Submission to the New South Wales Law Reform Commission

Consultation paper 13 - Security for costs and associated costs orders

19 August 2011

pilch

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Endorsements

This Submission is endorsed by the following organisations and projects:

- National Pro Bono Resource Centre
- Public Interest Law Clearing House, New South Wales
- Pro Bono Animal Law Service ('PALS@PILCH'), a project of the Public Interest Law Clearing House, New South Wales

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Contents

1. Executive summary

The Public Interest Law Clearing House (VIC) (**PILCH Vic**) (Cf PILCH NSW) welcomes the opportunity to make a submission to the New South Wales Law Reform Commission (the **Commission**) in response to its Consultation Paper 13 on security for costs and associated costs orders (the **Consultation Paper**). We consider that reform on the issues raised in the Consultation Paper has the potential to significantly advance the rule of law and access to justice for marginalised and disadvantaged persons – particularly public interest costs orders and recovery of costs in pro bono matters.

We commend the Attorney General, the Hon John Hatzistergos, for issuing the terms of reference and the New South Wales Law Reform Commission on its detailed Consultation Paper.

PILCH Vic confines itself to responding to those issues most relevant to its practice, and especially to those issues on which it has previously made submissions to both state and federal government.[1] We respond to the following questions in the Consultation Paper:

- Questions 2.1(1), 2.6 and 2.7, which relate to the jurisdictional grounds and proposed discretionary factors to be considered by courts in deciding whether to grant security for costs;
- Questions 3.5, 3.8 and 3.9, which relate to the law and practice on costs recoverability and security for costs in relation to pro bono litigants; and
- Questions 4.1 – 4.9, which relate to public interest and protective costs orders.

Broadly, PILCH Vic recommends the introduction of public interest and protective costs orders (collectively, **PCO**) and the introduction of costs orders and orders for the security of costs in favour of pro bono litigants.

[1] PILCH Vic Submission to the Commonwealth and Victorian Attorneys-General on Recovery of Costs in Pro Bono Matters, April 2009; PILCH Vic Submission to PILCH Submission to the Commonwealth Attorney-General on Protective Costs Orders, April 2009; PILCH Vic Submission to the Attorney-General of Victoria on Protective Costs Orders, 25 September 2008.

2. About PILCH Vic

PILCH Vic is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH Vic seeks to:

- address disadvantage and marginalisation in the community;
- effect structural change to address injustice; and
- foster a strong pro bono culture in Victoria and increase the pro bono capacity of the legal profession.

PILCH Vic has significant expertise on the issues raised in the Consultation Paper. In particular, PILCH Vic:

- is the largest facilitator of pro bono referrals in Australia;
- has previously submitted and advocated to state and federal Government on issues raised in the Consultation Paper;
- has prepared and circulated, earlier this year, a review of the Australian and Commonwealth jurisprudence on PCO in public interest litigation (**Attachment 2**); and
- supports its member firms in applications for PCO and costs recovery.

3. Jurisdiction to order security for costs

3.1 Introduction

Determining applications for security for costs involves a careful balancing of the rights of the plaintiff to pursue a legitimate claim, and the rights of the defendant to recover costs if successful in defending that litigation. As an access to justice and rights based organisation, PILCH Vic recommends caution when considering reforms with the potential to erode access to the courts.

Accordingly, PILCH Vic supports the provision of clear guidance as to the factors that may be considered when considering security for costs, to ensure that legitimate claims (particular those that are in the public interest) are not defeated at the outset.

3.2 Response to Consultation Paper

Question 2.1

(1) Should legislation provide a broad ground for courts to order security for costs where the order is necessary in the interests of justice?

PILCH Vic emphasises the importance of the principle that poverty is no bar to a litigant. PILCH Vic does not support the expansion of security for costs provisions to the extent they may reduce an individual's opportunity to have his or her case determined by a court or tribunal. Increasing the grounds under which security for costs can be awarded against individual (impecunious) plaintiffs has the potential over time to entrench a further access to justice barrier.

Question 2.6

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to provide a list of discretionary factors that courts may take into account when deciding whether or not to order security for costs? If so,

(a) Should r 672 of the *Uniform Civil Procedure Rules 2009* (Qld) be used as the basis for such a list? If so, do you agree or disagree with any of the factors listed in r 672? Are there factors that are not listed in r 672 which should be included in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21?

(b) Should the list include the proportionality principle, that is, whether the security for costs applied for is proportionate to the importance and complexity of the subject-matter in dispute?

(c) Should the list include public interest? If so, should the provision refer to "public interest" or "public importance"?

Should the list include the impecuniosity of the plaintiff regardless of whether the plaintiff is a natural person or a corporation? Alternatively, would it be preferable to adopt a provision in the *Uniform Civil Procedure Rules 2005* (NSW), separate from the list of discretionary factors, stating the general rule that security for costs shall not be ordered merely on account of the poverty of the plaintiff or the likely inability of the plaintiff to pay any costs that may be awarded against him/her?

A list of discretionary factors

PILCH Vic endorses the introduction of a list of discretionary factors that courts may take into account when deciding whether or not to order security for costs, particularly if a broad ground for ordering security for costs is introduced.

PILCH Vic considers that the factors listed in r 672 of the *Uniform Civil Procedure Rules 2009* (Qld) would be a useful basis for such a list, and supports the factors listed in that rule. In particular, PILCH Vic notes that the following discretionary factors from r 672 are likely to be important balancing factors where a court is considering an application for security for costs against individual and public interest litigants:

> (e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;
>
> (g) whether an order for security for costs would be oppressive;
>
> (h) whether an order for security for costs would stifle the proceeding; and
>
> (i) whether the proceeding involves a matter of public importance.

PILCH Vic addresses the specific additional factors raised in question 2.6 of the Consultation Paper as follows:

Proportionality

PILCH Vic supports the inclusion of proportionality as a discretionary factor. This would codify the position at common law that the court may weigh the costs sought as security against the costs of the subject matter of the litigation. In PILCH Vic's experience, the relative costs of the subject matter of public interest litigation (e.g. environmental litigation) will often be a proper factor against ordering security for costs.

Public interest

PILCH Vic recommends the inclusion of a 'public interest' or 'public importance' as a discretionary factor. PILCH Vic suggests the provision should refer to 'public interest', primarily for consistency with the common law, and also for consistency with the regime of PCO for which PILCH Vic advocates later in this submission.

Introduction of public interest as a discretionary factor would codify the position at common law that public interest may operate against an order for security in cases involving areas of law that require judicial clarification or where the claim is brought by the plaintiff to pursue an interest common to other members of the community. PILCH Vic recommends the inclusion of public interest as a discretionary factor to be considered by the court in deciding whether to order security for costs, even if specific PCO rules and procedures are adopted elsewhere. In our experience, there will be proceedings which may fall short of characterisation as 'public interest' to engage a PCO threshold,[2] but which may have sufficient public interest elements to militate against a security for costs order. In these cases, it will be important to retain public interest as a factor in the ordinary scheme for security for costs.

[2] See e.g. *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts (No 2)* [2009] FCA 492; *Blue Wedges Inc v Minister for the Environment, Heritage and the arts (No 2)* [2008] FCA 1106. In PILCH Vic's view, these decisions have too narrowly ruled down the availability of PCO when compared to the United Kingdom and Canada.

Impecuniosity of plaintiff who is a natural person

PILCH Vic considers that the impecuniosity of the plaintiff who is a natural person should be included in the list of discretionary factors, in addition to the impecuniosity of a corporation. PILCH Vic agrees that inclusion of this discretionary factor would emphasise the importance of the rule that poverty is no bar to a litigant. We would further recommend that the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) be amended to state the rule that poverty is not a bar to litigation.

PILCH Vic considers that the impecuniosity of the plaintiff who is a natural person and the impecuniosity of the plaintiff who is a corporate entity should be listed as separate discretionary factors. This is because the impecuniosity of a natural person will tend to go against ordering security for costs against that person, whereas impecuniosity of a corporate plaintiff generally will generally support an order for security for costs being made. The different treatment of corporate plaintiffs and plaintiffs who are natural persons is justified on the basis outlined in the Consultation Paper at 2.104, i.e. that in exchange for the privilege of limited liability, a corporate plaintiff is given a statutory obligation to give security for the defendant's costs if there is credible evidence that it will be unable to pay an adverse costs orders. PILCH Vic notes, however, that there will be limited circumstances where an impecunious corporate plaintiff should not be ordered to pay security for costs, such as where the plaintiff is litigating in the public interest.

Question 2.7

(1) If Uniform Civil Procedure Rules 2005 (NSW) r 42.21 were amended to include a list of discretionary factors that courts may take into account when deciding whether or not to order security for costs, what should be the relationship of those factors with the jurisdictional grounds listed in Uniform Civil Procedure Rules 2005 (NSW) r 42.21(1)?

(2) Should such a relationship be stated in Uniform Civil Procedure Rules 2005 (NSW) r 42.21 or should it be left for courts to develop?

If a list of discretionary factors for ordering security for costs is introduced into the UCPR, then PILCH Vic considers that the court ought to be permitted to consider those discretionary factors in deciding whether or not a ground for ordering security in r 42.21 has been made out.

In the interests of certainty and consistency, PILCH Vic considers that this relationship should be stated clearly in the UCPR.

4. Costs orders and pro bono litigants

4.1 Introduction

PILCH Vic submits that clients represented pro bono should be entitled to recover costs, and that those costs should in turn be recoverable by their legal practitioners, on access to justice grounds. PILCH Vic makes those submissions on the following grounds:

Retaining capacity

Through the generosity of legal practitioners including barristers, PILCH Vic is able to facilitate a large number of pro bono referrals each year. It is PILCH Vic's experience, however, that referrals requiring litigation can be particularly difficult to place, principally because of the significant cost and time implications of those referrals on legal practices and counsel.

Permitting pro bono costs recovery will facilitate those practitioners prepared to litigate on a pro bono basis to:

- pay litigation disbursements (including counsel's fees);
- direct funds back to their pro bono budgets, thereby retaining capacity for further pro bono assistance; and
- otherwise make donations (including to pro bono disbursement funds).

This would retain pro bono capacity in those practitioners, and would therefore improve access to justice.

Level playing field

Another important benefit of allowing pro bono litigants to recover costs is to ensure a level playing field between litigants, so that:

- unsuccessful litigants are not handed an unmeritorious windfall owing to the other party being represented pro bono; and
- all parties will be subject to the usual checks and balances as to costs, for example, by deterring unmeritorious claims and defences and encouraging the use of alternative dispute resolution, early settlement and the conduct of litigation in a cost sensitive matter.

Consistency

Reforms to allow recovery of costs in all pro bono matters will create consistency across the various pro bono referral schemes. Currently, lawyers who provide pro bono assistance to parties involved in litigation under Legal Assistance Schemes in the Federal Court, Federal Magistrates Court and the Supreme Court of NSW, for example, have a legislative entitlement to receive costs which may be recovered by the assisted litigant under a costs order.[3] There is no logical basis for placing some pro bono lawyers in a less favourable position than others.

[3] See *Federal Court Rules 2011* (Cth), r 4.19; *Federal Magistrates Court Rules 2001* (Cth), r 12.07 and *Uniform Civil Procedure Rules 2005* (NSW) r 7.41.

The current law

PILCH Vic notes that litigants acting pro bono are currently entitled to a costs order in their favour, provided they have an appropriate costs agreement in place. In *Wentworth v Rogers*[4] the court made clear that a pure pro bono retainer (i.e. where a party has no obligation at all to pay his or her solicitor) will fall foul of the indemnity principle. However, the two members of the Court who delivered substantive judgments, Santow JA and Basten JA, found that costs could be recovered (and the indemnity principle accommodated) by an appropriate costs agreement. Denying pro bono costs recovery would therefore reverse an existing right.

In our respectful view, however, there is considerable uncertainty and ambiguity arising from the lead judgements in *Wentworth v Rogers* as to what would constitute a compliant conditional costs agreement to satisfy the indemnity principle, and accordingly, codification of the right to recover costs in pro bono matters is required.

4.2 Response to Consultation Paper

Question 3.5

Should the court, in determining applications for security for costs, be able to take into account the fact that the plaintiff's lawyer is acting pursuant to a conditional costs agreement?

PILCH Vic submits that the existence of a conditional costs agreement should not be may be taken into account by a court in determining whether security for costs should be ordered. Since conditional costs agreements are a mechanism by which meritorious impecunious clients, in particular, may access the courts, allowing the existence of a conditional costs agreement to factor in favour of a security for costs order is contrary to principles of access to justice. Further, it would sit in contrast to the principle that poverty is no bar to a litigant.

Question 3.8

(1) Is it desirable to permit costs orders to be made in favour of pro bono litigants on an indemnity basis?

(2) If so, should costs awarded be recouped by the practitioner or given to a pro bono litigation fund?

(3) Should courts be able to order security for costs in favour of a party whose lawyer is acting on a pro bono basis?

Desirability of pro bono costs recovery

PILCH Vic's understanding from sections 3.94 – 3.101 of the Consultation Paper is that the Commission's focus is on whether costs ought to be recoverable in pro bono matters despite the indemnity principle. PILCH Vic notes, however, that question 3.8(1) asks whether it is desirable to

[4] [2006] NSWCA 145.

permit costs orders to be made in favour of pro bono litigants on an indemnity basis. Whether costs in any proceeding are awarded on an ordinary or indemnity basis is a matter to be determined by the court in its discretion, and PILCH Vic confines its comments in this submission to whether legislative amendment is required to codify the recoverability of costs in pro bono matters.

PILCH Vic supports the recoverability of costs in pro bono matters for the reasons outlined at 4.1 above.

Recoverability of costs in pro bono matters could be achieved in a number of ways. PILCH Vic submits that one way is to amend the *Legal Profession Act 2004* (NSW) (**LPA**) to clarify pro bono litigants can recover costs in matters where:

- the court is satisfied in all the circumstances that the legal services were provided 'pro bono'[5]; and
- A conditional pro bono costs agreement (which complies with the LPA) has been agreed under which payment of some or all of the legal costs is conditional on either the making of a costs order in favour of the client, or the actual recovery of costs by the client.

PILCH Vic has previously prepared a similar proposed amendment for the purposes of submissions to the Commonwealth and Victorian Attorneys-General (albeit in relation to the *Legal Profession Act 2004* (Vic)) and attaches this draft legislation as **Attachment 1**.

PILCH Vic notes that recovery of costs in pro bono matters is only tenable where an order is made that the party opposing the pro bono litigant is ordered to pay some or all of the pro bono litigant's costs. In family and criminal matters, PILCH Vic understands these orders are relatively rare. However, where costs are recoverable by a litigant, PILCH Vic sees no reason why lawyers should not be able to recover their costs when acting pro bono.[6] PILCH Vic considers that this would assist in increasing pro bono capacity in these areas, particularly in family law matters, where PILCH Vic sees enormous unmet legal need.

Litigation fund?

For the reasons stated at 4.1 above, PILCH Vic supports pro bono costs recovery by practitioners over a pro bono litigation fund. PILCH Vic makes the following additional observations:

The scheme established under section 194 of the *Legal Services Act 2007* (UK) is not a pro bono *litigation* fund. Under s 194, costs in pro bono matters are recoverable but must be paid to the charity prescribed by the Lord Chancellor, currently, the Access to Justice Foundation. The Foundation uses the funds raised to make grants to national pro bono organisations, Regional Legal Support Trusts and strategic pro bono projects, but does *not* fund litigation (including disbursements). PILCH Vic also understands that funds raised to date have been limited, and that as of 11 May 2011, the Foundation had raised only £130,000 from pro bono costs orders.[7] Further, a recent survey conducted by the Foundation found that the majority of lawyers interviewed were not aware of the availability of pro bono

[5] The definitions of legal pro bono most widely used in the sector are those of the Law Council of Australia (available at http://www.nationalprobono.org.au/probonomanual/page.asp?sid=1&pid=19) and the National Pro bono Resource Centre (available at http://www.nationalprobono.org.au/page.asp?from=3&id=189). PILCH Vic notes also that, in practice, there will typically be a clear distinction between a conventional (no-win-no-fee) contingency fee agreement, in which there is a commercial expectation of cost recovery and usually also of compensation recovery, and a pro bono conditional costs agreement, were neither of those expectations will be central to the decision to act.

[6] Facilitating family and criminal law pro bono recovery would require amendment to the LPA provisions which prohibit conditional costs agreements in criminal and family law matters.

[7] http://www.guardian.co.uk/law/butterworth-and-bowcott-on-law/2011/may/11/pro-bono-costs-scheme-lord-goldsmith.

costs orders.[8] PILCH Vic understands that the United Kingdom can also be distinguished from Australia in that the extent of (law firm) pro bono participation in the United Kingdom was historically not as established as it is in Australia, so that there was a greater imperative for Government to intervene in promoting and supporting pro bono (including, disbursing funds). With respect, PILCH Vic also notes that neither PILCH NSW nor the National Pro Bono Resource Centre supported the establishment in Australia of a fund similar to the United Kingdom model in their preliminary submissions to the Consultation Paper.[9]

Even if the fund proposed to be introduced into Australia would fund public interest litigation, PILCH Vic's strong preference is that costs recovered in pro bono matters be directed back to the lawyers that showed a willingness to take on the matter. It has been PILCH Vic's experience that those firms that take on public interest litigation do so regularly. Redirecting funds back to the pro bono budgets in those firms is therefore more directly achieving access to justice than a centralised fund as that which exists in the United Kingdom. This is all the more salient in light of the likely administration costs which such a Fund would entail.

Security for costs and pro bono representation

If courts are empowered to order costs orders in favour of pro bono litigants, then it follows that a court should be able to order security for costs in favour of a party whose lawyer is acting on a pro bono basis, in appropriate circumstances.

Question 3.9

Should s 99 of the Civil Procedure Act 2005 (NSW) and s 348 of the *Legal Profession Act 2004* (NSW) be amended to include an exemption for legal practitioners who have provided legal services on a pro bono basis

Pro bono litigation in service of the public interest often tests new areas of law, where the prospects of success are difficult to determine, but where the importance of intervening is high. For that reason, PILCH Vic supports amendment of s 348 of the LPA to protect legal practitioners acting pro bono from personal costs orders where the practitioner is said to have provided legal services to a party without reasonable prospects for success. However, PILCH Vic does not support exemption of pro bono lawyers from personal costs orders for neglect, incompetence or misconduct. Pro bono services must be carried out with the same diligence and care as those provided to a full fee paying client.

[8] http://www.accesstojusticefoundation.org.uk/downloads/ATJF_costs_survey_news_090511.pdf.

[9] Contra paragraph 3.101 of the Consultation Paper.

5. Public interest and protective costs orders

5.1 Introduction

Abandonment of meritorious matters

There are important reasons to support and facilitate public interest litigation.[10]

Each year, PILCH Vic facilitates a number of potential public interest litigation matters to its member law firms and barristers. However, while a public interest litigant represented pro bono will not face their own legal costs, PILCH Vic commonly sees meritorious public interest matters that are not pursued because of the risk of an adverse costs order. As Basten JA observed in *Delta Electricity v Blue Mountains Conservation Society Inc*,

> The principle that any person may bring proceedings to prevent a breach or threatened breach of environmental protection laws will be seriously undermined if some protection against large costs bills is not available. Important public interest disputes are often complex and based on expert evidence. Public-minded citizens may well be able to obtain donations of time and expertise from professional witnesses and lawyers, but will find it less easy to raise funds to meet the costs of the other party.[11]

Two cases seen by PILCH Vic are described in more detail below.

Case Study 1

Watershed Victoria is an incorporated not for profit organisation dedicated to campaigning against the use of desalination in Victoria and in favour of alternative sustainable water solutions. A number of Watershed Victoria's members, including Chris Heislers and Stephen Cannon, were involved in protests against the construction of the desalination plant in Wonthaggi, Victoria.

In December 2009, press reports stated that the Victorian Government had entered into a Memorandum of Understanding ('**MoU**') which governed the management of protesters at the site of the desalination plant. The MoU allowed the Victoria Police to transfer private information on protesters to AquaSure, the private consortium responsible for building the desalination plant. This raised significant privacy issues under both privacy legislation and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The Environment Defenders Office ('**EDO**') and counsel (on referral from PILCH Vic), assisted Dr Heislers and Mr Cannon, to file an action in the Supreme Court of Victoria seeking review of the decision of the Victorian Government to enter into the MOU.

Mr Heislers and Mr Cannon applied for a costs order protecting them from adverse costs orders in the event that they were unsuccessful. As private litigants, they were clear from the outset that they could not continue with the court proceedings without such an order.

[10] Public interest litigation is a mechanism for maintaining the rule of law by ensuring that uncertain or unjust laws are tested, that laws are not selectively enforced, and by increasing public confidence in the law. In particular, public interest litigation determines rights on behalf of economically and socially disadvantaged persons and addresses issues of systemic and public importance. Public interest litigation is frequently initiated by parties with little or no personal interest in the outcome, and on behalf of the voiceless, for example in animal law, environmental law, or refugee matters. To the extent that public interest involves questions of administrative law, the ability of public interest litigants to test government decisions is also an important check on the use of executive power.

[11] [2010] NSWCA 263, [218] – [219].

Case Study 1 (Cont'd)

Aquasure and the Victorian Government actively resisted the PCO application. They did so, ironically, by threatening costs on the costs application itself, and also by successfully defending an application to have the costs matter heard in advance of the substantive hearing. The consequential costs exposure resulted in the applicants withdrawing the case at the last minute, thereby depriving an opportunity to run a test case on protective costs orders, and to determine the legitimacy of an emerging practice of the Victorian Government to enter into controversial MoUs to share information with private entities.

Case Study 2

Client K was conceived as a result of an assisted reproductive treatment procedure. Client K's previous attempts to obtain her father's name directly from the IVF clinic that had assisted her mother were unsuccessful. With the assistance of a law firm (referred pro bono by PILCH Vic), Client K made a request to the Registrar of Births, Deaths and Marriages (**Registrar**) seeking that the Registrar write to Client K's biological father to inform him of voluntary statutory mechanisms through which he could share information with any biological children.

The Registrar refused Client K's request, on the basis that the relevant Act, in her view, did not require or imply that the Registrar should contact individual donors directly.

Client K sought a review of the Registrar's decision before the Victorian Civil and Administrative Tribunal (**VCAT**). Unfortunately, VCAT dismissed Client K's application for want of jurisdiction noting, however, that Client K did appear to have a compelling argument.

Client K contemplated judicial review of the Registrar's decision in the Supreme Court of Victoria but knew she could not pursue court proceedings without a PCO.

Ultimately, the matter did not proceed because Client K was advised that it is very difficult to obtain an order that each party bears its own costs from the Supreme Court, and the Registrar refused to consent that each party bear its own costs, even if limited to determination of the costs issue itself.

In this case, the substantive matter had the potential to determine the scope of the Registrar's powers to assist individuals to access information about their biological parents. In addition to the importance for individuals such as Client K, the issue had important public interest dimensions to it. Without a PCO, the client was unable to obtain a review of the Registrar's decision.

Need for PCO regime

PILCH Vic strongly supports the introduction of PCO, specifically to:

- confirm the courts' jurisdiction to make PCO and thereby overcome any reluctance to make such orders due to concerns about 'judicial legislating';
- clarify what factors are relevant to the discretion to make a PCO in public interest maters; and
- clarify the types of PCO that can be made, and that they can be ordered at any stage of a proceeding.

Introduction of a PCO regime would strengthen Australia's compliance with Article 14(1) of the ICCPR (which Australia has ratified) and which states that everyone is entitled to a fair hearing. International jurisprudence on the right to a fair hearing has established that a rigid application of a policy to award

costs to the winning party may breach the right of access to justice contained in the right to a fair hearing.[12]

No flood of litigation

PILCH Vic believes, and the evidence confirms, that the introduction of PCO would not result in a flood of litigation. For example, existing legislative and common law regimes that support public interest litigation in Australia and overseas have not led to any substantial increase in the number of litigants.[13] As noted, public interest litigation depends not only on costs (which will always remain an issue even with a legislative PCO regime), but also on the merits of the action, whether the parties have access to (pro bono) resources, time and access to experts, the costs of disbursements, and personal commitment. A balanced PCO regime, which PILCH Vic advocates, would also consider the financial consequences of a PCO on all parties.

PILCH Vic's proposed model would only see PCO ordered in exceptional cases, exceptional because the matters raised will be sufficiently important in all the circumstances to warrant a departure from the usual rule that costs follow the event.

5.2 Response to Consultation Paper

Question 4.1

Is there a need for new legislation to give courts the power to make public interest costs orders, or is the current law adequate?

Judicial reluctance to make PCOs

For the reasons outlined above, PILCH Vic is strongly of the view that there is a need for a robust and effective PCO regime. PILCH Vic further submits that there is a need for such a scheme to be in new legislative provisions specifically giving courts power to make PCO in appropriate circumstances.

The principle argument for a legislative regime is the demonstrable reluctance on the part of the courts in Australia to make PCO orders, in reliance on their inherent costs discretions, or indeed under the limited NSW schemes under UCPR 42.4 or the *Land and Environment Court Rules 2007*.

Australia does not have any specific legislative public interests cost regime. Rather, the High Court in *Oshlack v Richmond River Council*[14] has indicated that, in exceptional cases, it may be appropriate to make no orders as to costs. Importantly, there is no 'public interest' exception to the ordinary rule that costs follow the event. Rather, each case must be considered on its merits, and something more than the public interest characterisation of a case is required. As is outlined in further detail in Attachment 2, 'no costs' orders on the basis of public interest considerations have been rare.[15]

[12] See e.g. Anni Aarela and Jouni Nakkalajarvi v Finland UN Doc CCPR/C/73/D/779/1997.

[13] See Attachment 2.

[14] (1998) 193 CLR 72.

[15] Attachment 2.

PILCH Vic notes that the limited scope of the Oshlack decision was qualified in the following terms by Kirby J in *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2)*

> 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* (**emphasis added**).[16]

The situation in Australia stands in contrast to other Commonwealth jurisdictions where the courts have been prepared to introduce a more comprehensive (albeit judiciously applied) common law PCO regime (see Attachment 2).

Proposed reform - two stage approach

PILCH Vic is supportive of a refinement of its previous submission to Australian governments on the issue of a PCO regime, and now recommends a two stage approach where the question of whether the proceeding is a 'public interest proceeding' becomes a threshold question. PILCH Vic considers that this approach is consistent with overseas jurisprudence where 'public interest' is treated, in effect, as a threshold issue.[17]

PILCH Vic supports a synthesis of the proposed reforms put forward by both the Australian Law Reform Commission in its 1995 report 'Costs Shifting – who pays for litigation' (the **ALRC Report**) and the Victorian Environment Defenders Office's report 'Costing the Earth? The case for public interest costs protection in environmental litigation' (the **Victorian EDO's Submission**). PILCH Vic submits that the key elements of any PCO regime are:

- A two stage approach, where the first stage is to assess whether the proceedings are 'public interest proceedings' and the second stage is to assess what PCO is appropriate in all the circumstances;
- In the first stage, the use of guiding factors to assist a court to determine whether a matter is a 'public interest proceeding';
- In the second stage, the use of guiding factors to assist a court to determine what PCO is appropriate; and
- The availability of a broad range of orders, including capped costs or an order that, regardless of the outcome, the public interest litigant will pay no costs.

Question 4.2

(1) Should any proposed legislation establishing public interest costs orders define public interest proceedings?

(2) If so, what should the definition be?

PILCH Vic notes the difficulties in defining 'public interest proceedings', but considers that the introduction of guiding factors that a court must have regard to in determining this question would be useful. PILCH

[16] (1998) 154 ALR 411, 412.

[17] Attachment 2.

Vic would not support the introduction of a rigid definition of what constitutes 'public interest proceedings', for example, by way of fixed categories.

PILCH Vic considers that the following factors (a synthesis of approaches taken in the ALRC Report and the Victorian EDO's Submission) would be a useful basis for a list of discretionary factors:

- the public interest in the subject matter of the dispute;
- whether the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community;
- whether the litigation raises a novel and important question of law or concerns the interpretation or future administration of laws;
- whether the proceedings will affect the development of the law generally; and
- whether the proceedings otherwise have the character of public interest or test case proceedings.

Question 4.3

Should the legislation establishing public interest costs orders provide that courts may make an order at any stage of the proceedings, including at the start of the proceedings?

PILCH Vic supports a PCO regime which enables a court to make PCO at any stage of the proceedings.

Allowing public interest litigants to apply for a PCO at the outset of proceedings allows them (and other parties) to make an informed decision about whether and how to proceed based on a known costs exposure at the earliest opportunity. Indeed, an inability to determine costs exposure at the outset would in many instances frustrate the very purpose of a PCO regime, that is, to assist the public interest applicant to determine whether he or she is in a position to institute proceedings at all (see, for example, Case Study 1 above).

Question 4.4

(1) Should the legislation giving courts power to make public interest costs orders contain a list of discretionary factors that courts may take into account when determining whether to make a public interest costs orders?

(2) If so, what should these factors be?

In the interests of clarity and certainty, and having regard to the various factors developed in parallel jurisdictions, PILCH Vic submits that the courts and public would benefit from a codification of the discretionary factors the court may consider in the exercise of its costs discretion. PILCH Vic is supportive of the following factors listed at 4.57 and 4.60 of the Consultation Paper:[18]

- the evidence before the Court as to the financial resources of the parties to the proceeding;
- the costs that are likely to be incurred in the usual course by the parties to the proceeding;
- the ability of each party to present his or her case properly or to negotiate a fair settlement;

[18] These factors are derived from the Corner House decision (discussed in Attachment 2) and from Australian case law (which generally follows Corner House) as well as from Recommendation 47 of the ALRC Report.

- the nature and extent of any private or pecuniary interest that the applicant for the order has in the outcome of the proceeding (with the express proviso that a private interest should not constitute a automatic bar to a PCO);
- legislative intent, including objects clauses and broad standing entitlements;
- the proportion of costs compared to the issues at stake;
- the strength of the case;
- any effect upon marginalised or vulnerable people; and
- the ability of proceedings to continue if public interest costs order is not made.

Question 4.5

If a court is satisfied that there are grounds for making a public interest costs order, what are the types of orders that it should be able to make?

PILCH Vic considers that a court making a PCO should have a range of orders available to it. PILCH Vic is supportive of the types of orders outlined in Recommendation 47 of the ALRC Report, being orders that

- costs follow the event;
- each party bear his or her own costs;
- regardless of outcome, applicant shall;
    - not be liable for the other party's costs;
    - only be liable to pay a specified proportion of the other party's costs; or
    - be able to recover all or part of his or her costs from the other party; and
- another person, group etc is to pay all or part of the costs of one or more of the parties.

PILCH Vic submits these types of orders should be expressly codified.

Question 4.6

Should the provisions giving courts power to make public interest costs orders be located in statute or in the Uniform Civil Procedure Rules 2005 (NSW)?

PILCH Vic considers that the power to make PCO should be located in statute.

Question 4.7

(1) What is the appropriate scope and purpose of Uniform Civil Procedure Rules 2005 (NSW) r 42.4?

(2) Should this rule be used more frequently in public interest proceedings?

Broadly, PILCH Vic recognises the potential access to justice benefits of UCPR r 42.4. However, PILCH Vic does not see the rule as a substitute for a comprehensive PCO regime as advocated for in this submission.

Absent such a PCO regime, we would support UCPR r 42.4 being used more frequently in public interest proceedings.

PILCH Vic notes that, even if a PCO regime is introduced, the availability of maximum costs orders under r 42.4 will still be relevant for those matters which are not 'public interest proceedings' within the meaning of any PCO regime, but in which, in the interests of access to justice, it will still be appropriate to order maximum costs orders.

Question 4.8

Should the provisions on courts' power to specify the maximum costs that may be recovered by one party from another, which are currently located in Uniform Civil Procedure Rules 2005 (NSW) r 42.4, be relocated into s 98 of the Civil Procedure Act 2005 (NSW)?

PILCH Vic considers that the court's power to make maximum costs orders should be located in statute.

Question 4.9

Should New South Wales establish a public interest fund that will provide financial assistance to cover the legal costs of, and any adverse costs orders against, persons or organisations whose litigation raises issues that are in the public interest?

PILCH Vic supports the establishment of a public interest fund to provide financial assistance to cover the legal costs, disbursements or adverse costs of public interest or pro bono litigation. In practice PILCH Vic is concerned about the obvious funding hurdle of such a litigation fund.

Further, PILCH Vic would not regard such a fund to be a substitute for a PCO regime in ameliorating an unmitigated exposure adverse cost orders.

Attachment 1 – Proposed legislative amendment to abrogate the indemnity principle in pro bono assisted cases

Chapter 3, Part 3.4 of the *Legal Profession Act 2004* (Vic) be amended as follows:

(1) Amend section 3.4.2 by inserting a new definition as follows:

pro bono includes the provision of legal services without fee or without expectation of a fee.

(2) After section 3.4.28 insert a new section as follows:

3.4.28A Conditional costs agreements in pro bono cases

(1) This section applies where a court is satisfied that the legal services to which a conditional costs agreement relates have been provided on a pro bono basis.

(2) A court may make an order for costs in a matter to which a conditional costs agreement relates, and those costs are recoverable by the client, notwithstanding that the payment of some or all of the legal costs is conditional upon:

(a) the making of an order for costs in favour of the client in respect of the matter; or

(b) the client recovering any sum in respect of the matter from another party by way of costs.

and the relevant condition has not been satisfied at the time the order for costs is sought or made, or the costs payable under the order for costs are assessed.

(3) On the assessment of costs payable under the terms of any judgment or order, including an order made under this section, or of any settlement of an action or claim no item thereof shall be disallowed merely because the obligation to pay in whole or in part for the service to which the item relates is conditional upon the client recovering any sum in respect of the matter from another party, whether by way of costs or otherwise, and that condition has not been satisfied at the time of the assessment.

Attachment 2: Protective Costs Orders in Public Interest Litigation:

Jurisprudence Review 2011

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Contents

1. Executive summary

This Review provides a survey of comparative jurisprudence on the award of costs in public interest litigation.

The paper surveys four jurisdictions

- Australia;
- The UK;
- Canada; and
- South Africa.

The results of this survey are set out in sections 2 - 5 below. PILCH has focused primarily on the case law in each jurisdiction, although relevant statutory provisions are mentioned. We have not discussed various statutory alterations to costs regimes which have been implemented in some jurisdictions, notably administrative tribunals, on the basis that it is always open to Parliament to pass legislation mandating specific cost regimes.

1.1 Summary

The starting point for any discussion of costs is that generally the rule in common law jurisdictions is that costs follow the event. That is, the successful party can expect a costs award in their favour. The question is how different jurisdictions have adapted this rule in respect of public interest litigation.

1.2 Australia

- Australia does not have any specific legislative public interest costs regime. Rather, the High Court has indicated that, in exceptional cases, it may be appropriate to make no order as to costs.
- Judgments have provided little general guidance on what constituted an exceptional case, however, and courts have differed in their willingness to make 'no costs' orders.
- There is no general 'public interest' exception to the operation of the ordinary rule that costs follow the event. Each case will be considered on its merits, and something more than the public interest characterisation of a case is required.
- The NSW Land and Environment Court has been the most active in making 'no costs' orders.
- The Federal Court has made 'no costs' orders, but these are unusual.
- The Victorian Courts, so far as we are aware, have never made a 'no costs' order on the basis of public interest considerations. The Supreme Court of Victoria has, however, held that an impecunious plaintiff seeking an interlocutory injunction should not be required to provide security in addition to the usual undertaking as to damages because the application was brought 'in the public interest'.
- The Federal Court and New South Wales Courts have the power to grant an order capping the maximum costs of a proceeding from the outset. Public interest litigants have recently applied successfully for a maximum.

1.3 England

- While Australian 'no costs' orders are only considered at the conclusion of the substantive proceedings, an English Court may make a 'Protective Costs Order' at any stage of the proceedings which operates to insulate the litigant, wholly or in part, from the effects of an adverse costs order. The general public importance of a case can be a key factor in whether a Protective Costs Order is made.
- In its decision in *Corner House*, the Court of Appeal set out general principles that a court may apply in order to determine whether a matter is entitled to some form of costs protection.
- More recently, in the context of environmental public interest litigation, the Court of Appeal has held that the *Corner House* rules must be modified to meet the UK's obligations under EU law.
- At the time of writing, the 'Protective Costs Order' principles have not been incorporated into the *Civil Procedure Rules.*
- Interestingly, the House of Lords has not explicitly considered the question of costs in public interest matters.

1.4 Canada

- The Canadian Supreme Court can award a plaintiff costs prior to the commencement of the merits portion of a proceeding. It may do this on the basis that the public interest in the matter is such that it must be heard, even if that necessitated awarding costs before the proceedings were complete.
- More recently, the Supreme Court emphasized the exceptional character of such an award and referred approvingly to the UK approach as an intermediate step in protecting public interest litigants.

1.5 South Africa

- The Constitutional Court of South Africa has confirmed that an exception to the basic rule that costs follow the event applies to constitutional litigation. In South Africa, "constitutional litigation" applies broadly to cover most public interest litigation.
- The new approach in constitutional matters is that where a private party achieves substantial success against the state, the state should bear the costs. Where a private party is unsuccessful against the state or another private party, the parties should bear their own costs.

2. About PILCH

PILCH is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- address disadvantage and marginalisation in the community;
- effect structural change to address injustice; and
- foster a strong pro bono culture in Victoria; and, increase the pro bono capacity of the legal profession.

3. Australia: No Public Costs Regime

3.1 The Basic Rule as to Costs

In general, a party that has been successful in its action will be awarded the costs of the proceedings.[1] This rule has been applied in a range of judgments, often in cases dealing with public interest litigation.[2]

3.2 Costs in Public Interest Litigation in Australia: *Oshlack v Richmond River Council*

The leading Australian judgment on the award of costs in public interest matters is considered *to be Oshlack v Richmond River Council* (***Oshlack***).[3] The language of public interest litigation does not, in fact, form part of the ratio of the case, but it does figure in Justice Kirby's concurrence.

Oshlack was an appeal from the decision of Stein J in the NSW Land and Environment Court. The plaintiff, 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, section 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.

Stein J, as he then was, used his discretion under the section to make no order as to costs. His Honour reviewed the authorities and determined that the fact the proceedings were in the public interest was insufficient in itself to justify a no costs order. There had to be some further 'special circumstances' beyond the public interest to warrant the making of an order.

The developer accepted this, but 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,[4] but rather considered the narrower question of whether Stein J's discretion had miscarried. 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.

---

[1] *Donald Campbell & Co. v Pollak* [1927] AC 732.

[2] See, in the High Court, *Oshlack v Richmond River Council* (1998) 193 CLR *72;* in Victoria, *Board of Examiners v XY* [2006] VSCA 190; in the NSW Court of Appeal dealing with a costs appeal from the NSW Land and Environment *Court, Thaina Town (on Goulburn) Pty Ltd v City of Sydney Council* [2007] NSWCA 300; and in the Federal Court, *Ruddock v Vardalis (No.* 2) (2001) 115 FCR 229.

[3] (1998) 193 CLR 72.

[4] Ibid, [30] - [31]. Their Honours did, however, refer to the case *of Liversidge v Sir John* Anderson [1942] AC 206 at [42], apparently indicating that general public importance of a matter is a relevant factor in exercising the costs discretion.

Kirby J took essentially the same approach, but was more vigorous in his conclusions. Like Gaudron and Gummow JJ, he considered the structure of section 69(2) and its context in environmental legislation. His Honour observed that the statutory context of the NSW Land and Environment Court altered some of the assumptions that had given rise to the traditional, adversarial nature of cost orders. His Honour noted that:

> … in some cases at least, the contestants will be ranged as they were in these proceedings: on the one side an individual or representative body seeking to uphold one perception of the public interest and the requirements of environmental law; on the other side, a local government authority seeking to uphold another.[5]

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. This was done, however, on the basis of a departure from the general position that costs follow the event based on 'special circumstances'.[6]

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.[7]

It is important to note that *Oshlack* only upheld Stein J's original decision, which itself said that public interest factors were not necessarily sufficient to justify declining to award costs to the successful party. Moreover, the scope of the decision was qualified when only a few weeks after giving judgment in *Oshlack,* Kirby J himself said in *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2):*

> 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.[8]

More recently, in the case of *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs,*[9] the six member majority of the High Court observed that there is no absolute rule with respect to the exercise of the power to award costs.

[5] Ibid, [117].

[6] Ibid, [120].

[7] Ibid, [136].

[8] (1998) 154 ALR 411, 412.

[9] (2007) 234 ALR 114, [77] - [78].

3.3 The Award of Costs in Public Interest Litigation in Victoria

The Victorian Supreme Court has the power to award costs by virtue of section 24 of the *Supreme Court Act 1986,* which provides:

> 24 Costs to be in the discretion of Court
>
> (1) Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.
>
> (2) Nothing in this section alters the practice in any criminal proceeding.

We have not been able to locate a Victorian case in which *Oshlack* has been argued successfully to support a 'no costs' order. This may be, in part, because the kind of matters in which *Oshlack* has typically been applied, (ie, environmental matters), are largely handled by the Victorian Civil and Administrative Tribunal ***(VCAT)***. VCAT does not ordinarily make any order as to costs.

Parties that have attempted to raise *Oshlack* to obtain a 'no costs' order in Victoria appear to have been uniformly unsuccessful. See, for example, *Knight v Secretary, Department of Justice (Re Costs),*[10] *Board of Examiners v XY,*[11] and *Weinstein v Medical Practitioners Board of Victoria (No 2).*[12]

In *Geeveekay Pty Ltd, Keogh v Director of Consumer Affairs Victoria,*[13] Bell J recognised that the substantive question at issue had national importance, the resolution of the question was in the public interest, the appeal became a virtual test case on the question, and the decision was likely to have application beyond the immediate parties to the appeal. However, Bell J still held that those considerations were not sufficient to bring the case within the category of special and exceptional cases involving public interest like *Oshlack*, because it was an appeal of a private nature that pursued commercial interests.[14]

However, a recent Victorian Supreme Court decision has applied the broad principle that exceptional circumstances, such as public interest litigation, warrant departure from general costs rules. In *Environment East Gippsland Inc v VicForests (No. 2)*[15] (***VicForests No 2***), Justice Forrest held that the impecunious plaintiff seeking an interlocutory injunction should not be required to provide security in addition to the usual undertaking as to damages because it was an exceptional case brought 'in the public interest' that involved 'consideration of the obligations (imposed by State legislation) of a State statutory corporation to comply with principles of conservation as they affect an endangered species'. His Honour relied on obiter comments by Mandie J in an earlier Victorian Supreme Court decision,[16] as well as a line of authority in the NSW Land and Environment Court to the effect that the usual undertaking as to damages or the need for security for the undertaking may not be required where an interlocutory injunction is sought in the public interest. Justice Forrest also

[10] (2004) VSC 29.

[11] [2006] VSCA 190, [14].

[12] [2008] VSCA 224.

[13] [2008] VSC 152.

[14] [2008] VSC 152, [4] - [6].

[15] [2009] VSC 421.

[16] *Blue Wedges Inc v Port Melbourne Corporation* [2005] VSC 305, [11].

appeared to be influenced by the fact that an order that Environment East Gippsland Inc provide even a modest amount of security would likely stultify its ability to run its case.

While a case concerning whether security for costs in addition to an undertaking as to damages when seeking an interlocutory injunction can be set apart from the line of authority on the grant of 'no costs' orders, *VicForests No 2* may suggest a growing openness by the Victorian courts to consider arguments that public interest considerations should be given greater weight when exercising the discretion as to costs generally.

3.4 The Award of Costs in Public Interest Litigation in the New South Wales Land and Environment Court

Oshlack dealt with a case arising in the jurisdiction of the NSW Land and Environment Court. That Court is a superior court of record,[17] albeit with a very specific jurisdiction.[18] A right of appeal lies to the NSW Supreme Court.[19] Section 69(2) of the *Land and Environment Court Act 1979,* which dealt with the award of costs at that time, is set out above.

The NSW Land and Environment Court generally appears willing to make 'no costs' orders. In fact, a number of recent cases have concerned whether Practice Notes that directed that a 'no costs' order should generally be made in certain proceedings constituted an improper fetter on the Court's discretion as to costs.[20]

The Court is prepared to make a 'no costs' order where there are public interest factors present and the case raises important issues of statutory construction affecting many people: for example, *Engadine Area Traffic Action Group Inc v Sutherland Shire Council and Another (No 2)*[21] and *Plumb v Penrith City Council.*[22] In *Plumb,* Pearlman J sets out the factors relevant to the exercise of the costs discretion, including:

(a) the Court must take into account all relevant factors, which, in proceedings that have been brought pursuant to the open standing provision contained in section 123 of the *Environmental Planning and Assessment Act 1979* (NSW), may include factors which have a public interest nature;

(b) the consideration of all relevant factors may lead to a finding that special circumstances exist for departing from the general rule that costs follow the event and may lead to a consequent determination that there be no order for costs;

(c) public interest factors are not determinative factors; they are merely relevant factors to consider; and

(d) nor is it necessary that the Court characterise the litigation as 'public interest litigation'. What is required is the consideration of all relevant factors, including factors of a public interest nature.[23]

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[17] *Land and Environment Act 1979* (NSW), s 5(1).

[18] *Land and Environment Act* 1979 (NSW), Pt 3.

[19] *Land and Environment Act 1979* (NSW), Pt 5.

[20] See, for example, *Thaina Town (on Goulburn) Pty Ltd v City of Sydney Council* [2007] NSWCA 300 and cases cited there.

[21] (2004) 136 L GERA 365.

[22] (2003) 126 LGERA 109.

[23] Ibid, [6].

Her Honour ultimately concluded that the making of a no costs order was appropriate based on the high level of public interest in the matter, the applicant's success on one key point, the applicant's lack of a personal interest and the public benefit accruing from the proper explanation of the eight point test application under section 5A of the *Environmental Planning and Assessment Act.*[24]

In *Engadine,* Lloyd J followed *Plumb*. He found a number of public interest factors that meant the litigation was public interest litigation. His Honour noted, however, that this was insufficient in the absence of special factors.[25] His Honour said that the issues of statutory construction raised by the matter were sufficient to warrant the making of a no costs order.[26]

The provisions relating to costs in the NSW Land and Environment Court were amended with effect from 28 January 2008, and effectively replaced section 69 of the *Land and Environment Court Act 1979* according to which *Oshlack* was determined. The new rule 4.2 of the *Land and Environment Court Rules 2007* provides:

> (1) The court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.
>
> (2) The court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.
>
> (3) In any proceedings on an application for an interlocutory injunction or interlocutory order, the court may decide not to require the applicant to give any undertaking as to damages in relation to:
>
> (a) the injunction or order sought by the applicant, or
>
> (b) an undertaking offered by the respondent in response to the application,
>
> if it is satisfied that the proceedings have been brought in the public interest.

However the rule is limited to cases which fall within Class 4 of the Court's jurisdiction, namely environmental planning and protection.

Justice Biscoe in *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning*[27] pointed out that the new rules do not prescribe that, in addition to the public interest, there must be a factor leading to the conclusion that there are special circumstances justifying departure from the usual costs rule. However, Biscoe J stated that this will have little practical impact on the application of the public interest exception to the usual costs rule:

> …in my opinion, the discretion under the new rule is only enlivened if departure from the usual costs order is justified. The public interest consideration alone may be of such moment or magnitude as to ground that justification. An example might be an unsuccessful proceeding, based on a good arguable case, brought to stop or limit the development of one of the last habitats of an endangered species. In most cases, however, I expect it would also be necessary to establish special circumstances additional

[24] Ibid, [28].

[25] (2004) 136 LGERA 365, [19].

[26] Ibid, [20] - [21].

[27] [2008] NSWLEC 272.

> to the public interest in order to enliven the discretion. In such cases the practical application of the new rule would not be different from the pre-existing position.[28]

Biscoe J's reasoning was applied with approval by Lloyd J in A*ndersons on behalf of the Numbahjing Clan within the Bundjalung Nation v Director-General of the Department of Environment and Climate Change & Anor*[29] (***Andersons 2***). Justice Lloyd stated that the new rule 4.2 does not change the pre-existing position, and in fact simply gives statutory recognition to the High Court judgment in *Oshlack,* which remains binding on the NSW Land and Environment Court. Therefore, he stated that 'in most cases one would expect it would also be necessary to establish special circumstances additional to the public interest in order to enliven the discretion'.[30] In *Andersons 2*, the applicant objected to the grant of a permit by the Director-General to disturb or remove Aboriginal objects from the land. In rejecting the application for a 'no costs' order, Lloyd J held that the proceedings did not involve any real or substantial questions of the proper interpretation of legal questions of general significance. On the contrary, the case involved the application of settled principles of administrative law to the facts of the case.

In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Another No 3*[31] (***Caroona No 3***), the plaintiff challenged the validity of certain mining authorities issued by the Minister for Mineral Resources under Class 8 of the Court's jurisdiction. The plaintiff was ultimately unsuccessful and sought a 'no costs' order. As the specific cost rules for public interest litigation under rule 4.2 are limited to Class 4 cases, Preston J instead applied the usual cost rules under Part 42 of *Uniform Civil Procedure Rules 2005* (NSW) (***UCPR***), which are binding in the NSW Land and Environment Court to the extent only that they are not inconsistent with the *Land and Environment Rules 2007* (NSW). Part 42.2 of the UCPR provides that costs follow the event unless it appears to the court that some other order should be made.

Accordingly, Preston J comprehensively analysed the principles stemming from Australian case law considering whether to depart from the usual costs rule in unsuccessful public interest cases, and held (at [13]) that the following three-step approach has been developed:

1. Can the litigation be characterized as having been brought in the public interest?
2. If so, is there something more than the mere characterisation of the litigation as being brought in the public interest?
3. Are there any countervailing circumstances, including in relation to the conduct of the applicant which speaks against departure from the usual costs rule?

With regard to step two, Preston J (at [58]) identified the following five categories of cases containing additional factors justifying departure from the usual costs rule:

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

---

[28] [2008] NSWLEC 272, [11]. This interpretation of the new rule has thus far been upheld in *Ku-Ring-Gai Council v Minister for Planning (No 2)* [2008] NSWLEC 226, *Arnold v Minister Administering the Water Management Act 2000 (No 4)* [2009] NSWLEC 87, and *Harvey v Minister Administering the Water Management Act 2000* [2008] NSWLEC 213 (***Harvey***) however Biscoe J presided in both cases. In *Harvey,* Jagot J applied the new rules to the case, however he did not comment on Biscoe J's interpretation of the rules as he concluded there was not sufficient public interest in the case.

[29] [2008] NSWLEC 299.

[30] Ibid, [9].

[31] [2010] NSWLEC 59, [16].

b) the litigation has contributed, in a material way, to the proper understanding, development or administration of the law;

c) where the litigation is brought to protect the environment or some component of it, the environment or component is of significant value and importance;

d) the litigation affects a significant section of the public; and

e) there was no financial gain for the applicant in bringing the proceedings.[32]

This three-step approach and the above categories of additional factors identified by Preston J have been subsequently applied as a useful, although not definitive checklist in *Kennedy v NSW Minister for Planning,*[33] *Hooper v Port Stephens Council and Anor (No 3),*[34] and *Gray and Anor v Macquarie Generation (No 2)*.[35]

3.5 The Award of Costs in Public Interest Litigation under the Queensland *Judicial Review Act 1991*

According to section 49 of the *Judicial Review Act 1991* (Qld), if an application is made for a statutory order of review under the Act, the court can order that each party bear their own costs regardless of the outcome of the review in certain circumstances. Section 49(2)(b) states that the court must consider the following matters:

(a) The financial resources of —

(i) the relevant applicant; or

(ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and

(b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and

(c) if the relevant applicant is a person mentioned in subsection (1)(a) — whether the proceeding discloses a reasonable basis for the review application; and

(d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c) — whether the case in the review application of the relevant applicant can be supported on a reasonable basis.

Section 49(3) sets out the powers of the court in relation to any order made under section 49:

The court may, at any time, of its own motion or on the application of a party, having regard to—

(a) any conduct of the relevant applicant (including, if the relevant applicant is the applicant in the review application, any failure to prosecute the proceeding with due diligence); or

(b) any significant change affecting the matters mentioned in subsection (2);

revoke or vary, or suspend the operation of, an order made by it under this section.

[33] [2010] NSWLEC 269.

[34] [2010] NSWLEC 178.

[35] [2010] NSWLEC 82.

In *Parker v President of the Industrial Court,*[36] the Queensland Court of Appeal held, it appears on its own motion, that even though the applicant's appeal was dismissed, the Court was not disposed to make any order for costs against the applicant bearing in mind the applicant's unfortunate circumstances, 'and the circumstance that the proceeding involved the discussion of issues that may affect the public interest'.[37]

Moreover, in *Alliance to Save Hinchinbrook Inc v Cook*[38] the Supreme Court of Queensland granted Alliance to Save Hinchinbrook Inc an order that they would only bear their own costs despite the outcome of a proposed review of the decision by the Environmental Protection Agency and the Queensland Parks and Wildlife Service to grant the Cardwell Shire Council permission to construct two breakwaters at the entrance to Port Hinchinbrook. The environmental group argued that the proposed construction could have a drastic impact upon the natural environment of the area. The term 'public interest' is not defined in the Act, however Justice Jones cites with approval the interpretation given by Stein J in *Oshlack* that litigation 'which had nothing to gain … other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna' amounted to public interest litigation.

3.6 The Award of costs in Public Interest Litigation in the Federal Court

The Federal Court, as with other Australian courts, has a broad discretion as to costs. Section 43 of the *Federal Court Act 1976* (Cth) provides:

> (1) Subject to subsection (1A), the Court or a Judge has jurisdiction to award costs in all proceedings before the Court (including proceedings dismissed for want of jurisdiction) other than proceedings in respect of which any other Act provides that costs shall not be awarded.
>
> [Sub-section (1A) deals with costs in representative proceedings]
>
> (2) Except as provided by any other Act, the award of costs is in the discretion of the Court or Judge.

The most significant case since *Oshlack,* from a public interest litigant's perspective, is the Full Federal Court decision in *Ruddock v Vardalis (No 2).*[39] That case involved an unsuccessful challenge to the existence of a prerogative power in the Commonwealth to exclude aliens. There, Black CJ and French J held:

> This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights. There was substantial public and, indeed, international controversy about the Commonwealth's actions. The proceedings provided a forum in which the legal authority of the Commonwealth to act as it did with respect to the rescued people was, and was seen to be, fully considered by the Court and ultimately, albeit by majority, found to exist. The case is quite different in character from the predominantly environmental litigation in which many of the previous decisions concerning the impact of public interest considerations on costs awards have been made. Having

[36] [2009] QCA 120, [52].

[37] Cf *Remely v O'Shea* [2008] QCA 78 and *Chapman v Richards* [2008] QSC 164 where the court held that no public interest exists to depart from the ordinary rule that costs follow the event.

[38] [2005] QSC 355.

[39] (2001) 115 FCR 229.

> regard to its character and circumstances the appropriate disposition is that there be no order as to the costs of the appeal or the application before North J.[40]

The Federal Court in *Emirates v Australian Competition and Consumer Commission (No 2)*[41] applied *Ruddock* as authority for the ability of the court to take into account in determining whether costs should follow the event, that the proceeding seeks to clarify the law on an issue. However, the Court distinguished *Ruddock* on the facts as in *Emirates*, the applicants specifically sought to set aside notices that directly affected them and thus the case was not in the public interest.

In general, however, the Federal Court has tended to interpret *Oshlack* narrowly. In *Friends of Hinchinbrook Society Inc v Minister for Environment and Ors (No 5),*[42] the Full Court of the Federal Court observed that *Oshlack* merely emphasized the width of the discretion as to costs. It did not create a rule as to how the discretion should be exercised in any given case.

In *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts (No 2),*[43] the Federal Court once again emphasized that 'there is no general "public interest" exception to the operation of the ordinary "rule"' as to costs. In that case, Lawyers for Forests Inc (***LFF***), whose application to review a decision of the Minister to grant conditional approval to Gunns Limited to construct a pulp mill was dismissed, was refused its request for either no order as to costs, or that it pay only a percentage of the costs of the respondents. Tracey J refused LFF's application on the grounds that the case did not raise novel issues of interpretation of the relevant Act, LFF's capacity to meet a costs order was not a relevant consideration, and that the public interest nature of LFF's objects and its lack of potential financial gain from litigation alone is not considered a reason to depart from the ordinary rule as to costs.

This decision serves as a contrast to the approach taken by the NSW Land and Environment Court, since, on the principles laid out in *Plumb*, *Engadine*, and *Caroona* it is possible that the Court would have declined to make an award of costs.

*In Construction, Forestry, Mining and Energy Union and Others v Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd and Others (**CFMEU**),*[44] Wilcox J considered the application *of Ruddock* to a case concerning superannuation entitlements. His Honour quoted the passage in *Ruddock* set out above and observed:

> None of the circumstances referred to in Ruddock was present in this case. It is true to say that the present case raised important and difficult questions of law affecting many people; that is, employees and employers engaged in the coal mining industry. However, standing alone, that circumstance has not generally been considered a sufficient basis upon which to refrain from making the conventional costs order.[45]

[40] Ibid, [29].

[41] [2009] FCA 492.

[42] (1998) 84 FCR 186, 188.

[43] [2009] FCA 466.

[44] (2003) 132 FCR 516.

[45] Ibid, [6].

In *Save the Ridge Inc v Commonwealth*[46] the Full Court of the Federal Court, including Black CJ who was in the majority in *Ruddock,* summarized the position in Australia in relation to costs in public interest litigation:

> Moreover, the courts have held that there is no special costs regime applicable to "public interest" litigation: *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2)* (1998) 154 ALR 411; 72 ALJR 1008; [1998] HCA 35 at [5]-[6] per Kirby J; *Hollier v Australian Maritime Safety Authority (No* 2) [1998] FCA *975; Edgley v Federal Capital Press of Australia Pty Ltd (2001) 108* FCR 1; 192 ALR 395 ; [2001] FCA 379 at [91]-[96] per Beaumont ACJ. In a passage cited with approval by Weinberg J in *Mees v Kemp (No 2) [2004] FCA 549* at [19], the Full Court of the Supreme Court of Western Australia stated in *Buddhist Society of Western Australia (Inc) v Shire of Serpentine-Jarrahdale [1999] WASCA 55* at [11]:
>
> > In our opinion great care must be taken with the concept of public interest litigation that it does not become an umbrella for the exercise of discretion with respect to costs in an unprincipled, haphazard and unjudicial manner ... In our view, the denial of costs to successful litigants upon the ground that the litigation bears a public interest character should continue to be the rarity which this Court supposed it would be in the *South West Forests Defence Foundation* case.[47]

Likewise, in *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources*[48] Marshall J surmised the position:

> The real issue was not what was considered to be in the public interest or whether public interest considerations were a recognised exception to the usual rule, but rather, whether it could be said that there were sufficient public interest related reasons connected with or leading up to the litigation that warranted a departure from or outweighed the important consideration that a wholly successful respondent would ordinarily be awarded costs.[49]

However, in another recent case, *Wilderness Society Inc v Minister for Environment and Water Resources and Anor,*[50] the Court ordered that the applicant pay only 70 per cent of the Minister's costs and only 40 percent of the second respondent's costs (Gunns) based on the following circumstances:

> …it was of general importance both to the minister and to the public that the law concerning the proper construction of the provisions of the EPBC Act with which this appeal was concerned should be clarified. Significance may also be seen to attach to the fact that the appellant was concerned, along with a large segment of the Australian community, to avoid harm to the Australian environment. The appellant was not seeking financial gain from the litigation; rather it appropriately sought to resolve a dispute, which had engaged the emotions of many, concerning the proper administration of the EPBC Act in the court rather than elsewhere.[51]

Further, in *Blue Wedges Inc v Minister for Environment, Heritage and the Arts,*[52](***Blue Wedges***) Heerey J held that there should be no order as to costs, even though Blue Wedges Inc's application

[46] (2006) 230 ALR 411.

[47] Ibid, [6].

[48] [2007] FCA 1863.

[49] [2007] FCA 1863, [30].

[50] [2008] FCAFC 19.

[51] [2008] FCAFC 19, [9] – [10].

[52] (2008) 165 FCR 211.

failed in challenging the Minister's decision to approve the Port of Melbourne Corporation's proposed deepening of the shipping channels in Port Philip Bay.[53] Heerey J stated at [73]:

> In my view, however, this is a clear case for the application of the Oshlack approach. The condition of Port Phillip Bay is a matter of high public concern, and not only for the four million or so Victorians who live around it. … There is a public interest in the Approval Decision itself, and equally in whether it has been reached according to law. Also, the application raised novel questions of general importance as to the approval process under the Environment Act: cf *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 430 at [11]-[12].

Interestingly, Heerey J also concluded that despite the fact that Blue Wedges Inc's solicitor represents some businesses who fear they will be commercially damaged by the proposed project, this commercial element of the case did not gainsay the public interest that lay at the base of the present application.

The Federal Court dismissed another action brought by Blue Wedges Inc in March 2008 regarding the proposed channel deepening. However on this occasion North J refused Blue Wedges Inc's submission that there should be no order as to costs.[54] Whilst North J agreed that there were public interest issues in the litigation, he did not believe that the *Oshlack* case should be applied in this instance. First, North J held that the application did not raise significant issues as to the interpretation and future administration of the relevant Act, and on this basis was able to distinguish this case from Heerey J's judgment in the previous Blue Wedges Inc application. Second, North J rejected the argument that the cooperative conduct of Blue Wedges Inc during the litigation was a special feature that merited a no costs ruling. Here, North J emphasised that the original pleadings of Blue Wedges Inc contained many causes of action based on misconceptions of the law, and that while it responded quickly to the obvious deficiencies in its case, two hearing days were wasted dealing with clearly untenable causes of action.

Likewise, in dismissing an application for a no costs order in *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts (No 2)*,[55] Heerey J distinguished his own judgment in *Blue Wedges* and held that the present case did not raise any novel questions of general importance about the operation of the relevant Act, nor any difficult questions of construction, and in his Honour's opinion, the case itself had arguable merit.

However, in the recent full Federal Court case of *Australian Crime Commission v NTD8,*[56] Chief Justice Black and Justices Mansfield and Bennett applied *Ruddock* and held that there should be no order as to costs due to the special public interest elements in the case. The Australian Crime Commission (***ACC***) was conducting a special intelligence operation into indigenous violence and child abuse. It issued a notice under the relevant Act requiring NTD8, an Aboriginal community-controlled health services provider, to produce detailed personal and health records of eight Aboriginal children. NTD8 issued proceedings as it was concerned that releasing the documents would be perceived as a breach of trust such that the children might not continue to seek its medical services, to their own detriment.

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[53] See also *Lansen v Minister for the Environment and Heritage (No 3)* [2008] FCA 1367 where the public interest issues in the case meant it would be appropriate for the applicants to pay only 35% of the taxed costs of the respondent (this was further reduced to 25% for other reasons).

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

[55] [2008] FCA 900.

[56] [2009] FCAFC 143.

The Federal Court held that the special circumstances of the public interest litigation were such that the just and proper order for costs is that there be no order for costs, and in applying *Ruddock*, stated at [8]:

> There were undoubtedly special public interest elements in this case, as it concerned the possible acquisition under compulsion of law of highly personal and sensitive information about young women or girls in circumstances in which (though quite unintended) there could be harmful consequences to them of both a direct and indirect nature. The consequences, were they to occur, would be the result of the exercise of extraordinary powers. If information about young women or girls attending a medical practice to obtain advice about matters of an especially private nature is to be obtained under compulsion of law, in circumstances where those directly affected are unable to challenge the exercise of that power, there is a high public interest in a legitimate challenge, by a person or entity with a legitimate and caring interest in the matter, to the lawfulness of the exercise of the powers under which the information is sought.

3.7 The grant of an upfront "maximum costs order" under order 62A of the *Federal Court Rules* and rule 42.2 of the NSW *Uniform Civil Procedure Rules*

An alternative to the ordinary costs rule that may be of use to public interest litigants is legislation permitting the courts in certain jurisdictions to specify the maximum costs that may be recovered in commenced proceedings from the outset, rather than once the litigation has concluded. Preston J of the NSW Land and Environment Court observed that the purpose of such an order is to facilitate access to justice as 'a party may be inhibited … where its own legal costs will be high but also where it fears an order that it pay high legal costs of the other parties'.[57] Notably, the courts have identified the public interest as a factor relevant to the discretion to grant a maximum costs order.

(a)*Federal Court Rules*

Order 62A of the *Federal Court Rules* (***FCR 62A***) states that the Federal Court 'may, by order made at a directions hearing, specify the maximum costs that may be recovered on a party and party basis'. FCR 62A(2) sets out the costs that are excluded from the maximum amount, and FCR 62A(3) and (4) allows the Court to revisit and vary the order if necessary.

In *Corcoran v Virgin Blue Airlines Pty Ltd,*[58] Bennett J granted the applicants an order in the early stages of the commenced proceeding fixing the maximum amount for costs recoverable. The case involved a claim that the airline discriminated against the applicants in implementing a set of travel criteria requiring passengers who were unable to carry out certain actions independently to travel with a carer. Bennett J reviewed the existing case law on FCR 62A and identified the following factors as relevant in determining whether a maximum costs order should be made:

- the timing of the application;
- the complexity of the factual or legal issues raised in the proceedings;
- the amount of damages that the applicant seeks to recover and the extent of the remedies sought;
- whether the applicant's claims are arguable and not frivolous or vexatious;

[57] *Caroona Coal Action Group v Coal Mines Australia Pty Ltd and Another* [2009] NSWLEC 165, [16].

[58] [2008] FCA 864.

- the undesirability of forcing the applicant to abandon the proceedings; and
- whether there is a public interest element to the case.

The key reasons Bennett J gave in *Corcoran* for granting the cap on costs were the public interest in people with disabilities having dignified access to goods and services, that the applicants did not seek financial gain from the litigation, that novel and complex issues would be raised in the proceeding, and that the applicants could be forced to discontinue the litigation if the order was not made.

However, while the existence of a public interest element in a FCR 62A case has been held to be a factor of 'some significance', it is not decisive, and something more than a public interest is required.[59]

Recently, in *Haraksin v Murrays Australia Ltd,*[60] Nicholas J granted a maximum costs order capping the costs in an upcoming hearing to $25,000 on the basis that there was a public interest in the determination of whether Murray Australia Ltd, an operator of public transport services, failed to comply with disability access standards set out in the relevant Act by failing to provide coaches that are wheelchair accessible. Nicolas J observed at [26]:

> I am satisfied that there is a public interest element to this case. And I am also satisfied that the case is brought by the applicant in good faith for the purpose of obtaining orders enforcing a legislative instrument which is expressly intended 'as far as possible' to eliminate discrimination against people with disabilities in the field of public transport. The evidence shows that there are other people suffering from similar disabilities who are inconvenienced by the lack of wheelchair accessible coaches on Sydney/Canberra coach services.

His Honour also appeared to be influenced by the fact that the applicant had not made a claim for compensation and therefore had no pecuniary interest in the proceeding, and that the applicant would not proceed with the case if a maximum costs order was not granted.

One of the limitations of FCR 62A, however, is that the Federal Court has repeatedly held that an order for maximum costs must apply to both parties.[61] There is no such limitation under the NSW *Uniform Civil Procedure Rules.*[62]

(b) *Uniform Civil Procedure Rules 2005* (NSW)

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

> (1) The court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.
>
> (2) A maximum amount specified in an order under subrule (1) may not include an amount that a party is ordered to pay because the party:
>
> (a) has failed to comply with an order or with any of these rules, or
>
> (b) has sought leave to amend its pleadings or particulars, or

[59] *Woodlands v Permanent Trustees Co Limited* [1995] FCA 1388, [148].

[60] [2010] FCA 1133.

[61] *Maunchest Pty Ltd v Bickford* [1993] FCA 318; *Hanisch v Strive* (1997) 74 FCR 384; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864; *Sacks v Permanent Trustees Australia Ltd* (1993) 45 FCR 509; *Muller v Human Rights & Equal Opportunity Commission* [1997] FCA 634.

[62] *Caroona Coal Action Group v Coal Mines Australia Pty Ltd and Another* [2009] NSWLEC 165, [12].

(c) has sought an extension of time for complying with an order or with any of these rules, or

(d) has otherwise caused another party to incur costs that were not necessary for the just, quick and cheap:

(i) progress of the proceedings to trial or hearing, or

(ii) trial or hearing of the proceedings.

(3) An order under subrule (1) may include such directions as the court considers necessary to effect the just, quick and cheap:

(a) progress of the proceedings to trial or hearing, or

(b) trial or hearing of the proceedings.

(4) If, in the court's opinion, there are special reasons, and it is in the interests of justice to do so, the court may vary the specification of maximum recoverable costs ordered under subrule (1).

In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Another*[63] (***Caroona No 1***), Preston J held that the factors set out by the Federal Court in *Corcoran* were relevant to the application of UCPR 42.4, however he noted that they provide guidance only and should not be elevated to become fixed criteria governing the discretionary power to grant the order.[64] Instead, the discretion to make a maximum costs order 'will vary depending on the circumstances of the case and of the plaintiff and what is necessary to facilitate access to justice in that case.'[65]

Further, Preston J held that, unlike order 62A, a maximum costs order under UCPR 42.4 can specify any one or more of the parties as being protected by it.[66]

In *Caroona No 1*, the applicant, who was challenging the validity of an exploration licence, applied by notice of motion at any early stage in the proceedings for an order capping the costs to $34,000. The application was refused as Preston J concluded that the applicant had access to sufficient financial resources and would continue with the litigation regardless of whether an order was made, and therefore, a refusal to grant a maximum costs order would not impede access to justice. Preston J also noted that the refusal to grant a maximum costs order did not preclude the Court in the future exercising its discretion to make a 'no costs' order if the applicant was unsuccessful in the substantive proceedings, on the basis of the public interest nature of the litigation.[67] The applicant was ultimately unsuccessful in the substantive proceedings, but its request that the court make a 'no costs' order was also refused by Preston J in *Caroona No 3*, which is discussed in section 2.4 above.

[63] [2009] NSWLEC 165.

[64] *Caroona No 1* [2009] NSWLEC 165, [36].

[65] Ibid, [31].

[66] Ibid, [12]. Basten JA in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263 at [187] agreed that the language of rule 42.2 does not constrain the judge from binding only one party with a maximum costs order.

[67] *Caroona No. 1* [2009] NSWLEC 165, [66].

An application for a maximum costs was, however, successful in *Blue Mountains Conservation Society Inc v Delta Electricity*.[68] The Blue Mountains Conservation Society (***BMCS***) commenced proceedings in the NSW Land and Environment Court seeking a declaration that Delta Electricity had polluted the waters of the Coxs River, which is an important watercourse feeding into Sydney's water supply . BMCS filed a notice of motion at an early stage in the proceedings seeking a maximum costs order of $10,000, which Delta Electricity opposed, claiming their costs would likely be more than $200,000.

Pain J granted an order that the maximum costs recoverable by either party would be $20,000. Although Pain J conceded that making the order would adversely impact the financial interests of Delta Electricity, her Honour weighed this against the likelihood of the proceedings not being pursued if an order were not made, the fact that the case was reasonably arguable, that BMCS had acted reasonably in pursuing it, and that it was public interest litigation.

Delta Electricity appealed the order to the NSW Court of Appeal. However the majority decision of Basten JA and Macfarlan JA dismissed the appeal.[69] Basten JA (with whom Macfarlan JA agreed), in approving the judgment of Pain J at first instance, held that the exercise of judicial discretion under UCPR 42.4 required:

> …a consideration of the future of the litigation from the point of view of the defendant, if the proposed order is made from the point of view of the applicant, if it is not made. Each perspective needs to be addressed separately and the likely consequences balanced.[70]

Basten JA rejected Delta Electricity's submission that litigation cannot readily be characterized as public interest litigation at an early stage of the proceedings. His Honour stated that the public interest in preventing or limiting pollution to a body of water that feeds a water supply is readily apparent, and that 'the proceedings would not lose their character as public interest litigation because the Court might ultimately not be satisfied that the water was being polluted.'[71] Further, Basten JA stated that the public interest nature of a proceeding is 'directly relevant' to the propriety of a maximum costs order.[72]

Basten JA also made the following comments concerning the need to protect access to justice for public interest litigants:

> … the principle that any person may bring proceedings to prevent a breach or threatened breach of environmental protection laws will be seriously undermined if some protection against large costs bills is not available. Important public interest disputes are often complex and based on expert evidence. Public-minded citizens may well be able to obtain donations of time and expertise from professional witnesses and lawyers, but will find it less easy to raise funds to meet the costs of the other party.
>
> In the past, such litigation was sometimes undertaken by people of no means, rendering it unlikely that a successful respondent which obtained an order for its costs would ever be likely

[68] [2009] NSWLEC 150.

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

[70] Ibid, [204].

[71] Ibid, [209].

[72] Ibid, [203].

> to recover those costs. It is preferable that litigation be conducted by responsible entities and that the final arrangements with respect to recovery be transparent.[73]

This very recent decision by the NSW Court of Appeal to uphold a maximum costs order at the outset of a public interest proceeding may encourage other public interest litigants in NSW to file a similar notice of motion under UCPR 42.4 after the commencement of proceedings to cap their total costs exposure to the litigation.

[73] Ibid, [218] – [219].

4. The United Kingdom: Protective Costs Orders

4.1 Introduction

The courts of England and Wales have developed rules for the granting of 'protective costs orders' (***PCOs***), which can be granted at the commencement of public interest litigation, in contrast to the Australian 'no costs' orders which are only considered at the conclusion of the substantive proceedings. A PCO can take a variety of forms, discussed in *R (Corner House Research) v Secretary of State for Trade and Industry* (***Corner House***)[74] below, and are designed to insulate, wholly or in part, the party in whose favour the order is made from the effects of an adverse costs order.

In the context of environmental public interest litigation, however, a recent decision of the Court of Appeal has held that the *Corner House* rules must be modified to meet the UK's obligations under EU law.

4.2 The Civil Procedure Rules

A significant element of the English decisions is the *Civil Procedure Rules* (***CPR***). These rules govern the procedure of the courts of England and Wales. Rule 44.3 prescribes a broad power to make costs orders:

> 44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs
>
> (1) The court has discretion as to -
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs -
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> (3) The general rule does not apply to the following proceedings -
>
> (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
>
> (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.
>
> (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -
>
> (a) the conduct of all the parties;

[74] [2005] EWCA Civ 192.

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes -

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(d) whether a claimant. who has succeeded in his claim, in whole or in part, exaggerated his claim.

(6) The orders which the court may make under this rule include an order that a party must pay -

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

(8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.

(9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either -

(a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or

(b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.

By force of rule 1.2 of the CPR, however, the interpretation of any other rule in the CPR is subject to the considerations elaborated in rule 1.1, the 'overriding objective' rule, which provides:

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable -

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate -

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

In the case of *R (Refugee Legal Centre) v Secretary of State for the Home Department,*[75] Lord Justice Brooke indicated that rule 1.1 was a significant consideration in the making of PCOs.

4.3 Corner House

The leading English decision on PCOs is that of *Corner House.*[76] There, Corner House Research, an anti-corruption group, sought to challenge new regulations issued by the Export Credit and Guarantee Department (***ECGD***), a branch of the Department of Trade and Industry, on the basis that the new guidelines had been prepared with inadequate public consultation (as required by the ECGD's consultation policy). At first instance, Davis J refused to grant a PCO. Corner House appealed to the Court of Appeal.

Lord Phillips MR (as he then was) gave the judgment of the Court, prepared by Brooke LJ. The judgment considered the leading authorities on costs in public interest litigation in Australia, Canada and Ireland as well as the UK. Lord Phillips stated:

> We would therefore restate the governing principles in these terms:
>
> 1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> i) The issues raised are of general public importance;
>
> ii) The public interest requires that those issues should be resolved;
>
> iii) The applicant has no private interest in the outcome of the case;
>
> iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
>
> v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> 2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
>
> 3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.[77]

[75] [2004] EWCA Civ 1296, [211].

[76] [2005] EWCA Civ 192.

[77] Ibid, [74].

His Lordship then considered the types of PCO that had been made:

> A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted:
>
> i) A case where the claimant's lawyers were acting pro bono and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (*Refugee Legal Centre)*;[78]
>
> ii) A case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost *(CND)*;[79]
>
> iii) A case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (CPAG);[80]
>
> iv) The present case where the claimants are bringing the proceedings with the benefit of a [conditional fee agreement (***CFA***)], which is otherwise identical to (iii).[81]

The Master of the Rolls stated that orders of the kind made in *Refugee Legal Centre* or *CND* would be preferable in the ordinary course of things. He indicated that, if the judges had had more time to consider the matter, they would have required Corner House Research to pay up to the first £10,000 of the ECGD's costs if unsuccessful.[82] His Lordship also made some important remarks about the extent of the protection provided by a PCO. He observed:

> There is of course room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise. It is likely that a cost capping order for the claimants' costs will be required in all cases other than (i) above, and the principles underlying the court's judgment in *King* at paras 101-2 will always be applicable. We would rephrase that guidance in these terms in the present context:
>
> 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 CFA funded party is concerned, of any additional liability;
>
> 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

[78] Referring to *R (Refugee Legal Centre) v Secretary of State for the Home Department*, above in 25 (***Refugee Legal Centre***).

[79] Referring to *Campaign for Nuclear Disarmament v Prime Minister & Others* [2002] E'NHC 2712 (Admin) (***CND***).

[80] Referring to *R v Lord Chancellor ex parte Child Poverty Action Group* (1998) EWHC Admin 151 (***CPAG***).

[81] Ibid, [75].

[82] Ibid, [146].

> representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.[83]

His Lordship also observed that the Court did not consider that an English court could make the kind of orders made in *British Columbia (Minister of Forest) v Okanagan Indian Band,* where the Supreme Court of Canada had ordered the Minister to pay the opposite party's costs to allow the litigation to proceed.[84]

Finally, the Court of Appeal observed that it anticipated the rules set out in *Corner House* would be formalised and placed in the CPR in the future. This has not yet occurred.

4.4 Subsequent Interpretation of the Corner House Decision

In July 2008, the Court of Appeal judgment in *R (Compton) v Wiltshire Primary Care Trust* (***Compton***)[85] considered the principles underlying the grant of PCOs that were set out in *Corner House.* Lord Justice Waller emphasised that the paragraphs in *Corner House* are not statutory provisions, and should not be read in an over-restrictive way.[86] The majority of the Court of Appeal (Lord Justice Waller and Lady Justice Smith) also clarified the position on other aspects of the *Corner House* case that are set out below.

The majority's approach in *Compton* was unanimously approved in *Re (Buglife – The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation* (***Buglife***).[87] Arguably, the interpretation of the *Corner House* principles in these two cases has increased the likelihood of these orders being granted in future cases.[88] Indeed, Lord Justice Buxton in *Compton* observed that 'the effect of the decision in this case is very greatly to extend the types of case in which, if other requirements are filled, a PCO can be made'.[89] Subsequent cases have confirmed this trend, and are discussed below.

a. Definition of 'general public importance'

The first governing principle in *Corner House* requires the judge to evaluate whether the issues raised are of 'general public importance'. This has been given a broad definition by the courts.[90] In *Compton*, Smith LJ stated:

> In my view, Corner House does not define what is an issue of general public importance. It provides some examples of the type of issue which will be of general public importance … but it does not seek to define or limit the field to issues of that nature. … It seems to me that a case may raise issues of general public importance even though only a small group of people will be directly affected by the decision. A much larger section of the public may be indirectly affected by the outcome. Because it is impossible to define what amounts to an issue of

[83] Ibid, [76].

[84] Ibid, [77], referring to [2000] SCC 71, discussed below.

[85] [2008] EWCA Civ 749.

[86] [2008] EWCA Civ 749, [23].

[87] [2008] EWHC 475.

[88] Andrew Lidbetter and Nusrat Zar, 'Protective Costs Orders in Judicial Review Proceedings' at <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=a6cb88ba-733d-4eaa-a3f1-67dd12baebe2>.

[89] [2008] EWCA Civ 749, [70].

[90] See, for example, *Thompson, Re Judicial Review* [2010] NIQB 38.

> general public importance, the question of importance must be left to the evaluation of the judge without restrictive rules as to what is important and what is general.[91]

For example, 'matters of public importance' have included questions about whether a registered social landlord was a 'public authority' under the *Human Rights Act 1998* (UK),[92] and whether planning permission should be granted for a power station on a site used for bird-watching.[93]

b. The 'No Private Interest' Requirement

Another of the requirements adopted in *Corner House* was that the litigant have no 'private interest' in the proceedings.[94] The requirement has been the subject of severe criticism, which is discussed below. It was considered by the Court of Appeal in *Goodson v HM Coroner for Bedfordshire.*[95] There, Mrs Goodson's father died as a result of surgery. A coronial inquest made a finding of death by misadventure. Mrs Goodson thought the death was brought about by the negligence of the hospital where the surgery had been performed. She sought judicial review of the coroner's decision. The application was refused at first instance, but leave to appeal to the Court of Appeal was granted. Before Mrs Goodson pursued the right to appeal, she sought a PCO.

The Court of Appeal declined to grant a PCO, concluding:

> Leaving aside Mrs Goodson's undoubted private interest in the proceedings, I can see no reason for concluding that the public interest in having the issues which arise in this case decided by this court is so great that they should be decided in this appeal and at the inevitable expense of the Hospital as regards its own costs. When one adds to that the fact that Mrs. Goodson has a strong interest of her own in seeing the case through to a successful conclusion, the case for refusing an order becomes even stronger.[96]

This decision has been attacked on the basis that the mere existence of a private interest should not disentitle a party from a PCO. It is not clear that Goodson goes so far. Nevertheless, some judges have declined to follow it. In *Wilkinson v Kitzinger,*[97] a lesbian couple who had been married in Canada sought recognition of their marriage in England as a marriage, rather than a civil partnership. The matter was heard in the Family Court, but it was agreed there was a 'quasi-public' aspect to it and a PCO could be made. Sir Mark Potter P stated:

> As to (1)(iii), 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

[91] [2008] EWCA Civ 749, [75], [77].

[92] *Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235.

[93] *McGinty, Re Judicial Review* [2010] CSOH 5.

[94] Although Jaffey notes that the point was not considered in argument in *Corner House:* Ben Jaffey, 'Protective Costs Orders in Judicial Review', paper presented at *Focus on Public Law and Human Rights,* 18 November 2005.

[95] [2005] EWCA Civ 1172.

[96] Ibid, [31].

[97] [2006] EWHC 835 (Fam).

> 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. Were I to be persuaded that the remaining criteria are satisfied, I would not regard requirement 1(iii) as fatal to this application.[98]

More recently, in a decision of the English High Court in *King's Cross Railway Lands Group v London Borough of Camden,* Collins J stated:

> While the suggestion the plaintiffs have a private interest is not being pursued, I have the gravest doubt whether the limitation suggested in *Corner House* was correct. No doubt a private interest is a relevant consideration which may in many cases mean that a PCO would not be appropriate, but I do not think it should be an absolute bar. I am satisfied that Goodson is wrong in this respect. In any event, since *Corner House* provides guidance and not rigid rules, that aspect can be properly reconsidered in individual cases.[99]

As such, it seems that, as a matter of practice, the general trend is to simply take the extent of a private interest into account when deciding whether or not to award a PCO. Lord Justice Latham affirmed this practice, stating in *Lynn McCaw v City of Westminster Magistrates' Court* that:

> …the apparent requirement that there should be no private interests in the outcome of the case has been in practical terms replaced with the approach that it is merely one of the material considerations when the court comes to its conclusions.[100]

The Court of Appeal recently reaffirmed that, as per *Compton* and *Buglife*, a flexible approach should be taken to all of the *Corner House* requirements, including the 'no private interest' rule: *Morgan v Hinton Organics (Wessex) Ltd & CAJE* .[101]

c. The exercise of the judge's discretion

The majority in *Compton* emphasized that the judge retains full discretion to decide what form the PCO should take in different cases, and that a judge should be flexible and use the full spectrum of PCOs to cater for both strong and less strong public interest cases. In *Compton*, Smith LJ stated at [87]:

> 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.

[98] Ibid, [54].

[99] [2007] EWHC 1515.

[100] [2008] EWHC 1504.

[101] [2009] EWCA Civ 107, [39]. See also *Ewaida v British Airways plc* [2009] EWCA Civ 1025.

d. Additional requirement of exceptionality

Lord Phillips in *Corner House* agreed with Dyson J's statement in *R v Lord Chancellor ex parte Child Poverty Action Group*[102] that a PCO should only be made in exceptional circumstances. The appellant in *Compton* sought to argue that the Court of Appeal was imposing an additional requirement of exceptionality beyond the five governing principles set out at paragraph 74.

However, the majority in *Compton* (with Buxton LJ dissenting on this point) rejected this submission. Lady Justice Smith stated at [83]:

> I conclude therefore, in respectful disagreement with Buxton LJ, that exceptionality is not an additional requirement over and above satisfying the five governing principles and persuading the judge that it is fair and just to make the order. So far as I can see, the only function of the *Corner House* endorsement of Dyson J's statement was to serve as a reminder that PCOs are not to be routinely made and that it will be a rare case which meets all the requirements.

4.5 European Court of Human Rights

In *Allen v UK*,[103] British citizens who had been denied a PCO in the domestic courts for public interest litigation claimed that this refusal amounted to a denial of their right of access to court guaranteed by article 6 of the European Convention on Human Rights.

The European Court of Human Rights rejected this contention. Importantly, the Court noted:

> …the general approach adopted in the United Kingdom whereby the unsuccessful party bears the costs of the successful party pursues a legitimate aim - namely, to provide a disincentive for unmeritorious applications and to protect a successful party which has been required to spend money in order to assert its claim or defend its position.[104]

While the Court did not dismiss the possibility that a failure to award a PCO could constitute an impairment of 'the very essence of [the applicants'] right of access to court', it found that there was no such impairment in the context of the case.[105]

4.6 Environmental litigation and PCOs

There have been some recent important developments with respect to the availability of PCOs for environmental public interest litigation in the UK.

a. The Aarhus Convention and EU law

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the ***Aarhus Convention***), imposes obligations on member states to ensure public participation in environmental decision-making.[106] The UK ratified this convention on 23 February 2005.

[102] [1999] 1 WLR 347.

[103] App no 5591/07, 6 October 2009 (European Court of Human Rights, Fourth Section).

[104] Ibid, [81].

[105] Ibid, [86].

[106] Available at <http://www.unece.org/env/pp/documents/cep43e.pdf>.

Article 9 provides that members of the public with a sufficient interest must have access to review procedures to challenge the legality of environmental decisions, and that the review procedures must be 'fair, equitable, timely and not prohibitively expensive'.

EU Council Directive 85/337/EEC of 27 June 1985 (***EU Directive***) incorporates the Aarhus Convention into EU law.[107] Relevantly, article 10a of the EU Directive provides:

> Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> (a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
>
> …
>
> Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

b. Reviewing the UK's costs regime for environmental litigation

In November 2010, the UN Aarhus Compliance Committee (***Compliance Committee***) found that the UK was in breach of the Aarhus Convention because, among many grounds, its costs regime for environmental litigants is prohibitively expensive, while its overall scheme does not sufficiently reduce or remove financial barriers to access to justice.[108] Further, the judicial discretion inherent in the system creates too much uncertainty for public interest claimants.[109] In reaching these conclusions, the Compliance Committee considered the UK's costs regime as a whole, including but not limited to PCOs.

In its response to the Compliance Committee's draft findings in September 2010, the UK government stated that it intended to consolidate the case law on PCOs into rules of court, and that it anticipated that those rules would be in force by April 2011.[110] At the time of writing, no further details were available. If this reform does occur, it may help to ameliorate the current uncertainty facing public interest litigants under the *Corner House* rules, as the UK response affirmed:

> This codification will give added clarity and transparency to the law and the procedure for making an application for a PCO, thereby providing certainty for applicants at the outset of the

[107] Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1985L0337:20090625:EN:PDF>

[108] UN Aarhus Compliance Committee, 'Findings and Recommendations of the Aarhus Convention Compliance Committee with Regard to Communication ACCC/C/2008/33 Concerning Compliance by the United Kingdom', 18 November 2010, available at <http://www.unece.org/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf>. For other documents concerning the matter, including the parties' response to a draft of the findings, see <http://www.unece.org/env/pp/compliance/Compliance%20Committee/33TableUK.htm>, [141]-[142].

[109] Ibid, [135].

[110] Response of the Party Concerned to the Draft Findings, 22 September 2010, available at <http://www.unece.org/env/pp/compliance/Compliance%20Committee/33TableUK.htm>.

> proceedings that the costs they will face if their claim fails will not be prohibitively expensive and certainty as to the modest costs of applying for a PCO.[111]

However, it appears unlikely that merely transposing the *Corner House* requirements into rules of court would by itself address the concerns expressed by the Compliance Committee regarding environmental litigation in the public interest. Further, it is unclear whether the current rules would be codified to have effect only for environmental litigants, or all public interest litigants. It is also unclear how codification will constrain judicial discretion, which under the current test was the key concern for the Compliance Committee.

c. Impact of the Aarhus Convention on UK case law

The EU Directive, incorporating the Aarhus Convention, has direct effect in UK law. In *Morgan v Hinton Organics (Wessex) Ltd & CAJE*,[112] Carnwath LJ (at [47]) foreshadowed that existing *Corner House* rules governing PCOs may have to be altered in cases where the EU Directive applied.

An example of this 'alteration' to the *Corner House* rules to give effect to the EU Directive is the recent decision of the full bench of the Court of Appeal in *R (Garner) v Elmbridge Borough Council* (***Garner***).[113] In *Garner*, the applicant challenged a grant of planning permission for redevelopment of a railway station and surrounding areas opposite an historic palace. The applicant applied for a PCO. The Court of Appeal overturned the lower courts' decisions and granted the PCO.

Sullivan LJ, speaking for the Court, observed that *Corner House* should only be modified to the extent required to secure compliance with the EU Directive, and held that the 'general public importance' and 'public interest' requirements in *Corner House* do not apply to article 10a cases, because:

> Both Aarhus and the directive are based on the premise that it is in the public interest that there should be effective public participation in the decision-making process in significant environmental cases … and an important component of that public participation is that the public should be able to ensure, through an effective review procedure that is not prohibitively expensive, that such important environmental decisions are lawfully taken.[114]

On the issue of whether costs in a proceeding rise to the level of 'prohibitively expensive', Sullivan LJ rejected the lower courts' purely subjective approach to the issue, and suggested that the inquiry should be largely objective, based on a consideration of whether costs would be prohibitively expensive for 'an ordinary member of the public concerned'.[115]

While the Court of Appeal in *Compton* had previously flagged that 'it would seem less than satisfactory to carve out different rules where environmental issues are involved as compared with other serious issues',[116] the effect of *Garner* appears to be that it will now be

[111] Response of the Party Concerned to the Draft Findings, 22 September 2010, available at <http://www.unece.org/env/pp/compliance/Compliance%20Committee/33TableUK.htm>.

[112] [2009] EWCA Civ 107.

[113] [2010] EWCA Civ 1006.

[114] Ibid, [39].

[115] Ibid, [46].

[116] *Compton* [2008] EWCA Civ 749, [20] (per Waller LJ).

significantly easier to obtain a PCO in cases where article 10a applies (which is likely to cover most environmental public interest litigation). The Court of Appeal's approach in *Garner* was subsequently applied in *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change*.[117]

d. Article 10a in Irish law

It is also instructive to examine the effect of article 10a in Ireland, which has a comparable body of law, and a recent European Court of Justice decision on the matter with respect to the Irish costs regime.

Generally speaking, Irish courts have adopted the *Corner House* approach to PCOs, although so far only two cases have considered the grant of a PCO, and in both the court declined to make a PCO award.[118]

However, though Ireland is also bound by the EU Directive, the Irish courts that have considered the problem of prohibitive costs have held that Ireland's costs regime does not breach its obligations under article 10a. In *Friends of the Curragh Environment Ltd v An Bord Pleanála*,[119] Kelly J held that the prohibitive costs element of article 10a could not have direct effect in Irish law because of its lack of clarity. Clarke J agreed with this view in *Sweetman v An Bord Pleanála*,[120] and further argued, after examining the text of article 9 of the Aarhus Convention, that the 'absence of excessive cost' requirements in article 10a of the EU Directive 'is not intended (nor are there substantial grounds for arguing to the contrary) to cover the exposure of a party to reasonable costs in judicial proceedings'.[121]

Since those cases, however, the European Court of Justice has considered Ireland's costs regime in *Commission of the European Communities v Ireland*.[122] The ECJ held that the Irish costs regime did not satisfactorily comply with the requirement that costs for environmental public interest litigants not be prohibitively expensive. The ECJ held that, while Irish courts have the discretion to make a variety of costs orders, that discretion 'cannot, by definition, be certain'.[123] Further, as 'the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty',[124] the ECJ concluded that Ireland had failed to implement the obligations arising from article 10a.[125]

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[117] [2010] EWHC 2313 (Admin). In that case, Wyn Williams J of the High Court held that the private company in the case was not a 'member of the public concerned' and therefore did not fall within the scope of article 10a. This meant that the lower court's decision to deny a PCO on the basis of the *Corner House* principles stood.

[118] *Village Residents Association Ltd v An Bord Pleanála and McDonalds* [2000] 4 IR 321; *Friends of the Curragh Environment Ltd v An Bord Pleanála* [2006] IEHC 243.

[119] [2006] IEHC 243.

[120] [2007] IEHC 153, [7.1]. This case dealt in particular with the standing requirements under article 10a.

[121] Ibid, [7.8].

[122] Case C-427/07 (European Court of Justice, Second Chamber, 16 July 2009), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-427/07>.

[123] Ibid, [93]-[94].

[124] Ibid, [55].

[125] Ibid, [94].

Therefore, in Ireland, there appears to be some uncertainty about the place of PCOs for both general public interest litigation and article 10a jurisprudence for environmental public interest litigation.

5. Canada Interim Costs Awards

5.1 Introduction

Canada's response to the difficulties of funding public interest litigation is arguably the most progressive. It goes a step beyond 'no costs' orders or 'protective costs orders' to allow a court to make an award of costs prior to the hearing of the substantive case. Traditionally, these awards had been restricted to matrimonial cases and private litigation where there is a private fund available. However, in *British Columbia* (*Minister of Forests*) *v Okanagan Indian Band* (***Okanagan***),[126] the Supreme Court of Canada granted the public interest litigant an interim costs order to cover their legal fees and disbursements of the upcoming trial. The Supreme Court revisited the issue in the case of *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)* (***Little Sisters (No. 2)***).[127]

5.2 The Power to Award Costs

Canada is a federal polity and, as such, each province has its own judicial system as does the federal government. There is no uniform civil procedure. As a result, each court system has different statutes and rules prescribing how the power to award costs is to be exercised. We have not explored these in the present discussion.

5.3 Okanagan

Okanagan concerned a dispute over Aboriginal logging rights. The Okanagan Indian Band (***Band***) were in a long-standing native title dispute with the government of British Columbia. They took to logging in the area claimed. The Ministry of Forests sought an injunction restraining the logging, which was met by an assertion of native title. The Ministry sought to have the matter moved from being heard in chambers to the trial list. The Band opposed the application on the basis that they could not afford a trial. Alternatively, the Band sought an interim costs order requiring the Crown to pay their legal fees and disbursements upfront prior to any trial.

At first instance, Sigurdson J dismissed the application. The British Columbian Court of Appeals overturned the decision, saying that the case was 'unique and exceptional' and an interim costs order granting the Band upfront legal costs should be granted subject to detailed terms. The Ministry appealed to the Supreme Court of Canada which upheld the Court of Appeal by majority (Lacobucci, Major and Bastarache JJ dissenting).

LeBel J gave judgment for the majority. His Honour observed:

> The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are

[126] [2003] SCC 71.

[127] [2007] SCC 2.

> of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate.[128]

His Honour then set out the three criteria for whether an interim costs award should be made in a public interest case:

> With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case 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.[129]

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.[130]

The dissenting judges accepted the power of the court to make an interim costs order, but confined it to its traditional application. They suggested that it was inappropriate to expand the power on the basis of access to justice concerns best dealt with by the legislature. Professor Chris Tollefson described the distinction as being 'whether and to what extent courts should undertake the task of adapting doctrine to accommodate evolving and emerging social purposes'.[131]

5.4 Little Sisters (No. 2)

In *Little Sisters (No.* 2), the Supreme Court of Canada revisited the question of interim costs orders. Little Sisters Book and Art Emporium (***Little Sisters***) is a gay and lesbian bookshop that stocks, among other things, erotica. In *Little Sisters (No. 1)*,[132] the bookshop sued Canada Customs on the basis that its obscenity classification procedures violated their right to freedom of expression. That application was largely successful, the majority finding that whilst the impugned customs legislation was conformable with the *Canadian Charter of Rights and Freedoms,* the application of the

[128] [2003] SCC 71, [38].

[129] Ibid, [40].

[130] Ibid, [41].

[131] Chris Tollefson, Darlene Gilliland and Jerry DeMarco, 'Towards a Public Interests Cost Jurisprudence' (2004) 83 *Canadian Bar Review* 473, 481.

[132] [2000] SCC 69.

legislation by Canada Customs was systemically discriminatory. The matter was, in part, resolved by the respondent undertaking to alter its procedures.[133]

Little Sisters (No. 2) arose from a declaration by Canada Customs that four books which Little Sisters sought to import were obscene. Little Sisters sought review of the decision that the four books were obscene, as well as a systemic inquiry into Canada Customs' practices and procedures. They sought an interim costs award to cover the cost of the application. In chambers, they were successful, but the decision was overturned by the Court of Appeal. Little Sisters appealed to the Supreme Court. The Supreme Court dismissed the appeal.

The majority decision in *Little Sisters (No.* 2) made clear that the discretion in *Okanagan* was to be exercised sparingly. They said:

> *Okanagan* did not establish the access to justice rationale as the paramount consideration in awarding costs. Concerns about access to justice must be considered with and weighed against other important factors. Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs. By the same token, however, a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs. Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously.
>
> …
>
> An application for advance costs may be entertained only if a litigant establishes that it is impossible to proceed with the trial and await its conclusion, and if the court is in a position to allocate the financial burden of the litigation fairly between the parties. (internal citations omitted)[134]

Their Honours continued, highlighting the 'rare and exceptional' character of an interim costs award. They emphasized the following factors:

- *The high threshold of the public interest test*. The majority stressed that '[t]he justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups' and stated that the mere fact that a case was in the public interest was not sufficient in itself to justify an interim costs award.[135]
- *The exceptional nature of the award:* The majority stated that an interim costs award was exceptional and that an applicant must explore 'all other possible funding options', including private funding 'through fundraising campaigns, loan applications, [and] contingency fee agreements'. An applicant who is not impecunious but cannot afford the litigation must expect to make a contribution.[136]
- *'Different kinds of costs mechanisms*': The majority indicated that interim costs awards were part of a spectrum of options. They referred specifically to PCOs as made in the UK and the case *of Corner House* as being an option short of granting an interim costs award.[137]
- *The need to explore other dispute resolution options:* The majority emphasized that no injustice would arise where a matter could be settled without an interim costs award. The

[133] Ibid, [157].

[134] [2007] SCC 2, [35] - [36].

[135] Ibid, [39].

[136] Ibid, [40].

[137] Ibid.

> judges indicated that it was a relevant consideration if other litigation was pending that could resolve the issue without the grant of an interim costs award.

The majority also stated that, where a party received an interim costs award, that party was restricted in how it could conduct the proceedings:

> Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public purse - or another private party - takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds. The litigant cannot spend the opposing party's money without scrutiny. The benefit of such funding does not imply that a party can, at will, multiply hours of preparation, add expert witnesses, engage in every available proceeding, or lodge every conceivable argument. A definite structure must be imposed or approved by the court itself, as it alone bears the responsibility for ensuring that the award is workable.[138]

The majority went on to say that a court supervising the order should set limits on the 'chargeable rates and hours of legal work' of the successful party's lawyers and cap the advance costs award 'at an appropriate global amount'. It also suggested that an advance costs award might be set off against any award of damages received by a successful party.[139]

The majority concluded by observing that, even though the court's discretion to award costs was unfettered, it should only make an advance costs award to provide the basic level of assistance for the case to proceed.[140]

In making these statements, the majority made clear that it recognised the difficulties arising from a lack of equality of arms between litigants, but suggested that the problem was too large to be solved purely by judicial intervention.[141] Ultimately, the majority concluded that the case in *Little Sisters (No. 2*) did not meet the necessary requirements of public interest and, as such, it would not be contrary to the interests of justice if it were not pursued. Moreover, Little Sisters was not sufficiently impecunious to justify the making of an interim costs awards.

Canadian courts have continued to apply *Okanagan* and *Little Sisters (No. 2)*, with an emphasis on the exceptionality of interim costs awards. In *Abdelrazik v Minister for Foreign Affairs and International Trade*, Mactavish J observed that 'extreme caution should be used in the exercise of this power'.[142] For recent examples of the application of the principles espoused in *Little Sisters (No 2)*, see *Metrolinx (Go Transmit) v Canadian Transportation Agency*[143] and *Joseph v Canada*.[144]

[138] Ibid, [42].

[139] Ibid, [43].

[140] Ibid, [43].

[141] Ibid, [44].

[142] [2008] FC 839, [24].

[143] [2010] FCA 45.

[144] [2008] FC 574.

6. South Africa: Limiting Adverse Cost Orders in Constitutional Litigation

6.1 Introduction

In South Africa, costs are subject to judicial discretion. The basic rule is that costs follow the event. The Constitutional Court of South Africa's decision in *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and Others*[145] (***Biowatch***) is currently the leading authority on public interest costs.

6.2 Public Interest Costs Before *Biowatch*

Prior to *Biowatch*, the status of costs orders in public interest litigation was uncertain. A number of ad hoc judgments provided some foundation for refusing to make costs orders in public interest litigation, but there was no binding authority on the issue. Certain statutes provide that unsuccessful litigants may not to be subject to adverse costs orders for specific causes of action, such as environmental protection under the *National Environmental Management Act 1997* (South Africa).[146] Statutory provisions which provide broad judicial discretion for specialist courts, such as the Land Claims Court, allow judges to deviate from the general rule that costs follow the event for limited types of public interest litigation.[147] In the Land Claims Court case of *Hlatshwayo and Others v Hein,*[148] Dodson J commented in obiter that an approach to costs in constitutional litigation which did not make adverse costs orders against private litigants should be applied in the 'new area of public interest litigation.'[149] The problem is that decisions under specific statutory provisions limited by subject matter do not apply to public interest litigation in general.

The Constitutional Court has greater precedential weight than specialist court judgments, but had not provideed clear authority for how to approach costs in public interest litigation prior to *Biowatch*. In *Oranje v Vrystaat,*[150] Goldstone J refused to make a costs order against the applicants, who had withdrawn an application for judicial review. Goldstone J wanted to ensure that litigants bringing claims which are not frivolous or vexatious are not discouraged from enforcing their constitutional rights because of the risk of paying considerable costs.[151] Similarly, in *Government of the Republic of South Africa v Grootboom*[152] the Constitutional Court declined to make an order as to costs, as the interpretation of the Constitution from the case had a significant impact on economic and social rights.

[145] [2009] ZACC 14 (Constitutional Court)

[146] *National Environmental Management Act 1997* (South Africa) s31(2).

[147] *Land Claims Court Rules* r61(1)(a); *Land Claims Court Act* s33(1)(f).

[148] (LCC31/96) [1997] ZALCC 5.

[149] *Hlatshwayo and Others v Hein* (LCC31/96) [1997] ZALCC 5 (Land Claims Court) [32].

[150] *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole and Another v Premier van die Provinsie Vrystaat and Others* (CCT12/96) [1998] ZACC 4; 1998 (3) SA 692; 1998 (6) BCLR 653 (Constitutional Court).

[151] *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole and Another v Premier van die Provinsie Vrystaat and Others* (CCT12/96) [1998] ZACC 4; 1998 (3) SA 692; 1998 (6) BCLR 653 (Constitutional Court) [4].

[152] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (Constitutional Court).

6.3 The Impact of *Biowatch* on Constitutional Litigation

Under the ad hoc judgments outlined above, a private litigant issuing proceedings in the public interest would not know whether they would be subject to adverse costs orders or not, which likely served as a disincentive to pursue legitimate constitutional claims. *Biowatch* affirms the approach initially adopted in *Affordable Medicines*[153] and goes a step further in providing clear guidelines which set out when the general rule that costs follow the event will not apply. *Biowatch* makes it clear that in constitutional litigation, where the state is unsuccessful, it should pay the costs of the other side, and if the state is successful, each party should bear its own costs.

As a threshold issue, the *Biowatch* approach is only available in "constitutional litigation". Constitutional litigation must raise 'genuine and substantive constitutional issues'.[154] It ordinarily involves private parties against the state, but may arise in exceptional cases between competing private parties where constitutional issues arise.

The scope of constitutional litigation is much wider in South Africa than in Australia. The broad range of substantive rights codified in the South African Constitution post apartheid means that most public interest matters are also likely to be constitutional matters.[155] The Constitutional Court's jurisdiction is limited to constitutional matters.[156] For the few public interest matters which are not covered by the South African Constitution, it is unclear whether *Biowatch* will be followed, as this has not yet arisen.[157]

6.4 The Biowatch Case

The Biowatch Trust, a South African environmental watchdog which monitors the use, control and release of genetically modified organisms (***GMOs***), applied to a government department for information on the decision-making process for permitting GMOs. The Biowatch Trust was denied access to significant details, and commenced proceedings to obtain 11 categories of information. Monsanto SA Pty Ltd (***Monsanto***), a biotechnology company involved in the research, development and sale of GMOs, joined the proceedings to protect its direct interest by ensuring certain information remained confidential. A number of companies and governmental departments were joined as respondents, and a range of public interest groups appeared as amicus curiae.

At first instance, The Biowatch Trust procured access to 8 of the 11 categories from the government. The first costs order held that, although The Biowatch Trust was substantially successful on the merits, the state would not be required to pay The Biowatch Trust's costs. It was argued that the procedural defects made by The Biowatch Trust in requesting the information meant that they should be required to bear their own costs. The second costs order required The Biowatch Trust to pay the costs of Monsanto, as Monsanto was forced to join the proceedings to protect their private interests.

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[153] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2005 (6) BCLR (CC); 2006 SA 247 (Constitutional Court).

[154] *Biowatch* [25].

[155] *Constitution of the Republic of South Africa 1996* (South Africa) Chapter 2.

[156] *Biowatch* [12], [25].

[157] See eg Manong and Associates (Pty) Ltd v City of Cape Town and Another (457/09) [2010] ZASCA 169 (1 December 2010); Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd (Formerly Tropical Paradise 427 (Pty) Ltd and Others (71/09) [2010] ZASCA 50; [2010] 3 All SA 577 (SCA) (31 March 2010); Manyatshe v M G Media Ltd and Others (415/08) [2009] ZASCA 96 (17 September 2009) [24].

On appeal to the Constitutional Court, Sachs J's judgment, delivered on behalf of a unanimous court, held that The Biowatch Trust raised legitimate constitutional issues concerning rights to information and the environment. Sachs J created guidelines for limiting adverse costs orders in constitutional litigation to conform with the right to equal protection and benefit of the law under the South African Constitution.[158]

In applying the *Biowatch* approach to the firsts costs order and the facts of the case, Sachs J held that The Biowatch Trust's procedural irregularities were insufficient to deny them their costs for being substantially successful. The state was ordered to pay The Biowatch Trust's costs in the High Court and the Constitutional Court.[159] In relation to the second costs order, Sachs J held that The Biowatch Trust should not be responsible for the costs of private parties joined during the proceedings. The Biowatch Trust was not required to pay Monsanto's costs.[160]

6.5 The *Biowatch* Approach to Costs in Constitutional Litigation

The *Biowatch* approach stipulates the following:

- litigants who have been successful against the state in constitutional litigation should have their costs paid by the state;[161]
- litigants who have been unsuccessfully against the state should not be subject to an adverse costs order. Rather, each party will bear its own costs of the litigation;[162] and
- third party private litigants who become involved in the litigation should not be subject to an adverse costs order.[163]

Exceptions to the *Biowatch* approach remain where the claim is vexatious, frivolous, professionally unbecoming, an abuse of court process,[164] or 'manifestly inappropriate'.[165] In these limited circumstances, the court may make adverse costs orders against the litigants notwithstanding the legitimate constitutional matters raised.

Sachs J developed the following additional guidelines for approaching costs in constitutional litigation:[166]

a. the court must consider the nature of the litigation, not the parties involved or the causes advanced;[167]

b. the conduct of the parties and whether there has been impropriety in the manner in which the litigation has been undertaken is relevant to the question of costs; and

c. appellate review of costs is limited to situations where judicial discretion was incorrectly exercised.[168]

[158] *Constitution of the Republic of South Africa 1996* (South Africa) s9(1).

[159] *Biowatch* [43].

[160] *Biowatch* [60].

[161] *Biowatch* [22].

[162] Ibid.

[163] *Biowatch* [56].

[164] *Biowatch* [18].

[165] *Biowatch* [24].

[166] *Biowatch* [9].

[167] *Biowatch* [20].

Biowatch states that the primary consideration is 'the way in which a costs order would hinder or promote the advancement of constitutional justice.'[169] Unlike in the UK, Canada and Australia, the court will not have regard to whether parties are acting in their own interests, or the relative financial positions of the parties.[170]

The rationale for the new approach is three-fold:[171]

- Firstly, it diminishes the "chilling effect" that costs orders may otherwise have on parties seeking to assert their constitutional rights. Parties who pursue litigation in the public interest should not be deterred by the risk of 'financially ruinous consequences'[172] or being deprived of their costs for purely procedural faults.
- Secondly, constitutional litigation is in the public interest. It has a broader effect on non-claimants and enriches constitutional jurisprudence in South Africa.
- Thirdly, the state is primarily responsible for ensuring that the law and state conduct are consistent with the Constitution, and should bear the costs accordingly.

6.6 The Potential Effect of South African Jurisprudence in Australia

It is unlikely that *Biowatch* will be considered in Australia as the South African Constitution establishes a radically different framework for judicial oversight of substantive rights. Although South African jurisprudence has limited applicability in Australia, drawing from Sachs J's reasoning may be useful in arguing against adverse costs orders in public interest litigation. It may be possible to draw parallels between the right to equal protection and benefit of the law under the South African Constitution[173] and the right to equal protection under law in the Victorian Charter or the *Human Rights Act 2004* (ACT).[174]

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[168] For example, where the discretion was not exercised judicially, was based on incorrect principles of law, or there was misdirection on the material facts. *Biowatch* [29]-[31].

[169] *Biowatch* [16].

[170] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2005 (6) BCLR (CC); 2006 SA 247 (CConstitutional Court) [139]; approved by Sachs J at *Biowatch* [18].

[171] *Biowatch* [21], [23].

[172] *Biowatch* [23].

[173] *Constitution of the Republic of South Africa 1996* (South Africa) s9(1).

[174] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s8(3), *Human Rights Act 2004* (ACT) s 8(3).