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PUBLIC INTEREST COSTS ORDERS

INTRODUCTION

THE title of this article is taken from Chapter 13 of the Australian Law Reform Commission's report on *Costs Shifting - Who Pays for Litigation* (1995).[1] The central recommendation made by the Commission in this chapter is Recommendation 45. It reads as follows:

> A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that
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> • the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
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> • the proceedings will affect the development of the law generally and may reduce the need for further litigation
>
> • the proceedings otherwise have the character of public interest or test case proceedings
>
> A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.

The Commission has made further recommendations on factors to be taken into account by a court or tribunal in determining whether a public interest costs order should be made, and the terms on which such orders might be made.[2] In Recommendation 47 the Commission suggests that a public interest costs order might include an order that:

> • costs follow the event
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> • each party bear his or her own costs

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1 Australian Law Reform Commission, *Costs Shifting - Who Pays for Litigation?* (Report No 75, 1995). The report was preceded by a draft recommendation paper, *Litigation Costs Rules* (1995).

2 See Recommendations 47 and 48 (at p223).

- the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall

  – not be liable for the other party's costs

  – only be liable to pay a specified proportion of the other party's costs

  – be able to recover all or part of his or her costs from the other party

- another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.

A public interest costs order made on the application of a plaintiff might therefore be one which provides that, even if the suit is unsuccessful, the plaintiff shall not be liable to pay the defendant's costs. It would appear that in such a case the order might even be that the unsuccessful plaintiff be able to recover all of his or her costs from the defendant.

These recommendations have not yet been implemented at either Commonwealth or State levels. Whether they should be so implemented is a matter on which opinions are likely to differ. In its final report, the Commission noted a number of concerns which had been expressed about the recommendations presented in its draft recommendations paper.[3] It was not, however, persuaded to alter its proposals.

This article analyses and evaluates the recommendations and does so in the light of judicial consideration of matters which are thought appropriate for courts to take into account in allocating costs between litigants. It also examines the concept of public interest litigation and the problems it presents. The article does not, however, deal with a related recommendation in Chapter 18 of the Commission's report to do with creation, by governments, of public interest litigation funds from which grants in aid of litigation might be made. The Commission envisages that such schemes for the subsidy of litigants would operate in tandem with the recommended public interest costs orders.

THE DISCRETION TO AWARD COSTS

In Australia, the power of courts to make orders by which a party to litigation is obliged to pay the costs of an opposing party is invariably a statutory power.[4] That power is also, invariably, a discretionary power whose exercise cannot be fettered by rules of court

3 See text accompanying nn86 and 87 below.

4 The discretion is usually conferred by the statute which constitutes the court: see eg *Supreme Court Act* 1986 (Vic) s24; *Federal Court of Australia Act* 1976 (Cth) s43.

(unless those rules have been accorded, by statute, the force of parliamentary enactments) or by judicial pronouncements which enunciate what appear to be inflexible rules.[5]

Courts have nonetheless acknowledged their competence to establish guidelines for the exercise of the open-ended discretion reposed in them by statute. In the leading High Court case of *Latoudis v Casey*,[6] Mason CJ stated that courts had been correct in emphasising "the unconfined nature" of the judicial discretion to make costs awards.[7] But he went on to say that:

> it does not follow that any attempt to formulate a principle or guideline according to which the discretion should be exercised would constitute a fetter upon the discretion not intended by the legislature. Indeed, a refusal to formulate a principle can only lead to exercises of discretion which are seen to be inconsistent, a result which would not have been contemplated with any degree of equanimity.[8]

Dawson J made similar comments.[9]

The guiding principles proffered by the majority in *Latoudis* were summarised by Clarke JA in *Richmond River Council v Oshlack*[10] thus:

> (1) Where proceedings have failed it will ordinarily be just and reasonable to award the successful defendant costs ...
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> (2) The purpose of an award of costs is to compensate the successful party - costs are not awarded to penalise the unsuccessful party ...
>
> (3) In exercising the relevant discretion a court should look at the matter primarily from the perspective of the successful party - its conduct may provide a sound basis for refusing to award it costs. The conduct of the unsuccessful party is, in general, not relevant ...

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5 See *Donald Campbell & Co Ltd v Pollak* [1927] AC 732; *Cretazzo v Lombardi* (1975) 13 SASR 4 at 11.

6 (1990) 170 CLR 534.

7 At 541.

8 As above. Reference was made to comments by Mason and Deane JJ in *Norbis v Norbis* (1986) 161 CLR 513 at 519.

9 (1990) 170 CLR 534 at 558-559.

10 (1996) 39 NSWLR 622.

> (4) The fact that an unsuccessful plaintiff has acted in good faith in the public interest is not a ground for depriving the successful defendant of its costs.[11]

Clarke JA considered these principles applicable to both civil and criminal litigation. He interpreted *Latoudis* to mean that the public interest purpose of a plaintiff or prosecutor is not a relevant consideration in the exercise of a judicial discretion to award costs. He did, however, suggest that in the future the High Court might "be required to consider whether such a consideration is of relevance in the light of legislative changes in the law, such as open standing provisions ... in various legislative instruments".[12] The High Court had occasion to consider that very question in the subsequent appeal in *Oshlack*.

OSHLACK v RICHMOND RIVER COUNCIL[13]

Oshlack instituted proceedings in the Land and Environment Court of New South Wales to challenge the validity of a decision by the Council to grant consent to a proposed subdivision of land at Evans Head. He sought a declaration that the decision was "void and of no effect" and an injunction to restrain the developer from carrying out any development on the land without a valid consent. Oshlack's suit was brought under s123(1) of the *Environment Planning and Assessment Act* 1979 (NSW) which provides that "[any] person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act." His concern was that the proposed development was likely to affect the environment of endangered native fauna. He alleged that the Council had failed to carry out certain statutory obligations.

The suit was dismissed, but, in exercise of the discretion conferred by s69(2) of the *Land and Environment Court Act* 1979 (NSW), Stein J determined that there be no order as to costs.[14] In so determining, Stein J had regard to the general principle that costs should normally follow the event. But he recognised that where a plaintiff has brought suit in the public interest, but without success, there may be special circumstances which render it inappropriate to award costs against that plaintiff. In his view the circumstances of the present case were special. Oshlack had nothing to gain from the suit "other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna".[15] There was "a significant number of members of the public" who shared

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11 At 627. The omissions in the passages quoted are merely ones which indicate page references and some references to unreported cases decided by the Court of Appeal. The principles emerging from *Latoudis* were considered in *Oshlack v Richmond Rivers Council* (1998) 152 ALR 83 at 104-107 per McHugh J and at 118-120 per Kirby J.

12 (1996) 39 NSWLR 622 at 627.

13 (1998) 152 ALR 83.

14 *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236.

15 At 246.

Oshlack's concern.[16] The litigation had resolved significant legal issues of general interest.[17]

The approach which Stein J adopted conformed with that which the Land and Environment Court had adopted in several prior cases in which individuals or organisations had unsuccessfully challenged the validity of decisions under planning and environment legislation,[18] and also with that adopted in several other Australian jurisdictions.[19]

The Council, though not the developer, appealed against Stein J's determination on the matter of costs. The New South Wales Court of Appeal allowed the appeal.[20] In the opinion of that Court, the fact that litigation has been instituted in the public interest is not a consideration which a court may properly take into account in exercise of its discretion as to award of costs.[21]

Oshlack was granted special leave to appeal to the High Court on 2 December 1996. The appeal was allowed with the consequence that Stein J's costs determination was restored. The High Court was, however, divided. The majority, Gaudron, Gummow and Kirby JJ, concluded that there had been no miscarriage in the exercise of the discretion reposed in the primary judge. The considerations which Stein J had taken into account in exercising the discretion could not be regarded as irrelevant. Brennan CJ and McHugh J disagreed.

Oshlack's case presented the High Court with an occasion on which to review prior case law to do with principles guiding the exercise of judicial discretion regarding the award of costs, and factors which may be taken into account in the exercise of that discretion.

16 As above.

17 At 244-246.

18 The cases are reviewed in the judgment of Stein J at 240-242. See also *Friends of Hay Street Inc v Hastings Council* (1995) 87 LGERA 44 and *Byron Shire Businesses for the Future Inc v Byron Shire Council* (1994) 83 LGERA 59 (security for costs).

19 See eg *Wyatt v Albert Shire Council* [1987] 1 Qd R 486 at 493-494; *Solomon Services Pty Ltd v Woongarra Shire Council* [1988] 2 Qd R 202 at 207; *Re Smith; Ex parte Rundle (No 2)* (1991) 6 WAR 299 at 302-303; *Carter v Northmore, Hale, Davy and Leake*, (Unreported, WA Supreme Court, Full Court, 21 Sept 1993); *South-West Forests Defence Foundation (Inc) v Lands and Forest Commission (No 2)* (1995) 86 LGERA 382; *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607 at 622, 638; *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd* (1991) 100 ALR 568 at 571-572 (though cf on appeal (1993) 113 ALR 257 at 283); *Pareroultja v Tickner* (1993) 42 FCR 32 at 48-49; *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139 at 146-148; *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545 at 556; *Cairns Port Authority v Albietz* [1995] 2 Qd R 470 at 475-476; *Qantas Airways Ltd v Cameron (No 3)* (1996) 68 FCR 387. See also Bayne, "Costs Orders on Review of Administrative Action" (1994) 68 *ALJ* 816.

20 *Richmond Rivers Council v Oshlack* (1996) 39 NSWLR 622.

21 The decision of the Court of Appeal was followed by the Full Court of the Supreme Court of South Australia in *District Council of Kingscote Kangaroo Island Eco-Action Inc (No 2)* (1996) 67 SASR 422.

While the opinions of the majority have made it clear that the public interest character of litigation is not to be regarded as entirely irrelevant to the exercise of the discretion, they do not go so far as to suggest that the considerations which Stein J took into account were ones he was required, as a matter of law, to take into account. Certainly the opinions of the majority cannot be said to have implemented the recommendations of the Australian Law Reform Commission on public interest costs orders.

In their joint opinion Gaudron and Gummow JJ stated that the issue before the High Court was not whether the suit instituted by Oshlack was "public interest litigation". Rather, the question was "whether the subject matter, scope and purpose of [the relevant statutory discretion] are such as to enable the Court of Appeal to pronounce the reasons given by Stein J to be definitely extraneous to any objects the legislature could have had in view in enacting" the provision.[22] Their answer was "no".

Kirby J's opinion may be interpreted as lending more positive support for the recognition of "public interest litigation" as a special category of litigation in which it will often be appropriate to depart from the usual order as to costs. Kirby J conceded that "it is difficult to define with precision what is meant by 'public interest' litigation". But he noted a series of cases in which Australian and other courts had adopted

> a discrete approach ... to costs in circumstances where courts have concluded that a litigant has properly brought proceedings to advance a legitimate public interest [which] has contributed to a proper understanding of the law in question and has involved no private gain.[23]

In contrast, McHugh J (with whose reasons for opinion Brennan CJ was in general agreement[24]) rejected entirely the proposition that courts invested with an unconfined costs discretion could and should adopt a discrete approach in "public interest" cases. He considered it all important that there be principles to guide the exercise of this discretion and, moreover, principles which establish clear and objective criteria. He identified what he thought to be good reasons for the cardinal principle that costs should follow the event, a principle previously endorsed by the High Court in *Latoudis*.[25] He described the concept of "public interest litigation" as "protean".[26] It could encompass a wide variety of cases brought to the courts, particularly in the domain of public law. The analysis of Stein J failed to provide the clear, objective criteria needed to inform exercise of the relevant discretion. In the opinion of McHugh J, the status of the successful party as a public authority "with a significant interest in the resolution of any legal uncertainty in respect of

22 (1998) 152 ALR 83 at 91.
23 At 123.
24 At 84.
25 (1990) 170 CLR 534.
26 (1998) 152 ALR 83 at 104.

the powers it exercises" was not a relevant consideration.[27] Equally irrelevant was the circumstance

> that the unsuccessful party had arguable submissions or that the proceedings involved an analysis of statutory provisions that should prove helpful in future cases or that the subject matter of the litigation was a matter of public controversy.[28]

McHugh and Kirby JJ disagreed about the relevance of certain other considerations. McHugh J did not think it at all relevant that Oshlack had brought suit under the open standing provision in the *Environment and Planning Assessment Act* 1978 (NSW).[29] The legislature had widened "standing requirements but [had] stopped short of taking the separate and further step of expressly altering the traditional costs discretion".[30] Kirby J in contrast thought that, given the statutory context in which the Land and Environment Court exercises its jurisdiction,

> and the clear purpose of Parliament to permit, and even encourage, individuals and groups to exercise functions in the enforcement of environmental law before the Land and Environment Court, a rigid application of the compensatory principles in costs orders would be completely impermissible. It would discourage, frustrate or even prevent the achievement of Parliament's particular purposes.[31]

In the subsequent case of *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management (No 2)*[32] Kirby J indicated that he regarded the open standing provision upon which Oshlack had relied as a critical consideration. In *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management (No 1)*,[33] the High Court (Gaudron, McHugh, Hayne and Callinan JJ, Kirby J dissenting) had dismissed an application for special leave to appeal against a decision of the Supreme Court of Western Australia. In the subsequent hearing on the matter of costs, the applicants submitted that, with one exception, the Court should leave each party to bear its own costs, partly on the ground that the proceedings were "of a public interest character, in that they seek to enforce environmental laws for the benefit of the general public and for the benefit of the endangered species of flora and fauna in the forest areas in question". The Court, however, ordered that the costs of the applications for special leave

27 At 109.
28 At 110.
29 At 108.
30 At 108-109.
31 At 122; see also at 124, 125.
32 (1998) 154 ALR 411.
33 (1998) 154 ALR 405.

should follow the event. Kirby J supported this order and took the opportunity to emphasise that:

> Nothing in the recent decision in *Oshlack* ... 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.[34]

His Honour went on to say that "[o]ne of the particular considerations in *Oshlack* which led to confirmation of Stein J's order" was the existence of the open standing provision in the New South Wales legislation.[35] There was no similar Western Australian legislation. Indeed the respondents in the present case had contested the standing of the applicants.[36]

The Full Court of the Federal Court of Australia has also had occasion to consider the effect of *Oshlack*. In *Friends of Hinchinbrook Society v Minister for the Environment*[37] the Court regarded the majority decision as doing no more than affirming "the width of the discretion conferred upon a court in relation to costs".[38] It dismissed the appeal against the orders for costs which the judge at first instance had made against the appellant, the unsuccessful applicant for judicial review.[39] There was "no basis at all upon which ... [the Court] could hold that the trial judge's discretion in relation to costs miscarried".[40] The Full Court had dismissed the appellant's appeal[41] and found "nothing to disentitle the respondents to the compensation of an order for their costs", particularly since the appellant had "persisted in insupportable claims".[42]

In the course of its reasons for judgment on the matter of costs, the Full Court noted observations which Gummow J had made when a member of the Federal Court. In that capacity Gummow J had taken the view that the fact that litigation had been initiated by a body set up to pursue causes in the public interest was not sufficient to justify departure

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34 (1998) 154 ALR 411 at 412.
35 As above.
36 As above.
37 [1998] 432 FC.
38 At 4.
39 *Friends of Hinchinbrook Society Inc v Minister for the Environment* (1997) 69 FCR 28.
40 [1998] 432 FC at 5.
41 *Friends of Hinchinbrook Society Inc v Minister for the Environment* (1997) 147 ALR 608. The Court deferred decision of the matter of costs pending the High Court's judgment in *Oshlack*.
42 [1998] 432 FC at 5.

from the ordinary rule as to costs.[43] The Full Court found nothing in the joint judgment of Gaudron and Gummow JJ in *Oshlack* that suggested that they "intended to modify in any way the views on that subject [ie public interest litigation] embraced by Gummow J when a member of this Court".[44]

Kirby J's reading of what was decided by the High Court in *Oshlack*, and likewise that of the Federal Court, suggests that the case has to be regarded as special and that the recommendations of the Australian Law Reform Commission regarding public interest orders cannot be implemented fully without legislation.

In the following sections of the article I analyse and attempt an evaluation of the Commission's recommendations. I begin with the concept of public interest litigation and the problems it presents.

WHAT IS PUBLIC INTEREST LITIGATION?

The Australian Law Reform Commission concedes that "[n]o clear definition of public interest exists in legislation or case law".[45] It suggests, however, that, in the context of the discretion to award costs, courts have given some guidance on what may be regarded as public interest litigation. "A widely accepted approach is to see whether the case affects the community or a significant sector of the community or involves an important question of law."[46] Recommendation 45 reflects this broad understanding of the concept of public interest litigation.

This recommendation, it should be noted, draws no distinction between civil or criminal proceedings, or between proceedings to vindicate private rights and those to vindicate public rights. The recommendation also makes no distinction between proceedings in which all of the parties are private parties and proceedings in which at least one of the parties is a government party. In most cases in which the public interest factor has figured in the exercise of a discretion to award costs, a governmental party has been the defendant or respondent to the proceedings and the proceedings have been to vindicate public rights rather than rights arising under private law. In most of the cases the party who initiated the proceedings was an individual or organisation having standing to sue either by virtue of an

43 *Council of the Municipality of Botany v Secretary, Department of the Arts, Sport, the Environment, Tourism and Territories* (1992) 34 FCR 412 at 416-417. Gummow J had there expressed agreement with views expressed in *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166 at 170-171. Those views had also been endorsed by Lindgren and Lehane JJ in *Qantas Airways Ltd v Cameron* (1996) 68 FCR 387 at 389.

44 [1998] 432 FC at 4.

45 Australian Law Reform Commission, *Costs Shifting - Who Pays for Litigation?* Para 13.2. See also Friedlander, "Costs and the Public Interest Litigant" (1995) 40 *McGill LJ* 55 at 60-61.

46 As above.

open standing provision contained in legislation[47] or by virtue of a special interest in the subject of the suit falling short of a purely private interest.

In the cases in which "public interest" was considered by a court to be relevant to the exercise of the costs discretion, the capacity in which the applicant/plaintiff sued, and the object of the suit, were regarded as important. The fact that the suitor did not stand to gain any personal benefit from a successful outcome was treated as one factor in favour of not awarding costs against that party in the event of the suit not succeeding. The capacity in which and purpose for which the suitor sued was certainly a most important consideration in *Qantas Airways Ltd v Cameron (No 3)*.[48]

Mrs Cameron had instituted proceedings against Qantas on behalf of a group of ten persons. She sought declaratory and injunctive relief for alleged breaches of the *Trade Practices Act* 1974 (Cth) and also damages under that Act and for tortious negligence. The suit was principally about the duties of Qantas as an international air carrier to persons vulnerable to "environmental tobacco smoke". The suit, which went on appeal to a Full Court of the Federal Court of Australia, was partially successful. Before entry of the Full Court's judgment, Mrs Cameron moved that the appeal (and her cross appeal) be relisted for further argument on the ground that the appeal had been decided on a point which had not been argued. This motion was dismissed, but the Full Court then had to decide on the appropriate order for costs. It decided "that Mrs Cameron pay 75 per cent of Qantas' costs of the proceeding before the trial judge and of the appeal and the cross appeal".[49]

In its reasons for making this order as to costs the Full Court stated that "the public interest purpose and nature of a proceeding launched by an individual or individuals is not necessarily irrelevant to the issue of costs".[50] But it also found it "impossible to view the proceedings" instituted by Mrs Cameron "as having been brought and pursued purely in the public interest".[51] The relief she had sought was mixed. "The declaratory and injunctive relief was sought in the public interest and the awards of damages were sought in the private interests of the 10 group members".[52] (In the result only one of those damages claims was successful and only to the tune of $200.) Nevertheless, the

47 Various New South Wales examples of open standing provisions were listed by Stein J in *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 238. See also *Trade Practices Act* 1974 (Cth) s80. In its report, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No 78, 1996) the Australian Law Reform Commission has recommended open standing to sue for public law remedies (p57). The Attorney-General for the Commonwealth has since announced that his Government does not propose to introduce legislation to implement this recommendation. See [1998] (No 72) *Reform* 4.

48 (1996) 68 FCR 367. The case was decided before *Richmond River Council v Oshlack* (1996) 39 NSWLR 622.

49 (1996) 68 FCR 367 at 390.

50 As above.

51 As above.

52 As above.

proceedings, the Court concluded, had "in fact served the public interest of establishing that the duty of care owed by international airlines such as Qantas to their passengers in relation to environmental tobacco smoke in the passengers' cabin requires the giving of a warning to those travellers whose medical conditions expose them to risk".[53]

Mrs Cameron and those on whose behalf she sued were clearly suing as individuals. Their position was distinguished from that of associations. The Court noted that in two prior cases it had

> accepted that at least where the applicant is a body established to pursue or safeguard a particular public interest, and to do so by litigation if appropriate, it should not be exempted from the usual adverse costs order where it has failed in a proceeding brought by it for that purpose.[54]

In one of the two prior cases the applicant was the Australian Conservation Foundation, a privately formed body; in the other case the plaintiff was a local government council.[55]

In Recommendation 45 the Australian Law Reform Commission has attempted to formulate criteria for identifying public interest cases. It suggests that these criteria reflect those already developed by courts in the context of award of costs.[56] To an extent they do, but it seems to me that they are so broadly framed as to embrace many cases of kinds which courts have not hitherto recognised as coming within the category of public interest litigation. If Recommendation 45 were to be adopted, litigation initiated by P would not necessarily be denied the character of public interest litigation (and thus a case in which a public interest costs order could not be made) merely because P had a personal interest in the matter. P's action for damages might be classified as a proceeding in the public interest because, for example, it requires judicial determination of a hitherto unresolved question of law or determination of whether a prior judicial interpretation of the law should be adhered to. P's case may be a test case, but one may question the soundness of the proposition that a test case should be regarded as one which, prima facie, qualifies as a public interest case, and therefore one which qualifies for consideration under a special costs regime.

Recommendation 45, if adopted, would also give courts and tribunals a capacity to extend the classes of matters recognisable by them as having the character of public interest proceedings.

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53 As above.
54 At 389.
55 *Australian Conservation Foundation v Forestry Commission (Tas)* (1988) 81 ALR 166 at 170-171; *Botany Municipal Council v Secretary, Department of Arts, Sport, Environment, Tourism and Territories* (1992) 34 FCR 412 at 416-417.
56 Para 13.16.

A CASE FOR REFORM?

The point has often been made that the principles applied by courts in the award of costs have been developed primarily in the context of private litigation between private parties. Some modifications of those general principles have been made in cases where applications have been made for judicial review of governmental action.[57] But the concept of public interest litigation seems to encompass a much wider range of cases.

Concern about the desirability of applying the general principles on the incidence of costs to public interest litigation was expressed by Fox J over twenty years ago in *Kent v Cavanagh*.[58] In that case several individuals sought to prevent the erection of a telecommunications tower on Black Mountain in the Australian Capital Territory on the ground that the scheme was not authorised by law. The suit failed both at first instance and on appeal to the High Court.[59] Fox J made no order as to costs. It seemed to him

> undesirable that responsible citizens with a reasonable grievance who wish to challenge Government action should only be able to do so at risk of paying costs to the Government if they fail. They find themselves opposed to parties who are not personally at risk as to costs and have available to them almost unlimited public funds. The inhibiting effect of the risk of paying costs is excessive and not in the public interest.[60]

In an address to an International Conference on Environmental Law in 1989 Toohey J drew attention to the relaxation of tests for determining the standing of individuals to sue for enforcement of public rights and duties. He went on to say:

> There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that "costs follow the event" is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or the environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.[61]

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57 See Campbell, "Award of Costs on Applications for Judicial Review" (1983) 10 *Syd LR* 20.

58 (1973) 1 ACTR 43.

59 *Johnson v Kent* (1975) 132 CLR 164.

60 (1973) 1 ACTR 43 at 55 (cf comment by McHugh J in *Oshlack v Richmond Rivers Council* (1998) 152 ALR 83 at 109-110). For details of the costs incurred by the "protesters" in *Kent* see Campbell, "Award of Costs on Applications for Judicial Review" (1983) 10 *Syd LR* 20 at 30-31.

61 Quoted in (1994) 82 LGERA 236 at 238. See also Wilcox, "Loosening the Shackles" (1996) 13 *EPLJ* 151.

The Australian Law Reform Commission seems to agree with these sentiments.[62]

In support of its case for the introduction of public interest cost orders the Commission identifies benefits that accrue from public interest litigation. These benefits, it maintains, include:

> • development of the law leading to greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law (which in turn should lead to less disputes and less expenditure on litigation)
>
> • economies of scale
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> • impetus for reform and structural change to reduce potential disputes (for example a test case can encourage the development of rules and procedures designed to ensure greater compliance with a particular law)
>
> • contribution to market regulation and public sector accountability by allowing greater scope for private enforcement
>
> • reduction of other social costs by stopping or preventing costly market or government failures.[63]

These are rather sweeping claims and ones which would be difficult to substantiate, particularly having regard to the looseness of the concept of public interest litigation. The case for public interest costs orders must, in my view, be made out rather in terms of why it is considered wrong or undesirable for the ordinary principles regarding the costs discretion to be applied to certain kinds of cases.

But we are brought back to the fundamental problem of how to determine which proceedings are to be recognised as public interest proceedings. The criteria suggested in Recommendation 45 are singularly vague[64] and are not ones, I think, which would be appropriate for incorporation into the statutes which endow courts which their general jurisdiction to make orders for payment of costs. The better approach, in my opinion, is to move for the incorporation of special costs regimes in particular statutes governing the exercise of particular jurisdictions. That approach would certainly allow for a finer degree of discrimination in selection of the factors to be taken into account by a court or tribunal in the exercise of its discretion in the award of costs. The factors which might be thought relevant in the context of, say, planning and environment legislation, enforceable under

62 Paras 13.8 and 13.9.
63 Para 13.6.
64 Submissions made to the Commission in response to its discussion paper and the Commission's answers to the submissions are set out in paras 13.14, 13.17 and 13.18.

open standing rules, may not be thought entirely relevant or appropriate in another and different statutory context, for example in a general statute on judicial review of administrative decisions.[65]

One thing is now clear: a court cannot, in exercise of an unregulated statutory discretion to award costs, take into account just any public interest which may have been served by the litigation. Even before the case of *Oshlack*[66] not all Australian courts had accepted that "public interest" is a relevant consideration in the exercise of the judicial discretion. In *South Melbourne City Council v Hallam (No 2)*[67] the Full Court of the Supreme Court of Victoria had unequivocally rejected the relevance of this consideration. The very concept of "public interest" was described by Tadgell J as "nebulous".[68]

In the principal case the plaintiff local government council had challenged the constitutional validity of a State statute, but without success.[69] The defendants (who included a Minister) had, at the conclusion of the proceedings, sought an order for costs. The plaintiffs then sought to persuade the Court that their suit had been brought in the public interest, partly because it was a test case, and that therefore no costs order should be made against them. Tadgell J found no discernible pattern in the precedents cited by counsel; indeed, they offered little guidance.[70] He saw no good reason for regarding suits by individuals or public authorities against the Crown or an agency of the Crown as a special case. In his opinion:

> A failure by the courts to take a stand which preserves an even-handedness so that (in the absence of special circumstances) a successful party has a reasonable expectation of receiving an award of costs would tend to mischief. This approach is at least as valid in litigation to which the government or its agencies are parties as in cases between citizens. Fair legal challenge to bureaucratic or other government regulation of society should not be deterred by a reluctance on the part of the courts to award a reasonable costs indemnity if the challenge succeeds. ... Concomitantly, those who make an unsuccessful challenge must ordinarily expect to give a reasonable costs indemnity to the other side. A principle which

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65 For an example of special provisions on the award of costs in judicial review proceedings see *Judicial Review Act* 1991 (Qld) s49. On the application of this provision, see *Anghel v Minister for Transport (No 2)* [1995] 2 Qd R 454 (CA).

66 *Oshlack v Richmond Rivers Shire Council* (1994) 82 LGERA 236; *Richmond Rivers Council v Oshlack* (1996) 39 NSWLR 622; *Oshlack v Richmond Rivers Council* (1998) 152 ALR 83.

67 (1994) 83 LGERA 307. This case is not mentioned in the report of the Australian Law Reform Commission.

68 At 311.

69 *South Melbourne City Council v Hallam* (1994) 83 LGERA 231.

70 (1994) 83 LGERA 307 at 309. Tadgell J's opinion essentially represented the opinion of all three judges.

> recognises this is necessary both to discourage indiscriminate challenges and as a justification for an award of costs to challengers who succeed.[71]

The views expressed by Tadgell J coincide, to a large extent, with those expressed by McHugh J in *Oshlack*. Like Tadgell J, McHugh J thought that the fact that a party to litigation happens to be a public body is irrelevant to the exercise of the judicial discretion to make orders for costs.[72]

TERMS AND TIMING OF PUBLIC INTEREST COSTS ORDERS

The recommendations of the Australian Law Reform Commission envisage that courts and tribunals invested with a jurisdiction to make public interest costs orders, and which are asked by a party to make such an order, should first decide whether the case is one in which such an order can be made. And then, if the court or tribunal is so satisfied that there are grounds for it to make such an order, it should make the order it considers appropriate, having regard to specified considerations. The Commission also envisages that, at a very early stage in proceedings, a court or tribunal should "be able to indicate the costs order it is likely to make at the end of the proceedings subject to any change in circumstances coming to light in the course of the proceedings".[73]

The inference to be drawn from its recommendations on public interest costs orders is that such orders would usually be made at a very early stage in the proceedings and certainly before the ultimate adjudication of the substantive issues.

The considerations which the Commission has identified as ones which a court or tribunal should take into account in deciding the terms of a public interest costs order are:

- the resources of the parties
- the likely cost of the proceedings to each party
- the ability of each party to present his or her case properly or to negotiate a fair settlement
- the extent of any private or commercial interest each party may have in the litigation.[74]

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71 At 311. Tadgell J quoted with approval remarks in *Re Southbourne Sheet Metal Co Ltd* [1993] 1 WLR 244.

72 (1998) 152 ALR 83 at 109-110.

73 Recommendation 3.

74 Recommendation 47. Recommendation 48 deals with factors to be considered in relation to the resources of parties.

This recommendation clearly contemplates that public interest costs orders should normally be made at the outset of proceedings. Although some courts already have been expressly empowered to make awards as to costs at any stage in proceedings before them,[75] they have demonstrated a reluctance to exercise that power in advance of the conclusion of the proceedings, and for good reasons.[76] The reasons are, essentially, that it is accepted that costs orders should normally follow the event, and that in exercise of the discretion in relation to the award of costs, a court or tribunal may properly take into account the conduct of a party as a litigant.[77]

Courts could well be reluctant to make indicative costs orders, having regard to the factors listed by the Australian Law Reform Commission, because of the time required to undertake the necessary inquiries, and possibly also because of the risk that the making of such an order might be seen as compromising the court's impartiality.[78]

Whether the relative financial means of parties should ever be regarded as a factor which a court may properly take into account in exercising its costs discretion is a matter on which opinion may well differ. Whether courts invested with federal jurisdiction could, constitutionally, be required to take that factor into account is debatable.[79] In *Oshlack* Kirby J conceded that there could be "an element of inequality in the approach to the costs of a person such as the appellant", but he defended that approach as "simply one designed to redress, in the appropriate case, the serious inequality in resources which typically (but not always) applies in the case of litigation commenced in the public interest between an objector and the public or private body resisting the objector's demands".[80] McHugh J, in contrast, seems to have regarded disparities in the economic resources available to parties as completely irrelevant to the exercise of the costs discretion. In the exercise of that discretion, he said "all persons are entitled to be treated equally and in accordance with traditional principle".[81] He would make no exception in relation to parties whose costs will be met from public funds:

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75 See eg O 62 r 3(1) of the Rules of the Federal Court of Australia.

76 See *GIO (NSW) v Ivanoff* (1991) 22 NSWLR 368 at 377.

77 See *Schaftenaar v Samuels* (1975) 11 SASR 266; *South Melbourne City Council v Hallam (No 2)* (1994) 83 LGERA 307; *Latoudis v Casey* (1990) 170 CLR 534 at 542, 565, 569. On the usual order as to costs, and exceptions, see *Oshlack v Richmond Rivers Council* (1998) 152 ALR 83 at 94-95 per Gaudron and Gummow JJ, at 101-102 per McHugh J and at 120-124 per Kirby J.

78 In granting special leave to appeal under s35 of the *Judiciary Act* 1903 (Cth) the High Court sometimes makes it a condition that the applicant "pays the costs of the respondent to the appeal and undertakes not to disturb the existing costs orders in the lower courts": *Oshlack v Richmond Rivers Council* (1998) 152 ALR 83 at 111 per McHugh J.

79 It might be argued that although a costs discretion is not, of itself, alien to the exercise of judicial power, a requirement that the discretion be exercised with reference to the economic resources of the parties is incompatible with the exercise of judicial power.

80 (1998) 152 ALR 83 at 124-125.

81 At 109.

> Every irrecoverable dollar spent on litigation is one dollar less to spend on the services that public authorities do and ought to provide. Often enough the services that will be reduced will be those that favour the politically weak - children, the unemployed, the disabled and the aged. Such results cannot be in the public interest.[82]

CONCLUDING COMMENTS

The recommendations discussed in this article preserve the judicial discretion in the award of costs. They nevertheless establish guidelines for the exercise of the discretion which, if enshrined in legislation, would be binding on courts in the sense that if courts acted in disregard of them, an order as to costs might be set aside on appeal.[83] The guidelines suggested by the Australian Law Reform Commission clearly authorise departure from the general principle that costs should follow the event. Should they be incorporated in legislation they are most likely to be invoked by those who initiate litigation to enforce public rights and duties and do so under open or liberal standing rules.

The criteria to be applied by courts in deciding whether a proceeding is one in which a public interest costs order can be made are vague. They include whether a proceeding has the character of a public interest proceeding.[84] Whether a proceeding is of that character could be a matter of dispute. Even if a court is satisfied that a proceeding is one in which a public interest costs order can be made, it must then decide whether such an order should be made and, if so, on what terms. At this stage the resources available to the parties must be considered.[85]

Some of those who made submissions on the Commission's draft recommendations expressed concern about the uncertainty of the suggested criteria.[86] Another concern was that the system recommended by the Commission would encourage unmeritorious litigation. Yet another concern was that applications for public interest cost orders could add to the time and expense of proceedings.[87]

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82 As above.

83 The principles to be applied by a court of appeal in review of an order for costs are set out in *Richmond River Council v Oshlack* (1996) 39 NSWLR 622. They recapitulate principles enunciated by the High Court of Australia regarding review, on appeal, of decisions made in the exercise of judicial discretions. See *House v The King* (1936) 55 CLR 499 at 504-505; *Lovell v Lovell* (1950) 81 CLR 513 at 532-533; *Gronow v Gronow* (1979) 144 CLR 513.

84 See text accompanying n1 above.

85 Recommendation 47.

86 Para 13.14.

87 As above. The Federal Court of Australia is stated to have expressed concerns on these last two grounds But cf remarks by Kirby J in *Oshlack v Richmond Rivers Council* (1998) 152 ALR 83 at 124.

The Commission's reply to the first of these concerns was that the criteria it recommended reflected those already developed by the courts.[88] But that was before *Richmond River Council v Oshlack*.[89] The Commission also rejected the floodgates argument. It pointed out that its recommendations in relation to public interest costs orders "must be understood in the context of an enhanced scheme of disciplinary and case management costs orders".[90] And the Commission doubted whether the time and expense involved in administering the public interest costs order scheme would be any greater than the time and expense already involved in determining applications for costs.[91] One wonders whether the Commission considered the possibility that a party seeking a public interest costs order might seek an indicative costs order at the commencement of a proceeding[92] and then a final public interest costs order at the conclusion of the proceedings. These possibilities, together with the nature of the inquiries to be made when a public interest costs order is sought, must surely add to the time and expense of a proceeding.

It is generally accepted that a potential liability to pay the defendant's costs may deter a party from initiating litigation. That potential liability may, however, discourage claims which are without merit and are bound to fail. At the same time it must be recognised that by liberalising rules about standing to sue to vindicate public rights and to enforce public duties, courts and legislatures between them have fortified the role of individuals and groups as "prosecutors" or surrogate Attorneys-General. Sometimes that role has been further fortified by financial subsidy of public interest groups from public funds.[93] As Toohey J and others have pointed out, traditional rules about the allocation of costs between litigants are not really adapted to deal satisfactorily with cases of this kind.[94]

The remedy, I have suggested, should not be along the sweeping lines recommended by the Australian Law Reform Commission. It should rather be specific to particular statutory contexts, for example planning and environment legislation or legislation which establishes a special procedure for challenging, say, the validity of subordinate legislation made by local government councils. The statute-specific approach has the advantage of forcing the legislators to be attentive to the relationship between standing to sue, the role expected of those accorded standing to sue, and principles regarding allocation of costs. This approach has the further advantage of prompting careful attention to the ways in which traditional

88 Para 13.16.
89 (1996) 39 NSWLR 622.
90 Para 13.18.
91 Para 13.17.
92 Recommendation 3 (at p25).
93 Governmental subsidy of the activities of public interest groups, and integration of their activities in other ways in the performance of governmental functions, has been recognised by the Federal Court as a factor which strengthens the claims of such groups to have standing to sue: see eg *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492.
94 See text accompanying n61 above.

principles regarding costs allocation should be modified. Judges, I suspect, would be less discomforted by public interest costs regimes which are statute specific than by the kind of over-arching regime which has been recommended by the Australian Law Reform Commission.

POSTSCRIPT

In *R v Lord Chancellor; Ex parte Child Poverty Action Group*,[95] decided in February 1998, Dyson J considered the principles which should be applied when an applicant for judicial review seeks an order that, whatever the outcome of the litigation, no order for costs should be made against the applicant, for the reason that the proceedings have been brought in the public interest. Dyson J accepted that the court had jurisdiction to make a pre-emptive order of the kind sought, but was of the view that, "even in cases involving public interest challenges", this discretionary jurisdiction "should be exercised only in the most exceptional circumstances".[96] The reasons were twofold:

> First, it will often not become clear whether an issue is of sufficient public importance to justify departure from the basic rule that costs follow the event until the hearing of the substantive application. ...
>
> [Secondly] it will rarely be possible to make a sufficient assessment of the merits of the claim at the interlocutory stage.[97]

Dyson J noted that, when an applicant for judicial review seeks a pre-emptive costs order of the kind sought in the cases before him, what the court is being asked to do

> is to say, in advance, that a public body should subsidise proceedings that have been brought against it, and to do so even at a time when the court has an incomplete appreciation of the merits of the claim, and when it may also be unable to assess properly the extent of the general public importance of the issues raised by the proceedings.[98]

In the judge's view the court should not in such a case make a pre-emptive costs order unless it

> is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the

95 [1998] 2 All ER 755.
96 At 764.
97 At 765.
98 At 766.

> claim that it can conclude that it is in the public interest to make the order.[99]

Those necessary conditions would not, however, be sufficient to justify the making of pre-emptive costs orders. The court would also have to consider "the financial resources of the applicant and respondent, and the amount of costs likely to be in issue".[100] The court, he suggested,

> will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.[101]

Dyson J declined to make the pre-emptive costs orders sought by the applicants for judicial review in the two cases before him.[102] He nevertheless granted leave to appeal to the Court of Appeal.

99 As above.
100 As above.
101 As above.
102 At 767-768.