA 238, [23].
[168] Ibid, [26], [28].
[169] *R (Corner House Research) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192 ('*Corner House*'). English courts had previously given consideration to cost capping orders and protective costs orders in a number of public law and public interest cases. See, e.g., *R v Lord Chancellor, Ex Parte Child Poverty Action Group* [1998] EWHC Admin 151; [1998] 2 All ER 755 (Dyson J); *Hammersmith and Fulham London BC, ex parte Council for the Protection of Rural England London Branch* [2000] Env LR 544 (Richards J).
[170] As to CCOs, see e.g., *Nadia Eweida v British Airways PLC* [2009] EWCA Civ 1025, [8].
[171] See *Eweida v British Airways plc* [2009] EWCA Civ 1025, applied in *Jolyon Maugham QC v Uber London Limited* [2019] EWHC 391 (Ch). The plaintiff in that latter case (a barrister) sought a declaration that UBER was required to pay VAT for a short journey he had taken using the service, relating to an amount of £1.06. He brought the litigation in light of the public perception of tax avoidance by US tech companies, leading to general public distrust of the government and 'establishment', such as to be a matter of public concern, at [10]-[11]. The Court found that the case lacked the requisite 'public' interest element.
[172] See *Jolyon Maugham QC v Uber London Limited* [2019] EWHC 391 (Ch) [22]-[25].
[173] See Rules 45.43 and 45.44 of the *Civil Procedure Rules.*

(iii) the applicant has no private interest in the outcome of the case;

(iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that is likely to be involved it is fair and just to make the order;

(v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in light of the considerations set out above.'[174]

These principles were endorsed, re-stated in similar terms and in several respects clarified in subsequent Court of Appeal cases.[175]

In the aftermath of the decision in *Corner House,* various public interest organisations and NGOs expressed concern at the limiting effect of the requirement that the public interest litigant have no 'personal interest' in the matter. However, it would appear that this 'requirement' has 'been diluted in later case law.'[176] As noted in one case:

> '…the nature and extent of the 'private interest' and its weight or performance in the overall context should be treated as a flexible element in the court's consideration...of whether it is fair and just to make the order…'[177]

In a 2007 High Court case it was doubted whether the presence of a private interest was a bar to a PCO and noted that the decision in *Corner House* provides guidance rather than rigid rules.[178] This view was shared in obiter by the Court of Appeal to the effect that the 'flexible' approach should be applied.[179]

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[174] *R (Corner House Research) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192 [74]. Lord Phillips MR gave the judgment of the Court, prepared by Brooke LJ. The Public Law Project was permitted to intervene in the litigation, at first instance and on appeal. The Court of Appeal proceeded to express the view that courts in that jurisdiction did not have power to make orders of the type endorsed by the Canadian Supreme Court in the *Okanagan Indian Band* case (discussed above), at [77].

[175] *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749; *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209 ,[14]. This involved, inter alia, an application for a PCO to protect the claimant against its liability for costs of the appeal if it lost the appeal. The respondent contended that no such order should be made or, in the alternative, that a reciprocal order should be made as was done by the judge at first instance. The Conservation Trust sought an order that, if successful on the appeal, there should be no fixed cap on its recoverable costs at first instance and on appeal. The proceedings arose out of a challenge to a property development on a site where it was alleged that there were rare and endangered invertebrate species.

[176] *R (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin) [19] per Lloyd Jones J, referring to *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam). See also R*(Compton) v Wilshire Primary Care Trust* [2008] EWCA Civ 749; *R (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin), where in an application for judicial review of a decision to stop providing acute services at a particular hospital an application for a PCO was refused. In *Re McHugh's Application* [2007] NICA 26, the Northern Ireland court noted that the fact that an applicant had a personal interest in proceedings did not invariably amount to a complete bar to the making of a protective costs order.

[177] *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam) per Sir Mark Potter P, referred to in *R(Compton) v Wilshire Primary Care Trust* [2008] EWCA Civ 749 by Waller LJ, at [23].

[178] *Kings Cross Railway Lands Group v London Borough of Camden* [2007] EWHC 1515 (Collins J). See also *Lyn McCaw v City of Westminster Magistrates' Court* [2008] EWHC 1504 (Latham LJ).

[179] *Morgan v Hinton Organics (Wessex) Ltd & CAJE* [2009] EWCA Civ 107 [39]. Reference was made in the judgment to the report of an informal working group of representatives of different interests, (including private practitioners, NGO lawyers and private sector lawyers in a personal capacity) sponsored by Liberty and

The majority of the Court of Appeal in *Compton* were of the view that 'exceptionality' is not a requirement beyond the five governing principles. The endorsement of the notion of 'exceptionality' in *Corner House* was said to be merely a reminder that such orders are not to be routinely made, given that the relevant requirements would only be satisfied in rare cases.[180]

In 2009, a challenge to a refusal to grant a PCO, on the basis that this amounted to a denial of the right of access to the courts guaranteed by Article 6 of the *European Convention on Human Rights,* was rejected by the European Court of Human Rights.[181]

Concern had also arisen that the approach of English courts to costs might not be compliant with the UNECE *Aarhus Convention* in relation to access to justice in environmental matters.[182] The limitation of PCOs to 'exceptional' cases was said to set too high a threshold.[183]

Further concerns arose out of the view expressed in *Corner House* that where a cost capping order is made it may be appropriate to cap the amount that the public interest litigant may recover, if successful, and that '(t)he applicant should expect the capping order to restrict it to solicitor's fees and a fee for a single advocate of junior counsel status that are no more than modest'.[184] As the Court of Appeal noted in a subsequent case: 'there can be no absolute rule limiting costs to those of junior counsel because one can imagine cases in which it would be unjust to do so.'[185] Moreover, as Waller LJ has noted, the *Corner House* principles are not to be read as statutory provisions nor read in an overly restrictive way.[186]

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the Civil Liberties Trust, and chaired by Lord Justice Maurice Kay (*Litigating the Public Interest – Report of the Working Group on Facilitating Public Interest Litigation*, July 2006) and also to the report of another informal working group representing a range of interested groups, headed by Lord Justice Sullivan (*Ensuring Access to Environmental Justice in England and Wales – Report of the Working Group on Access to Environmental Justice,* (May 2008)). See also *Ewaida v British Airways plc* [2009] EWCA Civ 1025.

[180] *R (Compton) v Wilshire Primary Care Trust* [2008] EWCA Civ 749, per Smith LJ at [83] (with Buxton LJ in dissent).

[181] *Allen v UK*, European Court of Human Rights (Fourth Section) No 5591/07, 6 October 2009.

[182] United Nations Economic Commission for Europe (UNECE) *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*. See also EU Council Directive 85/337/EEC, 27 June 1985, requiring member states to adopt certain review procedures that are fair, equitable, timely and not prohibitively expensive. The directive was ratified by the UK in February 2005. Modification of the *Corner House* principles to give effect to the requirements of the EU Directive was further considered by the Court of Appeal in a challenge to the grant of planning permission for redevelopment of a railway station and surrounding areas in 2010: *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006. See also *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change* [2010] EWHC 2313 (Admin).

[183] See the *Report from a Working Group on Access to Environmental Justice* chaired by Sullivan LJ (9 May 2008); *Morgan & Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA 107. In September 2010, the UK Government signaled its intention to consolidate the law on PCOs into rules of court, to be in force by April 2011. This did not occur. See also the comment in obiter of Beastor LJ in *IS v Director of Legal Aid Casework* [2014] EWCA Civ 886 at [31]: 'While all the Corner House principles are overarching principles applying regardless of context, the extent of the flexibility may vary accordingly to context and the circumstances of a particular case. For example, in an environmental case in which the Aarhus principles apply, as was stated in Morgan at paragraph 38(iv), the influential 2008 Sullivan Report considered that the private interest requirement was inconsistent with those principles. In other contexts, it remains a requirement, albeit diluted and to be applied flexibly.'

[184] [76(ii)]. See also *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749.

[185] *R (Buglife-The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp and Rosemound Developments* [2008] EWCA Civ 1209 [25]. See also: *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] 1 WLR 2274*; Morgan and Another v Hinton Organics (Wessex) Ltd and others* JPL 2009, 10, 1335-1353; *R (Garner) v Elmbridge Borough Council* [2011] 3 All ER 418.

[186] *R (Compton) v Wilshire Primary Care Trust* [2008] EWCA Civ 749 [23].

Notwithstanding these views which were strongly expressed in obiter, the approaches set out in *Corner House* and *Eweida* to the exercise of the court's discretion continue to be applicable.[187]

Apart from the cases from the United Kingdom and Canada referred to above, courts in many other jurisdictions have grappled with the problem of costs in public interest litigation.[188]

3. Security for costs

3.1 **Applications for security for costs**

Where a defendant, prior to judgment, is concerned that its litigation costs might not be paid if it wins the case, the defendant may apply to the court for an order for security for costs. It is not unknown for defendants to seek orders for security for costs for strategic reasons, in the hope of frustrating the claims against them if the plaintiff is unable or unwilling to provide the required security. Courts have power to make orders for security for costs through legislation,[189] court rules,[190] and/or inherent or implied powers.[191] Proceedings may be stayed if security, as ordered, is not provided.[192]

The court will usually decide whether or not to order security by considering a number of factors which may be specified in legislation or court rules[193] or developed through case law.[194] This will usually involve the exercise of judicial discretion as to whether or not to make the order sought.[195]

In some jurisdictions there is express reference to the 'public interest' or 'public importance'[196] in the rules of court setting out the discretionary factors to be taken into consideration in determining security for costs applications.

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[187] Subject to rule 52.19, relating to appeals. See *Swift v Carpenter* [2020] EWCA Civ 165.

[188] It is beyond the scope of the present paper to consider these in detail. See, for example, the South African Constitutional Court decision in *Trustee for the time being of the Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14. The proceedings arose out of a refusal to supply documents concerning the use, control and release of genetically modified organisms. The court determined, inter alia, that in constitutional cases in which the state is unsuccessful, it should pay the costs of the other side and in cases in which the state is successful each side should pay its own costs. The public interest nature of proceedings has also been accepted by New Zealand courts as a basis for departure from the normal costs rule. See e.g., *Taylor v District Court at North Shore (No 2)* HC Auckland CIV-2009-404-2350, 13 October 2010 at [9] *affirmed New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] NZCA 555 at [11], referred to in *Aotearoa Water Action Incorporated v Canterbury Regional Council and Ors*, [2021] NZHC 48 [33, note 10]. See also: *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 993, (2014) 21 PRNZ 766 – judicial review proceedings over the Council's decision to add fluoride to town water supplies; *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13; *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 524-525.

[189] See, e.g., s 56 *Federal Court of Australia Act 1976* (Cth) and s 13351(1) *Corporations Act 2001* (Cth), which is applicable to plaintiff corporations.

[190] See, e.g., r 42.21 *Uniform Civil Procedure Rules 2005* (NSW)

[191] See, e.g., *Meribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group* [1998] HCA 41.

[192] In most Australian jurisdictions the court has a discretion whether to order a stay. In several jurisdictions there is an automatic stay if a party fails to comply with an order for security. In some instances, there has been controversy as to the power to order a stay. See e.g., with reference to the District Court of NSW, *Phillips Electronics Pty Ltd v Mathews* [2002] NSWCA 157.

[193] For example: residence outside the jurisdiction; the failure to state an address or a change of address with a view to avoiding the consequences of the proceedings; a corporation with insufficient funds; where the plaintiff sues for the benefit of another person: see r 42.21 *Uniform Civil Procedure Rules 2005* (NSW).

[194] For example: dissipation of assets; nonpayment of previous costs orders; the bringing of a weak case to harass the defendant: *Green (as liquidator of ARIMCO Pty Ltd) v CGU Ltd* [2008] NSWCA 148.

[195] See, e.g., *P S Chellaram & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321 at 323 (Mc Hugh J).

[196] See, e.g., r 672(i) *Uniform Civil Procedure Rules 2009* (Qld); r. 1902(i) *ACT Court Procedures Rules*

Even in the absence of express provisions, the court will usually take into account any public interest aspect of the proceedings in deciding whether or not to make an order for security for costs. However, the mere fact that the proceedings have a public interest dimension will not preclude an order for security for costs.[197]

If the court decides to grant the defendant's application, it will order the plaintiff to provide security for the defendant's costs in the form of money, a bond, a bank guarantee or some other acceptable form. The court will also usually order a stay of proceedings until the security is given, and if the plaintiff does not comply with the order, the court may stay or dismiss the proceedings.

In New South Wales, the *Uniform Civil Procedural Rules 2005* provide that a plaintiff is not required to provide security for costs in judicial review proceedings except in exceptional circumstances.[198] Where a plaintiff invokes an open standing provision or commences a representative proceeding, the court will not usually treat the plaintiff as bringing the proceedings for the benefit of a third party for the purpose of considering whether exceptional circumstances exist.

Amounts sought by way of security may be substantial. For example, in three related recent investor class actions in the Victorian Registry of the Federal Court, the defendants sought security for costs in the sum of $8.2 million.[199] At first instance, Murphy J dismissed the application and in doing so considered the relevant authorities and the considerations in favor and against the making of an order for security. His Honour was of the view that security should not be ordered as this was likely to stultify the litigation.[200]

The decision was overturned by the Full Federal Court, which determined that some form of security was appropriate given the nature of the underlying claims and the view that at least some group members were able to contribute to a fund for such a purpose.[201]

After the matter was remitted for further consideration the respondents sought an order for security in the sum of $6.58 million and an order staying the proceedings pending payment of that sum. Murphy J declined to make such an order but made orders requiring the solicitors for the applicants to write to each of the group members to inform them that the Court intended to fix an amount of security in the sum of $6.58 million and that it was likely that the proceeding would be stayed if the security was not paid.[202]

At a further hearing new evidence was allowed as to the capacity and willingness of group members to pay security, the unavailability of litigation funding, the lack of adverse costs insurance and the lack of interest of most unknown group members. The amount of security offered by the group members was $1,730,379. The respondents pressed for the amount of $6.58 million which was said to be the likely amount of their costs. Murphy J was of the view that security for this amount should be ordered unless he was satisfied that this was likely to stultify the proceedings. He concluded that if an order for security for this amount was made it was 'highly likely' that the proceedings would be

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2006 (ACT).

[197] See e.g., *Sales-Cini v Wyong City Council* [2009] NSWLEC 201.

[198] *Uniform Civil Procedural Rules 2005* (NSW) r 59.11.

[199] Although not a public interest case per se, given that the proceedings sought damages for losses allegedly suffered, the principles considered by the court are of relevance to public interest cases generally and class action proceedings in particular. This was the first case in which security had been ordered to be given by group members in an open class action.

[200] *Kelly v Willmott Forests Ltd (in liquidation)* [2012] FCA 1446. For a discussion of the cases concerning the discretion to order security in the Federal Court, see *Ozmen v Culture Map Pty Ltd (No 2)* [2020] FCA 1891 (Rares J).

[201] *Madgwick v Kelly* [2013] FCAFC 61.

[202] *Kelly v Willmott forest (in liquidation) (no 2)* [2013] FCA 732.

stultified. An interim order for security in the sum of $1,730,379 was made with further orders intended to have the effect of limiting the ambit of the class and to facilitate further steps to increase the amount of the security.[203]

This interlocutory disputation as to security for costs extended over three years, involved three substantial hearings at first instance and one appeal to the Full Federal Court. No doubt the costs incurred over this costs dispute were substantial. Subsequently, the Court refused to approve a settlement reached by the parties, partly on the basis that it imposed a significant detriment on those who had not registered and provided security, but who had also not opted out of the proceedings, as the settlement included an admission that the loan agreements involved in the proceedings were valid and enforceable.[204]

The absence of a litigation funder was clearly a factor in *Kelly v Willmott Forests* which was said to support the making of an order for security for costs (particularly given the evidence that funding and adverse costs insurance had been refused). Similarly, the presence of a litigation funder may be a relevant factor in awarding security for costs.[205]

In *Jeffrey & Katauskas v SST Consulting,*[206] the security for costs provided by the plaintiff were insufficient to pay for the defendant's costs. The defendant sought a costs order against the litigation funder for the shortfall. Both the Court of Appeal and the High Court held that the Supreme Court did not, as a general rule, have power to order costs against a non-party to the proceedings, such as a litigation funder. This left the defendant to foot the bill for a substantial amount of costs.

The rule which prohibited courts in New South Wales from ordering costs against non-parties has since been repealed. There is no law in NSW expressly giving courts power to order costs or security for costs against litigation funders, per se.[207] However, litigation funders often indemnify the funded party in respect of any order for costs, or security for costs. An adverse costs (or 'after the event') insurance policy may be taken out whereby the insurer will be at risk of meeting any order for security or adverse costs, within the limits specified in the policy. Thus, in practice, a defendant in a funded case is often in a more advantageous position in relation to recovery of costs than in other cases.

The courts have evinced a judicial disinclination to order security for costs against a natural person, at least at first instance.[208] However, '[e]ach case necessarily turns on its own particular facts and

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[203] *Kelly v Willmott Forests Ltd (in liquidation) (no 3)* [2014] FCA 78. A process of registering group members was undertaken, whereby those willing to contribute to security for costs, or those who could demonstrate that they were not able to contribute, were registered and eligible to participate in the class action.
[204] *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323.
[205] *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Limited* [2008] NSWCA 148. However, Basten JA (in dissent) was of the view that this would be contrary to the trend in the law embracing litigation funding. See also *The Australian Derivatives Exchange Ltd v Doubell* [2008] NSWSC 1174*; Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd* [2014] VSC 154, [51]-[52]; *Troiano v Voci (Security for costs)* [2019] VSC 859; 61 VR 511; *Turner v Tesa Mining (NSW) Pty Ltd* [2019] FCA 1644, [71]-[72].
[206] [2009] HCA 43, 239 CLR 75.
[207] The New South Wales Law Reform Commission recommended that the Uniform Rules Committee should give consideration to amending the *Uniform Civil Procedure Rules 2005* to provide courts with the power to make security for costs orders against litigation funders in terms similar to the provisions of r 25.14 of the *Civil procedure Rules 1998* (UK): *Security for costs and associated costs orders* (Report No 137, December 2012).
[208] Various authorities are referred to by Griffiths J in *Ninan v St George Bank* [2012] FCA 905, [31]-[32] (including the decision of Lindgren J in *Knight v Beyond Properties Pty Ltd* [2005] FCA 764, [32]-[33]). See also *Sheather v Staples Waste Removals Pty Ltd* [2012] FCA 998, [18] (Nicholas J*); Elshanawany v Greater Murray Area Health Service* [2004] FCA 1272, [11].

circumstances … [and it is also the case that] there is no predisposition one way or the other to ordering security for costs in the case of an individual impecunious litigant.'[209]

The impecuniosity of the plaintiff is a vexed issue in the context of a security for costs application. There is a clearly a public interest in facilitating access to the courts by everyone, including those with limited financial resources who may be unable to meet an adverse costs order.

Some courts have recognised this interest by adopting the view in respect of security for costs 'that poverty is no bar to a litigant'.[210] In NSW, Biscoe J has gone as far as to state that in examining applications for security for costs, 'the principle of access to justice trumps mere poverty.'[211] If courts were to routinely order security for costs on the ground of impecuniosity, access to justice would be frustrated because such orders would deny the impecunious the opportunity to secure their legal rights.[212]

As noted by Mortimer J:

> The potential chilling effect of requirements to provide security for costs on individual litigants are well recognised, and the impediment which such orders could otherwise impose on access to justice means, at first-instance level, an individual impecunious litigant will rarely be ordered to provide security.[213]

The poverty of the plaintiff may be excluded as a factor taken into account in the exercise of judicial discretion in relation to security for costs[214] or expressly stated to be a factor which, per se, does not provide a basis for an order.[215]

However, as in many other contexts, there are countervailing private and public interest considerations.

One consideration is the need to protect defendants by ensuring that there are funds available to cover costs if a case is successfully defended. There is also a public interest in avoiding abuse of the court's processes by 'preventing impecunious persons from litigating without responsibility'.[216] Private and public interest factors favour discouraging the filing of unmeritorious, frivolous or vexatious claims.[217] Also, it may be considered desirable to prevent the plaintiff from frustrating court orders in relation to costs.

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[209] *Waters v Commonwealth of Australia (Australian Taxation Office)* [2014] FCA 1107, [43] (Griffiths J).
[210] *Cowell v Taylor* (1885) 31 Ch D 34, 38. See also *Pearson v Naydler* [1977] 3 All ER 531, 533 (Megarry VC); *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 744.
[211] *Sharples v Minister for Local Government* [2008] NSWLEC 67, 8. In that case at first instance Biscoe J ordered the applicant to pay one third of the Council's costs. Although a public interest element was acknowledged only part of the case was held to satisfy the threshold requirements of novelty and importance such as to justify a departure from the usual order as to costs. An appeal, including in relation to costs, was unsuccessful: *Sharples v Minister for Local Government* [2010] NSWCA 36.
[212] See, e.g., *McSharry v Railway Cmrs* (1897) 18 LR (NSW) L 33, 37 (Darley CJ); *Fletcher v Commissioner of Taxation* (1992) 23 ATR 555, 558 (Hill J);*Staff Development & Training Centre Pty Ltd v Commonwealth of Australia* [2005] FCA 1643, [39] (Spender J).
[213] *Kiefel v State of Victoria* [2014] FCA 604, [34]. Cf *Waters v Commonwealth of Australia (Australian Taxation Office)* [2014] FCA 1107, [43] (Griffiths J).
[214] For example, r 42.21(1)(d) *Uniform Civil Procedure Rules 2005* (NSW), which only refers to the inability of a *corporate* plaintiff to meet any order for costs.
[215] See, e.g., O 25 r 1, *Rules of the Supreme Court 1971* (WA).
[216] *Re Marriage of MA and Brown* (1991) 15 Fam LR 69.
[217] See generally, Stephen Colbran, 'The Origins of Security for Costs' (1993) 14 *The Queensland Lawyer* 44. See also *Morris v Hanley* [2000] NSWSC 957; *Bhagat v Murphy* [2000] NSWSC 892; *Lall v 53-55 Hall Street Pty Ltd* [1978] 1 NSWLR 310.

Thus, courts have often held that although poverty should not be a bar to litigation, the lack of funds of the plaintiff is not irrelevant and may be one of a number of factors to be taken into account in the exercise of judicial discretion in relation to security for costs.[218] Different considerations apply in the case of a corporate plaintiff.[219]

Although it was clearly a major 'public interest' test case, security for costs was ordered against an impecunious corporate plaintiff in *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd*.[220]In that case, a class action had been commenced by a newly incorporated body, the Tobacco Control Coalition Inc (TCI), the members of which comprised five people, all of whom were associated with (solvent) organisations concerned about the extent of cigarette smoking in the Australian community and the effect of the practice on public health.

The respondent tobacco companies threatened that an order for costs would be sought against the solicitors for commencing the proceedings on behalf of a 'person of straw'. As a result, the solicitors withdrew from acting.

The respondents contended that the proceeding was structured to immunise persons of substance (especially the New South Wales Cancer Council) from liability for costs. TCCI had been incorporated only a few days before the commencement of the proceeding and after the obtaining of legal advice.

In a letter written by Dr Penman of the Cancer Council, it was stated that:

> The TCC has been created as a vehicle for the litigation in order to protect health and medical groups such as the Cancer Council from potentially adverse costs orders.

In the circumstances, and not surprisingly, Wilcox J proceeded to make orders for security for costs against the company that had commenced the proceedings. The security was never provided and the proceedings were discontinued.

In his judgment Wilcox J proceeded to make a number of observations of broader relevance:[221]

> The claim sought to be litigated by TCCI is one of public importance. It is brought by an association controlled by people who have a sincere and informed interest in the subject matter of the litigation and who appear to be motivated by concern for the public interest, rather than any pecuniary or other private interest. If the litigation were successful, it might provide funds valuable for the amelioration of a major public health problem. Moreover, the litigation has the potential to contribute to professional and public understanding of a provision of the *Trade Practices Act* (s 87) that contains some unresolved problems and, perhaps for that reason, is utilised less often than might have been expected.
>
> However, a factor that would have to be taken into account, in exercising the Court's discretion as to costs, would be the extent of the allegations made by TCCI and the conduct of the litigation. It is not enough for litigants and their advisers, both zealous in the public interest, to have their hearts in the right place; their heads must be there also.

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[218] See, e.g., *Lucas v Yorke* (1983) 50 ALR 228; *Grant v Hall* [2012] NSWSC 779; *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, 239 CLR 95 [91] (Heydon J*); Green (as Liquidator of Arimco Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148 [6] (Hodgson JA); *Viviattene v Morton* [2011] NSWSC 1173; *Morris v Hanley* [200] NSWSC 957.

[219] See, e.g., s 1335 *Corporations Act 2005* (Cth); *Pioneer Park Pty Ltd v Australian ANZ Banking Group* [2007] NSWCA 344; 65 ACSR 383; *Harrington Services Pty Ltd (In Liquidation) v Harrington* [2003] NSWCA 89; *Beach Petroleum NL v Johnston* [1992] 7 ASCR 2003*; Livingspring v Kliger Partners* [2008] VSCA 93; *Mercantile Pty Ltd v Dierickx* [2013] NSWCA 87; *Cornelius v Global Medical Solutions Australia Pty Ltd; Farag Global Medical Solutions Australia Pty Ltd* [2014] NSWCA 65. See also the recent case of *All Class Insurance Brokers Pty Ltd (in liq) v Chubb Insurance Australia Limited* [2020] FCA 840, [40]-[44].

[220] [2000] FCA 1004 (Wilcox J).

[221] [2000] FCA 1004, [123]-[125].

> Those who litigate in the public interest need to be dedicated to their cause and enthusiastic in its pursuit. But dedication and enthusiasm are not enough; public interest claims also require strict professionalism, with rigorous attention to any legal problems inherent in the proposed claim. Sadly, in the present case, this is lacking.

However, where the plaintiff's impecuniosity has been caused by the acts of the defendant giving rise to the litigation, security for costs will not normally be ordered, although this factor will not be viewed in isolation.[222]

In another public interest case in the Federal Court, an application for security for costs was sought against the applicant, No TasWind Farm Group Inc, by the Tasmanian Hydro-Electric Corporation.[223] The proceedings related to the proposed establishment of a wind farm on King Island and representations made by the respondent in the course of community consultation. It was contended that various representations were made in trade or commerce and were misleading or deceptive.

In seeking an order for security for costs, the respondent contended that the applicant was incorporated merely as a device to avoid members of the previously unincorporated group being exposed to the risk of an adverse costs order. The fact that the organisation was incorporated 'in essence' to bring the proceedings was held to be a factor in favour of the Court making an order for security for costs,[224] although not a 'decisive' consideration.[225] As Kerr J proceeded to note,[226] there is a difference between the interests of members of non-profit organisations and the interests of shareholders in corporations that seek to make a profit. However, a further difficulty for the applicant was its alleged failure to make full disclosure of its financial position.

It was accepted by Kerr J that the litigation could be regarded as public interest litigation for two reasons. First, there was no commercial element as no claim for damages was being pursued (such claim having been previously denied by way of summary judgment). Secondly, his Honour was of the view that there is a public interest in the enforcement of laws of the Commonwealth (such as the provisions of the *Australian Consumer Law* in issue).

A further issue relevant to the security for costs was the proportionality between the security sought and the total costs of the project giving rise to the controversy.[227]

After weighing up the various competing considerations, including whether the amount of security sought would have the effect of stultifying the litigation, Kerr J ordered that security be provided in the sum of $35,000 (being less than the amount sought by the respondent).[228]

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[222] See, e.g., *Tonks, in the matter of Ambient Rail Pty Ltd (in liq) v Fishwick* [2020] FCA 1755, which discusses various authorities on this point.
In a 2012 report, the NSW Law Reform Commission referred to the following decisions: *Lynnebry Pty Ltd v Farquhar Enterprises Pty Ltd* (1997) 3 ACLR 133; *Ococane Pty Ltd v SRJ Development Pty Ltd* [1999] SASC 231: NSW Law Reform Commission, *Security for costs and associated orders* (Report No 137, December 2012) n 92, 25. As the Commission proceeds to note, it may be difficult to establish a causal connection between the acts giving rise to the litigation and the poverty of the plaintiff. The onus is on the plaintiff to establish this, and the court may take a more cautious approach in cases involving loss of profit compared with cases where the claim is based on the infliction of damage: see *Wollongong City Council v Legal Business Centre Pty Limited* [2012] NSWCA 245 [33], per Beazley JA.

[223] *No TasWind Farm Group Inc v Hydro-Electric Corporation (No 2*) [2014] FCA 348.

[224] See also *Byron Shire Businesses for the Future Inc v Byron Shire Council* (1994) 83 LGERA 59 at 61 (Pearlman J), referred to by Kerr J in *No TasWind Farm Group Inc v Hydro-Electric Corporation (No 2*) [2014] FCA 348, [59].

[225] *No TasWind Farm Group Inc v Hydro-Electric Corporation (No 2*) [2014] FCA 348, [49].

[226] Including by reference to the judgment of Branson J in *Friends of Hinchinbrook Society Inc v Minster for Environment* (1996) 69 FCR 1, 21 [52].

[227] See *Gunns Limited v Tasmanian Conservation Trust* [2012] TASSC 51.

[228] A further judgment dealt with the costs of the security for costs application: *No TasWind Farm Group Inc v Hydro-Electric Corporation (No 3)* [2014] FCA 349.

In 'public interest' cases there will often be factors that may weigh heavily against the making of an order for security for costs. For example, the law in issue may require clarification[229] or there may be conflicting judicial decisions that require resolution. The claim may involve a matter where other members of the community may have common interests or be affected.[230]

However, in *Shurat HaDin, Israel Law Center v Lynch (No 2)*,[231] Robertson J was of the view that the notion of public interest provides an 'elusive principle'[232] to apply in matters of costs and of itself did not justify a departure from the ordinary rule as to costs. On the issue of whether security should be provided, his Honour concluded that, subject to an undertaking by one of the applicants not to diminish or dispose of or encumber his interests in certain property in Australia, without giving 21 days' notice, no order for security for costs would be made.

By way of contrast (albeit in a different factual scenario), Forrest J in the Victorian Supreme Court held that exceptional circumstances in public interest litigation warrant departure from normally applicable costs rules. His Honour held that an impecunious plaintiff seeking an interlocutory injunction should not be required to provide security for costs (in addition to the usual undertaking as to damages) in an environmental case against a State statutory corporation seeking compliance with conservation principles applicable to an endangered species.[233]

In *Delta Electricity,* Pain J in the NSW Land & Environment Court refused the respondent's application for an order for security for costs. The NSW Court of Appeal refused leave to appeal from the decision not to make an order for security.[234]

In another NSW Land & Environment Court case, an incorporated body (established by local residents) sought to prevent certain mining activity by a mining company. The company sought an order for security for costs. Although accepting that there was an element of public interest involved in the case,[235] Sheahan J noted that the matter was not without consequence for the private members of the association, given that they were local residents. After considering various relevant considerations, Sheahan J concluded that an order for security was appropriate, although the amount ordered ($40,000) was less than that sought by the applicant ($75,000).

By way of contrast, in *Friends of King Edward Park*,[236] there was a challenge in the NSW Land and Environment Court to a development consent for a function centre, kiosk and carpark and a challenge to the validity of a plan of management for the area in question. After considering in detail various cases concerning the relevance of public interest considerations in the exercise of judicial discretion in relation to costs and r 4.2(2) of the *Land and Environment Court Rules 2007*, Biscoe J refused the application for an order for security for costs.[237]

In the view of at least one (former) judge, applications for security for costs have little attraction for judges. According to Heydon J:

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[229] See, e.g., *Smail v Burton* (1975) VR 776.

[230] See e.g., *Maritime Services Board of NSW v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107.

[231] [2014] FCA 413 (discussed above in relation to cost capping orders).

[232] [2014] FCA 413 [14], [19].

[233] *Environment East Gippsland Inc v Vic-Forests (No 2)* [2009] VSC 421. See also *Blue Wedges Inc v Port Melbourne Corporation* [2005] VSC 305 (Mandie J).

[234] *Delta Electricity v Blue Mountains Conservation Society Inc (security for costs)* [2010] NSWCA 264 (discussed above in relation to cost capping orders).

[235] *Illawarra Residents for Responsible Mining Inc v Gujarat NRE Coking Coal Limited* [2012] NSWLEC 259 [73]. In an earlier judgment Sheahan J considered in detail the relevance of public interest principles in relation to costs: *John Williams Neighbourhood Group Inc v Minister for Planning* [2011] NSWLEC 100 [31]-[51]; 183 LGERA 327. See *also Friends of King Edward Park v Newcastle City Council* [2012] NSWLEC 113 (Biscoe J).

[236] *Friends of King Edward Park Inc v Newcastle City Council* [2012] NSWLEC 113.

[237] Ibid.

> The lack of judicial generosity (for the amount awarded as security) is one of several signs that applications seeking security for costs have little attraction for judges. In part that is because they are interlocutory, satellite and hypothetical. Their interlocutory character is repellent to courts eager to deal with trials but hard pressed to do so. They are satellite in character because they often involve spending significant time examining complex questions of solvency which are irrelevant to the main proceedings. They are hypothetical in character because their point depends on the hypothesis, which may or may not be realised, that the defendant will succeed, so that through them stalks the fear in many instances that they are a waste of time. They generate additional costs of their own.[238]

Where security is ordered, security may be in the form of payment into court or the provision of a suitable bank guarantee or indemnity.

3.2 **Security for costs in appeals**

Where an order for security for costs is sought in connection with an appeal, different legal principles may apply.[239]

In some jurisdictions, such as NSW,[240] there must be 'special circumstances' for the court to order security for costs in respect of an appeal. In other jurisdictions, such as Victoria, no such requirement is imposed.[241]

In the Supreme Court in Victoria r 64.38(4) of the *Supreme Court (General Civil Procedure) Rules 2015* provides that the Court has power to make an order that security be given for the costs of an application or appeal on such terms as the Court thinks fit. This involves the exercise of discretion.[242]

In the Federal Court there is an 'unfettered' discretion to order security for costs in respect of an appeal.[243]

In all jurisdictions it is broadly accepted that if the matter is one of *public interest* then that *may* provide a reason (having regard to other relevant considerations) for not making an order that would have the effect of preventing the continuation of the appeal.[244]

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[238] *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd & Ors* (2009) 239 CLR 75, [93].

[239] See e.g., *Cowell v Taylor* (1886) 31 Ch D 34, 38 per Bowen LJ; *J & M O'Brien Enterprises Pty Ltd v The Shell Co of Australia Ltd (no 2)* (1983) 70 FLR 261, 264 (Bowen CJ).

[240] *Uniform Civil Procedure Rules* r 51.50. See, e.g., *Fagin v Australian Leisure and Hospitality Group Pty Limited* [2017] NSWCA 306, [53]-[57]; *Stoltenberg v Bolton* [2019] NSWCA 71, [4]. The removal of the requirement for 'special circumstances' has been suggested by the New South Wales Law Reform Commission in *Security for costs and associated costs orders* (Report No 137, December 2012) recommendation 5.1.

[241] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 68.38(4). A requirement for special circumstances applied under an earlier version of the Victorian rule (r 64.24(2)). See, e.g., *Bodycorp Repairers Pty Ltd v Australian Associated Motor Insurers Ltd* [2017] VSCA 213, [21]; *Australian Dream Homes Pty Ltd v Stojanovski* [2016] VSCA 38; *Timbercorp Finance Pty Ltd v Tomes* [2015] VSCA 322, 16]; *Maher v Commonwealth Bank of Australia* [2008] VSCA 122; *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2015] VSCA 169, [11]; *Trkulja v Dobrijevic* [2015] VSCA 281, [43].

[242] Factors relevant to the exercise of such discretion are discussed in *Bodycorp Repairers v Oakley Thompson & Co Pty Ltd (No 3)* [2016] VSCA 185 [19] and in *Con Michos v Eastbrooke Medical Centre Pty Ltd* [2019] VSCA 282 [25]- et seq.

[243] See s 56 F*ederal Court Act 1976* (Cth); r 36.09 *Federal Court Rules 2011* (Cth). Nevertheless, there is relevant guidance to be drawn from a number of cases, which have been recently noted by Flick J in *Du Bray v ACW* [2020] FCA 1680, [9]-[15].

[244] In NSW, see r 51.50 *Uniform Civil Procedure Rules 2005* (NSW); *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247 per Basten JA (with whom Ipp JA and Hoeben J agreed); *Pratt v Ashton* [2012] NSWCA 313 [6] (Hoeben J); *Alexandria 1 Pty Ltd v Echelon Property Management Pty Ltd* [2014] NSWCA 413 (Ward J). In the Federal Court see e.g., *Sheather v Staples Waste Removals Pty Limited* [2012] FCA

4. Cost orders at the conclusion of litigation

4.1 Costs in civil litigation: basic principles

In Australian civil litigation most courts have an unfettered discretion as to whether to order costs in favour of the prevailing party at the conclusion of the litigation. In practice, the losing party is usually ordered to pay most of the legal costs incurred by the winning party. This 'loser pays' rule is intended to indemnify the winning party for some or all of the costs incurred in conducting the litigation.

Such costs are normally ordered to be paid on what is described as a 'party-party' basis, whereby the actual costs recovered are less than the commercial costs actually incurred. The costs that are recoverable on a 'party-party' basis are governed by costs scales or standards that are different from the method by which lawyers charge their own clients (often based on time billing). Thus, there is usually a considerable disparity between the costs that a client is charged by his or her solicitors and the costs which he or she can normally expect to recover from the losing party in the event of a successful outcome.

Over time, this disparity appears to be increasing significantly. At present it is not uncommon for a winning party in the higher courts to only recover around 50-60% of the costs actually incurred from the losing party. This disparity serves as a substantial disincentive to litigating even the most meritorious civil cases. The problem is particularly acute in public interest cases where the public interest litigant is not seeking to recover damages or compensation (out of which any shortfall between costs incurred and costs recovered may be met). This difficulty may often prevent private law firms or barristers from taking on the conduct of public interest litigation.

However, legal centres and pro bono organisations or practices are often prepared to take on the conduct of public interest cases, accepting that the only costs which they may recover are those ordered to be paid to the public interest litigant by the other party in the event that the case is successful.

Legislation and rules governing the award of costs by courts in civil cases usually either expressly enshrine the 'cost follow the event rule' or confer on the court a general discretion in relation to orders for costs at the conclusion of the case. In those courts where a general discretion is conferred this is, in theory, unfettered. However, in practice it is influenced by a body of case law that gives effect to the presumption that costs should ordinarily follow the event.

The Federal Court has a broad discretion in relation to costs.[245]

As noted by the Full Federal Court:

> The principles relevant to the exercise of that discretion are well-settled. A convenient summary was given by Black CJ and French J *in Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [11], recently cited by the Full Court in *PAC Mining Pty Ltd v Esco Corporation (No 2*) [2009] FCAFC 52 at [9].[246]

The *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth) added the following provisions to s 43 of *the Federal Court Act*:

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998 where Nicholas J refers to various authorities including *Equity Access v Westpac Banking Corporation* (1989) ATPR 40-972 at 50,635 (Hill J). See also *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, 197-198 (Beazley J) and *Kiefel v State of Victoria* [2014] FCA 604 (Mortimer J).

[245] Section 43 *Federal Court of Australia Act 1976* (Cth). See also *the Federal Court Rules 2011* (Cth).

[246] *H Lundbeck A/S v Alphapharm Pty Ltd (No 2)* [2009] FCAFC 118.

(3) Without limiting the discretion of the Court or a Judge in relation to costs, the Court or Judge may do any of the following:

(a) make an award of costs at any stage in a proceeding, whether before, during or after any hearing or trial;

(b) make different awards of costs in relation to different parts of proceedings;

(c) order the parties to bear the costs in specified proportions;

(d) award a party costs in a specified sum;

(e) award costs in favour or against a party whether or not the party is successful in the proceedings;

(f) order a party's lawyer to bear costs personally;

(g) order that costs awarded against a party are to be assessed on an indemnity basis or otherwise.[247]

In New South Wales, section 98 of the *Civil Procedure Act 2005* (NSW) provides that '[s]ubject to the rules of court', 'costs are in the discretion of the court' and 'the court has full power to determine by whom, to whom and to what extent costs are to be paid.'[248]

In some circumstances costs may be ordered on what is described as an indemnity or 'solicitor and client' basis.[249] In this event, most if not all of the costs incurred will be recovered. Costs of an appeal may also be ordered to be paid on an indemnity basis.[250]

The prospect of an order at the conclusion of the proceedings that the unsuccessful public interest litigant pay the costs of the other party is a major deterrent even in cases with very substantial merit.[251]

The observations of Basten JA, in the context of environmental law litigation, are of broader relevance:

> The principle that any person may bring proceedings to prevent a breach or threatened breach of environmental protection laws will be seriously undermined if some protection against large costs bills is not available. Important public interest disputes are often complex and based on expert evidence. Public-minded citizens may well be able to obtain donations of time and

[247] See also: ss 37N(4)and (5) [obligation of parties to act consistently with the overarching purpose] and 37P(6)(d) and (e) [power of the court to give directions about practice and procedure in a civil proceeding].
[248] Rule 42.1 of the *Uniform Civil Procedure Rules* 2005 (NSW) states the general rule as to costs.
[249] See, e.g., *Federal Court Rules 2011*, Rule 40.02; *Federal Court of Australia Act 1976* (Cth) s 43(2), (3)). This includes situations where a party has been guilty of misconduct or procedural default or where an offer to resolve or compromise the litigation has been unreasonably or imprudently refused. See *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225, 233 (Sheppard J), on the need for a 'special or unusual feature' in the case; and the principles restated recently by Reeves J in *Hegde, in the matter of Nutricare Holdings Limited v Nutricare Holdings Limited (No 2)* [2021] FCA 33. For a detailed consideration of costs more generally, see Gino Dal Pont, *Law of Costs* (Lexis Nexis, 4th ed, 2018), particularly chapter 9 on public interest and test case litigation.
[250] See, e.g., *Australian Competition and Consumer Commission v Oceana Commercial Pty* Ltd [2004] FCAFC 174, [196], cited in *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* [2020] FCA 598.
[251] In its 2012 submissions to the NSW Law Reform Commission, PILCH Vic gave examples of cases and appeals that did not proceed because of concerns about an adverse costs order: PILCH Vic, *Submission to the New South Law Reform Commission Consultation paper 13 - Security for costs and associated costs orders* (19 August 2011) chapter 5; PILCH Vic, *PILCH response to requests for further information* (17 September 2012).

> expertise from professional witnesses and lawyers, but will find it less easy to raise funds to meet the costs of the other party.[252]

Apart from the rules in relation to costs in civil litigation that are substantially similar in most Australian jurisdictions, there are various categories of litigation which are governed by specific costs provisions.

For example, parties are generally required to bear their own costs in proceedings under the the *Fair Work Act 2009* (Cth). Also, costs provisions were introduced[253] in respect of 'migration litigation' with a view to deterring unmeritorious applications. Such rules render parties, lawyers and migration agents liable to be ordered to pay costs in cases and appeals that had no reasonable prospects of success.[254]However, as Rangiah J has observed:

> While Parliament intended to discourage persons from encouraging others to make and continue unmeritorious applications in migration cases, it is evident from Pt 8B that Parliament was also concerned to balance competing aspects of the public interest. It is in the public interest that 'lawyers should not be deterred from pursuing their clients' interests by fear of incurring a personal liability to their clients' opponents': *Ridehalgh v Horsefield* [1994] Ch 205 at 226. If costs are too readily awarded against lawyers and other persons, even more litigants (many of whom have little or no English and no familiarity with our legal system) will have to represent themselves in migration litigation, increasing the burden on the courts and potentially decreasing the quality of justice that is delivered. Parliament balanced these competing considerations by building some protections for lawyers and other persons into Pt 8B.[255]

Specific costs protective provisions have also been introduced in a number of areas, including to protect whistle-blowers and victims of victimisation.[256]

A number of ways of circumventing or reducing the risk of an adverse costs order in human rights and public interest litigation are discussed below. First, however, we will briefly discuss some cost issues which may arise in the event that a public interest or human rights litigant is successful.

4.2 **Costs for successful public interest litigants**

4.2.1 *Costs on an indemnity basis in favor of successful public interest litigants*

Public interest litigants may be awarded indemnity costs. For example, Morling J took into account the public interest nature of the proceedings in *Australian Federation of Consumer Organisations v Tobacco Institute of Australia,*[257] when ordering indemnity costs in favour of the successful consumer organization that had brought the proceedings. Although the costs were varied on appeal, this was because the Full Federal Court[258] was of the view that the applicant was not entitled to all the relief granted by Morling J. Only Hill J in the Full Federal Court rejected the significance of a public interest element.[259]

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[252] *Delta Electricity v Blue Mountains Conservation Society Inc*, [2010] NSWCA 263, [218]-[219].
[253] *Migration Litigation Reform Act 2005* (Cth).
[254] See s 486E and s 486F *Migration Act 1958* (Cth) and the recent decision of Charlesworth J in *DAB16 v Minister for Home Affairs (No 2)* [2021] FCA 120.
[255] SZTMH v Minister for Immigration and Border Protection (2015) 230 FCR 550 [55].
[256] See e.g., s 1317AH *Corporations Act 2001* (Cth) introduced by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth); s 14ZZZC *Taxation Administration Act 1953* (Cth).
[257] (1991) 100 ALR 568.
[258] *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisation* [1993] FCA 83; (1993) 113 ALR 257.
[259] As noted by Wilcox J in *Woodland v Permanent Trustee Company Limited* [1995] FCA 1388 [25].

An indemnity costs order was also made in favour of the successful public interest litigant in *Australians for Sustainable Development Inc v Minister for Planning.*[260]

Various court rules and common law principles in relation to costs make provision for costs to be awarded on an indemnity basis where a party offers to settle the case on specified terms and the other party rejects the offer and obtains a judgment which is less favorable than the terms of the rejected offer. Thus, there is a sanction for parties who unreasonably reject reasonable settlement offers. The mere fact that a party is seeking to bring a case on public interest grounds may not provide a sufficient ground for the rejection of a reasonable settlement offer and will not preclude an order for costs on an indemnity basis. However, this will be a relevant factor in the exercise of judicial discretion.

4.2.2 *Lawyers acting pro bono*

It is 'well established that a party who does not have a liability to the party's solicitor cannot recover costs against the unsuccessful party to the litigation'.[261]

Legal costs may not be recoverable if the successful public interest litigant is represented by lawyers who have acted on a purely *pro bono* basis[262] (as distinct from a 'no win no pay' costs agreement). As the NSW Law Society has noted:

> Pro bono work means work for free. The agreement with the client should state unconditionally that the practitioner would not charge the client and hence the client would not be entitled to a costs order. If, however, the practitioner is to charge the client upon a costs order being obtained in favour of the client, then this arrangement will need to be reflected in the costs agreement.[263]

The term 'pro bono' is often used more loosely to encompass situations where the law firm (and/or counsel) does not seek to charge the client but wishes to preserve an entitlement to recover professional costs and/or out of pocket expenses if the case is successful.[264]

As Basten JA has observed:

> Whether the term 'pro bono' now extends to situations where the lawyer, satisfied that the client has a meritorious claim, nevertheless enters a speculative fee arrangement to charge a usual fee, taking some risk of non-payment, is a question of fact to be determined in the context of the particular case.[265]

In some jurisdictions where courts refer litigants to lawyers under a court appointed referral scheme legal costs may be recoverable.[266] The validity of a conditional fee agreement whereby the lawyer acted on the basis of payment out of any amount recovered by way of an order for costs has been

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[260] [2011] NSWLEC 33.

[261] *Frigger, in the matter of Computer Accounting and Tax Pty Ltd (in Liq) (No 2)* [2018] FCA 612, [26], citing *Noye v Robbins* [2010] WASCA 83 at [296], [380], [382] and *Wentworth v Rogers* (2006) 66 NSWLR 474 at [45], [126].

[262] See, e.g., *Wentworth v Rogers* [2006] NSWCA 145, 66 NSWLR 274. See generally Marina Wilson, 'Professional Standards: Preserving Party-Party Costs in Pro Bono Cases' (2004) 42 *Law Society Journal* 34.

[263] Submission to NSW Law Reform Commission in response to Consultation Paper 13: *Security for Costs and Associated Costs Orders* (23 August 2011), 12.

[264] In its report, the Productivity Commission reviewed pro bono schemes in Australia. Productivity Commission, *Access to Justice Arrangements* (Report No. 72, 5 September 2014) chapter 23. See also recommendation 13.4 that parties represented on a pro bono basis should be entitled to seek an award of costs.

[265] *Wentworth v Rogers* (2006) 66 NSWLR 274, [132].

[266] For example, see r 7.41 *Uniform Civil Procedure Rules 2005* (NSW); *Babolas v Waverley v Council* [2012] NSWCA 126; 187 LGERA 63; r 4.19 *Federal Court Rules 2011* (Cth).

affirmed by the Victorian Court of Appeal.[267] In its review of access to justice in Victoria the Department of Justice and Regulatory Affairs recommended that costs rules should be amended to clarify that a costs order may be made in favour of a party who is represented by pro bono lawyers, as an exception to the indemnity principle.[268]

In Western Australia the Supreme Court Rules provide that lawyers providing free legal services to a party shall be entitled to recover costs in the same manner and to the same extent as if the services were provided for reward. [269]

Similarly, in the United Kingdom, as noted above, the limitation on recovery of costs in cases handled *pro bono* has been overcome by legislation.[270]

4.2.3 *Litigants in person*

Successful litigants in person are not entitled to an order for 'costs' in respect of the time expended by them on litigation but may be able to recover any out-of-pocket expenses they have incurred.[271] This may include payments made for advice or other legal services in connection with the litigation.

By way of contrast, in the United Kingdom there is statutory provision for the award of costs to self-represented litigants.[272] This allows the recovery of not only out of pocket expenses but also financial loss arising out of time spent on the proceedings, subject to caps.

In its 2014 report, the Productivity Commission recommended that a similar approach should be adopted in superior courts in Australia with the amount of costs recoverable by self-represented litigants to be based on either their actual financial loss or an hourly rate equivalent to average full time earnings, subject to a cap.[273] In lower tier courts it was recommended that the costs recovered by successful self-represented parties should be the fixed, lump sum scale amounts applicable to all parties.

4.3 **What if you win some issues and lose others?**

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[267] *Mainieri v Cirillo* [2014] VSCA 227.

[268] Government of Victoria, Department of Justice and Regulation, *Access to Justice Review, Volume 2 Report and Recommendations* 463.

[269] Order 66 rule 8A *Rules of the Supreme Court 1971* (WA).

[270] *Legal Services Act 2007* (UK), s 194. However, all recovered costs are paid to a prescribed charity, the Access to Justice Foundation, which distributes funds to national pro bono organisations, strategic projects and trusts (which fund law centres and legal advice agencies). See Access to Justice Foundation, 'About us' <https://atjf.org.uk/about-us>. In a 2012 report, the NSW, Law Reform Commission expressed support for the recovery of costs in pro bono cases with a view to such costs being used to fund pro bono litigation, rather than going to a special fund: NSW Law Reform Commission, *Security for costs and associated orders* (Report No 137, December 2012), [3.60]-[3.65].

[271] See, e.g., *Cachia v Hanes* (1994) 179 CLR 403; *Australian Super Pty Ltd v Woodward* [2009] FCAFC 168; (2009) 262 ALR 404; *Mbuzi v Favell* (No 3) [2012] FCA 1078 (Collier J). An historical English exception to this role for self-represented litigants who were solicitors (the *Chorley* exception) was recognized in *Guss v Veenhuizen [No 2]* (1976) 136 CLR 47. However, this exception was found in 2019 not to form part of the Australian common law, as it was 'an affront to the fundamental value of equality of all persons before the law': *Bell Lawyers Pty Ltd v Pentelow* (2019) 372 ALR 555, [3]. This was then applied to clarify that the exception did not apply to incorporated legal practices in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15.

[272] *Litigants in Person (Costs and Expenses) Act 1975*.

[273] Productivity Commission, *Access to Justice Arrangements* (Report No. 72, volume 1, 5 September 2014) 480, recommendation 13.5.

Although a public interest litigant may not be ultimately successful, success on some issues in the circumstances may justify an order that each side bear its own cost of the proceedings or an order requiring the defendant to pay part of the costs.[274]

An order for partial payment of the other sides' costs may be made against a public interest litigant depending on the circumstances of the case.[275] In civil litigation generally, the court may apportion costs between the parties depending on their success on different issues. However, this is often said to be a discretion only exercised in the 'clearest of cases', being those which exhibit the most exceptional circumstances.[276] The court will only order the apportionment of costs where this is appropriate.[277]

In *McCallum* the applicant brought proceedings alleging that a quarry was the cause of water, air and noise pollution but only succeeded on the water pollution claim. An order was made for the respondents to pay 60% of the applicant's costs given that water pollution was the major issue in the case.[278]

In the *Vioxx* product liability class action *all* available causes of action were pleaded and were sought to be relied upon at trial. This had the effect of considerably widening the ambit of discovery and the factual and expert evidence at what became a lengthy trial. On one estimate the total costs of the parties exceeded $20 million. The representative applicant, Mr Peterson, succeeded at trial and obtained an award of damages in the sum of $330,465. However, he only succeeded on the two 'strict liability' causes of action under the *Trade Practices Act 1974* (ss 74B & D). Moreover, those causes of action had only been pleaded against one of the two respondents.

Jessup J held that, because Vioxx involved about a doubling of the risk of heart attack, it was not reasonably fit for the purpose of being used for the relief of arthritic pain, which was the purpose implicitly made known by the applicant as required by s 74B and which was the purpose for which goods of the relevant kind were commonly bought as required by s 74D.

The trial judge held that the first respondent, under its common law duty of care, ought to have warned the Applicant's doctor of the cardiovascular risk and ought not to have emphasised the safety of Vioxx. However, he was not satisfied that, had a sufficient warning been given, or had the safety of Vioxx not been emphasised, the applicant would not have taken Vioxx exactly as he did. Thus, it was held that the first respondent's failure to discharge its duty of care did not contribute to

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[274] See *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, [11]. See also *Tasmanian Conservation Trust Inc v Minister of Resources and Gunns Limited* [1996] FCA 1229; *Bains v Minister for Immigration and Citizenship (No 2)* [2012] FCA 814; *Tasmanian Conservation Trust Inc v Minister of Resources and Gunns Ltd* (1995) 55 FCR 516; *Axent Holdings Pty Ltd v Compusign Australia Pty Ltd* [2020] FCA 1835.

[275] See e.g., *Wilderness Society Inc v Minister for Environment and water Resources* [2008] FCAFC 19.

[276] See, e.g., the following recent cases: *The Owners – Strata Plan 85044 v Murrell; Murrell v The Owners – Strata Plan 85044 (No 3)* [2020] NSWSC 1754; *Bashour v Australia and New Zealand Banking Group Ltd (No 2)* [2020] VSC 551; *Lifestyle Investments 1 Pty Ltd v Commissioner of State Revenue (No 2)* [2020] VSC 431, [6]; *Tonna v Mendonca (No 2)* [2020] NSWSC 306 [172]; and the general principles set out in *Corbett Court Pty Limited v Quasar Constructions (NSW) Pty Limited* [2008] NSWSC 1423. In contrast, such orders have been described as 'not uncommon' in the Federal Court: *H Lundbeck A/S v Alphapharm Pty Ltd (No 2)* [2009] FCAFC 118, [8]. The discretion to apportion costs in the Federal Court appears to be exercised with regard to the general broad discretion of that Court to award costs, where a departure from the general rule is warranted. See, e.g., the following recent cases: *BlueScope Steel Limited v Dongkuk Steel Mill Co., Ltd (No 3)* [2020] FCA 113, [6]; *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd (No 7)* [2020] FCA 206; *Sandini Pty Ltd v Commissioner of Taxation (No 2)* [2017] FCA 905. See also High Court comment on 'special circumstances' where such a departure providing for apportionment will be warranted in *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* (2015) 90 ALJR 270, [6].

[277] See, e.g., *Hegde, in the matter of Nutricare Holdings Limited v Nutricare Holdings Limited (No 2)* [2021] FCA 33.

[278] *McCallum v Sandercock (No 2)* [2011] NSWLEC 203.

the applicant's heart attack. Accordingly, he rejected this aspect of the applicant's negligence case as against the first respondent. The applicant claim in negligence against the second respondent was also dismissed.

In respect of the applicant's other cause of action under the *Trade Practices Act*: Jessup J held that the first respondent's failure to warn, and its emphasis on safety, amounted to misleading conduct in trade or commerce in contravention of s 52. However, he was not satisfied that the applicant's heart attack occurred by reason of this misleading conduct.

The applicant alleged also that *Vioxx* had a defect within the meaning of s 75AD of the *Trade Practices Act*. Jessup J held that *Vioxx* did have such a defect, in the sense that the safety of *Vioxx* was not such as persons generally were entitled to expect. However, he upheld the first respondent's defence under s 75AK(c) of that Act, namely, its claim that the state of scientific or technical knowledge at the time when *Vioxx* was supplied to the applicant was not such as would enable the defect to be discovered. Thus he rejected the applicant's claim under s 75AD of the *Trade Practices Act*.[279] In the end result, although successful at trial, the applicant succeeded only on two of the causes of action and only against one of the two respondents.

Moreover, at the trial it was sought to be proved that *Vioxx* caused a number of physical injuries, including heart attacks and strokes. Mr Peterson succeeded in respect of his own claim, arising out of his heart attack, but the trial judge did not accept that *Vioxx* caused strokes.

Thus, although successful in respect of his claim for damages, he obtained an order for only some of the costs incurred in connection with the proof of his individual claim and was ordered to pay the costs of the successful respondent, as well as some of the costs incurred by the unsuccessful respondent.[280] Things got worse for Mr Peterson. The judgment in his favor was overturned on appeal.[281]

The *Vioxx* class action litigation illustrates the pitfalls, for litigants generally and public interest litigants in particular, of proceeding to trial on *all* available causes of action and the advantages of seeking a preliminary determination of what, from the plaintiff's perspective, are the 'easiest' causes of action to succeed and which may be resolved more economically and expeditiously.

Moreover, it is of little comfort to defendants to succeed on some but not all of the causes of action, particularly if a costs order in their favor is not able to be enforced against an impecunious lead plaintiff and where, at least in the federal, Victorian, NSW and Queensland statutory class action regimes, cost orders cannot be made against class members.[282] Furthermore, it is clearly in the interests of the administration of justice for cases to be resolved more quickly and expeditiously and with fewer judicial resources.[283]

4.4 Costs when there is no hearing on the merits

Where there has been no hearing on the merits, it is difficult to see how any order for costs can be made other than an order that each side bear its own costs, unless the parties reach a different agreement. There may be special circumstances where the court is able to form a clear view as to

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[279] *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* [2010] FCA 180.

[280] *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd (No 5)* [2010] FCA 605.

[281] The decision of the trial judge was overturned on appeal by the Full Federal Court on the basis that the court was not satisfied that it had been proved at trial that *Vioxx* caused Mr Peterson's individual heart attack: *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128. The High Court refused to grant special leave.

[282] Except in limited circumstances not relevant for present purposes.

[283] Although courts have been historically disinclined to favour the preliminary determination of separate questions, procedural reforms, including statutory provisions providing for the 'just, quick and cheap determination of the real issues in dispute', have tended to favour a more interventionist judicial approach. See e.g., *AAI Ltd t/a Vero Insurance v Solarus Projects Pty Ltd (in liq)* [2014] NSWCA 168.

the merits or where the claim or defence is patently hopeless, in which event a costs order may be appropriate.[284] However, as noted by Finkelstein J:

> … there will be very few cases where the issues will be sufficiently clear, in the absence of a hearing, for an order for costs to be made in favour of a party.[285]

Thus, in many if not most cases in the absence of a hearing the court will not make an order for costs. Regard will be had to the reasonableness of the conduct of the parties and 'in some [very rare] cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried'.[286]

In the migration context, costs will almost always go one way or the other if a matter is concluded before hearing. The Federal Circuit Court may order an unsuccessful party to pay the costs of a successful party in accordance with the scale of costs set out in Sch 2 to the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021.* Tthis also applies to matters that are concluded prior to final hearing (either because they are conceded by the respondent or discontinued by the applicant).

There may be contexts in which it is appropriate for an applicant who has discontinued a case to seek an order for costs, for example where the respondent has effectively provided the relief that was sought in the proceeding through other means (e.g,, the government has reinstated a visa so judicial review of a decision to cancel it is no longer required).

4.5 **The liability of persons other than parties for costs**

4.5.1 *The liability of litigation funders*

Civil litigation generally, and public interest cases in particular, may be financially assisted by a third party. Such assistance may be provided for philanthropic or ideological reasons where there is support for the 'cause' which is the subject of litigation. Financial assistance may also be provided by a commercial funder with a view to making a profit out of the proceedings. In other instances, a person or entity, other than the named party, may provide financial or other assistance because they have some financial or other interest in the outcome.

Where financial assistance is provided in a case which is unsuccessful, the winning party will often seek to recover from the funder such costs as are not recoverable from the losing party.

Most Australian courts have power to make such an order and thus it is usually a question of judicial discretion as to whether such an order should be made in the interests of justice.[287] This will usually not need to be considered in cases where funding is provided by commercial litigation funders which normally indemnify a funded party in respect of adverse costs orders.

There may often be an understandable judicial reluctance to impose costs orders on third parties providing financial assistance to impecunious parties. Some judges may be concerned to avoid deterring support for those with deserving cases or 'punishing' those who have provided such support. However, there will usually be less reticence in the case of funders who are motivated to assist by commercial gain.

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[284] See e.g., the discussion on these issues in *Gribbles Pathology Pty Ltd v Health Insurance Commission & Ors* (1997) 80 FCR 284 at 287 (Finkelstein J); *Australian Securities Commission v Aust Home Investments Ltd & Ors* (1993) 116 ALR 523 at 530 (Hill J); *Mondello v Mondello Farms Pty Ltd* [2012] FCA 1062 (Bessanko J); and *Kiama Council v Grant* (2006) 143 LGERA 441, [80].

[285] *Gribbles Pathology Pty Ltd v Health Insurance Commission & Ors* (1997) 80 FCR 284 at 287.

[286] See the approach of McHugh J in *Re The Minister for Immigration & Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622, 624-5.

[287] See the recent decision *Habrok (Dalgaranga) Pty Ltd v Gascoyne Resources Pty Ltd (No 2)* [2021] FCA 72.

At the time of writing, a potential application for a costs order against the Environmental Defenders Office (EDO) and those who provided funding to the (impecunious) Tiwi Islander applicants in their unsuccessful challenge to the proposed offshore gas pipeline proposed by Santos off the North Australian coast has been foreshadowed. The case was conducted in the Federal Court by the EDO and resulted in a number of adverse findings against both the EDO and one of the expert witnesses called on behalf of the applicants in the proceeding.[288]

At the time of revising this paper active steps were being taken by the Santos company with a view to applications for third party costs orders against persons or entities that had provided funding for the conduct of an unsuccessful case brought by the EDO on behalf of Tiwi islanders in the Federal Court.[289]

In considering the applications for leave to issue subpoenas Charlesworth J reviewed the law in relation to costs orders against non-parties. She also observed that in considering the position of third parties who provide financial support for litigation:

> A "benefit" that may be achieved by a non-party in facilitating litigation (again in the relevant sense) need not be in the form of a financial return, but may conceivably take the form of the achievement of a political or ideological objective shared by the non-party. I say "conceivably" to emphasise that the Court is not presently concerned with the substantive merits of any costs application and to reinforce that on such an application it will be relevant to consider the character of the non-party in the sense described in the passage from *Court House Capital* extracted above. Here, the addressees may fairly be described as activist organisations, existing solely to achieve environmental outcomes, not to derive profits. It is at least arguable that a non-party's support of litigation to pursue a political or ideological objective of the non-party's own could, in an appropriate case, weigh in favour of a costs order. That is particularly so when a reason for the non-party's existence is to achieve one or more of the outcomes sought in the proceeding.[290]

It is instructive to examine the development of English law in this area. This may provide some guidance in Australian cases.

Historically, some English courts had taken the view that 'pure' funders (as distinct from 'commercial' funders) should not have any liability for adverse costs.[291] However, competing policy questions arise in a case where a commercial funder is involved.

The Court of Appeal resolved the various competing policy considerations in the *Arkin* case[292] by adopting a compromise position. The *commercial* funder was held liable to pay costs awarded against the funded party but not for an unlimited amount. The Court decided that it would cap the funders liability in an amount equivalent to the amount of funding provided by the funder to the funded party. Such an outcome has important commercial consequences for a commercial funder. It assists with budgetary and solvency requirements given that the funder is able to ascertain the extent of its potential liability, at any given time, where adverse costs liability is capped in this manner. Moreover, this may make is easier to re-insure this risk.

However, the Arkin cap has been criticised and doubted, with English courts recently revisiting the issue, noting that it is not to be automatically applied, distinguishing the instant case from the situation in *Arkin* and refusing to apply such a cap.[293]

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[288] *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9.
[289] See *Munkara v Santos NA Barossa Pty Ltd (No 4)* [2024] FCA 414 (Charlesworth J).
[290] Ibid, [47].
[291] See e.g., *Hamilton v Al Fayed* [2003] QB 1175.
[292] *Arkin v Borchard Lines Ltd* [2005] 3 All ER 613.
[293] *Davey v Money & Anor* [2019] 1 WLR 6108. See also *Sandra Bailey & Ors v Glaxosmithkline UK Ltd* [2018] 4 WLR 7 (in relation to security for costs); *Laser Trust v CFL Finance Ltd* [2021] EWHC 1404 (Ch) .

4.5.2 *The liability of company directors*

An issue which not infrequently arises in considering public interest litigation concerns the potential *personal* liability for costs of the directors of organisations (including not for profit entities) that may be parties to cases, particularly where there are open standing provisions.

The mere fact of being a director, per se, of an incorporated entity that has engaged in legal proceedings will not ordinarily subject that person to potential personal costs liability.

However, there may be circumstances which may give rise to a potential costs order against a director of a company involved in litigation. For example, where a non-party (whether a director or otherwise) promotes (and/or funds) proceedings brought by an insolvent company, particularly if this is substantially for his or her benefit, the court may consider it appropriate to make a cost order against that person where the claim by the insolvent company fails.[294] The categories of cases in which an order for costs may be made against a non-party are not closed.[295]

4.5.3 *The liability of lawyers for costs*

Although legislative provisions vary between Australian jurisdictions it is generally the case that a costs order may be made against lawyers, including in circumstances where litigation is brought or defended where there are no reasonable prospects of success,[296] where costs have been incurred improperly or without reasonable cause,[297] or otherwise through the serious neglect, incompetence or misconduct of a lawyer.[298]

The failure to comply with court orders,[299] rules, overarching obligations or other statutory obligations applicable to the conduct of litigation may give rise to a costs order against lawyers.[300] The obligations on lawyers, parties and others influencing the conduct of litigation imposed by the *Civil Procedure Act 2010* (Vic) are the most comprehensive and onerous in Australia. They appear to have improved standards of conduct in litigation before those Victorian courts in which they are applicable.

Leaving aside specific statutory provisions and rules of court, there are numerous cases which have set out the courts' powers to make an order for costs in the exercise of their supervisory jurisdiction over their own officers, including solicitors, notwithstanding that they are not a party.

In the words of the NSW Court of Appeal:[301]

> The court has a right and a duty to supervise the conduct of its solicitors, and to visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in

[294] See generally: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 192; *Jeffrey & Katauskas v SST Consulting Pty Ltd* (2009) 239 CLR 75,94*; Ipex ITG Pty Ltd (in liq) v Victoria [no 2]* [2011] VSC 39; *Ipex ITG Pty Ltd (in liq) v State of Victoria* [2014] VSCA 315.
[295] *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5. See also *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429.
[296] See, e.g., s 348 *Legal Profession Act 2004* (NSW).
[297] See, for example the consideration of the issue of 'reasonable cause' for the institution of an appeal or judicial review proceedings by the Full Federal Court in the context of the *Fair Work Act 2009* (Cth) in *Baker v Patrick Projects Pty Ltd (No 2)* [2014] FCAFC 166. The decision also considered whether the existence of *public interest* in granting permission to appeal under s 400(1) of the *Fair Work Act 2009* (Cth) is a jurisdictional fact.
[298] See, e.g., s 99 *Civil Procedure Act 2005* (NSW); *Keddie & Ors v Stacks/Goudkamp Pty Ltd* [2012] NSWCA 254 (Beazley JA at [1]; Barrett JA at [197]; Sackville AJA at [198]). See also r 40.07 *Federal Court Rules 2011* (Cth); *Mijac Investments Pty Ltd v Graham* [2013] FCA 296.
[299] See e.g., *Yeo (as liquidator), in the matter of Lyco Innovations Pty Ltd (in liq) v Onesteel Trading* [2013] FCA 568 (Bromberg J).
[300] See ss 37 M & N *Federal Court of Australia Act 1976* (Cth). In respect of Victorian provisions see e.g., the decision of the Victorian Court of Appeal in *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 which has been cited in a number of subsequent judgments.
[301] *Kelly v Jowett* [2009] NSWCA 278, [2].

> the very cause in which the solicitor is engaged professionally. The jurisdiction is exercised where it is demonstrated that the solicitor has failed to fulfil his or her duty to the Court and to realise his or her duty to aid in promoting in his or her own sphere the cause of justice. The order is for payment of costs thrown away or lost because of the conduct complained of and is frequently exercised in order to compensate the opposite party in the action. Misconduct or default or negligence in the course of the proceedings is in some cases sufficient to justify an order. The jurisdiction may be exercised even where there has been no personal complicity by the solicitor charged: (at [61] – [62], [65]).[302]

In many instances, courts may be reluctant to make costs orders against lawyers involved in the conduct of civil litigation generally and public interest cases in particular. However, this is not the case where there has been a serious dereliction of the lawyer's duty to the court.[303]

4.6 **Whether costs follow the event in public interest litigation**

In each Australian jurisdiction courts have grappled with the 'public interest' nature of proceedings in the exercise of judicial discretion in relation to costs at the conclusion of the case.[304] This is discussed in detail below.

4.6.1 *Principles applied by the courts*

The fact that a litigant is seeking to advance matters alleged to be in the public interest, including in judicial review proceedings, does not mean that if unsuccessful that party will not be ordered to pay the winning party's costs.[305]

The relevance of the public interest nature of the case in the exercise of judicial discretion in relation to costs at the conclusion of the proceedings arose for consideration in *Oshlack v Richmond River Council*.[306] The proceedings were brought pursuant to an open standing provision and the unsuccessful party had no personal interest in the outcome. The plaintiff sought to preserve the habitat of an endangered native animal in and around a particular site. The case was unsuccessful,

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[302] Applying *Re Jones* (1870) 6 Ch App 497; *Myers v Elman* [1940] AC 282; *Harley v McDonald* [2001] UKPC 18; [2001] 2 AC 678.

[303] See e.g., *White Industries (Qld) Pty Ltd v Flower and Hart (a firm)* (1998) 156 ALR 169, 230-1.

[304] For example, in **Queensland**: *Anghel v Minister for Transport (No 2)* [1994] QCA 232, *Lonergan v Silgoe & Ors (No 2)* [2020] QSC 146, *Foster v Shaddock* [2016] QCA 163, *Globex Shipping S.A. v Magistrate Mack (No 2)* [2018] QSC 172, *Meizer v Chief Executive, Dept of Corrective Services* [2005] QSC 351, *Hytch v O'Connell (No 2)* [2018] QSC 99; in the **Northern Territory**: *DPP v Dickfoss (No 2)* [2011] NTSC 29; in **South Australia**: *Starkey & Anor v State of South Australia & Ors (No 2)* [2011] SASC 64; in **Western Australia**: *Buddhist Society of Western Australia (Inc) v Shire of Serpentine-Jarrahdale* [199] WASC 55*, Roe v The Director-General, Department of Environment and Conservation for the State of Western Australia* [2011] WASC 57, *Jacob v Save Beeliar Wetlands (Inc)* [2016] WACA 126; in **Tasmania**: *Hardman v Ward* [2004] TASSC 74; in the **ACT**: *Kent v Cavanagh* (1973) 1 ACTR 43; *Concerned Citizens of Canberra Inc v Chief Executive (Planning and Land Authority (No 2)* [2017] ACTCA 1; *Jacka v Australian Capital Territory* [2015] ACTSC 239; *Electro Optic Systems Pty Ltd v The State of New South Wales*; *West and West v The State of New South Wales* [2013] ACTSC 155*; Mann v Carnell* [2001] ACTSC 18; *Judith Edgley v Federal Capital Press of Australia Pty Limited* [1999] ACTSC 124; in **NSW**: *Botany Bay City Council v Minister for Local Government (No 2)* [2016] NSWCA 127; *Local Democracy Matters Incorporated v Infrastructure NSW (No 2)* [2019] NSWCA 118; other NSW cases are discussed in the text below; in **Victoria**: *MyEnvironment Inc v VicForests* [2012] VSC 111; *Knight v Hastings* [2012] VSC 423; *Michos v Eastbrooke Medical Centre Pty Ltd (No 2)* [2019] VSC 437.

[305] See, e.g., *Re Australian Conservation Foundation, the Wilderness Society Inc and Tasmanian Conservation Trust Inc v Forestry Commission; Michael Manifold Helsham; Robert Henry Wallace; Peter Phillip Hitchcock and Commonwealth of Australia* [1988] FCA 144 (Burchett J); *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts (No 2)* [2009] FCA 466 (Tracey J).

[306] (1998) 193 CLR 72. At that time, the relevant statutory costs provision was s 69(2) *Land and Environment Court Act 1979* (NSW), which conferred on the Land & Environment Court a general discretion in relation to costs.

and the trial judge considered the exercise of discretion in relation to costs under *the Land and Environment Court Act 1979* (NSW).

At first instance Stein J made no order as to cost on the grounds that (a) the proceedings had been brought to enforce environmental laws (not for a private interest); (b) Oshlack's concerns had been shared by a significant sector of the public; (c) the case was arguable and (d) the proceeding resolved significant issues as to the interpretation of the legislation.

This was overturned by the NSW Court of Appeal. However, the High Court upheld the decision of Justice Stein (by 3:2 majority).

Justices Gaudron and Gummow considered that, in light of the broad discretion accorded under the Act, they could not interfere with its exercise. They noted, with approval, the factors which Justice Stein took into account to justify not making a costs order against the plaintiff.

The majority in the High Court noted that the 'special circumstances' taken into account by the judge at first instance, to justify departure from the ordinary rule as to costs, included the following:

> (i) The 'traditional rule' that, despite the general discretion as to costs being "absolute and unfettered", costs should follow the event of the litigation "grew up in an era of private litigation". There is a need to distinguish applications to enforce "public law obligations" which arise under environmental laws lest the relaxation of standing by s 123 have little significance.
>
> (ii) The characterisation of proceedings as 'public interest litigation' with the 'prime motivation' being the upholding of 'the public interest and the rule of law' may be a factor which contributes to a finding of 'special circumstances' but is not, of itself, enough to constitute special circumstances warranting departure from the 'usual rule'; something more is required.
>
> (iii) The appellant's pursuit of the litigation was motivated by his desire to ensure obedience to environmental law and to preserve the habitat of the endangered koala on and around the site; he had nothing to gain from the litigation 'other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna'.
>
> (iv) In the present case, 'a significant number of members of the public' shared the stance of the appellant as to the development to take place on the site, the preservation of the natural features and flora of the site, and the impact on endangered fauna, especially the koala. In that sense there was a 'public interest' in the outcome of the litigation.
>
> (v) The basis of the challenge was arguable and had raised and resolved 'significant issues' as to the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and relating to the ambit and future administration of the subject development consent; these issues had 'implications' for the Council, the developer and the public.[307]

Justice Kirby suggested that the standing provisions are a consideration in determining costs orders. He expressed concern that the Parliament's conferral of 'open standing' to promote the public interest could be rendered worthless where unsupported by a complementary approach to the

[307] *Oshlack v Richmond River Council* (1998) 193 CLR 72 [20], footnotes omitted.

question of costs.[308] However, in a subsequent judgment he noted the limitations of the principles said to be derived from the High Court's decision in *Oshlack*.[309]

The majority decision affirmed the court's discretion to include the public interest character of litigation as a relevant factor in the exercise of judicial discretion when determining an award of costs.

By way of contrast, Justice McHugh, in dissent, advanced a sharp criticism of the notion that characterisation of proceedings as being in the public interest could be relevant to the allocation of costs:[310]

> One significant difficulty … in the present appeal is the inherent imprecision in the suggested concept of 'public interest litigation' or what for present purposes is the same thing - the complex of factors involving or arising out of the public interest that justifies a court departing from the usual order as to costs.
>
> Much litigation concerns the public interest. Prosecutions and most constitutional and administrative law matters almost invariably affect or involve the public interest. So do many ordinary civil actions concerning private rights and duties. Many defamation actions, for example, involve the defence of fair comment on a matter of public interest or the truth of an imputation that 'relates to a matter of public interest'…
>
> … If the present case is 'public interest litigation', it is difficult to see how prosecutions, most administrative and constitutional matters and many ordinary civil matters are not also 'public interest litigation' entitling a court to depart from the usual order as to costs.
>
> At all events, it seems difficult - probably impossible - to formulate a principle that would indicate a rational basis for determining that the present litigation is public interest litigation without being compelled to hold that most cases involving criminal prosecutions and constitutional and administrative law are also 'public interest litigation' for the purpose of costs orders.

Oshlack continues to be the preeminent High Court case on the principles around costs in public interest litigation.[311] The decision is *Oshlack* and the nature of 'public interest' litigation has been considered in a number of subsequent cases.[312]

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[308] See also his extra-curial comments concerning the deterrent of adverse costs in public interest litigation: the Honourable Michael Kirby AC CMG, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 *Law Quarterly Review* 537.

[309] *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2)* (1998) 154 ALR 411, 412.

[310] *Oshlack v Richmond River Council* (1998) 193 CLR 72, 98-99.

[311] The High Court noted the considerations in *Oshlack* in *Northern Territory v Sangare* (2019) 265 CLR 164, [33].

[312] Recent cases include: *Cumming v Minister for Planning (No 2)* [2020] VSCA 231 [9]; *Mackenzie v Head Transport for Victoria (Costs)* [2020] VSC 436 [17]; *Council of the Law Society of New South Wales v Michael Arthur Hislop* [2019] NSWCA 302 [1][16][64]; *Viscariello v Legal Profession Conduct Commissioner [No 2]* [2019] SASC 165 [11]; *Ipswich City Council v BWP Management Limited [No 2]* [2019] QLAC 2 [13]; *Randren House Pty Ltd v Water Administration Ministerial Corporation (No 5)* [2019] NSWLEC 63 [14][31]; *Kimberley Land Council Aboriginal Corporation v Williams (No 2)* [2018] FCA 2058 [9]; *BAK v Gallagher (No 2)* [2018] QDC 132 [25][31]; *Conservation Council of Western Australia v The Hon Stephen Dawson MLC* [2018] WASC 34 [7][8]; *Concerned Citizens of Canberra Inv v Chief Executive (Planning and Land Authority) (No 2)* [2017] ACTCA 1 [46]. Although somewhat dated, the decision of Preston CJ in *Caroona Coal* is often cited: *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59 [47]-[60]. The question of costs in public interest litigation was also considered by the Full Federal Court in *Save the Ridge Inc v Commonwealth* [2006] FCAFC 51.

Although an important and frequently cited case, the decision does not lay down a 'rule' for application in other public interest cases in the making of costs orders. It affirms the width of the discretion conferred upon a court in relation to costs, with particular reference to the particularly wide discretion held to exist in that case under the relevant legislation.[313]

Thus, the mere fact that a case involves public interest issues does not necessarily lead to the unsuccessful public interest party avoiding an order for costs. As noted by Dowsett J:

> If it seems unfortunate that an unsuccessful party should bear the costs of the successful party, it seems even more unfortunate that a successful party should be left to bear the cost of having vindicated its position.[314]

Much will depend upon the relevant factors in any given case. As the Productivity Commission noted in its 2014 report:

> …there is a great deal of uncertainty surrounding the *Oshlack* principle- its use has been limited, and the power of judges to apply it is widely discretionary…This uncertainty is further compounded by the fact that the costs orders to which *Oshlack* pertains are usually made at the end of proceedings…Thus the possibility of pleading for a no costs order under *Oshlack* provides little assurance for public interest parties deciding whether to bring forth a case at the onset of litigation.[315]

In *Blue Wedges Inc v Minister for Environment, Heritage and the Arts (No 2),*[316] no order for costs was made against a public interest party which had failed in its challenge to the Minister's decision to approve the deepening of the shipping channels in Port Phillip Bay. The principles in *Oshlack* were said to be applicable.[317] However, in another unsuccessful case brought by the same public interest party an order for costs was made against it.[318]

In *Ruddock v Vardarlis*, Vadarlis and the Victorian Council for Civil Liberties sought orders in the nature of habeas corpus and mandamus to compel the release into Australia of a group of non-citizens whom the Commonwealth had detained on the MV Tampa. As the Court noted:

> The proceedings raised novel and important questions of law concerning the alleged deprivation of the liberty of the individual, the executive power of the Commonwealth, the operation of the *Migration Act 1958* (Cth) and Australia's obligations under international law.[319]

The issues were difficult and the subject of divided judicial opinion. The Commonwealth Parliament had passed laws to exclude the applicants from pursuing the matter further and legislated to

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[313] *Friends of Hinchinbrook Society Inc v Minister for the Environment (No 5)* (1998) 84 FCR 186, 188 (Northrop, Burchett and Hill JJ), endorsed *in Ruddock v Vadarlis* [2001] FCA 1865, [21] (Black CJ and French J). See also *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management (No 2)* [1998] HCA 35, [5] (Kirby J); *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 228 CLR 651, (77]-[78]; *Council of the Municipality of Botany v Secretary, Department of the Arts, Sport, the Environment, Tourism and Territories* (1992) 34 FCR 412, 416 (Gummow J); *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166, 171 (Burchett J), (1988) 76 LGRA 381, 386; *Kennedy on behalf of the Sandon Point Aboriginal Tent Embassy v Director-General of the National Parks and Wildlife Service (No 2)* (2002) 122 LGERA 84, [15] (Talbot J).

[314] *QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1644, [4].

[315] Productivity Commission, *Access to Justice Arrangements* (Report No. 72, 5 September 2014) 483.

[316] [2008] FCA 8; 165 FCR 211.

[317] *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [2008] FCA 8; 165 FCR 211 [73] (Heerey J).

[318] *Blue Wedges Inc v Minister for Environment, Heritage and the Arts (No 2*) [2008] FCA 1106 (North J). See also *Your Water Your Say Inc v Minster for the Environment, Heritage and the Arts (No 2)* [2008] FCA 900 where an order for costs was made.

[319] *Ruddock v Vardarlis (No 2)* (2001) 115 FCR 229, 241.

entrench the decision of the Full Court on the merits. The VCCL and Vadarlis had no financial interest in the proceedings, and their legal representation was provided free of charge. [320]

As noted by the Court:[321] the case 'raises a novel question of much public importance and some difficulty'; the liberty of the individual was at stake; the case had been run with expedition and efficiency; the case raised difficult and important questions of construction; there was public interest in the matter and whether the government action had been made according to law. It was held that there were sufficient public interest related reasons connected with or leading up to the litigation to warrant a departure from or outweigh the important consideration that a wholly successful respondent would ordinarily be awarded its costs.

Black CJ and French J proceeded to note that:

> It has been argued, in academic commentary, that the general compensatory principle rests upon two alternative rationales. The first is that the successful party is entitled to be compensated for its costs because it has been wronged at the hands of the unsuccessful party. Costs under this rationale function as a species of damages. But that characterisation is not always tenable. Where, for example, declaratory relief is sought because of genuine uncertainty about the interpretation of a document or a statute, it will not explain why the successful party should be reimbursed at the cost of its opponent where the legal issue is novel and has consequences extending beyond the particular litigation. The alternative rationale for the compensation principle is simply that the winner should not have to suffer financially for vindicating its rights. The criticism of this intuitively attractive approach is again that it does not necessarily follow that the obligation to compensate the winner should be imposed on the losing party. For the losing party may have had very good legal grounds for its position and have conducted itself in the litigation in an entirely reasonable way. Where the case is close or difficult and involves no obvious element of fault on the part of the loser the proposition that costs automatically follow the event may work unfairness. Moreover, it may set up a significant barrier against parties of modest means even if the contemplated claim has substantial merit: See Tollefson, "When the 'Public Interest' Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995) 29 *University of British Columbia Law Review* 303 at pp 309-311; see also McCool, "Costs in Public Interest Litigation: A Comment on Professor Tollefson's Article" (1996) 30 *University of British Columbia Law Review* 309. These criticisms will not justify a global modification, in public interest cases, of the usual rule that costs follow the event. They do however indicate the desirability of avoiding calcification of the discretion with rigid rules governing its exercise.[322]

In a subsequent case, the Full Federal Court summarised the position in relation to costs in public interest litigation to the effect that there is no special costs regime applicable. However, it was accepted that where a case or an appeal raises a novel question of some importance and difficulty the court may decline to order costs against an unsuccessful party.[323] The Court cited with approval the views express by the Full Court of the Supreme Court of Western Australia:

> In our opinion great care must be taken with the concept of public interest litigation that it does not become an umbrella for the exercise of discretion with respect to costs in an unprincipled, haphazard and unjudicial manner...In our view, the denial of costs to successful litigants upon the ground that the litigation bears a public interest character

[320] *Ruddock v Vardarlis (No 2)* (2001) 115 FCR 229, 242 (Black CJ and French J).
[321] Ibid, 237-242.
[322] Ibid, 235-6.
[323] *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 441 (Black CJ, Moore and Emmett JJ).

> should continue to be the rarity which this Court supposed it would be in the South West Forests Defence Foundation case.[324]

However, the principles in *Ruddock* were applied by the Full Federal Court in *Australian Crime Commission v NTD8,*[325] to support the conclusion that no costs order should be made in view of the public interest dimensions of the case.

In any case, consideration needs to be given to whether the public interest nature of the matter, together with other considerations, outweigh the factors in favour of a successful litigant recovering costs.[326]

For example, in *Hastings Point Progress Association*,[327] the NSW Court of Appeal held that the unsuccessful party should be ordered to pay costs, notwithstanding the acceptance that the case involved public interest elements.

As noted by Basten JA:

> The concept of 'public interest' is probably intended to distinguish between private and public interests, although in particular cases there may be no bright line to be drawn between the two.
>
> That is of no consequence: the extent to which public interests predominate over private interests, or are subservient to them, will be a factor which may properly be taken into account…[328]

It has been suggested that the exercise of judicial discretion in relation to costs in public interest cases involves a three-stage test:

(i) First, can the litigation be characterised as having been brought in the public interest?

(ii) Secondly, if so, is there something more than the mere characterisation of the litigation as having been brought in the public interest?

(iii) Thirdly, are there any countervailing circumstances that speak against departure from the usual costs rule?[329]

In *Caroona Coal No 3* Preston CJ identified five categories of cases where the presence of additional factors may justify departure from the usual costs rule. These comprise cases where the litigation:

a) raises one or more novel issues of general importance;

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[324] *Buddhist Society of Western Australia (Inc) v Shire of Serpentine-Jarrahdale* [1999] WASCA 55, [11] cited by the Full Federal Court in *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 441 [6].
[325] [2008] FCA 900.
[326] See, e.g., *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1863; *Bob Brown Foundation Inc v Commonwealth of Australia (No 2)* [2021] FCAFC 20; 286 FCR 160; *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 3)* [2023] FCA 153.
[327] *Hastings Point Progress Association Inc v Tweed Shire Council (No 3)* [2010] NSWCA 39; 172 LGERA 157.
[328] Ibid, [8]. In his judgment in that case, Young JA referred to five categories of 'public interest' groups or organisations: genuine groups with a sole interest in protection of the environment; those who seek to preserve their existing amenities but are happy for a proposed development to take place elsewhere (so called NIMBYs); groups which are a front for a competitor seeking to protect its commercial interests; those seeking to maintain religious or ethical standards; and groups which may include representatives of all four categories or those formed for some other purpose [2010] NSWCA 39, 172; LGERA 157, [33].
[329] *Parks & Playgrounds Movement Inc v Newcastle City Council* [2010] NSWLEC 231 [173]; *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Another No 3* [2010] NSWLEC 59; 173 LGERA 280, [16] (Preston CJ). See also *Engadine Area Traffic Action Group v Sutherland Shire Council (No 2)* [2004] NSWLEC 434; (2004) 136 LGERA 365 (Lloyd J); *Minister for Planning v Walker (No 2)* [2008] NSWCA 334 (Hodgson JA, with whom Campbell JA and Bell JA agreed).

b) has contributed, in a material way, to the proper understanding, development or administration of the law;
c) is brought to protect the environment or some component of it, the environment or component is of significant value and importance;
d) affects a significant section of the public; and
e) provides no financial gain for the applicant in bringing the proceedings.[330]

Generally, whether proceedings have a public interest element is clearly relevant but not regarded as decisive as to the question of costs.

Moreover, a personal interest will not preclude the proceedings from being characterised as having a sufficient public interest element to warrant departure from the usual costs rule. In some cases, a pecuniary interest may be perceived to be incompatible with the contention that the proceedings are sufficiently in the public interest to avoid the imposition of a costs order on the losing litigant.[331]

In *Cameron v Qantas*, at the instigation of anti-smoking and public health advocates, class action proceedings were brought against the airline by passengers with pre-existing respiratory problems who claimed damages for the exacerbation of their condition as a result of passive exposure to environmental cigarette smoke on international flights. Although some passengers were in nominated so-called non-smoking seats, passengers in other seats were permitted to smoke, thus contaminating the air. Nominal damages and the imposition of a ban on smoking on all international flights were sought. The latter claim was unsuccessful. The claims for damages succeed at first instance, although the question of monetary compensation was relatively unimportant. The trial judge ordered the respondent to pay 70% of the applicants' costs.[332]

The decision was overturned (by majority) on appeal.[333] On the question of costs, the Full Federal Court considered the public interest character of the proceeding and the private interests of the ten group members. It was accepted that the public interest was served to some extent by clarification of the nature of the duties owed by airlines to their passengers in respect of exposure to environmental tobacco smoke on international flights. According to Lindgren and Lehane JJ:

> In our view, the public interest purpose and nature of a proceeding launched by an individual or individuals is not necessarily irrelevant to the issue of costs. In the present case, the relief sought by Mrs Cameron was mixed. The declaratory and injunctive relief was sought in the public interest and the awards of damages were sought in the private interests of the ten group members. The proceeding has in fact served the public interest of establishing that the duty of care owed by international airlines such as Qantas to their passengers in relation to environmental tobacco smoke in the passengers' cabin requires the giving of a warning directed to those travellers whose medical conditions expose them to risk.[334]

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[330] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Another No 3* [2010] NSWLEC 59; 173 LGERA 280. See also *Kennedy v NSW Minister for Planning* [2010] NSWLEC 269, *Hooper v Port Stephens Council and Anor (No 3),* [2010] NSWLEC 178 and *Gray and Anor v Macquarie Generation (No 2)* [2010] NSWLEC 82.
[331] *See, e.g., Harvey v Minister Administering the Water Management Act 2000 (No 2)* [2008] NSWLEC 213, [7] (Jagot J). The existence of a pecuniary interest is a relevant factor but not determinative: *People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd (No 2)* [2017] NSWCA 157, [38]-[40]. See also *Anderson v Stonnington City Council (No 2)* [2020] VSCA 238, [6].
[332] *Cameron v Qantas Airways Limited* [1995] FCA 1304; (1995) ATPR 41-417; (1995) 55 FCR 147.
[333] *Qantas Airways Limited v Leonie Cameron* [1996] FCA 349; 1996 FCR 246; 145 ALR 294; (1996) ATPR ¶41–487.
[334] *Qantas Airways v Cameron* [1996] FCA 765; 68 FCR 387; 148 ALR 378; (1996) ATPR ¶41–530.

Mrs Cameron was ordered to pay 75% of the costs of Qantas in respect of the trial and appeal. The decision has been cited in a number of cases, including in connection with the issue of mixed private and public interests in determining costs.[335]As the Western Australian Court of Appeal has observed:

> …the extent to which the public interest predominates over the private benefit, or vice versa, will inform the exercise of the discretion as to costs. Where the unsuccessful plaintiff stood to gain significant private benefit from the litigation, that will ordinarily weigh heavily against departing from the usual rule as to costs.[336]

The mere impecuniosity of the litigant is not, without more, a sufficient reason to deny a successful party an order for costs, at least in cases in which the litigant seeks to vindicate his or her private interests.[337]

Furthermore, as Preston CJ of the NSW Land & Environment Court has observed (in considering an application for a costs limiting order):

> Although the archetypical public interest litigant is seen to be a person of limited financial resources, this is not always so. It may be that the plaintiff has, or has access to, financial resources sufficient to fund the public interest litigation. *There may be an overlap of the public interest with private interests. The public interest and private interests are not mutually exclusive categories. Litigation can still properly be characterised as being in the public interest, notwithstanding it also may advance private interests* (see *Nettheim v Minister for Planning and Local Government (No 2)* (unreported, NSWLEC, Cripps CJ, 28 September 1988) pp 3-5, and *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355 at [11]). Where public and private interests overlap, the plaintiff may be able to access financial resources from private interests. Public interest litigation may also be able to be funded by lawyers and experts acting on a contingency basis, such as a "no win, no fee" basis. Litigation funders may also be prepared to fund public interest litigation (see *Campbell's Cash and Carry Pty Limited v Fostif Pty* Ltd [2006] HCA 41; (2006) 229 CLR 386 for an example of proceedings funded by litigation funders).[338]

Other than the facts of the case, the costs orders made in public interest litigation may depend on the applicable legislation, court rules or established conventions in relation to costs. As noted above, these may simply confer an unfettered judicial discretion, may give rise to a presumption that costs should follow the event or may seek to constrain the making of costs orders in public interest cases.

Where there is express reference to the 'public interest' in legislation, rules or case law courts have been disinclined to seek to define the term with any specificity.[339] Moreover, as has been noted, there will often be competing 'public interest' considerations which need to be taken into account. Thus, in the exercise of judicial discretion in relation to costs the court will be required to determine

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[335] See e.g., *Ngarluma Aboriginal Corporation RNTBC v Ramirez (No 2)* [2018] FCA 2042 [10] (Banks-Smith J); *Turner v MyBudget Pty Limited (No 2)* [22018] FCA 1509 [11] (Lee J); *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2016] FCAFC 80 [75]; 248 FCR 280; 337 ALR 558; 113 ACSR 600 (Allsop CJ, Foster and Gleeson JJ); *Animals' Angels e.V. v Secretary, Department of Agriculture* [2014] FCAFC 173 [126]; 228 FCR 35; 146 ALD 1 (Kenny, Robertson and Pagone JJ*); Love v State of Victoria (No 2)* (30 November 2009) [2009] VSC 531 [36] (Cavanough J).

[336] *The State of Western Australia v Collard [*2015] WASCA 86 [46] (Buss JA, Newnes JA, Murphy JA).

[337] See *Northern Territory v Sangare* (2019) 265 CLR 164.The plaintiff was unsuccessful in proceedings for defamation. See also *JB & Ors v Northern Territory of Australia (No 2)* [2019] NTCA 3 [15].

[338] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165; 173 LGERA 280 [27] (emphasis added).

[339] See e.g., *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142; (2005) 145 FCR 70 [8] (Tamberlin J).

the relevant considerations and the relative weight of each.[340] The characterisation of the proceedings has been described as a matter of substance over form.[341]

In general, although a case such as a human rights case may concern public rights and duties, that is only one of the considerations to be taken into account in determining whether or not to make a costs order against an unsuccessful 'public interest' litigant. More is required to justify a departure from the usual outcome whereby the unsuccessful party will be ordered to pay the costs of the successful party. Where the court is of the view that the public interest considerations are tangential to the litigant's primary purpose of private gain no departure from the 'ordinary rule' as to costs is warranted.[342]

Apart from cases where *public interest* considerations are said to justify a departure from the costs follow the event convention, where cases may raise matters of public importance,[343] even if the litigants have personal interests, this may be relevant to the exercise of judicial discretion in relation to costs. Similarly, clarification of the law[344] and/or the fact that the matter is a 'test case' may be a relevant consideration.[345]The Victorian Court of Appeal referred to the statutory 'public interest' provision in FOI legislation in the following terms:

> The public interest is a term embracing matters, amongst others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals…[346]

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[340] See e.g. *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142; (2005) 145 FCR 70 [9]-[12] (Tamberlin J); *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 3)* 2012] FCA 744; *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111; *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2) Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2) Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* (2011) 280 ALR 91. See also the discussion of the balancing of competing public interest considerations of the plaintiffs and respondents in the recent case *Cumming v Minister for Planning (No 2)* [2020] VSCA 231, in which public interest litigation was considered not to be 'a useful designation', at [9].

[341] *Racing NSW v Fletcher (No 2)* [2020] NSWCA 67 at [12] (Bell P, Meagher and Payne JJA); *People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd (No 2)* [2017] NSWCA 157, [35].

[342] *John Raymond Anderson and Demitra Anderson v Stonnington City Council* [No 2] [2020] VSCA 238.

[343] See, e.g., *Liversidge v Sir John Anderson* [1942] AC 206, referred to by Gaudron and Gummow JJ *in Oshlack v Richmond River Council* (1998) 193 CLR 72 [42]. *Liversidge* concerned the liberty of the subject in a time of war which was said to be 'a matter of very general importance'. See also *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning (No 2)* [2008] NSWLEC 272 [10] (Biscoe J).

[344] See e.g., *Emirates v Australian Competition and Consumer Commission (No 2)* [2009] FCA 492. However in that case the notices sought to be set aside directly affected the litigants and the decision in *Ruddock v Vardarlis* was distinguished. Similarly, Wilcox J distinguished the decision in *Ruddock* in *Construction, Forestry, Mining and Energy Union and others v Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd* (2003) 132 FCR 516 notwithstanding that the present case concerned important and difficult questions of law affecting many people. See also *Chubb Insurance Company of Australia Limited v Moore (No 2)* [2013] NSWCA 299 (concerning the interests of insurers and the territorial ambit of legislation); *Anti-Doping Rule Violation Panel v XZTT (No 2)* [2013] FCAFC 135 (clarification of the National Anti-Doping Scheme); *Muldoon v Melbourne City Council* [2014] FCA 63 (North J) (whether challenge to local laws and regulations was in the public interest); *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* [2014] FCA 139 (Kenny J) (discusses the nature of public interest litigation); *Northern Inland Council for the Environment Inc v Minster for the Environment* [2014] FCA 216 (Cowdroy J) (whether the special circumstances of the litigation and the question of public interest justifies a departure from the usual costs order).

[345] See e.g., *Kordister Pty Ltd v Director of Liquor Licensing (No 2*) [2013] VSCA 30 (25 February 2013) (Warren CJ, Tate and Osborn JJA); *CSR Limited v Eddy* (2005) 226 CLR 1 at [80]-[81].

[346] *DPP v Smith* [1991] VR 63 (Kaye, Fullagar and Ormiston JJ).

Whilst decisions on costs concerning environmental law and planning cases may be differentiated from various types of 'human rights' litigation,[347] the principles derived from such cases need to be carefully considered in seeking to avoid the application of the 'usual' costs rule in unsuccessful human rights cases.

For example, in a recent appeal in relation to the treatment of juveniles in detention centres in the Northern Territory, the Court of Appeal accepted that grounds of appeal involved important questions of law and the resolution of those questions at an intermediate appellate level was beneficial for the administration of youth detention centres in the Northern Territory. However, the Court proceeded to conclude that:

> the law in relation to ground 4 had already been correctly declared in [an earlier case]. Further, the court below correctly found that the prison officers only used the CS gas as a last resort to resolve the emergency situation on 21 August 2014. A proclamation was issued before the CS gas was used and the use of the CS gas quickly brought the emergency situation to a halt. None of the appellants was injured. In the context of the whole of the appeals, the public interest aspects of these two grounds of appeal are not so special as to cause the Court to disapply the ordinary rule as to costs.[348]

In a number of cases courts have adverted to the public interest in ensuring that persons who are detained are not discouraged or precluded from seeking their liberty (e.g., through *habeas corpus* applications) by the 'chilling effect' of potential adverse costs orders.[349]

However, in many cases there will be an amalgam of private and public interests. As Bromwich J noted in proceedings arising out of allegedly unlawful discrimination:

> The conclusion I reach is that this case is neither a purely public interest proceeding, nor a purely private interest proceeding. It has features of both. It has a more of a private interest dimension insofar as the applicant seeks access to a service, and more of a public interest dimension insofar as that access, and the application of any finding that denial of such access in these and legally like circumstances is unlawful or lawful, would be likely to have wider application than the facts and circumstances of this case. That in turn is largely driven by the validity and scope of the legislation. It does have a test case quality to it, either way. [56][350]

4.6.2 *Court rules and statutory provisions*

As noted above, in a number of Australian jurisdictions there are legislative provisions, or rules of court, relating to costs that make express reference to the *public interest* as a factor to be taken into account in the exercise of judicial discretion.

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[347] It should also be borne in mind that some procedural rules provide expressly for costs in public interest cases. For example: r 4.2(1) of the *Land and Environment Court Rules 2007* (NSW) provides that the Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest. See also r 38.10 *Local Court Rules 1998* (NT).

[348] *JB & Ors v Northern Territory of Australia (No 2)* [2019] NTCA 3 [14]. See also, for example, *Brown v Australian Capital Territory (No 2)* [2020] ACTSC 109, involving an unsuccessful claim for compensation under the *Human Rights Act 2004* (ACT) and damages for false imprisonment in relation to the plaintiff's arrest, in which the ordinary rule was applied, citing the same costs outcome in *Strano v Australian Capital Territory (No 2)* [2016] ACTSC 206; 310 FLR 47.

[349] See *Cabal v United Mexican States (No 6)* [2000] FCA 651, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v MB* [2021] FCAFC 194; *DBE17 v Commonwealth of Australia (No 2)* [2018] FCA 1793; *Save the Children Australia v Minister for Home Affairs (No 2)* [2023] FCA 1542.

[350] *Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553.

For example, rule 4.2 of the *Land and Environment Court Rules 2007* (NSW), which applies to proceedings in class 4 of the court's jurisdiction (environmental planning and protection), expressly provides that the Court can decide not to order security for costs to not to order costs against a public interest litigant or decide not to require them to give an undertaking as to damages in relation to an interlocutory injunction application or other interlocutory order.[351]

In *Mullaley*[352] a community action group was unsuccessful in a proceeding seeking judicial review of the decision of the Independent Planning Commission to grant development consent to a gas project. Preston CJ, after considering the public interest nature of the proceedings, ordered that there be no order as to costs with the intention that each party was to pay their own costs of the proceeding. The *Uniform Procedure Rules 2005* (NSW) (UCPR) provide that the rules specified in Schedule 2 are to prevail over the UCPR. The rules in the Schedule include all of the rules in the Land & Environment Court. This includes Rule 4.2(1) which provides that 'The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.'

Preston CJ was satisfied that the proceeding had been brought in the public interest, noting that:

> Although the considerations identified in *Engadine* and the factors identified in *Caroona Coal* should not be regarded as 'fixed criteria', or as exhaustive, they do assist in characterising the nature of the proceedings and the purpose for which the proceedings have been brought.[353]

Having considered such matters, and as there were no countervailing considerations, including an absence of unreasonable conduct on the part of the applicant, his Honour was of the view that no costs order should be made against the losing party.[354]

The tri-partite test outlined by Preston CJ of the LEC in *Caroona Coal* has been applied in a number of cases.[355]

In the Northern Territory, there is specific provision for costs orders in relation to public interest litigation, incorporating recommendations made by the ALRC. An order is available at the application of a party at any stage of proceedings under the *Local Court Rules.*[356] Under the rule, the party has to satisfy the court that the proceeding would 'determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community', 'affect the development of law generally and may reduce the need for further litigation', or 'otherwise ha[d] the character of a public interest or test case proceeding'. The existence of a personal interest does not preclude the court from making such an order and the rule also sets out the factors the court should have regard to when exercising the discretion to make an order.

In Queensland, the *Judicial Review Act 1991* (Qld) provides that where an application is made for an order for statutory review under the Act the court may order that each party pay its own costs

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[351] Special circumstances are not to justify the departure from the usual rule, and the public interest may be of such scope or importance as to justify departure in and of itself, but generally 'something more' is required. See *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning (No 2)* (2008) 163 LGERA 132, [10]-[11] (Biscoe J); *Boomerang & Blueys Residents Group Inc v New South Wales Minister for the Environment, Heritage and Local Government and MidCoast Council (No 3)* [2020] NSWLEC 150.

[352] *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd (No 2)* [2021] NSWLEC 147.

[353] At [46].

[354] [63].

[355] See eg., *May v Northern Beaches Council (No 3*) [2023] NSWLEC 72. See also *Kennedy v Minister for Planning (NSW)* [2010] NSWLEC 269.

[356] *Local Court (Civil Jurisdiction) Rules 1998* (NT), r 38.10.

regardless of the outcome. Section 49(2)(b) states that the court must consider, among other factors, 'whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant'. These provisions have been considered or applied in a number of cases.[357]

In Tasmania Blow CJ considered the principles applicable to the making of costs orders in public interest litigation in an unsuccessful application for judicial review where the unsuccessful applicant was a non-profit incorporated association established to protect and promote the Tarkine region including to protect native fauna and flora.[358]

4.6.3 *A partial solution?*

In many instances, a decision in relation to the appropriate order for costs in litigation said to raise public interest or other important considerations need not result in an all or nothing outcome. After weighing up competing or conflicting considerations the court may decide that an order should be made for payment of only some of the costs in issue.[359]

Alternatively, the court may order the payment of a lump sum amount[360] or that the costs payable be reduced by a specified percentage.[361]

4.6.4 *Costs and interveners*

As discussed in detail in research paper 10, in many cases in which matters of public interest have arisen public interest groups or others have sought to intervene or participate as *amicus curiae*. Ordinarily, an intervenor or an amicus will not either seek an order as to costs or be at risk of being ordered to pay costs.

4.6.5 *Consideration by law reform bodies*

Various law reform bodies have proposed reforms in relation to costs in public interest cases.

The Australian Law Reform Commission recommended the adoption of legislation giving federal courts and tribunals an express power to make public interest costs orders.[362] As the Commission noted, although the courts had the power to depart from the usual rule that costs follow the event, its exercise was uncommon. In the view of the Commission: 'the significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules.'

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[357] See, e.g., *Lonergan v Stilgoe & Ors (No 2)* [2020] QSC 146; *Chibanda v Chief Executive, Queensland Health & Anor (No 2)* [2018] QSC 143; *Hytch v O'Connell (No 2)* [2018] QSC 99; *Burragubba & Anor v Minister for Natural Resources and Mines & Anor (No 2)* [2017] QSC 265; *Murphy v Legal Services Commissioner (No 2)* [2016] QSC 284; *BHP Billiton Mitsui Coal Pty Ltd v Isdale (No 2)* [2015] QSC 248.In *Hunt & Ors v Dr John Gerrard, Chief Health Officer & Anor; Ishiyama & Ors v Dr Peter Aitken, Former Chief Health Officer & Ors; Baxter & Ors v Dr John Gerrard, Chief Health Officer & Anor* [No 2] [2023] QCA 264 the Court of Appeal rejected the contention that costs should not be awarded against the losing party on public interest grounds.

[358] *Tarkine National Coalition Inc v Director, Environment Protection Authority (No 2)* [2024] TASSC 1.

[359] See, e.g., *Allseas Construction S.A. v Minister for Immigration and Citizenship (No 2)* [2012] FCA 747 (McKerracher J); *Mees v Kemp (No 2)* [2004] FCA 549 (Weinberg J); *North Australian Aboriginal Legal Aid Service Inc v Bradley (No 2)* [2002] FCA 564 (Weinberg J). See also part 4.3 of this paper above.

[360] Although not a 'public interest' case, relevant principles relating to lump sum orders for costs in the Federal Court are referred to in *CMA Corporation Limited v McSorley (No 2)* [2012] FCA 732 (Robertson J).

[361] See, e.g., *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd (No 2)* (2013) IPR 623; [2013] FCA 130 (Emmett J).

[362] ALRC, *Costs-Shifting - Who Pays for Litigation?* (Report No 75, 1995). As noted above, the Northern Territory Local Court rules subsequently introduced such a provision.

The ALRC recommended legislation that would expressly permit courts to make specific public interest costs orders (PICO) in respect of proceedings that will:

- determine, enforce or clarify an important right or obligation affecting a significant sector of the community
- involve the resolution of an important question of law or
- otherwise have the character of public interest or test case proceedings.

In respect of federal matters, a different view has been expressed by Professor Campbell.[363] In her view, the better approach is to move for the incorporation of special costs regimes in particular statutes governing the exercise of particular jurisdictions. That approach would arguably allow for a finer degree of discrimination in selection of the factors to be taken into account by a court or tribunal in the exercise of its discretion in the award of costs. She has contended that a 'statute-specific approach' would require legislators to be attentive to the relationship between standing to sue, the role expected of those accorded standing to sue, and principles regarding allocation of costs.

In 2008, the Victorian Law Reform Commission recommended that there should be express legislative provision empowering courts to make orders protecting public interest litigants from adverse costs in appropriate cases.[364] This could include orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.

In 2009 the Senate Legal and Constitutional Affairs Committee noted that it had received various submissions supporting the view that public interest litigants with meritorious claims should be relieved of the risk of an adverse costs order but was of the view that this should be determined by courts on a case-by-case basis.[365]

In its 2012 report on costs, the NSW Law Reform Commission recommended that the *Uniform Civil Procedure Rules 2005* (NSW) should be amended to adopt a rule based on r 4.2 of the *Land & Environment Court Rules 2007* (NSW) to facilitate appropriate orders for costs and security for costs in public interest cases.[366]

In a 2014 report, the Productivity Commission recommended that protective costs orders should be used to safeguard public interest litigation. It is proposed that courts should establish criteria to assess the eligibility of a party to a protective costs order.[367]

In 2016 the Victorian Department of Justice and Regulation proposed that amendments should be made to the costs rules to clarify when a protective costs order can be granted so that applications could be determined quickly.[368]

4.7 Costs in discrimination proceedings

In November 2023, cost reforms in respect of discrimination proceedings were introduced into the Federal Parliament by the Attorney-General, Mark Dreyfus KC. *The Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* will implement recommendation 25 of the ALRC

[363] Enid Campbell, 'Public Interest Cost Orders' (1998) 20(2) *Adelaide Law Review* 245.
[364] Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008) 676.
[365] The Senate, Legal and Constitutional Affairs References Committee, *Access to Justice* (2009).
[366] NSWLRC, *Security for costs and associated costs orders* (Report No 137, December 2012); see also NSWLRC, *Security for costs and associated costs orders* (Consultation Paper 13, May 2011).
[367] Productivity Commission, *Access to Justice Arrangements* (Report No. 72, 5 September 2014) chapter 13.
[368] Government of Victoria, Department of Justice and Regulation, *Access to Justice Review, Volume 2 Report and Recommendations* 450, 464.

Respect@Work Report, 2020.m This was a recommendation to amend the *Australian Human Rights Commission Act* to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).[369]

Proposed section 46PSA provides that if the applicant is successful on one or more grounds, the court must order the respondent to pay the applicants costs except the costs that the court is satisfied were incurred due to the applicant's unreasonable act or omission. Further, the applicant will only be liable to pay the respondent's costs where the court is satisfied that:

- the applicant instituted the proceedings vexatiously or without reasonable cause
- the applicant's unreasonable act or omission caused the other party to incur the costs or
- all of the following apply:
    - the other party is a respondent who was successful in the proceedings
    - the respondent does not have a significant power advantage over the applicant and
    - the respondent does not have significant financial or other resources, relative to the applicant.

The Explanatory Memorandum includes a diagram setting out how the costs provisions will work.

The Australian Human Rights Commission will have the ability to investigate and enforce compliance with the new positive duty that organisations and businesses have to eliminate sexual and sex-based harassment and discrimination in connection with work, as well as any related acts of victimisation. Employers need to actively seek to create a safer work environment free from this type of conduct.

The Bill passed the House of Representatives on 13 August 2024 and was introduced in the Senate on 14 August 2024. At the time of updating this paper it was expected to be passed shortly.

5. Class actions and cost implications

Class actions are a commonly used and useful vehicle for the assertion and defence of human rights and for the bringing of cases that are in the public interest. For example, human rights class actions have been brought regarding issues of refugee law and migration,[370] in relation to the Commonwealth discrimination law framework,[371] and in relation to the rights of Aboriginal and Torres Strait Islanders and racial discrimination.[372] Recently, there have also been a number of class actions brought concerning climate change.[373]

[369] See: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2324a/24bd33.

[370] E.g., *Heak v Minister For Immigration and Ethnic Affairs* (1993) 39 FCR 535; Fang *v Minister For Immigration and Ethnic Affairs* (1996) 135 ALR 583; *AS v Minister for Immigration & Ors* [2017] VSC 137; *DBE17 v Commonwealth of Australia* (No 2) [2018] FCA 1793; *Ali Yasmin & Ors v The Commonwealth of Australia & Anor* (Federal Court Case VID328/2020, filed 18 May 2020).

[371] E.g., *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8; *Duval-Comrie v Commonwealth of Australia* [2016] FCA 1523.

[372] E.g., *Wotton v State of Queensland (No 8)* [2017] FCA 639; *Basil Joshua Dawson & Ors v Commonwealth of Australia* (Federal Court Case VID328/2020, filed 18 May 2020).*; Patrick Cumaiyi & Ors v Northern Territory of Australia & Anor* (Federal Court Case NTD364/2019, filed 28 October 2019).

[373] E.g., *Kathleen O'Donnell v Commonwealth of Australia & Ors* (Federal Court, VID482/2020, filed 22 July 2020); *Pabai Pabai and Guy Paul Kabai v Commonwealth of Australia* (Federal Court, VID 622/2021). See part 3 of research paper 9.

Class actions carry with them their own cost implications which should be carefully considered. A comprehensive review of developments in class action law and commercial funding is outside the scope of the present paper.[374] However, the following brief overview may be of some interest.

Although various law reform bodies have recommended that a publicly funded class actions fund should be established in Australia, modelled on the provincial Canadian class actions funds, to date this has not occurred.

Because class members are statutorily immune from being ordered to pay such costs, the representative applicant is liable to be ordered to pay such costs, except in Victoria (discussed below).

This creates obvious problems and disincentives. Thus, in most cases, a commercial litigation funder will agree to meet any such 'adverse' order for costs or any order to provide security for costs during the conduct of the litigation. In many cases an insurance policy may be taken out with a commercial insurer in order to obtain an indemnity in respect of such costs (at a substantial premium).

Commercial funding of litigation has become common place in class actions in Australia in recent years, particularly in shareholder or investor class actions.[375] Unlike lawyers, commercial funders are entitled to seek payment of a commission, calculated as a percentage of the amount recovered by way of settlement or judgment. This has become widespread following the imprimatur of the High Court of Australia.[376]

Initially this was often done through entering into litigation funding agreements with individual class members. In many cases this resulted in 'opt in' class actions, limited to those who had entered into funding agreements, whereas the statutory regimes were designed to facilitate 'opt out' class actions.

A solution to this problem occurred when the Full Court of the Federal Court of Australia determined that the Court had power to make a 'common fund' order, whereby the funder became entitled to a commission (approved by the court) from all class members, not just those who had entered into contractual arrangements.[377]

However, in two cases, heard concurrently, orders by the NSW Court to Appeal and the Full Court of the Federal Court upholding judicial power to make common fund orders at an early stage in the litigation were overturned (by majority) by the High Court of Australia.[378]

At the time of writing there is some residual uncertainty, pending consideration of the issue by the High Court, as to whether similar orders may be made at the conclusion of the case (under different

[374] For empirical data and a review and critique of class action law and practice, see the following research papers by Peter Cashman and Amelia Simpson: 'Research Papers #1 and #2 - Class Actions and Litigation Funding Reform: The Rhetoric and the Reality' [2020] UNSWLRS 85; 'Research Paper #3 - Class Actions and Litigation Funding Reform: The Views of Class Action Practitioners' [2020] UNSWLRS 73; 'Research Paper #4 - The Problems of Delay in Class Actions' [2020] UNSWLRS 86; 'Research Paper #5 - Costs and Funding Commissions in Class Actions' [2020] UNSWLRS 87; 'Research Paper #6 - Class Action Remedies: *Cy-près*; "An Imperfect Solution to an Impossible Problem"' [2020] UNSWLRS 67; 'Research Paper #7 - Class Actions: Commercial Funding, Regulation and Conflicts of Interest' [2020] UNSWLRS 74.

[375] For example, in the public interest space, the class action in the Federal Court[375] brought against an Australian oil company on behalf of 15,000 Indonesian seaweed farmers who allegedly suffered losses arising out of the Montara oil spill off the north coast of Australia was funded by a UK based commercial litigation funder (Harbour).

[376] *Campbells Cash and Carry Pty Ltd v Fostif* (2006) 229 CLR 336.

[377] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148.

[378] *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.

statutory powers).[379] However, successive Federal Court decisions,[380] including the Full Federal Court,[381] have held that there is such power.

In class actions brought in the Victorian Supreme Court there is now statutory provision for a 'group costs order' to be made whereby solicitors (and funders) may obtain an order for payment of a percentage of the amount recovered in the litigation.[382] However, the solicitors conducting the litigation are liable to meet any adverse costs order in favour of the defendant(s).

Even in the absence of such a statutory obligation imposed on the solicitors for the applicant/plaintiff, law firms conducting class actions may agree to indemnify the lead applicant/plaintiff in relation to any order for costs or for security for costs.

The advantage is that this may facilitate the conduct of the litigation in circumstances where the applicant/plaintiff may not otherwise be prepared to do so given the exposure to the risk of an adverse costs order.

Th obvious downside is that the law firm may become liable for any adverse costs order in circumstances where it might not otherwise be enforced against an impecunious party.

The 'public interest' nature of class action litigation and the significance of this in determining costs orders in cases where the class action is unsuccessful has recently been considered by Justice Lee in the Federal Court. In *McNickle*[383] the applicant was unsuccessful in the initial trial concerning the carcinogenic effects of the chemical Roundup manufactured by Monsanto.

In a subsequent judgment in relation to costs[384]Lee J noted that the tendency in class action litigation for practitioners to make 'automatic' reference to established practice and procedure principles in ordinary *inter partes* litigation without adapting those principles to the different nature of class actions.[385]

In considering the exercise of his discretion in relation to costs Lee J made a number of important observations, including in relation to the issue of public interest in class action litigation.[386]

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[379] *Haselhurst v Toyota Motor Corporation* [2020] NSWCA 66.

[380] See e.g., *Uren v RMBL Investments Ltd & Anor (No 2)* [2020] FCA 647 at [50]-54]; *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 at [110]-[112]; *Court v Spotless Group Holdings Limited* [2020] FCA 1730 at *[77]-[80]; Ghee v BT Funds Management Limited* [2023] FCA 1553 [101] (Murphy J); *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Reserved Question)* [2023] FCA 1499 (Lee J).

381 In *Elliot-Carde v McDonald's Australia Limited* [2023] FCAFC 162 [170] (Beach J), [423] (Lee J), [504] (Colvin J) confirmed that the Federal Court has power under s 33V(2) of the Act to make a CFO at the point of settlement approval. See also *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; 281 FCR 501 at [42] (Lee J, with whom Middleton and Moshinsky JJ agreed) and the NSW Court of Appeal in *Brewster v BMW Australia Ltd* [2020] NSWCA 272 at [28(iv)-(v)], [30] and [41]-[43] (Bell P with whom Bathurst CJ and Payne JA agreed).

382 The Victorian Supreme Court Act was amended by the *Justice Legislation Miscellaneous Amendments Act 2020*, s 5.

[383] *McNickle v Huntsman Chemical Company Australia Pty Ltd (Initial Trial)* [2024] FCA 807.

[384] *McNickle v Huntsman Chemical Company Australia Pty Ltd (Costs)* [2024] FCA 883.

[385] Ibid at [4].

[386] Ibid at [61]-[80] referring to, inter alia: the VLRC 2018 Report; Ontario class action legislation; five Australian cases in which public interest questions have been considered in class action litigation- *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139; *Qantas Airways Ltd v Cameron (No 3)* (1996) 68 FCR 387; *DBE17 v Commonwealth of Australia (No 2)* [2018] FCA 1793; (2018) 265 FCR 600; *Turner v MyBudget Pty Limited (No 2*) [2018] FCA 1509; and *Cumaiyi v Northern Territory (No 2)* [2020] FCA 1804 referred to in the article by Petrovski, B, Li, K, Morabito, V and Nichol, M 'Public Interest Costs Orders in Federal Class Actions: Time for a New Approach' (2022) 45(2) *Melbourne University Law Review* 651.

In the case before him Maurice Blackburn had agreed to indemnify the applicant in respect of any adverse order for costs made against him.

Notwithstanding the public interest dimensions of the case, Lee J ordered the applicant to pay costs on a party-party basis. However, having regard to the initial forensic resistance of the respondent to the preliminary determination of the generic question of causation, the costs ordered to be paid were limited to those that would have been incurred had an initial trial (of the generic question of causation) been ordered on 12 October 2020. Pursuant to undertakings and orders of the Court Maurice Blackburn became liable to pay such costs given the indemnity that it had provided to the applicant.

6. The tax deductibility of legal costs

Ordinarily where private litigants are personally involved in civil litigation generally, and public interest litigation in particular, there are no tax concessions or deductions available for the legal expenses and out of pocket expenses incurred.

Where, however, such expenses are incurred in the course of conducting a business, such expenses are tax deductible, as expenses incurred in earning assessable income. Thus, corporations and businesses, including insurers, involved in litigation may deduct such expenses from income otherwise taxable.

Thus, as noted by the Productivity Commission, the entitlement of disputing parties to deduct civil litigation costs can be asymmetric, with only one party, typically businesses, able to claim a deduction.[387]

In view of the loss to revenue, taxpayers effectively subsidise the litigation expenses of businesses but not those of individuals. Moreover, in many circumstances, amounts paid by way of costs to the successful litigant may also be deducted. However, it needs to be borne in mind that the deduction only reduces the tax payable by the applicable tax rate that the business faces, not the total amount of the legal costs incurred.

It is not presently intended to canvass whether, *as a general rule*, legal costs should be treated differently from other legitimate deductible expenses incurred in deriving assessable income.

However, it is contended that this deductibility should not be unfettered. In particular, where in the conduct of a civil case, either as plaintiff or defendant, a party has acted unreasonably or pursued an unmeritorious claim or defence, or incurred costs unnecessarily, a deduction should not be available for any of the legal costs and expenses incurred.

It seems somewhat perverse that publicly funded legal aid is not generally available to civil litigants with meritorious claims but relatively unconstrained tax deductibility is available to corporations and businesses even in circumstances where they engage in unmeritorious litigious conduct.

If tax deductibility was removed for this category of cases, it is likely that this would result in a substantial increase in tax revenue. This could then be used to provide more adequate civil legal aid for parties with meritorious claims, who are not otherwise be able to obtain access to justice, including in relation to public interest litigation.

Provision could also be made for the payment of costs of successful defendants in public interest cases who are not otherwise able to recover such costs from the public interest litigant. This would provide a benefit for those companies and businesses that are successful in litigation which would be funded from extra tax revenue earned from the removal of tax deductibility for the legal expenses incurred by those companies and businesses that engage in unreasonable litigious conduct.

[387] Productivity Commission, *Access to Justice Arrangements* (Report No. 72, volume 1, 5 September 2014) 525.

The issue of tax deductibility for legal expenses was considered by the Productivity Commission in its 2014 report on access to justice.[388] Perhaps not surprisingly, most of the submissions from legal professional bodies were opposed to changes to the existing rules. After considering various proposals for reform, including the abolition of tax deductibility for 'unreasonable' expenses, the Commission concluded that no changes should be made to existing tax deductibility for legal expenses.

A number of the matters taken into consideration by the Commission are persuasive. Applying a 'reasonable' test may be inconsistent with other areas of tax policy, may be hard to enforce, may tie up resources in making determinations and may increase the uncertainty faced by businesses in attempting to calculate the potential gains or losses from litigation. Moreover, at the Commission notes, the mere fact of losing a case does not imply that it was unreasonable to pursue it and it is not in the interest of justice to deter litigants from pursuing reasonable claims where the result is uncertain.

However, there are countervailing considerations, some of which were acknowledged by the Commission but given little weight.

Tax deductibility is not conducive to the efficient resolution of disputes when one party has significant commercial advantage over another. This also accentuates imbalances of bargaining power in litigation to the advantage of the well-resourced parties and those acting strategically, with a view to financially exhausting the opponent rather than obtaining the 'just, quick and cheap' resolution of the key issues in dispute. Moreover, where legal expenses are deductible there is no cap or reasonable limits on the amount of such expenses.

As noted by the Law Reform Commission of Western Australia:

> Whilst there are general obligations not to waste court time and resources, there is little attention paid to the meaning of these obligations when lawyers acting for well- resourced clients who can, in practice, pursue every avenue for tactical purposes without regard to the taxpayer. The tax deductibility of legal fees as a business expense aggravates this problem.[389]

From a policy perspective, the weight to be given to the various competing considerations in favor and against some change to the existing law permitting unrestricted tax deductibility of legal expenses incurred in connection with litigation may be contentious.

In terms of practical implementation, it is accepted that there are obvious difficulties and costs in having a determination of whether a party has engaged in 'unreasonable' conduct in the course of litigation by someone unfamiliar with the facts of the case.

However, there is no reason in principle or practice why a court could not make such a determination in cases presided over by it at the conclusion of the proceedings. Where an adverse determination is made (including in cases where an indemnity costs order is made against a party), this could be the basis for denying tax deductibility for the legal costs incurred by the party in question. The prospect or threat of such an adverse determination may provide additional incentive for reasonable forensic conduct and cost minimisation.

How a determination as to the reasonableness of forensic conduct could be made in cases that settle is obviously problematic. However, it is suggested that perhaps the prospect of an adverse determination may encourage settlement.

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[388] Productivity Commission, *Access to Justice Arrangements* (Report No. 72, volume 1, 5 September 2014) chapter 15.

[389] Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia* (Project 92, September 1999) 331, quoted by the Productivity Commission at 526. See also Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 2008), 725.

If the extra tax revenue raised from the removal of tax deductibility in cases where a party has engaged in unreasonable conduct is used to fund meritorious public interest cases (and possibly also to contribute to the otherwise unrecoverable costs incurred by businesses that are successful in proceedings brought against them by public interest litigants), we consider that the policy considerations favouring this reform outweigh those against it.

7. Confidentiality constraints

Difficulties obtaining information present a further barrier to the successful conduct of human rights litigation in Australia. Employees or former employees of corporations or entities implicated in human rights abuses or other unlawful conduct may be aware of such conduct or in possession of relevant documentary or other information. This may be an invaluable source of potential evidence.

However, Australian courts have supported the enforcement of express or implied confidentiality obligations in employment contracts which may preclude access to such information or prevent lawyers from conferring with employees and former employees. Such confidentiality constraints would not prevent the production of revenant documents sought by way of subpoena or the calling of such persons as witnesses at the trial. In some instances, procedural rules may facilitate pretrial depositions to elicit such evidence.

In *AG Australia Holdings Ltd v Burton and Another*, [390] lawyers acting for a plaintiff in class action proceedings against AG Australia prepared a draft witness statement for a former employee of that company. Campbell J granted injunctive relief to AG Australia and held that enforcement of the contract did not contravene public policy.[391]

In a 2016 Victorian Supreme Court case, Forrest J concluded that confidentiality obligations would not be enforced by a Court where it has an adverse effect on the administration of justice, outweighing the public interest in the protecting the confidence.[392] In that case, lawyers for an infant seeking asylum in offshore detention sought to interview a former Serco employee before trial.

Murphy J followed this approach in the Federal Court in *Zantran Pty Ltd v Crown Resorts Ltd.*[393] This interlocutory decision formed part of a pending class action alleging misleading and deceptive conduct in relation to Crown's risks of conducting its business in China. Murphy J granted orders that various former employees of Crown Resorts Ltd (Crown) be relieved of obligations of confidence owed to Crown for the limited purpose of conferring with lawyers for Zantran and providing statements. However, this decision was unanimously reversed on appeal to the Full Court of the Federal Court, disapproving of the approach of Forrest J.[394]

In an appropriate case, where express or implied confidentiality constraints arising out of current or former employment may preclude conferring with potential witnesses, it may be possible to obtain orders for the taking of evidence from such persons in advance of the trial. Contractual or equitable confidentiality constraints do not prevent the disclosure of otherwise confidential information pursuant to orders of a court. Pretrial oral discovery of information is routine in civil litigation in the United States and Canada and is now under consideration in a number of Australian cases.[395]

A further problem, not unique to Australia, arises where corporate documents are produced on discovery in litigation in circumstances which preclude their disclosure or use in connection with

[390] (2002) 58 NSWLR 464.
[391] (2002) 58 NSWLR 464, at [170]-[172], [177].
[392] *AS v Minister for Immigration and Border Protection and Others* (2016) 53 VR 631, at [26]-[27].
[393] (2019) 370 ALR 516, [7], [114].
[394] *Crown Resorts Ltd v Zantran Pty Ltd* (2020) 374 ALR 739, [2], [64], [135].
[395] For example, at the time of writing, in the Federal Court class actions: *Davaria Pty Limited v 7-Eleven Stores Pty Ltd & Ors* VID 180/2018; *Pareshkumar Davraia & Anor v 7-Eleven Stores Pty Ltd & Anor* VID 182/2018.

other claims, whether by virtue of the implied *Harman*[396] undertaking, express terms of agreement[397] or court-imposed confidentiality /protective orders.

In appropriate circumstances, a court may grant leave for use of a document or information for a purpose other than that for which it was initially obtained.

8. Litigious and non-litigious strategies.

In considering an appropriate strategy to resolve a perceived human rights violation or problem of public interest it is necessary to consider both the potential and the pitfalls in human rights and public interest litigation. Apart from the legal, procedural and economic impediments to which we refer, success often requires resourcefulness and perseverance.

In the absence of comprehensive human rights protections in Australia, individuals and groups often need to resort to other common law or statutory entitlements in order to obtain a remedy for what may be perceived to be a denial of certain rights. This may require the conduct of one or more test cases in order to resolve contested legal issues. Several current examples of such litigation illustrate both the strengths and the limitations of seeking legal redress.

In the Northern Territory, a number of Indigenous communities contend that they are not being provided with safe drinking water or with habitable rented accommodation in public housing. In the case of the latter, on 22 January 2016, Australian Lawyers for Remote Aboriginal Rights (ALRAR) delivered 70 letters to the Department of Housing offices in Alice Springs, detailing over 600 repairs and maintenance issues in the Santa Teresa community, including a significant number of 'Emergency Repairs'. ALRAR did not receive a response to these notices, or to a further letter advising the Department that ALRAR would apply to the Northern Territory Civil and Administrative Tribunal (NTCAT) if its clients were not notified of arrangements to attend to the repairs.

On 7 February 2016, after unsuccessfully seeking urgent repairs in respect of unsatisfactory and unsafe accommodation, ALRAR, on behalf of Eastern Arrente Indigenous residents of Santa Teresa, filed 70 claims in the NTCAT.[398] Amongst other things, the claimants sought orders that the respondent make repairs to their premises and pay compensation, including for the loss of amenity arising out of the failure to carry out the repairs. The four initial cases that proceeded to a hearing were intended to be test cases, given that there are 70 other residents with similar claims. The claims were met by a counter claim by the Northern Territory Government for substantial arrears of rent. In their defences to the counter claims, both appellants claimed that, at the time of entry into the tenancy agreement, they: were elderly and in the case of [the now deceased] Mr Conway, suffered from serious illness; spoke English only as a second language; possessed very limited numeracy and literacy skills, lacked commercial experience, lacked financial advice and had a cultural tendency towards gratuitous concurrence[399].

The proceedings involved various technical legal questions and factual issues to be resolved under the *Residential Tenancies Act 1999* (NT). The respondent was the Chief Executive Officer (Housing), who was in effect the landlord of the premises in question. In 2019, the claimants were substantially successful, and orders were made for the refund of rent for periods when the premises were uninhabitable and for awards of compensation. NTCAT held that the NT government had an

[396] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280. See also *Hearne v Street* [2008] HCA 36; (2008) 235 CLR 125 and *Haswell v Commonwealth of Australia* [2020] FCA 915.
[397] For an interesting analysis see Seth Katsuya Endo, 'Contracting for Confidential' (2020) 53 *U.C. Davis Law Review* 1249.
[398] With the legal assistance of the pro bono team at Australian Lawyers for Remote Aboriginal Rights (ALRAR) and with financial backing and campaign support from the Grata Fund.
[399] *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, [14] (Blokland J).

obligation under the *Residential Tenancies Act 1999* (NT) to provide housing that was 'habitable', meaning safe. The counter claims seeking arrears of rent were dismissed.[400]

However, that was not the end of the matter. The claimants appealed the decision to attempt to extend the definition of 'habitable' housing beyond merely 'safe' to include also 'humaneness and reasonable comfort'. Applications for leave to appeal were consented to and the matter proceeded to a further hearing in the Supreme Court of the Northern Territory in December 2019 before Blokland J, with the decision handed down in September 2020. By that time, one of the appellants had passed away. A number of the grounds of appeal were upheld whereas others were dismissed. The failure of the Tribunal at first instance to deal with the question of whether the lease arrangements were unconscionable was remitted to the Tribunal. The decision of the Tribunal to dismiss certain claims under the *Residential Tenancies Act* was set aside and remitted to the Tribunal. A further aspect of the decision of the Tribunal was set aside and a further order for compensation was made.[401]

This did not bring about a resolution of the dispute. Both sides appealed to the Court of Appeal of the Northern Territory. The Indigenous tenant contended that the primary judge erred in determining a number of issues in respect of compensation.[402] The landlord contended that the primary judge erred in a number of respects, including in respect of the unconscionability claims; the implied or incidental powers under the legislation to order repayment of rent; the findings in respect of whether the premises were 'habitable' and the objects of the tenancy agreement.[403]

For over five years, the landlord did not provide an external door to one of the appellant's premises. In the initial period following the commencement of proceedings, for three and a half years, the landlord contended that the failure to provide an external door to the premises of one of the elderly female tenants was not a breach of the relevant statutory obligation to take reasonable steps to ensure the reasonable security of the premises. Her case has been on foot since February 2016. She is one of four tenants among 70 NTCAT applicants from Santa Teresa whose case was accepted by both parties and the Tribunal as being 'representative of the legal and factual issues that affect all 70 of the Santa Teresa proceedings, such that determination of those issues should supply a framework within which the balance of the proceedings can more expeditiously be resolved'.[404]

The Court of Appeal handed down its decision in February 2022,[405]12 months after the hearing. Some grounds of appeal were allowed whilst others were rejected. The appeal was allowed on the ground that the Supreme Court erred in remitting the claims for unconscionable dealings and repayment of rent to the Tribunal for reconsideration. The appeal was also allowed on the ground that the Supreme Court erred in finding that the tenancy agreement was an agreement whose object was to provide enjoyment, relaxation or freedom form molestation and was therefore governed by the 'second limb' of the principle in *Baltic Shipping*[406] concerning damages for distress and disappointment for breach of contract. The ground of appeal asserting that the Supreme Court was in error in construing the term 'habitable' under the residential tenancy legislation was dismissed. The Court held that the determination of habitability is not restricted to matters of health and safety but may encompass the reasonable comfort of the premises as a test of habitability.

[400] *Various Applicants from Santa Teresa v Chief Executive (Housing*) [2019] NTCAT 7.
[401] *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59.
[402] Notice of Appeal, 6 October 2020.
[403] Notice of Appeal, 6 October 2020.
[404] *Cavanagh v CEO Housing [No 4]* [2017] NTCAT 240, [7] cited in Submissions on behalf of Enid Young, Northern Territory Court of Appeal.
[405] *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1.
[406] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

A special leave application to appeal to the High Court on the calculation of compensation issue was successful and on 1 November 2023 the High Court allowed the appeal.[407]

The High Court held that the NT tenancy legislation empowered the Tribunal (the Civil and Administrative Tribunal of the Norther Territory) to order that a landlord compensate a tenant for distress or disappointment suffered by the tenant as a normal healthy reaction to a failure on the part of the landlord to comply with a statutorily imposed term of a residential tenancy agreement.[408]

The case was remitted to the court below for the purpose of quantifying the compensation.

In another matter, tenants from Gunbalanya and Laramba in the Northern Territory mounted a challenge to a new remote rent framework which resulted in increases in rent of 68% for Indigenous tenants in remote communities. The NT Supreme Court dismissed the original judicial review proceeding in November 2022. There was an appeal from that decision and separate excessive rent applications before NTCAT and a further judicial review challenge to more recent rent determinations by the NT Government. The questions for determination were referred to the NT Court of Appeal and a hearing was held in November 2023. As at August 2024 a decision has not been handed down.

In the case in respect of unsafe drinking water, referred to above, Indigenous families living in the remote community of Laramba have been supplied with drinking water contaminated with uranium for at least the last decade. It is contended that the concentrations of uranium are significantly higher than the maximum safe levels set out in the Australian Drinking Water Guidelines.[409] The level deemed 'safe' is 0.017mg/L. The uranium levels reported for Laramba by the Power and Water Corporation were as follows: 2018: 0.046mg/L; 2017: 0.047mg/L; 2016: 0.0406mg/L; 2015: 0.038mg/L; 2014: 0.039mg/L. In the proceedings it was not disputed that the uranium levels are substantially in excess of levels regarded as safe. They are approximately three times higher.

It was contended that the problem could be solved or alleviated through a relatively simple reverse osmosis system that Indigenous residents have been seeking to have installed in the 24 rental properties affected.[410] The members of the community have been seeking to require the Northern Territory Government to provide them with safe drinking water[411] and are seeking compensation. After some delays due to the Covid-19 crisis, the Tribunal proceeded to determine various separate questions arising out of the initial claims before the Northern Territory Civil and Administrative Tribunal (NTCAT) on behalf of 24 members of the community. The applicants were unsuccessful.[412] The Tribunal member Mark O'Reilly held that the uranium in the water was not the responsibility of the landlord. He held that the *Residential Tenancies Act 1999* (NT) did not place responsibility on the landlord and NTCAT 'had no jurisdiction' to impose responsibility. According to the Tribunal member:

> In my view there is an essential flaw in the applicants' assertion that "the only water made available by the landlord at the premises contains nearly three times the maximum safe level for ingestion of uranium". In reality the landlord does not make water available at the

[407] *Young v Chief Executive Officer (Housing)* [2023] HCA 31.
[408] Kiefel CJ, Gageler and Gleeson JJ at [1]. See also the separate judgment of Gordon and Edelman JJ.
[409] See National Health and Medical Research Council, *Australian Drinking Water Guidelines 6 (2011),* (version 3.5, August 2018) 188. The Guidelines are published by the Commonwealth Government with the endorsement of the National Health and Medical Research Council and the Natural Resources Management Ministerial Council. The level deemed 'safe' is 0.017mg/L.
[410] Grata Fund, *Impact Report: 2019-2020*, 12.
[411] Assisted by Australian Lawyers for Remote Aboriginal Rights (ALRAR) and the Grata Fund.
[412] *Various Applicants from Laramba v Chief Executive Officer (Housing)* [2020] NTCAT 22.

> premises at all … The landlord's responsibility is to provide safe and functioning infrastructure to facilitate the supply of water by the service provider.[413]

Responsibility for the supply and quality of water was said to rest with the Power and Water Corporation, pursuant to the provisions of the *Power and Water Corporation Act 1987*.

A number of the unsuccessful applicants applied for a review of the decision of the Tribunal member.[414] After considering various submissions and options, in October 2020 the President of NTCAT referred several questions of law to the Northern Territory Supreme Court.[415] This included the question of whether the landlord must ensure that water supplied to the premises subject to a tenancy agreement does not contain levels of uranium that are unsafe for drinking. The matter was referred to the Full Bench of the Northern Territory Supreme Court with a view to being heard in February 2021. However, in October 2021 the matter was remitted by the Supreme Court back to NTCAT for determinations of fact without any judicial determination of the matters in issue.

A decision of the Tribunal was handed down on 13 May 2022.[416]The Tribunal held that the landlord was not responsible for the supply and quality of the water as this was the sole responsibility of the Power and Water Corporation.

An application for leave to appeal was filed on 20 May 2022 in the Northern Territory Supreme Court and was heard on 6 September 2022. Leave to appeal was granted and the appeal was allowed.[417] This was on the ground that 'the Tribunal failed to apply a correct understanding of s 48(1)(a) of the Act by concluding that there is no breach of that obligation if the cause of there being a risk of injury to health in the premises emanates from a third party or "external provider".'

These current cases illustrate some of the forensic difficulties in seeking to resolve what at first sight seem relatively simple questions as to whether members of remote Indigenous communities have any 'rights' to be provided with habitable, affordable accommodation and safe drinking water by landlords responsible for rental premises or any redress by way of compensation in respect of inadequate accommodation or unsafe drinking water. At the time of writing these questions have not been finally resolved.

In many circumstances, even if there is a viable cause of action and an available Australian forum, there may still be a problematic lack of legal accountability for various forms of conduct which amount to human rights violations in which Australian or related companies may be directly or indirectly implicated. This has led some authors to focus on the need for a wide range of non-litigation strategies.[418]

The *Non-Judicial Human Rights Redress Mechanisms Project*, an academic research collaboration, conducted almost 600 interviews over five years with 1,100 persons with a view to analysing the effectiveness of these mechanisms in responding to alleged human rights violations associated with transnational business activity. The authors conducted empirical research into communities and workers pursuing a remedy for grievances in the garment and footwear manufacturing, mining, industrial and agribusiness sectors in India and Indonesia. This encompassed multinational corporations with links to Australian business, including agriculture (tea and palm oil); industrial projects (steel, mining, stone quarries) and garment manufacturing (homebased workers and factory

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[413] Ibid, [45].
[414] Pursuant to s 140 *Northern Territory Civil and Administrative Tribunal Act 2014*.
[415] *Jack v Chief Executive Officer (Housing)* [2020] NTCAT 39.
[416] *Various Applicants from Laramba v Chief Executive Officer (Housing)* NTCAT 3. See also *Jack v Chief Executive Officer (Housing) (No 2)* [2021] NTSC 81.
[417] *Pepperill v CEO Housing* [2023] NTSC 90 (Barr J).
[418] A number of proposals by various authors are outlined in Anna Grear and Burns Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on the Post-Kiobel Lawscape' (2015) 15 *Human Rights Law Review* 21, 37-39.

workers). The links to Australia included loans and investments from Australian financial institutions, and the sourcing of products by Australian companies and retailers. Not all of this activity has been beneath the radar. For example, as the authors note,[419] the operations of Australian mining companies have had negative impacts on Indigenous peoples' rights to land, health, living environments and livelihoods and this has been documented by a United Nations Committee.[420]

The study led to a number of recommendations concerning ways that *non-judicial mechanisms* can provide redress and justice to vulnerable communities and workers; how non-government organisations and worker representatives can more effectively utilise the mechanisms to provide support for and represent vulnerable communities and workers; and how redress mechanisms can contribute to long-term and sustainable respect and remedy of human rights by businesses throughout their operations, supply chains and other business relationships.[421]

Leaving aside non-judicial dispute resolution mechanisms,[422] those involved in advocating human rights and public interest cases and causes are usually mindful of the importance of various non litigious strategies. Community engagement, use of traditional and digital media, political lobbying and involvement in law reform are important strategic tools that may supplement or supplant litigation.

[419] Kate Macdonald et al, *Redress for Transnational Business-Related Human Rights Abuses in Australia: Non-Judicial Redress Mechanisms Report Series 3* (2016) 15, note 3.
[420] UN Committee on the Elimination of Racial Discrimination, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination, Australia' (13 September 2010) UN Doc CERD/C/AUS/CO/15-17 [13].
[421] Kate Macdonald et al, *Redress for Transnational Business-Related Human Rights Abuses in Australia: Non-Judicial Redress Mechanisms Report Series 3* (2016).
[422] A detailed consideration of these issues is outside the scope of the present paper given its forensic focus.