

## **Costing the Earth?**

The case for public interest costs  
protection in environmental litigation

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# About the Environment Defenders Office (Victoria) Ltd

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The Environment Defenders Office (Victoria) Ltd ('EDO') is a Community Legal Centre specialising in public interest environment law. We support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest planning and environmental law.

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# Glossary

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It is useful to begin by defining a number of phrases that will be used throughout this paper:

- > **Cost shifting** means assigning some or all of the costs of one party in the litigation to another party. The traditional common law rule is a cost-shifting rule, because it shifts the costs of the successful party to the unsuccessful party.
- > **Cost capping** means setting a maximum amount of costs that may be recovered in the event of successful litigation. Cost caps do not preclude the affected party or parties from spending more than the recoverable amount; they simply prevent recovery of any amount in excess of the capped amount. Order 62A of the Federal Court Rules is an example of cost capping.

Another useful pair of terms is **one way** and **two way** as modifiers of cost shifting or cost capping. **One way** means that the rule only operates in one direction; **two way** means that the rule applies equally to all parties. For example, the common law costs rule is a two-way cost-shifting rule—whichever party is successful, it may shift some or all of its costs onto the unsuccessful party. By contrast, a one-way cost-shifting rule would permit one party, A, to recover against another, B, if it were successful, but would prohibit B recovering from A if B were successful.

A particular type of costs order that is sometimes made is the '**no costs' order**. A 'no costs' order is an order that each party bear their own costs, regardless of the outcome of the case. These orders represent a departure from the ordinary common law rule, as no cost shifting occurs.

It should be noted that hybrids of cost shifting and cost capping can exist. For example, Order 62A of the Federal Court Rules caps the maximum amount of costs recoverable by either party (two-way cost capping), but permits recovery against either party (two-way cost shifting).

## Executive summary

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This paper examines a number of different approaches to the award of costs in public interest litigation, these approaches' usefulness in facilitating such litigation and the options for their implementation in public interest litigation under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

The default costs rule in common law jurisdictions such as Australia, Canada, and England and Wales is that the successful party receives costs from the unsuccessful party. Although this rule appears 'intuitively attractive', because of its apparent fairness and equality, in reality it is not always tenable or fair, particularly where there is genuine uncertainty about interpretation of a statute and the losing party had good legal grounds for making their claim.

In addition, it is likely that the rule discourages claims wherever the applicant would not be able to cope with the impact of an adverse costs order, regardless of their merit. This 'deterrence' effect is likely to be particularly pronounced where the potential applicant has no financial or personal interest in the proceedings, as is usually the case with public interest litigants.

In the context of the EPBC Act, public interest applicants are likely to be community organisations or other non-governmental organisations (**NGOs**) with limited financial resources to fall back on. For the reasons outlined above, the ordinary rule as to costs is particularly likely to deter them from bringing cases, whether meritorious or not.

In recognition of the difficulties faced by applicants with limited means, different approaches have been adopted in different jurisdictions to cap or shift costs. However, the rules currently available in the Federal jurisdiction in Australia do not provide adequate protection for public interest litigants.

There is a need to reduce the barriers to meritorious public interest litigation under the EPBC Act and provide more certainty for both parties.

## Proposal

The EPBC Act should be amended to incorporate a mechanism to allow applicants in proceedings for judicial review of a decision or civil enforcement of a breach under the Act to apply to the court at any time for a decision on whether a public interest costs order will be imposed.

## Recommendations

We recommend the following amendments be made to the EPBC Act:

The legislation should include a two-step mechanism to determine whether public interest costs apply. Firstly, a determination should be made as to whether the proceedings are 'public interest proceedings'. Then, if the proceedings are determined to be 'public interest proceedings', the court will determine what costs order should be made.

In public interest proceedings, the court should be prohibited from ordering that 'costs follow the event'. Instead, it should be required to make some form of public interest costs order (i.e. a 'no costs' order, a capped costs order, a one-way cost-shifting order or an indemnity).

1. The legislation should require that the court have regard to the following factors in deciding whether the proceedings are 'public interest proceedings' (the first stage of the test):
  - > whether there is an arguable basis for the application;
  - > the fact that the litigation raises a novel and important question of law or concerns the interpretation or future administration of laws;
  - > the motivation of the applicant;
  - > the subject matter of the dispute; and/or
  - > public interest in the subject matter of the dispute.
2. The legislation should require the court to have regard to the following factors in deciding what form of public interest costs order to make (the second stage of the test):
  - > the financial resources of the applicant;
  - > the existence of any personal interest on the part of the applicant in the outcome of proceedings; and
  - > the timing of the application.
3. The legislation should expressly provide that a court may make any of the following orders:
  - > each party bear his or her own costs;
  - > the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall not be liable for the other party's costs;
  - > only be liable to pay a specified amount of the other party's costs;
  - > be able to recover all or part of his or her costs from the other party; or
  - > another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.
4. The legislation should prevent the court from capping costs at an amount that is likely to cause the applicant, acting reasonably, to discontinue proceedings.
5. Any public interest costs mechanism should permit the making of public interest costs orders in respect of the costs of the public interest application itself, including cost-capping orders.

# Introduction

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Much environmental law in Australia is administrative law. Administrative law is 'the law relating to the control of governmental power.'<sup>1</sup> The primary purpose of administrative law is 'to keep the power of government within their legal bounds, so as to protect the citizen from their abuse. The powerful engines of authority must be prevented from running amok.'<sup>2</sup>

These features have led to the recognition in a number of major common law jurisdictions that administrative law litigation, i.e. judicial review, is quite distinct from ordinary disputes between private parties. This recognition has prompted reconsideration of other areas of the law that affect the ability to bring such litigation. In *Lord Chancellors Department; ex parte Child Poverty Action Group*,<sup>3</sup> Mr Justice Dyson accepted the argument that

the true nature of the court's role in public law cases is not to determine the rights of individual applicants, but to ensure that public bodies do not exceed or abuse their powers. It is a consequence of this recognition that procedural rules and practices that apply to the adjudication of the classic *lis inter partes* in private law cannot apply without modification to a public interest challenge to a decision of government.<sup>4</sup>

Civil enforcement is another important aspect of environmental law. In jurisdictions where it is available, civil enforcement presents an important opportunity for members of the public to ensure that environmental laws are complied with. Until recently, there were two major barriers to the ability of individuals to challenge improper government decisions. These were the doctrines of standing and costs. The first of these, standing, meant that the only people who could challenge a decision were those who, in the law's eyes, were sufficiently affected by it. In the context of federal environmental litigation, this problem has been largely remedied by the broad standing provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EBPC Act**).

As such, costs are now the major barrier to environmental litigation in Australia and in other common law countries that apply the rule that 'costs follow the event' (i.e. the successful party's legal fees are paid by the unsuccessful party). Where the successful party is a major corporation or a government body, these costs may be in the hundreds of thousands of dollars. For example, in the *Wielangta* litigation,<sup>5</sup> the costs of Forestry Tasmania in the hearing before the Full Federal Court alone amounted to approximately \$240,000.

The impact of the 'costs follow the event' rule is, quite simply, to price the vast majority of ordinary people and environmental groups out of the courts. Regardless of the legal strength of a claim, the prospect of paying hundreds of thousands of dollars if they lose and the need to pay high fees even before they get to that point ensures that many arguable claims are simply never brought before the courts.

The result of these cases not being brought must be measured not only by its cost to the environment, which is undoubtedly significant, but by its broader costs to the rule of law. As noted above, the ability to test government decisions is an important check on the use of executive power. If decisions are regularly going untested, for whatever reason, the quality of those decisions may suffer; laws may, in effect, be selectively enforced; and ultimately the ability to hold government accountable for its actions is undermined.

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1 H W R Wade and C F Forsyth, *Administrative Law* (8th ed., 2000), 4.

2 *Ibid*, 5.

3 [1998] EWHC Admin 151. This decision was followed by the Court of Appeal in *R (Corner House) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

4 [1998] EWHC Admin 151, [29].

5 *Forestry Tasmania v Brown* [2007] FCAFC 186.

Moreover, the benefits arising from public interest litigation are not being realised. As the Australian Law Reform Commission reported in 1995, public interest litigation 'is of significant benefit to the community'.<sup>6</sup> The Commission stated that public interest litigation provided a number of benefits including:

- > development of the law leading to greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law (which in turn should lead to fewer disputes and less expenditure on litigation);
- > impetus for reform and structural change to reduce potential disputes (for example, a test case can encourage the development of rules and procedures designed to ensure greater compliance with a particular law);
- > contribution to market regulation and public sector accountability by allowing greater scope for private enforcement;
- > reduction of other social costs by stopping or preventing costly market or government failures.<sup>7</sup>

If the promise of progressive environmental legislation, such as the EPBC Act, is to be fully realised, then Australian courts need to be empowered to move away from the apparent equality of the current costs rule to a model that reflects substantive fairness between frequently unequal parties.

By substantive fairness, we mean a model that permits the bringing of cases based on their legal merits and their public interest value, rather than on the financial assets available to the parties. The actual outcome of the trial is very rarely a foregone conclusion and is, in fact, just one of a number of factors that should influence the decision to award costs.

In this paper, we survey the approaches adopted in Australia and elsewhere to public interest litigation and make recommendations for the implementation of an approach that we believe provides a fairer and more flexible approach to costs in public interest litigation.

Although the discussion and recommendations in this paper are framed in relation to litigation under the EPBC Act, they could be equally applied to any area of Federal public interest litigation.

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<sup>6</sup> Australian Law Reform Commission, *Costs Shifting – who pays for litigation?* Report 75 (1995), [13.1].

<sup>7</sup> *Ibid*, [13.6]. The Report went on to note that public interest litigation had made a significant contribution in the area of environmental law: [13.7].

# Current approaches in the Federal Court

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## The common law rule

The 'common law' (default) rule is that a party which is unsuccessful pays the costs of the other side. Proceedings under the EPBC Act are heard in the Federal Court. In common with most other Australian courts, the Federal Court has the jurisdiction to award costs in any proceeding before it, unless prohibited by another statute.<sup>8</sup> The decision to award costs in a particular matter is discretionary.<sup>9</sup>

In awarding costs, trial judges have an unfettered discretion; however, that discretion must be exercised judicially, meaning rationally and on the basis of factors associated with the litigation.<sup>10</sup> The courts have developed guidelines on the way the costs discretion is to be exercised. Ordinarily, costs will be awarded to the successful party unless there are special circumstances justifying some other order.<sup>11</sup> As such, an unsuccessful party will often have to pay a portion of the successful party's costs, in addition to their own legal costs.

The rationale behind this rule, as stated by the High Court in *Latoudis v Casey*,<sup>12</sup> is compensatory. As McHugh J said in that case 'the object of costs is not to penalise; it is to indemnify the successful party in regard to expense to which he has been put by reason of legal proceedings'.<sup>13</sup>

This justification has its limits, however, and these were canvassed in *Ruddock v Vardalis*.<sup>14</sup> There, the majority of the Court stated:

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.<sup>15</sup>

The impact of the ordinary rule on access to justice is significant. In their 1994 report, *Who should pay? A review of the litigation costs rules*, the Australian Law Reform Commission identified a number of concerns with the current costs rules.<sup>16</sup> In particular they observed that:

**Rule adds uncertainty.** The costs indemnity rule adds a potentially large unknown element to the cost of litigation. A litigant has some control over the costs of his or her own legal representation. A litigant has little or no way of limiting the cost incurred by the other party or of predicting the proportion of those costs that he or she will have to pay in the event of an adverse costs orders. This uncertainty makes it almost impossible for a party to budget for the total cost of litigation. Uncertainty as to the amount of costs that may be awarded under the costs indemnity rule may discourage people from litigating. (Emphasis in original.)<sup>17</sup>

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<sup>8</sup> Section 43, *Federal Court of Australia Act 1976* (Cth).

<sup>9</sup> Section 43(2), *Federal Court of Australia Act 1976* (Cth).

<sup>10</sup> *Donald Campbell & Co. v Pollak* [1927] A.C. 732, 811-812 per Viscount Cave, L.C.

<sup>11</sup> *Ibid.* In the particular context of s 43(2), see, e.g., *Hughes v Western Australian Cricket Association Inc.* [1986] ATPR 40-748, 48,136, per Toohey J; *Seven Network Ltd v News Ltd* (2007) 244 ALR 374, 380-381 per Sackville J.

<sup>12</sup> (1990) 170 CLR 534.

<sup>13</sup> *Ibid.*, 567.

<sup>14</sup> *Ruddock v Vardalis* [2001] 115 FCR 229.

<sup>15</sup> *Ibid.*, [13]. See also the comments by McHugh J in *Latoudis v Casey* (1990) 170 CLR 534, 566-567, observing that 'in civil proceedings an order may, and usually will, be made even though the unsuccessful party has nearly succeeded or has acted reasonably in commencing the proceedings. It may, and usually will, be made even though the action has failed through no fault of the unsuccessful party.'

<sup>16</sup> Australian Law Reform Commission, *Who should pay? A review of the litigation costs rules*, Issues Paper 13 (1994).

<sup>17</sup> *Ibid.* [5.5].



The Commission continued:

A person may be deterred from pursuing a meritorious case by the risk of having to pay a portion of an opponent's costs in addition to his or her own costs if unsuccessful. A meritorious case may be one with a reasonable chance of succeeding. Alternatively, a case may be meritorious because it seeks judicial clarification or development of the law, notwithstanding that its success or failure cannot be predicted. All litigation has an element of risk, especially where success depends on the court accepting expert evidence or novel legal argument.<sup>18</sup>

These concerns have been echoed in the environmental context. At the International Conference on Environmental Law in 1989, Justice Toohey of the High Court stated:

There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.<sup>19</sup>

In the UK, the rule that costs follow the event has been said to be the 'single largest barrier to environmental justice' in the English legal system.<sup>20</sup>

Another problem with the common law rule is that, where it applies, awards of costs are almost exclusively made when judgment is given.<sup>21</sup> By that time, both the plaintiff and the defendant are likely to have incurred significant costs without any idea of whether they will be able to recover them. This adds further uncertainty to the process of litigation and may act as a further deterrent to poorly-resourced litigants.

## Holding the floodgates shut?

In some quarters, the deterrent effect of the common law costs rule is argued to be beneficial as it discourages the bringing of unmeritorious cases and that, if the rules were removed or altered, it would produce a flood of dubious cases. There are a number of things that may be said about this argument.

First, it is questionable whether this policy rationale for the rule is really consistent with the compensatory justification advanced in *Latoudis*. The idea of deterrence arguably implies punishment, whereas the High Court in *Latoudis* specifically stated costs were not intended to punish, but to compensate.<sup>22</sup>

Second, it is questionable whether the cases forming the theoretical flood actually exist. This has not been the experience of the United States. Despite generally applying a 'no costs' rule, it has not suffered from a flood of litigation since broadening its standing rules for environmental cases.<sup>23</sup> Similarly, the broad standing provisions of the New South Wales Land and Environment Court express acknowledgement that whether the proceedings were brought in public interest is relevant to the question of costs<sup>24</sup> and the willingness of that court to decline to apply the ordinary rule in appropriate cases does not appear to have created a flood of litigation.<sup>25</sup> Deane J supports this by describing such an argument as '[u]nreal', in part because it 'assumes the existence of a shoal of officious busybodies agitatedly waiting, behind the "flood-gates", for the opportunity to institute costly litigation in which they have no legitimate interest'.<sup>26</sup>

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18 Ibid [5.10].

19 This passage has been quoted many times in many places, including the first instance judgment by Stein J in *Oshlack* (1994) 82 LGERA 236 and the Australian Law Reform Commission's report on costs, *Costs Shifting – who pays for litigation?* Report 75 (1995) [13.9].

20 Environmental Justice Project, *Environmental Justice* (2004), [68]. Available at <http://www.ukela.org/content/doclib/116.pdf> on 21 March 2009.

21 Federal Court judges are empowered to make costs orders at any stage in proceedings: r 62.3(1), *Federal Court Rules*. As far as we are aware, however, that power has not been exercised except in respect of certain interlocutory proceedings and the small class of cases in which a 'private fund' (such as a trust fund or a deceased) is available.

22 The position may be somewhat different in relation to indemnity costs, but even there some judges have stated that such costs are not awarded to punish or deter: see, e.g. *Rotel Co Ltd v Panasales Clearance Centre (Australasia) Pty Ltd (No. 2)* [2008] FCA 629, [3].

23 See Orlando Delogu, 'Citizen Suits to Protect the Environment: the US Experience may suggest a Canadian Model' (1992) 41 *University of New Brunswick Law Journal* 124, 128.

24 Rule 4.2 of the Land and Environment Court Rules 2007.

25 See Justice Paul Stein, Down Under Perspective of the Environmental Court Project (Speech delivered to the UK Environmental Law Association Seminar on the Final Report of the Environmental Court Project, London, 27 June 2000).

26 *Phelps v Western Mining Corporation and Ors.* (1978) 33 FLR 327, 334.

Third, assuming costs do deter unmeritorious cases, it is not clear that they deter unmeritorious cases with any greater frequency than they deter meritorious cases. Costs rule do not operate with any nuance. As McHugh J frankly conceded in *Latoudis*,<sup>27</sup> a person who acts entirely reasonably in bringing a case, but loses through no fault of their own, will still have to bear the costs of the other party. As such, the costs rule is likely to deter not only those cases which genuinely are unmeritorious, but any litigation in which there is significant uncertainty about the outcome. This deterrent effect is likely to be particularly pronounced in public interest litigation, where uncertainty over the outcome of the litigation is exacerbated by the lack of any compensating financial or property interest in that outcome.<sup>28</sup>

If the goal is to prevent unmeritorious cases going to trial, it seems probable that better results could be achieved more fairly through some other mechanism, such as early neutral evaluation, where a third party provides a preliminary advice on the merits of the case.<sup>29</sup> Indeed, one advantage of the approach to public interest costs proposed in this paper, which involves a preliminary consideration of the merits of a case in determining whether the litigation should be entitled to costs protection, is that it may result in non-viable cases being withdrawn before either side has incurred the costs of a full trial.

Even if no new mechanism is introduced, courts still have a wide variety of procedural powers that enable them to dispose of unmeritorious litigation in a timely fashion.

We consider that, far from supporting the continued use of existing costs rules, the ‘floodgates’ argument tends to demonstrate precisely what is wrong with them.

## The *Oshlack* Approach: public interest and something more

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One of the recognised common law bases for not following the ordinary rule is where the litigation is brought in the public interest and there is some additional element justifying departure from the rule. The leading decision on this is *Oshlack v Richmond River Council (Oshlack)*.<sup>30</sup>

The case is significant for its acceptance by a majority of the High Court that the public interest character of a proceeding is relevant in determining what costs order should be made. Although the reasoning in *Oshlack* relies on the specific legislative context of the case, it has been applied outside that context in a number of cases.<sup>31</sup> In these cases the court will typically make a ‘no costs’ order, meaning that each side will only pay its own costs.

*Oshlack* was an appeal from the decision of Stein J in the NSW Land and Environment Court. The applicant, Mr Oshlack, sued Richmond River Council and Iron Gates Developments Pty Ltd, alleging they had breached the *Environmental Planning and Assessment Act 1979* (NSW). He was unsuccessful and the defendants sought their costs. At that time, s 69(2) of the *Land and Environment Court Act 1979* (NSW) provided:

Subject to the rules and subject to any other Act:

- (a) costs are in the discretion of the Court;
- (b) the Court may determine by whom and to what extent costs are to be paid; and
- (c) the Court may order costs to be taxed or otherwise ascertained on a party and party basis or on any other basis.

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<sup>27</sup> *Latoudis v Casey* (1990) 170 CLR 534, 566–567.

<sup>28</sup> The Australian Law Reform Commission commented that ‘[s]ubmissions to the Commission indicate that the [ordinary costs] rule is most likely to deter ... people or organisations involved in public interest litigation who have little or no personal interest in the matter.’ Australian Law Reform Commission, *Who should pay? A review of the litigation costs rules*, Issues Paper 13 (1994) [4.14]. See also Chris Tollefson, Darlene Gilliland and Jerry DeMarco, ‘Towards a Costs Jurisprudence in Public Interest Litigation’ (2004) 83 *Canadian Bar Review* 474, 485, quoting the 1974 Report of the Ontario Task Force on Legal Aid, which notes the ordinary costs rule ‘operates unequally as a deterrent ... [particularly] against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual private interest at stake.’

<sup>29</sup> Such a program is currently being trialled in the Supreme Court of Victoria, Commercial Court List. See *Notice to the Profession 10/2009 – Early Neutral Evaluation: Pilot Process*. Available at <http://tiny.cc/LNM3V> on 21 September 2009.

<sup>30</sup> (1998) 193 CLR 72.

<sup>31</sup> See, e.g., *Ruddock v Vardalis* (2001) 115 FCR 229.

Stein J made no order to costs. The council appealed to the NSW Court of Appeal who upheld the appeal. Mr Oshlack then appealed to the High Court. A majority of the High Court (Gaudron, Gummow and Kirby JJ, Brennan CJ and McHugh J dissenting) ruled that Stein J's decision had been incorrectly overturned on appeal.

Gaudron and Gummow JJ did not consider whether the litigation in question was in the public interest,<sup>32</sup> instead considering the narrower question of whether Stein J's discretion had miscarried. Moreover, they adopted a highly deferential standard in doing so.<sup>33</sup> They found his Honour had not taken into account anything that was definitely irrelevant to any objects that Parliament could have had in mind in enacting the legislation. They noted, however, that the public interest character of proceedings 'is not, of itself, enough to constitute special circumstances warranting departure from the "usual rule"; something more is required.'<sup>34</sup>

Kirby J took essentially the same approach, but was more vigorous in his conclusions. Two factors appear to have been important in his decision: first, the legislative context of the Land and Environment Court Act, and, second, the public interest nature of the litigation.

As to the legislative context of the Act, Kirby J noted the type of litigation that occurred in the Land and Environment Court was different from ordinary civil litigation and that this 'alters, to some extent, the assumptions on which litigation in this country has hitherto, ordinarily, taken place.'<sup>35</sup>

Apart from the legislation, however, Kirby J considered the public interest nature of the litigation could properly be taken into account in exercising the discretion as to costs, particularly in light of s 123 of the *Environmental Planning and Assessment Act 1979*, which allowed any person to bring an action to restrain a breach of that Act.

His Honour accepted that public interest litigation was a somewhat nebulous concept, but observed that, in a variety of cases from various jurisdictions:

[A] discrete approach has been taken to costs in circumstances where courts have concluded that a litigant has properly brought proceedings to advance a legitimate public interest, has contributed to the proper understanding of the law in question and has involved no private gain. In such cases the costs incurred have occasionally been described as incidental to the proper exercise of public administration. Upon that basis it has been considered that they ought not to be wholly a burden on the particular litigant.<sup>36</sup>

For these reasons, Kirby J took the view that Stein J had not erred in his exercise of the costs discretion. Since its application in *Oshlack*, the principle that, in certain public interest cases, the applicants should not be required to pay costs appears to have become well accepted.

## Limitations on usefulness of the *Oshlack* Approach

The primary limitation on the usefulness of *Oshlack* to community groups is the uncertainty associated with its application. It is difficult for plaintiffs or lawyers to accurately predict which cases will be protected. As Kirby J himself stated in *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2)*,<sup>37</sup> a few weeks after the decision in *Oshlack*:

Nothing in the recent decision in *Oshlack v Richmond River Council* requires that every time an individual or body brings proceedings asserting a defence of the public interest and protection of the environment, a new costs regime is to apply exempting that individual or body from the conventional rule. To suggest that would be to misread what the court decided in *Oshlack*. It would require legislation to afford litigants such a special and privileged position so far as costs are concerned. No such general legislation has been enacted.

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32 (1998) 193 CLR 72, [30]–[31]. Their Honours did, however, refer to the case of *Liversidge v Sir John Anderson* [1942] AC 206, [42], apparently indicating that general public importance of a matter is a relevant factor in exercising the costs discretion.

33 *Ibid* [31] where their Honours referred to *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492.

34 *Ibid* [20].

35 *Ibid* [117].

36 *Ibid* [136].

37 (1998) 154 ALR 411, 412. See also *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411, 413.

In the absence of a general rule, various factors have been identified as providing the ‘something more’ necessary for *Oshlack* to apply in a particular case. For example, in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts*,<sup>38</sup> North J stated:

In *Oshlack v Richmond River Council*..., a majority of the High Court held that the usual rule could be displaced in public interest litigation in environmental cases if special circumstances were shown. Such special circumstances could include where the prime motivation of the applicant was in upholding the public interest and the rule of law, where the applicant had nothing personal to gain from the litigation, and where a significant number of members of the public shared the stance of the applicant.

The presence of some or all of these features, however, does not necessarily mean that the court hearing the matter will apply *Oshlack*. For example, in *Save the Ridge Inc v Commonwealth*,<sup>39</sup> the Full Court of the Federal Court appeared to accept that the case raised significant issues of statutory construction, that it was not brought for personal gain and that action was brought under the broad standing provisions of the EPBC Act. Nonetheless, the Full Court declined to make a ‘no costs’ order.

This point is also demonstrated by two cases from 2008. In the first *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* decision,<sup>40</sup> concerning the Port Philip channel deepening, Heerey J made a ‘no costs’ order, stating the case was a clear one for the application of *Oshlack* and identifying a number of relevant factors. In a later case on the same subject, North J awarded costs against Blue Wedges.<sup>41</sup> In doing so, his Honour quoted the passage for Heerey J’s judgment identifying the relevant factors, but ruled that the second application had not raised a significant question of statutory construction.<sup>42</sup> As such, although the parties to the action, the level of public feeling and the factual issues around the environmental impact of the channel deepening remained the same, an award of costs was made in one matter and not in the other.

Quite apart from the uncertainty of its application, *Oshlack* represents at best a partial solution to the problems raised by the common law rule. As noted above, the uncertainty associated with the common law rule is exacerbated by the fact that costs orders are generally not made until the end of proceedings. In failing to address this, *Oshlack* offers, at best, a partial solution to the problems of uncertainty associated with costs.

## Order 62A, Federal Court Rules

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Another alternative to the ordinary costs rule is found in Order 62A of the Federal Court Rules. Order 62A (O 62A) permits costs to be capped in certain circumstances. In commenting on O 62A, it should be noted that, since its introduction in 1992, fewer than ten reported decisions on its application have been made. Whether this accurately reflects its application in practice is open to question; since O 62A rule 1 provides that maximum costs orders are to be made at a directions hearing, they will be interlocutory decisions and often given without formal reasons.

### The purpose of the rule

The stated purpose of rule 1 of O 62A was to enhance access to justice for ‘particularly for persons of ordinary means’ who might be deterred from asserting or defending their rights for fear of exposure to legal costs if unsuccessful.<sup>43</sup>

It was anticipated that the rule would apply principally to ‘commercial litigation at the lower end of the scale in terms of complexity and the amount in dispute’.<sup>44</sup> Order 62A is not expressly confined to such cases, however. For example, in *Corcoran v Virgin Blue Airlines Ltd*,<sup>45</sup> the dispute was brought under the *Disability Discrimination Act 1992* (Cth).

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38 [2008] FCA 1106, [2].

39 (2006) 230 ALR 411.

40 (2008) 254 ALR 584, [73].

41 *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (No 2) [2008] FCA 1106, [15].

42 *Ibid* [5].

43 Letter dated 6 November 1991 from the Chief Justice of the Federal Court to the President of the Law Council of Australia, quoted in *Sacks v Permanent Trustee Australia Ltd* (1993)

45 FCR 509, 511.

44 *Ibid*.

45 [2008] FCA 864.

## Factors relevant to the making of an Order

The case law on O 62A identifies six factors as relevant to the decision to make an order. In order of simplicity, they are:

- > the existence of an arguable case;
- > the timing of the application for an order;
- > the applicant's personal interest in proceedings;
- > the fact that, in the absence of an order, the litigation may be discontinued;
- > the complexity of the dispute and the amount in dispute; and
- > public interest factors.

We discuss each in turn.

### Arguable case

Whether the applicant's claims are arguable is a factor to be considered.<sup>46</sup> Where the applicant does not have an arguable case, there is no reason to make an order.

### Timing

Rule 1 of O 62A requires that the application be made at a directions hearing. The time at which the application for an order is brought has been considered a relevant factor in whether to make an order.<sup>47</sup> It is preferable that applications be brought early in the litigation process.

### Applicant's personal interests

The absence of any personal financial reward has been considered a relevant factor.<sup>48</sup> On the other hand, though, the presence of a private interest on the part of the applicant does not of itself detract from any public interest element.<sup>49</sup>

### Applicant may discontinue litigation or will be inhibited from continuing if no order is made

The fact that an applicant may discontinue or be discouraged from continuing the litigation is a factor considered relevant by the Court.<sup>50</sup> The application of this factor is somewhat unclear. In *Corcoran*, Virgin argued it was necessary to show that the applicant would be 'forced' to discontinue the litigation in the absence of an order under O 62A.<sup>51</sup> Bennett J rejected this view, but also noted that Mr Corcoran 'is in no different a position from many applicants in the Court. He has sufficient assets to meet a costs order but is disinclined to put them at risk.'<sup>52</sup> As such, her Honour imposed a higher cap on Mr Corcoran than on his co-applicant.<sup>53</sup>

### Complexity and amount in dispute

The complexity of the issues has had varying significance in cases applying O 62A. In some cases, the degree of complexity has weighed heavily for or against the making of an order.<sup>54</sup> In others, however, complexity has not been taken into account<sup>55</sup> or, alternatively, it has been said that '[t]here is no reason why [O 62A] should not apply, in appropriate situations, to cases that are somewhat complex'.<sup>56</sup>

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46 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [54]; *Woodland v Permanent Trustee Company Ltd* (1995) 58 FCR 139, 148; *Flew v Mirvac Parking Pty Ltd* [2006] FMCA 1818.

47 *Ibid* [15]–[17]; see also *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 511.

48 *Ibid* [54].

49 *Ibid* [33].

50 *Woodland v Permanent Trustee Company Ltd* (1995) 58 FCR 139, 148; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

51 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [37]–[41].

52 *Ibid* [49]–[51].

53 *Ibid* [60]–[61].

54 *Hanisch v Strive Pty Ltd* (1997) 74 FCR 384; *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509;

*Dibb v Avco Financial Services* [2000] FCA 1785; *Maunchest Pty Ltd v Bickford* [1993] FCA 318.

55 In *Woodland v Permanent Trustee Company Ltd* (1995) 58 FCR 139, Wilcox J did not address issues of complexity or amount at all, but rather made an order emphasising the public interest aspect, the financial position of the applicants, the importance of the preliminary issues and the disadvantages if fear of exposure were to prevent seriously arguable group proceedings being advanced.

56 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [53].

In *Hanisch v Strive Pty Ltd*,<sup>57</sup> Drummond J considered that the less complex nature of the issues and the recovery of moderate amounts of money (less than \$200,000) were ‘powerful factors’ justifying an order under O 62A and his Honour made an order limiting costs on that basis.<sup>58</sup>

In *Sacks v Permanent Trustee Australia Ltd*,<sup>59</sup> Beazley J declined to cap costs on the basis that the case involved issues of some complexity and, because the applicant ‘elected to pursue’ a particular course which led to this complexity, the applicant ‘ought, if unsuccessful, be prepared to bear such costs as may be incurred as a result.’ In *Dibb v Avco Financial Services*,<sup>60</sup> Sackville J similarly declined to make an order under O 62A on the basis that the applicant ‘framed his case in such a way that a large number of factual and legal issues [were] likely to arise’.

In *Maunchest Pty Ltd v Bickford*,<sup>61</sup> the disputed amount was a sum considerably less than \$20,000 and, on that basis, Drummond J made an order limiting costs to \$5,000 on a party–party basis.

## Public interest

Public interest has underpinned O 62A orders in two cases,<sup>62</sup> has been identified as a potentially relevant factor in one other case,<sup>63</sup> and has been noted as a factor which was relevant to an order under O 62A but not applicable in the particular circumstances.<sup>64</sup> It is clear from the case law that something more than public interest alone is required.<sup>65</sup>

Wilcox J in *Woodland* ordered that costs be capped under O 62A and, while the public interest element was not ‘decisive’, it was of ‘some significance’.<sup>66</sup> The proceedings (there were three) involved claims by a large number of people (as representative and private proceedings) who obtained ‘Home Fund’ loans as part of a scheme created by the New South Wales government to provide home finance for persons who would not satisfy the criteria of ordinary lending institutions. His Honour considered that the number of people affected, the potential benefit to thousands of people of limited means if the litigation were successful, and the importance of the legal issues raised were all components of the public interest aspect.

As noted above, *Corcoran v Virgin Blue Airlines Pty Ltd*<sup>67</sup> involved a claim that the airline discriminated against the applicants in implementing and applying a set of travel criteria. Passengers who were unable to carry out certain actions independently were considered not to have met the travel criteria and were required to travel with a carer to enable compliance. Justice Bennett ordered that costs be capped on the basis that there was public interest in the determination of the issues as well as the presence of additional factors.<sup>68</sup> Her Honour considered that the principles identified by Gaudron, Gummow and McHugh JJ in *Oshlack v Richmond River Council*<sup>69</sup> also apply in making an order under O 62A, namely, that in making a costs order a court may take into account that a

significant number of members of the public may be affected and that the basis of the challenge is arguable and raises “significant issues” as to the interpretation and application of statutory provisions

In this case, similarly to in *Woodland*, the existence of a public interest element was recognised as a factor of ‘some significance’ without being ‘necessarily decisive’.<sup>70</sup>

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57 (1997) 74 FCR 384.

58 Ibid [388].

59 (1993) 45 FCR 509.

60 [2000] FCA 1785.

61 [1993] FCA 318.

62 *Woodland v Permanent Trustee Company Ltd* (1995) 58 FCR 139; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

63 *Muller v Human Rights & Equal Opportunity Commission* [1997] FCA 634.

64 *Dibb v Avco Financial Services* [2000] FCA 1785, [16]; *Flew v Mirvac Parking Pty Ltd* [2006] FMCA 1818, [47]. *Flew* was a decision of the Federal Magistrates Court concerning Rule 21.03 of the Federal Magistrates Court Rules which provides that “[t]he Court may specify the maximum costs that may be recovered on a party and party basis.” Barnes FM referred to Federal Court cases on O 62A to guide in the application of Rules 21.03.

65 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [10].

66 Ibid 148. Other factors relevant to his Honour’s decision included the arguability of the case and the likelihood of deterrence if such an order was not made.

67 [2008] FCA 864.

68 Ibid [54].

69 (1998) 193 CLR 72.

70 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [45]. Bennett J stated that while the factors in this case were finely balanced, there were factors additional to public interest and the arguability of the case which persuaded her Honour to make an order. These factors included the timing of the application, the absence of financial reward, the possibility that the applicants may discontinue the litigation and that the applicants abandoned a number of claims to reduce the costs and complexity of the case.

In *Muller v Human Rights & Equal Opportunity Commission*,<sup>71</sup> Moore J recognised that there was a public interest element in the case, but declined to make an order under O 62A on the basis that the order sought was a one-way order. The proceeding was an application by the Commonwealth for judicial review of a decision of the Human Rights & Equal Opportunity Commission which had held that Mr Muller had been denied allowances payable to officers of the Department of Foreign Affairs and Trade, that that denial was based on Mr Muller's sexual preference, and that this constituted discrimination in employment based on sexual preference. When addressing a separate legal issue in the same judgment (the question of whether to consolidate two proceedings) Moore J stated that the 'proceedings raise[d] issues of some importance concerning the construction of the Commonwealth legislation' and that there was public interest in their determination.

## Limitations on Order 62A

The Court has consistently held that there is no power under O 62A to make an order specifying maximum costs which may be recovered by only one party.<sup>72</sup> One-way costs orders have been sought by litigants, but declined on this basis.<sup>73</sup>

Where an order is made under O 62A unequal exposure to costs can only occur by reason of the operation of rule 2.<sup>74</sup> Rule 2 specifies that a maximum amount under rule 1 will not include any amount that a party is ordered to pay because the party failed to comply with any order or with the Federal Court Rules, sought to amend its pleadings or particulars, sought an extension of time for complying with orders or the Rules, or otherwise caused any party to incur costs that were not necessary for the economic and efficient progress of the matter. In *Maunchest Pty Ltd v Bickford*,<sup>75</sup> Drummond J held that costs were set at a maximum of \$5,000, but further ordered that the applicant pay the costs of that day (as far as it related to directions) as a consequence of the applicant's conduct.

## Alternative approaches to public interest costs

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### Introduction

In considering how to address the issues associated with costs in public interest litigation under the EPBC Act, it is useful to look at how other jurisdictions have approached the same issues. In this section, we look at the approaches of Queensland, England and Wales,<sup>76</sup> Canada and South Africa.

As common law jurisdictions, each has the ordinary rule as their starting point for the award of costs. All of them, however, have taken some steps to make it easier for litigants to bring public interest claims.

### The *Judicial Review Act 1991*: Queensland

Under s 49 of the *Judicial Review Act 1991*, the Queensland Supreme Court may, on application by a party, order that:

- > another party indemnify the applicant for the reasonable costs of the proceedings incurred following the application; or
- > the applicant bear only its own costs in the proceedings, regardless of the outcome.

Any party to the proceedings may apply, other than the party whose decision, failure to make a decision or conduct engaged in for the purpose of making a decision is under review. Section 49(2) prescribes a number of factors to be taken into consideration. The prevailing view seems to be that these factors are not exhaustive.<sup>77</sup>

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<sup>71</sup> [1997] FCA 634.

<sup>72</sup> *Maunchest Pty Ltd v Bickford* [1993] FCA 318; *Hanisch v Strive* (1997) 74 FCR 384, 390; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864; *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 513; *Muller v Human Rights & Equal Opportunity Commission* [1997] FCA 634.

<sup>73</sup> See e.g. *Maunchest Pty Ltd v Bickford* [1993] FCA 318, [14]; *Hanisch v Strive* (1997) 74 FCR 384, 389; *Woodland v Permanent Trustee Company Ltd* (1995) 58 FCR 139, 148.

<sup>74</sup> *Maunchest Pty Ltd v Bickford* [1993] FCA 318, [14].

<sup>75</sup> *Ibid.*

<sup>76</sup> Scotland retains a largely separate legal system from England and Wales, which is essentially an uncodified civil law system. Only at the highest level, the House of Lords, do the two systems share a unified judicial system.

<sup>77</sup> See *Sharples v Council of the Queensland Law Society Inc* [2000] QSC 392, [21]–[26] and cases cited there.

Section 49 has been applied in a number of cases. In *Commissioner of Police Service v Cornack*,<sup>78</sup> the second respondent, Dunk, sought protection under 49(2)(d) which was granted by the Queensland Court of Appeal ‘as the matter was brought before the court as one of general public importance, and the second respondent has filed by leave an affidavit deposing to his having very limited resources’.

The jurisprudence suggests that the existence of public interest factors in litigation is not necessary to the making of an order under s 49. In *Anghel v Minister for Transport (No. 2)*,<sup>79</sup> the Court of Appeal found that the applicants were

understandably aggrieved at bearing what they see as a disproportionate share of the burden imposed by a public project; but it remains true to say that it was their rights of property and personal convenience and not the public interest they were intent on protecting when they made the review application.<sup>80</sup>

Nevertheless, the Court did make a ‘no costs’ order under s 49. The motivation for the application for judicial review is a factor that has been taken into account in deciding applications under s 49,<sup>81</sup> however. In *Cairns Port Authority v Albiez*,<sup>82</sup> Thomas J said:

An obvious example calling for the exercise of this particular power is the case of an impecunious applicant who applies for an indemnity at an early stage of proceedings in which a public authority may obtain the benefit of a test ruling or clarification of some point of practice or of public importance.<sup>83</sup>

Perhaps the most interesting aspect of the case law on s 49 is that it seems to have produced a shift in judicial attitudes towards the award of costs, at least in judicial review cases. While the case law in the other jurisdictions considered in this paper frequently refers to the extraordinary character of public interest costs orders, the Queensland jurisprudence does not do so.<sup>84</sup> This attitudinal shift appeared to be acknowledged by the Court of Appeal in *Albeitz*, where Thomas J stated it would ‘often’ be appropriate to exercise the discretion granted by s 49:

Too rigid an application of the “loser pays all” approach might adversely impact upon the effectiveness of judicial review as a remedy. Bearing in mind the nature of the litigation, the extent to which there is a public aspect in the proceedings, and the potential oppression of multiple costs orders, it will often be the case that limitation of costs which an unsuccessful party has to pay will be an appropriate exercise of the very wide discretion entrusted to the courts. Such an approach is by no means new in cases where matters affecting the public interest are ventilated.<sup>85</sup>

That said, orders under s 49 have only been sought in a ‘handful’<sup>86</sup> of cases since the law was passed. As such, it is important not to overstate the impact of the section.

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78 [2004] 1 Qd R 627, 641–2.

79 [1995] 2 Qd R 454.

80 *Ibid* 460.

81 *Ibid* 461.

82 [1995] 2 Qd R 470.

83 *Ibid* 475.

84 Searches for the terms ‘extraordinary’ or ‘rare’ in the decided cases on s 49 do not produce any results. A search for the term ‘unusual’ produces one case, *Ford v Legal Aid Commission (Qld)* (Unreported, QSC, Ambrose J, 16 May 1997), but the description is directed to the particular facts of the case, rather than the application for costs.

85 *Cairns Port Authority v Albiez* [1995] 2 Qd R 470, 476.

86 Chris McGrath, ‘Flying foxes, dams and whales: Using federal environmental laws in the public interest’ (2008) 25(5) *Environment and Planning Law Journal*, 324, 350.



## Protective costs orders: England and Wales

In a series of judgments in the late 1990s and early 2000s, the courts of England and Wales developed ‘protective costs orders’ (PCO) in public interest matters. In *R (Corner House) v Secretary of State for Trade and Industry*,<sup>87</sup> the Court of Appeal stated that the purpose of these orders is to

enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all.<sup>88</sup>

The judgment in *Corner House* provides a helpful summary of the English jurisprudence on costs in public interest matters. In his judgment Lord Phillips MR:

- > stated the test for whether a PCO should be granted;
- > identified a number of kinds of PCOs that could be made; and
- > discussed some of the restrictions that arise from the grant of a PCO.

### The test for the grant of a PCO

In *Corner House*, Lord Phillips identified five conditions that must be satisfied before a PCO could be granted:

- > The issues raised by the case must be of general public importance.
- > The public interest must require that those issues should be resolved.
- > The applicant must have no private interest in the outcome of the case.
- > It must be fair and just to make the order, taking into account the relative financial positions of the applicant and defendant and the amount of costs likely to be involved.
- > It must be probable that the applicant, acting reasonably, will discontinue the proceedings if a PCO is not made.<sup>89</sup>

His Lordship added that the fact that a party was being represented *pro bono* was ‘likely to enhance the merits of the application for a PCO’.<sup>90</sup> He stated that the ultimate question for the court was ‘whether it is fair and just to make the order in the light of the considerations set out above’.

It may be observed that the considerations identified by the Court of Appeal in *Corner House* overlap with those identified in the jurisprudence on O 62A of the Federal Court Rules.

### The private interest factor

The issue of whether an applicant’s private interest in the outcome of the case should necessarily be decisive has been debated. Although *Corner House* suggests that it is, it has been criticised on this basis and not followed in some cases. For example, in *Wilkinson v Kitzinger*,<sup>91</sup> a case concerning the recognition in the UK of a marriage between two women which had taken place in Canada, Sir Mark Potter P stated:

I find the requirement that the applicant should have “no private interest in the outcome” a somewhat elusive concept to apply in any case in which the applicant, either in private or public law proceedings is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest. In such a case, it is difficult to see why, if a PCO is otherwise appropriate, the existence of the applicant’s private or personal interest should disqualify him or her from the benefit of such an order. I consider that, the nature and extent of the “private interest” and its weight or importance in the overall context should be treated as a flexible element in the court’s consideration of the question whether it is fair and just to make the order.<sup>92</sup>

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87 [2005] 1 WLR 2600.

88 *Ibid* [76].

89 *Ibid* [74].

90 *Ibid*.

91 [2006] EWHC 835 (Fam).

92 *Ibid* [54].

In the recent case of *R (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust*,<sup>93</sup> Lloyd-Jones J, citing *Wilkinson v Kitzinger*, referred to the 'no private interest' requirement as having been 'diluted'.<sup>94</sup> This assertion was approved by the Court of Appeal in *R (on the application of Compton) v Wiltshire Primary Care Trust*,<sup>95</sup> suggesting that the requirement of *Corner House* that the applicant have 'no' private interest may no longer be good law.

## Forms of PCO

In *Corner House*,<sup>96</sup> the Court of Appeal identified a number of forms of PCO that could be made:<sup>97</sup>

- > Where a PCO prescribed in advance that there would be a 'no costs' order at the conclusion of the trial.
- > Where a PCO allowed a claimant to recover in full if they were successful, but capped their costs if they were unsuccessful.
- > Where a PCO allowed a claimant to recover in full if they were successful, but provided that there should be no order to costs if they were unsuccessful.

The Court also referred to a fourth situation, identical to the third except that the claimant's solicitors were employed on a no-win, no-fee basis (with a corresponding 'uplift' in the costs payable if the claimant was successful). It does not appear that the list given by the Court of Appeal is exhaustive.<sup>98</sup>

## Procedure

The Court made a number of observations about the process for obtaining a PCO. In the ordinary case, the application for a PCO should be contained in the documents commencing the claim.<sup>99</sup> The claimant would be liable for the costs of the application for the PCO and, if the application was refused, the costs of the defendant.<sup>100</sup>

## Restrictions imposed by PCO

The Court of Appeal made some important observations about the purpose and scope of PCOs:

- i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a [party funded by a conditional fee agreement] is concerned, of any additional liability;<sup>101</sup>
- ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.
- iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act *pro bono*) accordingly.<sup>102</sup>

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93 [2007] EWHC (Admin) 1350.

94 *Ibid* [19].

95 [2008] C.P. Rep. 36, [23].

96 [2005] 1 WLR 2600.

97 *Ibid* [75].

98 In the judgment, Lord Philips MR observed that there was room for 'considerable variation' in the terms of PCOs: *ibid* [76].

99 *Ibid* [78].

100 *Ibid*. As to defendant costs, the Court stated '[w]e would not normally expect a defendant to be able to demonstrate that proportionate costs exceeded £1,000', although the Court recognised some room for variation depending on the number of parties involved and whether a hearing was necessary.

101 In England and Wales, as elsewhere, conditional fee agreements commonly charge a premium where the litigation is successful. That premium is, of course, borne by unsuccessful party.

102 *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, [26].

These remarks have been the subject of some criticism, in particular the Court's comments on the extent of the costs available under a capping order. In *Litigating the Public Interest*, Liberty commented that some members of the Working Group on Facilitating Public Interest Litigation thought that both parties were entitled to equally high quality representation on the basis that the public interest required the matter to be properly ventilated.<sup>103</sup> This view has been repeated by the Public Law Project.<sup>104</sup> The counterargument is that lawyers are likely to take on public interest matters pro bono in any event, so restrictions on fees are an acceptable trade-off.<sup>105</sup>

## Recent developments in the law of PCOs

In recent months, there have been signs that the courts are prepared to take a more flexible and relaxed approach to the grant of PCOs. In two cases, *R (on the application of Compton) v Wiltshire Primary Care Trust*<sup>106</sup> and *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp*,<sup>107</sup> the English Court of Appeal has made comments that suggest that PCOs are likely to become more common in future.

In *Compton*,<sup>108</sup> Waller LJ (with whom Smith LJ agreed) referred to the Report of the Working Group on Public Interest Litigation, chaired by Maurice Kay LJ, which suggested that the first two criteria in *Corner House* should be given a 'broad purposive' interpretation in order to promote access to justice.<sup>109</sup> His Lordship also referred to the 2008 Report of the Working Group on Access to Environmental Justice, chaired by Sullivan J, which questioned whether a restrictive approach to PCOs was consistent with the UK's international obligations under the UNECE Aarhus Convention.<sup>110</sup> Waller LJ stated that '[t]he paragraphs in *Corner House* are not, in my view, to be read as statutory provisions, nor to be read in an over-restrictive way.'<sup>111</sup> In her concurring judgment, Smith LJ emphasised that different public interest costs orders may be appropriate to different cases:

It seems to me as a matter of common sense, justice and proportionality that when exercising his discretion as to whether to make an order and if so what order, the judge should take account of the fullness of the extent to which the applicant has satisfied the five *Corner House* requirements. Where the issues to be raised are of the first rank of general public importance and there are compelling public interest reasons for them to be resolved, it may well be appropriate for the judge to make the strongest of orders, if the financial circumstances of the parties warrant it. But where the issues are of a lower order of general public importance and/or the public interest in resolution is less than compelling, a more modest order may still be open to the judge and a proportionate response to the circumstances.<sup>112</sup>

The majority judgments in *Compton*, and the broader approach they seem to signal, was unanimously approved by the Court of Appeal in *Buglife*.<sup>113</sup> Additionally, the Court of Appeal ruled that

there should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount. As just stated, the amount of any cap on the defendant's liability for the claimant's costs will depend upon all the circumstances of the case.<sup>114</sup>

In both cases, the Court of Appeal noted that although *Corner House* referred to PCOs as 'extraordinary', there was no additional requirement that a case be 'extraordinary' in addition to satisfying the five criteria in *Corner House*. As such, it appears that PCOs are likely to become more common in England and Wales.<sup>115</sup>

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103 Liberty (UK), *Litigating the Public Interest* (2006) [93]–[94].

104 Public Law Project, *Judicial Review Costs Case Note: Protective Costs Orders in Judicial Review Proceedings* (2005) 3–4

105 Liberty (UK), *Litigating the Public Interest* (2006) [95].

106 [2008] C.P. Rep. 36.

107 [2009] C.P. Rep. 8.

108 [2008] C.P. Rep. 36.

109 *ibid* [18].

110 *ibid* [19].

111 *ibid* [23]. His Lordship referred to *R (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWHC (Admin) 1350 as supporting such an approach.

112 *ibid* [87].

113 [2009] C.P. Rep. 8.

114 *ibid* [27].

115 See further Adrian Zuckerman, 'Protective Costs Orders – A Growing Cost-Litigation Industry' (2009) 28 (2) *Civil Procedure Quarterly* 161 and Aileen McColgan, 'Limiting the Costs of Litigation – Protection Costs Orders in the Court of Appeal' (2009) 28(2) *Civil Procedure Quarterly* 169.

## Interim costs awards: Canada

The Canadian legal system follows the same basic principle as the Australian and English legal systems, i.e. costs follow the event. In terms of its public interest costs jurisprudence, Canada has arguably gone even further than England.

In *British Columbia (Minister of Forests) v Okanagan Indian Band*,<sup>116</sup> the Supreme Court of Canada made a costs order in favour of the Okanagan Indians prior to hearing the substantive issues. That is, the Court ordered that, regardless of the outcome of the substantive proceedings, the Minister would be responsible for the costs of the Indian Band. LeBel J, giving the judgment of the majority of the Court, set out a three-point test for the award of such an order:

The criteria that must be present to justify an award of interim costs in this kind of case are as follows:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.<sup>117</sup>

LeBel J noted these criteria were necessary to the grant of an interim costs order, but not sufficient. The court hearing the matter retained a discretion to decide to decline to make an order. His Honour noted it was important to not unfairly burden the defendants.<sup>118</sup> He also emphasised the special character of such awards.<sup>119</sup>

Consistent with this emphasis, Tollefson found that in the three years following *Okanagan*, there were six applications for interim costs awards, four of which were refused.<sup>120</sup>

In 2006, the Supreme Court of Canada reconsidered the matter of interim costs awards in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*.<sup>121</sup> In that case, the Court declined to make an interim costs order, re-emphasising the special character of such awards. The Court stated that such an order should only be made as a last resort.<sup>122</sup>

## Problems with current Australian approaches

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The principal problem with the ‘costs follow the event’ rule is one of uncertainty. It is difficult for a litigant commencing proceedings to know whether they will have to pay costs at the end of the litigation and, if so, in what amount. This makes it essentially impossible for parties to budget for litigation. This uncertainty acts as a disincentive to engage in litigation, regardless of its merits. This is particularly true of public interest litigants, who are often poorly resourced and typically will not receive any financial benefit from successful proceedings.

As an approach to public interest litigation, *Oshlack* does nothing to address this uncertainty. Although *Oshlack* permits the making of a ‘no costs’ order in public interest cases, its application is sufficiently uncertain that a public interest litigant cannot rely on it for protection. The fact that decisions on the application of *Oshlack* are generally made at the end of the substantive proceedings prevents any attempt to use *Oshlack* to control costs.

By contrast, O 62A goes a long way to addressing the problem raised by the ordinary rule. Utilised early in the proceedings, an order under O 62A allows litigants to control their exposure to adverse costs and to make informed decisions about whether to proceed with litigation.

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<sup>116</sup> [2003] SCC 71.

<sup>117</sup> *Ibid* [40].

<sup>118</sup> *Ibid* [41].

<sup>119</sup> *Ibid* [38].

<sup>120</sup> Chris Tollefson, ‘Cost and the Public Interest Litigant: Okanagan Indian Band and Beyond’ (2006) 19 *Canadian Journal of Administrative Law and Practice* 39.

<sup>121</sup> [2007] SCC 2.

<sup>122</sup> *Ibid* [35]–[36].

Order 62A raises two significant issues, however. First, the Federal Court has held that O 62A only permits the making of two-way cost-capping orders. While it will usually be appropriate to cap costs on both sides, the English experience suggests that there are cases where the proper course is to only cap costs on one side.

Second, O 62A is only a permissive statutory rule. Statutory rules do not have the force of legislation and cannot ‘fetter’ the trial judge’s discretion as to costs. As such, modification of O 62A is not a viable means to bring significant change to the law of costs.

A second problem with the *Oshlack* and O 62A approaches, touched on briefly above, is a lack of flexibility. Both approaches permit the making of only one kind of order each, either a ‘no costs’ order or a two-way costs-capping order. The effect of this is to artificially separate cases into only two kinds of cases: public interest cases and non-public interest cases.

In our view, and consistent with Queensland and recent English jurisprudence,<sup>123</sup> however, the public interest status of a case is a question of degree, rather than black or white proposition. At one end of the scale may be cases such as *Ruddock v Vardalis*<sup>124</sup> that impact on the prerogative powers available to the Federal government. On the other end are cases of more localised importance, such as *Engadine Area Traffic Action Group Inc. v Sutherland Shire Council*,<sup>125</sup> relating to the use that may be made by a council of money given to the council in return for a development consent. Limiting the kind of public interest costs orders that can be made means that, generally speaking, courts will only award public interest costs awards in the clearest cases.<sup>126</sup> By contrast, if a court is permitted to make various different kinds of orders, then the kind of order made can be tailored to the circumstances of the case and, as such, courts may be more prepared to make public interest costs orders in cases that have a public interest component.<sup>127</sup>

## Rules versus principles

Before discussing our proposals in greater detail, it is worth saying something about the issue of rules versus principles—that is, whether legislation and other statutory instruments granting discretion to decision-makers should be written in terms of clear-cut rules or guiding principles. This question has been extensively discussed in academic literature.<sup>128</sup> Rules are generally thought to be more efficient, because their clarity promotes certainty. The downside is that such clarity comes at the expense of flexibility, meaning that rules may work an injustice in new or unusual cases. By contrast, discretion allows for flexibility and the ability to adjust to new circumstances, but is more unpredictable for parties.

Currently, costs orders are discretionary, guided, but not constrained, by principles of general application. Advocates of such an approach argue that the costs discretion gives much needed flexibility to tailor the costs order to the justice of the case.

In its costs reference, the Australian Law Reform Commission considered these arguments, but ultimately rejected them. The Commission concluded that, because of the uncertainties associated with the costs discretion, it was preferable to move to a system of cost allocation rules, in spite of any resulting loss in flexibility.<sup>129</sup>

Our proposed mechanism adopts a similar view to the Commission. Uncertainty is the major problem with the current common law costs discretion. As such, the mechanism is designed to give applicants certainty about whether their proceedings are in the public interest, by permitting them to apply for and receive a decision on whether their proceedings are ‘public interest proceedings’.

At the same time, a secondary problem with the *Oshlack* and O 62A approaches to public interest costs is the inflexibility of the costs order that may be made under those rules and the exclusionary impact of this inflexibility on cases which are not clearly in the public interest. To address this problem, the Commission proposes that the mechanism would not require courts to make any particular public interest costs order, but simply prohibit them from ordering that costs follow the event in ‘public interest proceedings’. As such, courts could take a nuanced approach to public interest costs orders, moulding them to fit the circumstances of the case and preserving much of the flexibility of the original common law costs discretion.

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123 *Anghel v Minister of Transport (No. 2)* [1995] 2 Qd R 454; *Cairns Port Authority v Albiez* [1995] 2 Qd R 460; *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] C.P. Rep. 36, [86]–[87]; *R (on the application of Buglife: The Conservation Invertebrate Trust) v Thurrock Thames Gateway Development Corp* [2009] C.P. Rep. 8, [22]–[23].

124 [2001] 115 FCR 229.

125 [2004] 134 LGERA 75. In that case, a ‘no costs’ order was ultimately made: *Engadine Area Traffic Action Group Inc. v Sutherland Shire Council (No. 2)* (2004) 136 LGERA 365.

126 For example, in *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411, 415, the Full Court of the Federal Court stated that the application did not ‘raise questions of the same nature as *Ruddock v Vardalis*’. In our view, such a comparison sets the bar too high. Very few cases will be of the same calibre as *Ruddock v Vardalis*. Arguably, *Oshlack* did not do so.

127 See the comment of Smith LJ in *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] C.P. Rep. 36, [86]–[87].

128 See, e.g. Colin S. Diver, ‘The Optimal Precision of Administrative Rules’ (1983) 93 *Yale Law Journal* 65.

129 Australian Law Reform Commission, *Costs Shifting – Who pays for litigation*, Report 75 (1995) [2.14]–[2.17].

## Recommendations for a framework response

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We consider that an ideal response to the problem of uncertainty discussed, and to the limitations of *Oshlack* and O 62A above, has three core elements:

- > a mechanism permitting applicants to apply to the court for a decision on whether their proceedings are ‘public interest proceedings’ at any stage of those proceedings.
- > if proceedings are declared to be public interest proceedings, then the court hearing the application should be prohibited from ordering that costs follow the event. Instead, they should be required to make some form of public interest costs order (i.e. a ‘no costs’ order, a capped costs order, a one-way cost-shifting order or an indemnity). This order must be made at the same time as the ruling on whether proceedings are public interest proceedings.
- > clarification in the relevant legislation of what ‘public interest proceedings’ are, and whether a public interest costs order should apply.

### A public interest mechanism

As noted above, litigants typically do not know until the end of the trial whether their proceedings are in the public interest, leaving their costs exposure uncertain. By allowing applicants for judicial review or in enforcement proceedings to seek a decision on the level of their costs exposure, litigants could know early in the piece whether they were at risk of paying the other party’s costs and, hence, to make an informed decision about how to proceed.

There are two legislative costs control mechanisms in Australia: Order 62A of the *Federal Court Rules* and Rule 42.4 of the *Civil Procedure Rules 2005 (NSW)*, discussed above, which permits the court to make an order for maximum costs and s 49 of the *Judicial Review Act 1991 (Qld)*. Section 49 allows a party to judicial review proceedings, other than the person whose decision is under review, to apply for an order granting them a degree of costs protection (either a ‘no costs’ order or a costs indemnity from another party to the application). As such, this proposal is not unprecedented.

Empowering the Court to make public interest costs orders in the preliminary stage of proceedings was one of the recommendations contained in the Report of the Independent Review of the EPBC Act, completed in October 2009. In making this recommendation, the review noted that one of the fundamental weaknesses of the current EPBC Act is that parties have no way of knowing what costs they will have to pay until the conclusion of proceedings, which acts as a significant deterrent to bringing proceedings in the public interest.

Additionally, there is academic support for such a mechanism. In the Australian Law Reform Commission’s report, *Costs Shifting – who pays for litigation?*,<sup>130</sup> the Commission recommended the creation of a Federal public interest litigation costs statute that would govern the making of public interest costs orders in any case to which it applied. Enid Campbell also appeared to support some kind of public interest costs mechanism, but argued that ‘[t]he better approach... is to move for the incorporation of special costs regimes in particular statutes governing the exercise of particular jurisdictions.’<sup>131</sup> Given that this advice arises in the specific context of a review of the EPBC Act, we favour the approach suggested by Campbell. The ‘in principle’ support of the Australian Law Reform Commission for ‘public interest costs orders’ is significant, however.

### Proposal

**The EPBC Act should be amended to incorporate a mechanism to allow applicants in proceedings for judicial review of a decision under the Act to apply to the court at any time for a decision on whether a public interest costs order will be imposed.**

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<sup>130</sup> Ibid Ch. 13.

<sup>131</sup> Enid Campbell, ‘Public Interest Costs Orders’ (1998) 20 *Adelaide Law Review* 245, 257.

## The two-step mechanism

Our proposed mechanism to determine whether a public interest costs order should be imposed involves a two-step process.

1. An initial determination is made as to whether the proceedings are ‘public interest proceedings’.
2. A second determination is then made about what kind of public interest costs order will apply to the case.

If proceedings are declared to be public interest proceedings, then the court hearing the application should be prohibited from ordering that costs follow the event. Instead, they should be required to make some form of public interest costs order (i.e. a ‘no costs’ order, a capped costs order, a one-way cost-shifting order or an indemnity).

Although the process has been separated into two stages to assist with the determination of the differing factors, our mechanism requires the Court to make the ruling regarding public interest proceedings and the costs ruling at the same time. Regardless of what form of order is made, an applicant in public interest proceedings should know the extent of any potential adverse costs liability, which would either be capped or non-existent. Given that an applicant can control their own costs, knowing the extent of their potential exposure should make it possible to make a rational decision about whether to proceed with the litigation.

Similar considerations apply to respondents. An order specifying the applicant’s potential liability will enable respondents to make a decision about what resources to devote to a particular matter.

The recommendation is intended to effectively create a baseline of capped costs in public interest litigation, while retaining the ability to make more favourable orders where the circumstances of the case justify it.

### Recommendations:

1. *The legislation should include a two-step mechanism to determine whether public interest costs orders should be applied. Firstly, a determination should be made as to whether the proceedings are ‘public interest proceedings’. Then, if the proceedings are determined to be ‘public interest proceedings’, the court will determine what costs order should be made.*
2. *In public interest proceedings, the court should be prohibited from ordering that ‘costs follow the event’. Instead, it should be required to make some form of public interest costs order (i.e. a ‘no costs’ order, a capped costs order, a one-way cost-shifting order or an indemnity).*

## Factors that should be taken into account at each stage of the process

Clarification of the factors affecting the decision on whether proceedings are public interest proceedings is desirable to enable litigants to make an informed decision about whether their proceedings are likely to meet that definition and whether to apply for a decision on that question.

Each of the approaches to public interest costs discussed in this paper has identified a number of factors as being relevant to whether a public interest costs order should be made. Generally speaking, however, there has been no clear definition of what factors are ‘public interest’ factors.

There is, however, a significant degree of convergence across jurisdictions about the factors relevant to the determination of whether proceedings are entitled to costs protection. Factors relevant in two or more jurisdictions include:

- > the financial resources of the applicant;<sup>132</sup>
- > whether the applicant would be likely or able to continue the proceedings if an order was not made;<sup>133</sup>
- > whether there is an arguable basis for the application;<sup>134</sup>
- > the timing of the application;<sup>135</sup>
- > the existence of any personal interest on the part of the applicant in the outcome of proceedings.<sup>136</sup>

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<sup>132</sup> Relevant in all jurisdictions.

<sup>133</sup> Expressly referred to in O 62A jurisprudence, England and Canada.

<sup>134</sup> Expressly referred to in O 62A and Queensland jurisprudence, England and Canada.

<sup>135</sup> Expressly referred to in O 62A jurisprudence and England. Potentially relevant in Queensland: see *BB v Liebsanft (Acting Magistrate)* [2003] QSC 239, [9].

<sup>136</sup> Relevant in all jurisdictions.

Certain factors could be incorporated into legislation as factors that the court must have regard to in deciding whether a public interest costs order should be made. This would enable applicants to make an educated guess about whether they are likely to receive a favourable costs order before commencing litigation.

## Differing factors at each stage

After careful consideration, we have taken the view that the financial resources of the plaintiff and the existence of any personal interest of the plaintiff in the outcome of proceedings should not be taken into account at the first stage of the process. We acknowledge that these factors are currently taken into account in all the jurisdictions surveyed.

Whether a proceeding is a ‘public interest proceeding’ or not is independent of the identity of the plaintiff and therefore characteristics of the plaintiff, such as financial position or private interest, should not be taken into account in the first step of the process. For example, if a case is a public interest case because it concerns the proper construction of a section of the EPBC Act, it is no less in the public interest because it is a large well-established environmental organisation bringing the case than if it were a small community NGO.<sup>137</sup>

Rather, such considerations are relevant to the second stage of the process—the question of what kind of public interest costs order should be made.

A large environmental organisation may have a substantial annual turnover and so a ‘no costs’ order might be appropriate in a case where they were the plaintiff. On the other hand, a community NGO might not be able to afford a ‘no costs’ order and, hence, an order permitting them to recover in the event of success but protecting them in the event of failure might be appropriate.<sup>138</sup>

### Recommendations:

3. *We recommend that the legislation require that the court have regard to the following factors in deciding whether the proceedings are ‘public interest proceedings’ (the first stage of the test):*

- > *whether there is an arguable basis for the application;*
- > *public interest in the subject matter of the dispute;*<sup>139</sup>
- > *the fact that the legislation raises a novel and important question of law or concerns the interpretation or future administration of laws;*<sup>140</sup>
- > *the motivation of the applicant;*<sup>141</sup> and
- > *the subject matter of the dispute.*<sup>142</sup>

This list of factors is not intended to be a checklist. The legislation should make clear that these matters are all relevant to the decision, but that an affirmative answer is not required in relation to each factor for the Court to determine that proceedings are public interest proceedings.

4. *We recommend that the legislation require the court to have regard to the following factors in deciding what form of public interest costs order to make (the second stage of the test):*

- > *the financial resources of the applicant;*
- > *the existence of any personal interest on the part of the applicant in the outcome of proceedings; and*
- > *the timing of the application.*

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<sup>137</sup> A similar point was made in the South African case of *Biowatch Trust v The Registrar, Genetic Resources and Others* [2009] ZACC 14, [16] where Sachs J stated: Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.

<sup>138</sup> The same point was recognised by the Working Group into Access to Environmental Justice in their report, *Ensuring Access to Environmental Justice in England and Wales* (2008), 42.

<sup>139</sup> See, e.g., *Oshlack; Ruddock v Vardalis; Blue Wedges v Minister for Environment, Heritage and the Arts; R (on the application of Compton) v Wiltshire Primary Care Trust*

<sup>140</sup> See, e.g., *Oshlack v Richmond River Council; Ruddock v Vardalis; Ferneley v Boxing Authority of NSW and Others; Mees v Kemp (No. 2); Woodlands; Corcoran v Virgin Blue; Corner House.*

<sup>141</sup> See, e.g., *Oshlack; Ruddock v Vardalis; Anghel v Minister for Transport (No. 2); Cairns Port Authority; Corner House.* It is arguable this criterion is identical to the private interest factor of private interest.

<sup>142</sup> See, e.g., *Oshlack; Ruddock v Vardalis; Corner House; Okanagan*



## Forms of public interest cost order available

We see no reason to restrict the forms of public interest order available. All of them have been judged necessary in one case or another. It is anticipated that capped costs orders are likely to be the most common kind of order made, since this still permits a successful respondent to recover some of their costs and is thus likely to be viewed as the fairest form of order. In order to ensure, however, that courts do not feel restricted in their ability to make other orders, the power to do so should be expressly contained in the legislation.

### Recommendation:

5. *We recommend that the legislation expressly provide that a court may make any of the following orders:*
- > *each party bear his or her own costs;*
  - > *the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall not be liable for the other party's costs;*
  - > *only be liable to pay a specified amount<sup>143</sup> of the other party's costs;*
  - > *be able to recover all or part of his or her costs from the other party; or*
  - > *another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.*

## Restrictions on the terms of cost-capping orders

The availability of cost capping as an option raises the prospect that an order may be made capping costs at an amount that is still impossible or impractical for an applicant to meet.

It is likely that the requirement that the court have regard to the financial resources of the applicant in deciding the terms of the order would prevent the court from making such an order. It may be thought desirable, however, to include a provision in any statute prohibiting the court from capping costs at an amount that was likely to cause the applicant, acting reasonably, to discontinue proceedings. Alternatively, the prohibition could be set at a lower level, requiring the court not to cap costs at a level that would 'inhibit' a reasonable applicant from continuing proceedings.

### Recommendation:

6. *We recommend that the legislation prevent the court from capping costs at an amount that is likely to cause the applicant, acting reasonably, to discontinue proceedings.*

## Other features of a public interest mechanism

There are two features of any proposed public interest mechanism that merit further discussion: the costs of the application itself and appeals from the initial decision.

### Costs of the application

One concern about public interest costs orders, expressed even by those apparently supportive of such orders, is that the 'applications for public interest costs orders could add to the time and expense of proceedings.'<sup>144</sup> This is particularly true if the respondent takes an aggressive approach to the defence of the application. As such, an application for a public interest costs order could itself become a test of the applicant's financial resources.

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<sup>143</sup> The payable amount could be expressed in absolute or percentage terms, as the justice of the case requires.

<sup>144</sup> Enid Campbell, 'Public Interest Costs Orders' (1998) 20 *Adelaide Law Review* 245, 261. Campbell states that the Federal Court expressed this concern in its submissions to the Australian Law Reform Commission's costs reference.

The judgment of the English Court of Appeal in *Corner House* appeared to recognise this danger. There, Lord Philips MR stated that the applicant would be liable for court fees associated with the application and the costs of the defendant in contesting the application, if the application were unsuccessful. His Lordship stated, however, that he would not expect the costs of such a defence to exceed £5,000, and that the Court would be sceptical of permitting any recovery in excess of that amount.<sup>145</sup> This concern about the costs of obtaining a PCO were repeated in *Buglife*,<sup>146</sup> where the Court of Appeal stated that

the courts should do their utmost to dissuade parties from engaging in expensive satellite litigation on the question of whether PCOs and thus cost capping orders should be made.<sup>147</sup>

As such, it may be appropriate for judges hearing applications under the public interest mechanism to cap the costs of that hearing under O 62A, in order to prevent the application hearing adding too much time and expense to the substantive proceedings. Alternatively, the statutory mechanism might provide for the making of cost-capping orders in respect of the application itself.

### Recommendation:

7. *We recommend that any public interest costs mechanism should permit the making of public interest costs orders in respect of the costs of the public interest application itself, including cost-capping orders.*

### Appeals

The second issue relates to appeals from the initial decision on the application. Section 24(1) of the *Federal Court Act 1976* (Cth) provides a right of appeal from the judgment of a single judge of the Federal Court. It is appropriate for both applicant and respondent to be able to appeal the initial decisions. There is a possibility, however, that a respondent might abuse the right of appeal to force the applicant to incur further expenditures.

At common law, a judge's decision on how to exercise their discretion as to costs is protected. The High Court decision of *House v The King*<sup>148</sup> states that a discretionary judgment by a trial judge will only be overturned in a narrow set of circumstances and not merely where the appellate court would have made a different order.<sup>149</sup> As such, it is often hard to appeal successfully against a discretionary judgment, including one on costs.

In two of the jurisdictions surveyed above, however, further protections appear to apply in the context of public interest costs orders. Queensland may adopt a 'pre-emptive' approach to appeals against public interest costs orders, potentially requiring leave from both the trial judge and the Court of Appeal before permitting an appeal against such an order.<sup>150</sup> *Corner House* suggests that the English courts should adopt a punitive approach to unsuccessful appeals against public interest costs orders. After noting that the initial PCO would protect the public interest litigant from the costs of the appeal, Lord Philips MR stated '[a]n unmeritorious application to set aside a PCO should be met with an order for indemnity costs, to which any cap imposed by the PCO should not apply.'<sup>151</sup> Such a punitive response seems unlikely to be appropriate as a matter of course and so we cannot recommend it.

We consider that the principles in *House v The King* probably provide adequate protection for applicants against abuse of the right to appeal. Moreover, as in England, it seems likely that any public interest cost order would operate in respect of any appeal from the initial decision.

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145 *R (Corner House) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 [78]–[81].

146 [2009] C.P. Rep. 9.

147 *Ibid* [31].

148 (1936) 55 CLR 499.

149 *Ibid* 504–505. The circumstances in which a discretionary decision may be reviewed are '[i]f the [trial] judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration' or if the order is 'unreasonable or plainly unjust'.

150 The matter is somewhat uncertain. Section 253 of the *Supreme Court Act 1995* (Qld) requires leave from the trial judge to appeal against any decision on costs.

Section 49(5) of the *Judicial Review Act 1991* (Qld) provides that an appeal from 'an order made under [s 49(1)]' may only be made with leave of the Court of Appeal.

In their most recent judgment on the matter, the Queensland Court of Appeal suggested that the two leave requirements may be cumulative: *Remely v O'Shea* [2008] QCA 078, [77]–[80].

The Court did hold, however, that s 49(5) only applies when an order is made under s 49(1), i.e. when the applicant for the costs order is successful.

The approach suggested in *Remely v O'Shea* appears to have been applied, without apparent comment, in *Anghel v Minister of Transport (No. 2)* [1995] 2 Qd R 454, 451, where McPherson JA refers to the Minister obtaining leave from both the trial judge and the Court of Appeal.

151 *R (Corner House) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 [79].

## A broader solution

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This paper has focused on the question of costs in the context of enforcement proceedings and judicial review of decisions under the EPBC Act. In truth, the problem of the deterrent effect of adverse costs awards is a barrier to all litigation by persons of limited means. The model of 'public interest costs orders' offers a partial<sup>152</sup> solution to this general problem, if it is applied more broadly than the EPBC Act.

The public interest costs order approach is potentially applicable in any public law context, that is, any matter raising serious issues of constitutional or administrative law. This could be done by amending legislation that grants courts the power to award costs<sup>153</sup> or, potentially, by amending legislation that grants the power to engage in enforcement or judicial review. We consider the former would be preferable. It avoids any potential discrepancy in the costs rules applicable to judicial review brought under a statute as opposed to common law judicial review.

In the event that that a broader approach of this kind is taken, inclusion of an express power to make public interest costs awards in the EPBC Act may be unnecessary. We consider, however, that it would at least be desirable for the EPBC Act to specifically identify any public interest factors which are peculiar to environmental litigation. We also consider that the inclusion of an express power to award costs in the EPBC Act, in addition to a general power under the amendments to the *Federal Court of Australia Act 1976*, may be useful in providing an indication of the legislative intent to promote the making of public interest costs orders in appropriate cases.<sup>154</sup>

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152 The solution would only be partial because the model of public interest costs awards is unable to assist private litigants who have a claim which is valid, but does not raise a matter of public interest. A separate approach would be needed to assist litigants of this kind.

153 We note that, at time of writing, the Federal Parliament is considering the Access to Justice (Civil Litigation Reforms) Bill 2009. The Senate Legal and Constitutional Committee conducted an inquiry into the Bill in August 2009. That Bill amends s 43 of the *Federal Court of Australia Act 1976* (Cth) to provide a statutory codification of some aspects of the power to award costs in the Federal Court. As it stands, those amendments would make clear the power of the Court to make a public interest costs orders in the forms discussed in this paper. The Bill does not, however, expressly discuss public interest costs orders.

154 See *Ruddock v Vardalis* (2001) 115 FCR 229, [47]–[50] per Beaumont J (dissenting). Beaumont J distinguished *Oshlack* and another case on the basis of their particular statutory contexts.

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