PUBLIC INTEREST COSTS ORDERS IN FEDERAL CLASS ACTIONS: TIME FOR A NEW APPROACH

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Australia's oldest and most important class action regime, which has been regulated since March 1992 by pt IVA of the Federal Court of Australia Act 1976 *(Cth), is predominantly based on a regime recommended by the Law Reform Commission ('LRC') in 1988. The LRC was acutely aware of the need to deal with one of the barriers to group litigation: the risk of being required to pay a substantial portion of the costs incurred by defendants in the event of an unfavourable outcome. To address this problem, the LRC recommended the creation of a class action fund to provide financial assistance to lead plaintiffs. It was not implemented by the government of the day. More than 30 years later, no measures have been taken by successive Commonwealth governments to address this problem. In practice, this liability has been removed from lead plaintiffs in pt IVA litigation supported by litigation funders and/or after-the-event insurance. But this solution — and in particular the support of litigation funders — has been largely confined to commercial class actions such as shareholder class actions. As a result, this barrier has remained with respect to many of the potential class actions likely to be appropriately characterised as public interest litigation, including proceedings brought on behalf of vulnerable or disadvantaged persons. It is the principal aim of this article to submit that, in the current climate of significant class action reform initiatives and recommendations designed to ensure that class actions do serve the interests of class members and the broader community, it is time to introduce a legislative measure designed to reduce this barrier to class action litigation, thus facilitating the filing of class actions that raise matters of public interest. In light of the continued bipartisan political opposition to the creation of a public class action fund, our recommendation is to add to pt IVA a modified version of a provision recommended by the Victorian Law Reform Commission ('VLRC') in 2018, in relation to Victoria's class action regime, which is based on pt IVA. The provision recommended by the VLRC would have empowered trial judges, when deciding whether to make an adverse costs order against unsuccessful lead plaintiffs, to take into account, among other things, the function of class actions in providing access to justice and whether the class action involved a matter of public interest.*

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I Introduction

> [T]he problem is that a representative party is exposed to the risk of an order to pay the costs of a respondent or respondents (the amount of which will usually be increased by the very fact that the proceeding is a representative one), without gaining any personal benefit from the representative role. So there is little or no incentive for a person to act as a representative party. Unless the person's potential costs are covered by someone else, there is a positive disincentive to taking that course.[1]

[1] *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139, 145 (Wilcox J) (emphasis omitted) ('*Woodlands*'). See also Law Reform Committee of South Australia, *Report Relating to Class Actions* (Report No 36, 1977) 7–8; *Report of the Attorney General's Advisory Committee on Class Action Reform* (Report, February 1990) 57–8 ('*Ontario Committee Report*'); *Ayrton v PRL Financial (Alta) Ltd* (2006) 265 DLR (4th) 240, 249 [28] (Conrad, Paperny JJA and Romaine J)

The comments set out above were made by Wilcox J of the Federal Court of Australia in 1995, three years after pt IVA of the *Federal Court of Australia Act 1976* (Cth) ('*Federal Court Act*') — Australia's first and most important legislative class action regime — came into operation.[2] In our view, these comments still carry significant practical relevance in 2022, notwithstanding the fact that, in the last few years, a majority of pt IVA proceedings have been supported by commercial litigation funders ('funded class actions').[3] These funders have invariably agreed to protect lead plaintiffs from adverse costs orders, including any security-for-costs orders granted to class action defendants during the course of the litigation.[4] And more recently, after-the-event ('ATE') insurance has been taken up for this purpose in pt IVA proceedings — mostly in unfunded class actions,[5] although funders are increasingly using this type of insurance cover in class actions that they support.[6]

But what if an aspiring lead plaintiff is not able to secure ATE insurance cover or the support of a litigation funder? In its 1988 report on grouped proceedings, the Law Reform Commission ('LRC') recommended the establishment of a special fund that would help lead plaintiffs meet the significant costs of grouped proceedings, including adverse costs orders.[7] Whilst pt IVA was

(Alberta Court of Appeal) ('*Ayrton*'); Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2, 607 ('*Productivity Commission Report*').

2 See *Federal Court of Australia Amendment Act 1991* (Cth) s 2, inserting *Federal Court of Australia Act 1976* (Cth) pt IVA ('*Federal Court Act*'). The existence of this problem prompted the Ontario Law Reform Commission ('OLRC') in 1982 to observe that

> the question of costs is the single most important issue that this Commission has considered in designing an expanded class action procedure … the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilized at all.

Ontario Law Reform Commission, *Report on Class Actions* (1982) vol 3, 647 ('*OLRC 1982 Report*').

3 Vince Morabito and Michael Duffy, 'An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions' [2020] (3) *New Zealand Law Review* 377, 388.

4 See Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Discussion Paper No 85, June 2018) 15 [1.7] ('*ALRC DP 85*'); *Court v Spotless Group Holdings Ltd* [2020] FCA 1730, [83] (Murphy J) ('*Spotless*'); *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd [No 3]* (2020) 385 ALR 625, 634 [32] (Lee J) ('*Asirifi-Otchere*').

5 See Vince Morabito and Vicki Waye, 'Seeing past the US Bogey: Lessons from Australia on the Funding of Class Actions' (2017) 36(2) *Civil Justice Quarterly* 213, 230–1.

6 See, eg, *Perera v GetSwift Ltd* (2018) 263 FCR 1, 25 [71] (Lee J) ('*Perera*'); *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699, [23]–[24] (Yates J) ('*Petersen Superannuation Fund*'); *Kenquist Nominees Pty Ltd v Campbell [No 6]* [2020] FCA 1388, [28] (McKerracher J); *Clarke v Sandhurst Trustees Ltd [No 2]* [2018] FCA 511, [5] (Lee J).

7 Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) 126–7 [308]–[309] ('*LRC 1988 Report*').

substantially based on the grouped proceedings regime recommended by the LRC, this recommendation was not implemented by the Commonwealth government, and no explanation was provided for this omission.[8] Speaking at a seminar organised by the Federal Court in 2009, one of the principal authors of the LRC's report — the aforementioned Murray Wilcox — observed that in light of the many demands on public funds, it would no longer be reasonable to expect the creation of a public fund to provide financial support to lead plaintiffs in pt IVA proceedings.[9]

Yet it is important to provide an answer to the crucial question posed in the preceding paragraph, particularly in light of the following circumstances:

1 the significant costs incurred by formal parties to class action litigation;[10]

2 the fact that the involvement of litigation funders in pt IVA proceedings is decreasing and is likely to continue decreasing (especially for overseas based funders) in the near future due to the requirement, introduced by the Commonwealth government in August 2020, that litigation funders must be licensed under both the Australian Financial Services Licence regime and the Managed Investment Scheme regime;[11]

[8] See *Woodlands* (n 1) 146 (Wilcox J). See also Justice SC Derrington, 'Litigation Funding: Access and Ethics' (Australian Academy of Law Lecture, Brisbane, 4 October 2018) 2, where it is noted that if a criticism could be made of the pt IVA regime, it is that it left 'unanswered the difficult question of how to relieve a principal applicant from the brunt of an adverse costs order should the proceeding fail'.

[9] See Murray Wilcox, 'Investor Class Actions' (Speech, Sydney, 3 August 2009) 8. Cf *Evans v Davantage Group Pty Ltd [No 3]* [2021] FCA 70, [73] (Beach J). The fact that, in December 2020, the government members of the Parliamentary Joint Committee on Corporations and Financial Services rejected the calls by, among others, the Law Council of Australia for such a fund confirms the existence of a strong political dislike in Australia for this type of initiative: see Parliamentary Joint Committee on Corporations and Financial Services, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) 141 [10.46]–[10.47] ('*PJC Report*').

[10] See, eg, *Kelly v MIS Funding No 1 Pty Ltd* (2012) 300 ALR 675, where it is stated that class actions 'are notoriously expensive both to conduct and defend': at 702 [129] (Murphy J). For some of the available information on the costs of defending class actions in Australia, see Vicki Waye and Vince Morabito, 'Collective Forms of Consumer Redress: Financial Ombudsman Service Case Study' (2012) 12(1) *Journal of Corporate Law Studies* 1, 23 n 125; *Spotless* (n 4) [94] (Murphy J); *Asirifi-Otchere* (n 4) 627 [7] (Lee J); *Perera* (n 6) 71 [271], 73 [282] (Lee J); *Petersen Superannuation Fund* (n 6) [165], [186] (Yates J); *Kayler-Thomson v Colonial First State Investments Ltd* [2020] FCA 1867, [119], [127], [130] (Beach J); *Oztech Pty Ltd v Public Trustee of Queensland [No 3]* [2016] FCA 253, [13], [95] (Yates J).

[11] See *Corporations Regulations 2001* (Cth) regs 5C.11.01, 7.1.04N, 10.38.01(1); *Stanwell Corporation Ltd v LCM Funding Pty Ltd* [2021] FCA 1430, [59]–[81] (Beach J); *Brett Cattle Co Pty Ltd v Minister for Agriculture [No 3]* [2020] FCA 1628, [2], [5] (Rares J); Australian Securities

3 the fact that many meritorious class actions are not backed by funders solely on the basis that they do not satisfy the requirements of the business models employed by these entities;[12]

4 the very limited interest that litigation funders have generally displayed for class actions filed on behalf of vulnerable or disadvantaged persons;[13]

5 the very high cost of, and the very limited number of suppliers of, ATE insurance;[14] and

6 the fact that where plaintiff solicitors fund class actions, by agreeing not to be paid by the lead plaintiffs unless a favourable outcome has been secured on behalf of the class, they are not required to also provide lead plaintiffs with an indemnity for costs.[15] This requirement only exists in Victorian class actions — as a result of a legislative amendment to the Victorian counterpart to pt IVA that came into effect in June 2020 — and it applies where the solicitors for the lead plaintiffs have been authorised by court order to receive a specified percentage of any monetary compensation secured on behalf of the class members.[16]

The scenario depicted above raises the desirability of courts presiding over class actions having the power or discretion, where the class action litigation exhibits an important characteristic, to:

1 refrain from awarding costs against unsuccessful lead plaintiffs; or

and Investments Commission, *Litigation Funding Schemes: Guidance and Relief* (Consultation Paper No 345, 9 July 2021); Vince Morabito, 'Will 2020 Mark the Beginning of the End for Class Actions in Australia?', *Lawyerly* (Web Page, 27 May 2020) <https://www.lawyerly.com.au/will-2020-mark-the-beginning-of-the-end-for-class-actions-in-australia>, archived at <https://perma.cc/V66U-SSGN>.

[12] See generally John Walker, Susanna Khouri and Wayne Attrill, 'Funding Criteria for Class Actions' (2009) 32(3) *University of New South Wales Law Journal* 1036.

[13] See Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons: An Australian Study' (2016) 35(1) *Civil Justice Quarterly* 61, 87–8. But see Morabito and Duffy (n 3) 389–90 in relation to recently funded pt IVA proceedings.

[14] See *ALRC DP 85* (n 4) 17 [1.16]; Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Consultation Paper, July 2017) 15 [2.25]–[2.28]; *Spotless* (n 4) [87]–[89] (Murphy J); *Asirifi-Otchere* (n 4) 628 [9] (Lee J); Vince Morabito and Naomi Hatcher, 'Security for Costs in Unfunded Federal Class Actions: Back to the Future' (2018) 92(2) *Australian Law Journal* 105, 123.

[15] A rare example of solicitors providing lead plaintiffs with an indemnity for costs is provided by the recently settled Robodebt pt IVA proceeding: *Prygodicz v Commonwealth [No 2]* [2021] FCA 634, [25] (Murphy J).

[16] *Supreme Court Act 1986* (Vic) s 33ZDA.

2 award a lower amount in costs to successful class action defendants than would otherwise be the case; or

3 make an order at the early stages of the litigation that imposes a ceiling on the total amount of costs that may be awarded against the lead plaintiffs in the event of a loss for the class members ('maximum costs orders').

The characteristic in question is that the class action proceeding raises matters of public interest — or, to put it differently, that the class action in question can properly be characterised as a form of public interest litigation. In this article, the term 'public interest costs orders', used by the Australian Law Reform Commission ('ALRC') in 1995,[17] will be employed to capture the three categories of costs orders set out above.

Examples of legal proceedings, other than class action proceedings, that have been judicially recognised in Australia or overseas as dealing with matters of public interest or importance include litigation:

1 concerning protection of the environment;[18]

2 raising constitutional or legal questions concerning the liberty of individuals who were unable to take action on their own behalves to determine their rights;[19]

3 concerning tobacco advertising;[20]

4 concerning the ability of disabled persons to fly with a major commercial airline in Australia without the extra cost of a carer;[21]

5 challenging a decision by the Office of Police Integrity not to investigate an allegation by a minor that police had assaulted and racially abused him;[22]

[17] Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation* (Report No 75, 1995) ch 13 ('*Costs Shifting*').

[18] See, eg, *VicForests v Friends of Leadbeater's Possum Inc [No 2]* [2021] FCAFC 92, [8] (Jagot, Griffiths and SC Derrington JJ); *Kent v Cavanagh* (1973) 1 ACTR 43, 45, 55 (Fox J) ('*Kent*'); *Arnold v Queensland* (1987) 73 ALR 607, 621–2 (Wilcox J), 635 (Burchett J); *Re Sierra Club of Western Canada v A-G (British Columbia)* (1991) 83 DLR (4th) 708, 716 (Curtis J) (British Columbia Supreme Court).

[19] *Ruddock v Vadarlis [No 2]* (2001) 115 FCR 229, 241–2 [28]–[29] (Black CJ and French J) ('*Ruddock*'). See *Cabal v Mexico [No 6]* (2000) 174 ALR 747, 753 [22] (Goldberg J).

[20] *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd* (1991) 100 ALR 568, 571–2 (Morling J).

[21] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [33] (Bennett J).

[22] *Bare v Small* (2013) 47 VR 254, 257 [2]–[4], 265 [43] (Hansen and Tate JJA) ('*Bare*').

6 challenging the failure of an operator of a public transport service to use coaches that were wheelchair accessible;[23]

7 dealing with the inability of a person requiring a wheelchair to fly with a commercial airline because that airline's limit on passengers requiring wheelchair assistance for that flight had been reached;[24]

8 clarifying the interpretation and application of provisions in the *Superannuation Act 1976* (Cth)[25] and the *Sex Discrimination Act 1984* (Cth),[26] as well as provisions in the *Migration Act 1958* (Cth) that sought to discharge some of Australia's 'important international obligations, including under the *Convention Relating to the Status of Refugees 1951*';[27] and

9 raising constitutional challenges to voter eligibility requirements, mandatory retirement, and criminal code provisions authorising the physical disciplining of children.[28]

As we will show in the remainder of this article, class actions which have been judicially accepted as having raised matters of public interest have frequently encompassed some of the most disadvantaged members of society.

The main purpose of this article is to recommend the addition to pt IVA of a modified version of the provision recommended by the Victorian Law Reform Commission ('VLRC') in 2018 in relation to litigation costs in class actions.[29] The VLRC recommended the addition of a provision that specified that

[23] *Haraksin v Murrays Australia Ltd* (2010) 275 ALR 520, 525 [26] (Nicholas J) ('*Haraksin*').

[24] *King v Jetstar Airways Pty Ltd* [2012] FCA 413, [9] (Perram J) ('*King*').

[25] *Perrett v Commissioner for Superannuation* (1991) 29 FCR 581, 582, 594 (Wilcox, Burchett and Ryan JJ).

[26] *Jacomb v Australian Municipal, Administrative, Clerical & Services Union* [2004] FCA 1600, [10] (Crennan J) ('*Jacomb*').

[27] *Minister for Immigration and Border Protection v CQZ15 [No 2]* (2018) 259 FCR 569, 574 [23] (Kenny, Tracey and Griffiths JJ). See also *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954). See also *Shafran v Repatriation Commission [No 2]* [2020] FCA 1072, [28] where Logan J referred to decisions of the Federal Court 'where it was regarded as a relevant consideration … in an administrative law case that a wider public interest in government according to law could be seen to be served'.

[28] See the Canadian judgments referred to in Chris Tollefson, Darlene Gilliland and Jerry DeMarco, 'Towards a Costs Jurisprudence in Public Interest Litigation' (2004) 83(2) *Canadian Bar Review* 473, 492.

[29] Victorian Law Reform Commission, Access to Justice: Litigation Funding and Group Proceedings (Report, March 2018) 136 recommendation 29 ('*VLRC 2018 Report*').

> in making an adverse costs order, or a security for costs order in [Victorian] class actions, the Court may take into account, among other factors:
>
> (a) the function of class actions in providing access to justice
>
> (b) whether the case is a 'test' case or involves a novel area of law
>
> (c) whether the class action involves a matter of public interest.[30]

The VLRC explained that the rationale for this provision was to reduce the risk that lead plaintiffs in Victorian class actions that concern, among other things, a matter of public interest would be required to pay some of the costs of their opponents.[31] The VLRC envisaged that this type of class action litigation may be seeking non-monetary relief, or monetary relief in an amount 'that is too low to attract the financial support of a litigation funder or lawyer'.[32] Thus, reducing the risk of an adverse costs award was intended to encourage more claimants to assume the daunting role of lead plaintiff and encourage third parties to support class actions that they would otherwise not have been willing to fund because of the risk of adverse costs.[33]

The VLRC explained that this provision was based on a provision found in Ontario's class action legislation, which has been operating since 1993.[34] Whilst not expressly mentioned by the VLRC, similar provisions are contained in the legislation regulating class actions in Saskatchewan[35] and Nova Scotia[36] and in Alberta's rules of court,[37] and the VLRC's recommended provision is actually more similar to the Saskatchewan and Alberta provisions than the Ontario provision. To our surprise, this important recommendation has not yet been implemented by the Victorian government or other Australian governments, and has been ignored by commentators and scholars alike.

[30] Ibid.

[31] Ibid 135 [5.118].

[32] Ibid. In its July 2019 final report on class actions, the Law Commission of Ontario ('LCO') noted that its consultations with organisations and clinics representing low-income and other vulnerable communities in that Province revealed that the risk of an adverse costs award was a major reason for not filing public interest class actions: Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (Final Report, July 2019) 81 ('*LCO Report*'). In a New Zealand context, see also Law Commission, *Class Actions and Litigation Funding* (Issues Paper No 45, December 2020) 13, 30 [1.15], 97 [5.18], 235 [13.14] ('*NZLC Issues Paper*').

[33] *VLRC 2018 Report* (n 29) 135 [5.116]–[5.123].

[34] Ibid 135 [5.120], citing *Class Proceedings Act*, SO 1992, c 6, s 31(1).

[35] *Class Actions Act*, SS 2001, c C-12.01, s 40(2) ('*Saskatchewan Class Actions Act*').

[36] *Class Proceedings Act*, SNS 2007, c 28, s 40(2) ('*Nova Scotia Class Proceedings Act*').

[37] *Alberta Rules of Court*, Alta Reg 124/2010, r 10.32.

This reform would be particularly appropriate and desirable in relation to pt IVA litigation in light of the ambitious class action reform agenda that the Commonwealth government may implement, perhaps justified in part on the basis that some class actions have not been in the interests of the public or class members.[38] Class actions that involve matters of public interest may be said to be prima facie in the public interest[39] and thus facilitate the attainment of the government's objective.

In Part II, we briefly explain the sui generis nature of class action litigation and its three major policy goals. We also draw attention to the need, in all litigation, for trial judges to consider any matters of public interest raised by unsuccessful proceedings when considering whether to award costs in favour of the successful defendant. In Part III, we highlight the lack of clarity and consistency in relation to the judicial principles that govern the availability of public interest costs orders in Australian legal proceedings and contrast this unsatisfactory state of affairs with the reasonably coherent jurisprudence in this area in Canada and the United Kingdom.

In Part IV, we explore the general synergies between class action litigation and public interest litigation, whilst in Part V we canvass, in some detail, the only five judgments handed down to date by the Federal Court in response to applications for public interest costs orders filed by lead applicants in pt IVA proceedings. In Part VI, we briefly outline the major lessons that may be learnt by Australia from the Canadian experience with express legislative authorisation of, and guidance on, the making of public interest costs orders in class action proceedings. We then explain the changes that should be made to the provision recommended by the VLRC.

[38] See Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 2020, 3340–3 (Christian Porter, Attorney-General).

[39] The claims advanced in public interest litigation must of course have some merit. As highlighted by Wilcox J in *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] ATPR (Digest) ¶46-205, 50,403 [125],

> [t]hose who litigate in the public interest need to be dedicated to their cause and enthusiastic in its pursuit. But dedication and enthusiasm are not enough; public interest claims also require strict professionalism, with rigorous attention to any legal problems inherent in the proposed claim.

See also *Campbell v Northern Territory [No 4]* [2021] FCA 1413, [24] (White J).

II Class Actions, Public Interest Litigation and the Judicial Discretion to Award Costs

A *The Essential Characteristics and Policy Goals of Class Actions*

Like proceedings filed under other contemporary class action regimes available around the world, pt IVA proceedings bind not only the formal parties to the litigation — the lead plaintiff and the respondent (as defendants are called in the Federal Court) — but also persons and entities whose claims and/or circumstances are sufficiently similar to the claims and circumstances of the lead plaintiff.[40] These claimants, known generally as class members,[41] are bound by the outcome of the class action litigation (on the common issues) despite not being formal parties to the litigation and, as a result, not being in control of the way in which the litigation is conducted.[42] In light of this unique status of class members,[43] costs may not be awarded against an individual class member unless the costs were incurred solely in relation to their individual claim.[44] As a result, lead plaintiffs are generally the only claimants against whom adverse costs orders may be made in class actions.[45]

There are three internationally recognised objectives of class action devices, as explained by the Supreme Court of Canada:

> First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.[46]

[40] See *Federal Court Act* (n 2) ss 33C, 33E, 33ZB.

[41] Part IVA refers to claimants covered by proceedings brought under this regime as 'group members': see ibid s 33A (definition of 'group member'). In this article, however, the internationally recognised term 'class members' will be employed.

[42] Justice DM Ryan, 'The Development of Representative Proceedings in the Federal Court' (1993) 11(2) *Australian Bar Review* 131, 141.

[43] See, eg, *American Pipe & Construction Co v Utah*, 414 US 538, 552 (Stewart J for the Court) (1974); *McCann v CP Ships Ltd* [2008] OJ No 5957, [19] (HA Rady J).

[44] *Federal Court Act* (n 2) ss 33Q–33R, 43(1A).

[45] *Ayrton* (n 1) 249 [28] (Conrad, Paperny JJA and Romaine J).

[46] *Hollick v City of Toronto* [2001] 3 SCR 158, 170 [15] (McLachlin CJ for the Court). See also *Deposit Guaranty National Bank of Jackson, Mississippi v Roper*, 445 US 326, 338 n 9

B *Costs Orders under the English Rule*

The ability of the Federal Court to make orders in relation to costs is governed by s 43(1) of the *Federal Court of Australia Act 1976* (Cth). It provides that, subject to sub-s (1A),

> [t]he 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 this or any other Act provides that costs must not be awarded.[47]

Judicial descriptions of this provision, and similar provisions, by Australian and English superior courts, have drawn attention to the 'general statutory discretion which has not been constrained — even by prescription of relevant considerations or criteria'[48] — and the 'absolute and unfettered',[49] 'unlimited',[50] 'unconfined',[51] 'uncontrolled',[52] 'unqualified'[53] and 'untrammelled'[54] discretion that has been conferred on courts to award or not award costs. Yet, s 43 and similar provisions have been largely construed by courts as if they read as follows:

> [I]n the absence of special circumstances … [t]his discretion … ought not to [be] exercise[d] … against the successful party except for some reason connected with the case.[55]

This principle, enunciated by the House of Lords in 1927, still represents the guiding principle in relation to the discretion of courts to award costs in legal

(Burger CJ for Burger CJ, Brennan, White, Marshall, Rehnquist and Stevens JJ) (1980); *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 374 [248] (Finkelstein J); *Cridge v Studorp Ltd* (2017) 23 PRNZ 582, 586–7 [11] (French J for the Court) (New Zealand Court of Appeal); Scottish Law Commission, *Multi-Party Actions* (Report No 154, 1996) 8 [2.10].

47 As explained by the ALRC, '[a] court "awards" costs when it orders a party to proceedings to pay the legal costs of the other party': Australian Law Reform Commission, *Who Should Pay? A Review of the Litigation Costs Rules* (Issues Paper No 13, October 1994) 7 [2.2] n 1.

48 *Latoudis v Casey* (1990) 170 CLR 534, 541 (Mason CJ) ('*Latoudis*').

49 *Donald Campbell & Co Ltd v Pollak* [1927] AC 732, 811 (Viscount Cave LC) ('*Donald Campbell*').

50 *Marks v GIO Australia Holdings Ltd [No 2]* (1996) 66 FCR 128, 131 (Einfeld J).

51 *Latoudis* (n 48) 540 (Mason CJ).

52 Ibid 568 (McHugh J).

53 Ibid 558 (Dawson J). See also *Oshlack v Richmond River Council* (1998) 193 CLR 72, 112 [110] (Kirby J) ('*Oshlack (High Court)*').

54 *Ingram v Ardent Leisure Ltd [No 2]* [2020] FCA 1390, [2] (Derrington J).

55 *Donald Campbell* (n 49) 811–12 (Viscount Cave LC).

proceedings.[56] The exception mentioned in the passage quoted above — 'some reason connected with the case' — has essentially encompassed instances of misbehaviour by the successful party in relation to the litigation in question.[57]

The need for flexibility in applying this rule, commonly known as the English Rule, becomes apparent when account is taken of the significant developments that have occurred over the last 100 years. In the 1920s, litigation was perceived as an entirely private matter between the litigants.[58] As perceptively noted by Gary Cazalet, in that period public law and administrative proceedings barely existed.[59] The concept of class actions, as they are known today, also did not exist. Group litigation, brought pursuant to rules of court, was seen merely as a tool of convenience when all the claimants in question had essentially identical claims, and not as a procedural vehicle that had the potential to secure important benefits such as access to justice or deterrence of illegal conduct.[60]

In 2001, in *Ruddock v Vadarlis [No 2]* ('*Ruddock*'), a majority of the Full Federal Court — comprising Black CJ and French J (the latter of whom would go on to become Chief Justice of the High Court) — drew attention to the potentially unfair impact of the English Rule, including where the losing party

> may have had very good legal grounds for its position and have conducted itself in the litigation in an entirely reasonable way. Where the case is close or difficult and involves no obvious element of fault on the part of the loser the proposition that costs automatically follow the event may work unfairness. Moreover it may set up a significant barrier against parties of modest means even if the contemplated claim has substantial merit …[61]

According to these former Chief Justices, the existence of this undesirable scenario pointed towards 'the desirability of avoiding calcification of the discretion

[56] Gary Cazalet, 'Unresolved Issues: Costs in Public Interest Litigation in Australia' (2010) 29(1) *Civil Justice Quarterly* 108, 109. See, eg, *Latoudis* (n 48) 542–3 (Mason CJ), 568 (McHugh J); *Oshlack (High Court)* (n 53) 97 [67] (McHugh J); *Northern Territory v Sangare* (2019) 265 CLR 164, 173 [25] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ) ('*Sangare*').

[57] As explained by McHugh J of the High Court, '[t]he traditional exceptions to the usual order as to costs focus on the conduct of the successful party which disentitles it to the beneficial exercise of the discretion': *Oshlack (High Court)* (n 53) 97 [69]. See also *Latoudis* (n 48) 565–6 (Toohey J); *Ruddock* (n 19) 236–7 [15] (Black CJ and French J); *Sangare* (n 56) 173 [25] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

[58] See Cazalet (n 56) 109.

[59] Ibid. See also Kellie Edwards, 'Costs and Public Interest Litigation after *Oshlack v Richmond River Council*' (1999) 21(4) *Sydney Law Review* 680, 686.

[60] See, eg, *Duke of Bedford v Ellis* [1901] AC 1, 8 (Lord Macnaghten).

[61] *Ruddock* (n 19) 235 [13].

with rigid rules governing its exercise'.[62] The most obvious category of litigation where a greater level of discretion is warranted, in the area of costs, is public interest litigation. As explained by the Productivity Commission in 2014, the disincentive to the filing of meritorious cases caused by the English Rule

> will be particularly strong for public interest litigants, who may not have a significant private stake in the outcome of the case to compensate for the costs risk they would be exposed to by litigation.
>
> The result is that public interest cases may be deterred by the risk of an adverse costs order, resulting in a loss of the potential benefits to the wider community.[63]

III Public Interest Costs Orders

A *Comparative Perspectives on the Concept of Public Interest Litigation*

The Hon Michael Kirby, formerly of the High Court, provided the following examples of public interest litigation in an article published in 2011:

> Public interest litigation includes the bringing of proceedings before courts and tribunals asserting that a government official or other person has acted unlawfully; seeking a binding ruling that the law be complied with; or claiming orders clarifying the operation and meaning of the law as well as the obligations of those who are subject to it.[64]

We were not able to find a precise definition of public interest litigation in judgments issued by Australian courts. Furthermore, the concept or category of

[62] Ibid 236 [13].

[63] *Productivity Commission Report* (n 1) vol 1, 481 (citations omitted). See also *PJC Report* (n 9) 56 [6.44]; Murray Wilcox, 'Tying the Threads Together' (2010) 22(3) *Bond Law Review* 226, 231–2; *Re Mahar v Rogers Cablesystems Ltd* (1995) 25 OR (3d) 690, 704–5 (Sharpe J); Eliza Ginnivan, 'Public Interest Litigation: Mitigating Adverse Costs Order Risk' [2016] (136) *Precedent* 22, 23; *St James' Preservation Society v City of Toronto* (2006) 272 DLR (4th) 149, 156 [13] (T Ducharme J) (Ontario Superior Court of Justice); New South Wales Law Reform Commission, *Security for Costs and Associated Costs Orders* (Report No 137, December 2012) 73–4 [4.3] ('*NSWLRC Report*'); *Harris v Canada* [2002] 2 FC 484, 561 [221] (Dawson J); *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (2009) 170 LGERA 20, 27 [16]–[17] (Preston J).

[64] Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 (October) *Law Quarterly Review* 537, 537. See also *NSWLRC Report* (n 63) 74 [4.5]; Law Reform Commission, *Standing in Public Interest Litigation* (Report No 27, 1985) xix; Cazalet (n 56) 120–2; Dominique Allen, 'Using Public Interest Litigation to Achieve Systemic Change for People with a Disability' (2020) 26(2) *Australian Journal of Human Rights* 227, 228–30; Ginnivan (n 63) 22; Andrea Durbach et al, 'Public Interest Litigation: Making the Case in Australia' (2013) 38(4) *Alternative Law Journal* 219, 219; Lara Friedlander, 'Costs and the Public Interest Litigant' (1995) 40(1) *McGill Law Journal* 55, 60.

'public interest litigation' has been criticised by Australian judges on a number of grounds, including its 'inherent imprecision';[65] that it is a 'nebulous',[66] 'notoriously elusive'[67] and 'protean concept';[68] and that it may 'become an umbrella for the exercise of discretion with respect to costs in an unprincipled, haphazard and unjudicial manner'.[69] The judicial hostility towards the relevance of the concept of public interest litigation to the allocation of costs in legal proceedings that is apparent from these comments, together with the difficulty involved in providing a predominantly objective content to this concept,[70] has resulted in the absence of a coherent and distinct costs jurisprudence in public interest litigation in Australia.[71]

In 1995, the ALRC concluded that the significant benefits of public interest litigation should not be impeded by the application of the English Rule.[72] As a result, it recommended expressly empowering courts and tribunals to make a public interest costs order where, upon the application of a party, they are satisfied that:

1 the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community;

2 the proceedings involve aid in the development of the law generally; or

3 the proceedings otherwise have the character of public interest or test case proceedings.[73]

Similarly, other law reform commissions and broadly similar entities — including the Ontario Law Reform Commission ('OLRC') in 1989,[74] the VLRC in

[65] *Oshlack (High Court)* (n 53) 98 [71] (McHugh J).

[66] Ibid 84 [30] (Gaudron and Gummow JJ), quoting *South Melbourne City Council v Hallam [No 2]* (1994) 83 LGERA 307, 311 (Tadgell J).

[67] *Shurat HaDin, Israel Law Centre v Lynch [No 2]* [2014] FCA 413, [19] (Robertson J) ('*Shurat HaDin*').

[68] *Oshlack (High Court)* (n 53) 100 [75] (McHugh J).

[69] *Buddhist Society of Western Australia Inc v Shire of Serpentine-Jarrahdale* [1999] WASCA 55, [11] (Kennedy, Wallwork and Murray JJ).

[70] See *LCO Report* (n 32) 83. See also *Peters v SNC-Lavalin Group Inc* [2021] ONSC 6161, [12] (Perell J) ('*Peters*').

[71] See Kirby (n 64) 554, where the conclusion is reached that 'the overwhelming practice of costs in Australia remains conventional, unreformed and largely unsympathetic'.

[72] *Costs Shifting* (n 17) 145 [13.8]–[13.11]. See also Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March 2008) 676 ('*VLRC 2008 Report*').

[73] *Costs Shifting* (n 17) 147 recommendation 45. See also *Report of the Scottish Civil Courts Review* (2009) vol 2, 43–4.

[74] Ontario Law Reform Commission, *Report on the Law of Standing* (Report, 1989) 179 recommendation 11 ('*OLRC 1989 Report*').

2008,[75] the Australian Attorney-General's Department's Access to Justice Taskforce in 2009,[76] the New South Wales Law Reform Commission in 2012,[77] and the Productivity Commission in 2014[78] — made recommendations that courts be expressly empowered to make public interest costs orders.

A far more positive scenario exists in Canada and the United Kingdom.[79] The following comments, made by the Supreme Court of Canada in 2003, evince a willingness: (a) to set aside, in public interest litigation, the notion of perceived restorative justice[80] that underpins the English Rule; and (b) to provide some guidance as to when litigation may be said to be in the public interest:

> [I]n cases of public importance … 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 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.[81]

[75] *VLRC 2008 Report* (n 72) 676.

[76] Access to Justice Taskforce, Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, September 2009) 114 recommendation 8.10 ('*A-G's Taskforce Report*').

[77] *NSWLRC Report* (n 63) 85 recommendation 4.1.

[78] *Productivity Commission Report* (n 1) vol 1, 483 recommendation 13.6.

[79] See generally Kirby (n 64) 552–3; Raj Anand and Ian G Scott, 'Financing Public Participation in Environmental Decision Making' (1982) 60(1) *Canadian Bar Review* 81, 96; Cazalet (n 56) 114–15, 123; Friedlander (n 64) 67–71; Tollefson, Gilliland and DeMarco (n 28) 492. But see, eg, Chris Tollefson, 'Costs in Public Interest Litigation Revisited' (2011) 39(2) *Advocates' Quarterly* 197, 200–3; *Oshlack (High Court)* (n 53) 123–4 [136] (Kirby J).

[80] See *Ruddock* (n 19) 235 [12] (Black CJ and French J); Vince Morabito, 'Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs' (1995) 21(2) *Monash University Law Review* 231, 255. An extremely succinct description of this philosophy was provided by Brennan CJ of the High Court: '[c]osts are awarded to indemnify a successful party in litigation, not by way of punishment of an unsuccessful party': *Oshlack (High Court)* (n 53) 75 [1].

[81] *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371, 398 [38] (LeBel J for McLachlin CJ, Gonthier, Binnie, Arbour, LeBel and Deschamps JJ) ('*Okanagan Indian Band*'). See also *Little Sisters Book and Art Emporium v Commissioner of Customs and Revenue* [2007] 1 SCR 38, 79 [83] (McLachlin CJ for McLachlin CJ and Charron J), where it was stated that '[i]n such cases, policy interests often supersede the interest to the litigant'; *Incredible Electronics Inc v A-G (Canada)* (2006) 80 OR (3d) 723, 752 [81]–[83] (Perell J) ('*Incredible Electronics*').

In the same case, the Supreme Court of Canada went one step further by holding that, in very exceptional circumstances, the costs orders that may be made in favour of those bringing public interest litigation include ordering, early in the litigation, *the defendant to provide advance financing* to the plaintiff to enable them to proceed with the litigation.[82]

United Kingdom courts have been quite active in the area of protective costs orders (usually known as maximum costs orders in Australia). Pursuant to these orders, the plaintiff, in the event of a loss, would be liable for costs not exceeding a specified amount or not be liable at all.[83] This judicial practice is directly relevant to public interest costs orders given that some of the main factors applied by courts in the United Kingdom, when dealing with applications for these orders, have included the fact that the case was a public law case that raised issues of general public importance and that the public interest required that those issues be resolved.[84] Conversely, in Australia, despite provisions such as r 40.51 of the *Federal Court Rules 2011* (Cth), which empowers trial judges to specify 'the maximum costs as between party and party that may be recovered for the proceeding', maximum costs orders have been issued only in a handful of public interest cases.[85]

The fact that these orders are made at the early stages of the litigation — as opposed to standard costs orders, which are usually made at the end of a trial — makes them particularly useful given that they have 'the potential to

[82] *Okanagan Indian Band* (n 81) 400 [41] (LeBel J for McLachlin CJ, Gonthier, Binnie, Arbour, LeBel and Deschamps JJ). Three requirements must be satisfied: (a) the litigation would be unable to proceed if the order were not made; (b) the claim advanced by the plaintiff is prima facie meritorious; and (c) the issues raised go beyond the individual interests of the plaintiff, are of public importance, and have not been resolved in previous cases: at 399–400 [40]. This concept is not foreign to the Australian legal landscape. The Australian Taxation Office ('ATO') has a Test Case Litigation Program which provides financial assistance to taxpayers to fund reasonable litigation costs in ATO-law related cases: 'Test Case Litigation Program', *Australian Taxation Office* (Web Page, 5 July 2021) <https://www.ato.gov.au/Tax-professionals/TP/Test-case-litigation-program>, archived at <https://perma.cc/7NHU-UTPT>.

[83] See Tollefson, 'Costs in Public Interest Litigation Revisited' (n 79) 201–2, 217–18. See generally Adrian Zuckerman, 'Protective Costs Orders: A Growing Costs-Litigation Industry' (2009) 28(2) *Civil Justice Quarterly* 161.

[84] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, 2625 [74] (Lord Phillips MR for the Court). In *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411, 417 [20] (Black CJ, Moore and Emmett JJ), the Full Federal Court explained that

> [a]lthough protective costs orders are, of their nature, made early in proceedings and not at their conclusion, they involve many of the same considerations as costs orders made after the event.

[85] See, eg, Cazalet (n 56) 119; *King* (n 24) 192 [265], 194 [279] (Robertson J); *Bare* (n 22) 267 [49] (Hansen and Tate JJA); *Haraksin* (n 23) 525 [27]–[28] (Nicholas J).

remove the uncertainty from the applicant's shoulders of the risk of an adverse costs order'.[86]

B *The High Court's Decision in* Oshlack v Richmond River Council

Symbolic of the unsatisfactory and comparatively inferior scenario in Australia in relation to public interest costs orders is the only ruling of the High Court with respect to such orders: the 1998 ruling in *Oshlack v Richmond River Council* ('*Oshlack (High Court)*').[87] The proceeding in question was filed pursuant to the open standing conferred on 'any person' by s 123(1) of the *Environmental Planning and Assessment Act 1979* (NSW) ('*EPA Act*') — that is, the plaintiff had no personal interest in the matter that prompted the proceeding.[88] The litigation essentially concerned the development of an area, which was likely to significantly affect the habitat of endangered koalas.[89]

Justice Stein of the Land and Environment Court dismissed the case but decided that there should be no order as to costs.[90] The relevant provision in the *EPA Act* in relation to the Court's power to award costs, s 69(2), was very similar to s 43 of the *Federal Court Act*. His Honour was of the view that the principal motivation of the plaintiff was the enforcement of the rule of law and the preservation of endangered koalas' habitat.[91] This allowed the characterisation of the litigation as 'public interest litigation', but in Stein J's view this finding was not of itself enough to justify depriving the Richmond River Council of its costs.[92] He found other factors sufficient to deny the council an award of costs, including the fact that the basis of the challenge was arguable; that a significant number of members of the public shared the plaintiff's view; and the fact that the *EPA Act* conferred standing to sue on any member of the public.[93]

[86] Joanna Shulman, 'Order 62A of the Federal Court Rules: An Untapped Resource for Unlawful Discrimination Cases' (2007) 32(2) *Alternative Law Journal* 75, 75. See also Wilcox, 'Tying the Threads Together' (n 63) 232; Friedlander (n 64) 87; Anand and Scott (n 79) 115; *Costs Shifting* (n 17) 151 [13.26]–[13.27]; *VLRC 2008 Report* (n 72) 676; *Productivity Commission Report* (n 1) vol 1, 482; *OLRC 1989 Report* (n 74) 179 recommendation 11(2).

[87] *Oshlack (High Court)* (n 53).

[88] Ibid 78 [13] (Gaudron and Gummow JJ). See also *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236, 246 (Stein J) (Land and Environment Court of New South Wales) ('*Oshlack (Land and Environment Court)*').

[89] *Oshlack (Land and Environment Court)* (n 88) 245 (Stein J).

[90] Ibid 238, 246.

[91] Ibid 243, 246.

[92] Ibid 244.

[93] Ibid 238, 246.

The New South Wales Court of Appeal reversed Stein J's decision with respect to costs.[94] The High Court, by a narrow 3:2 majority, set aside the Court of Appeal's order.[95] Two of the majority Justices — Gaudron and Gummow JJ — indicated in their joint judgment that '[t]he true issue [with respect to costs was] not whether this was "public interest litigation"'.[96] The proper line of inquiry was instead whether the subject matter, scope and purpose of s 69(2) led to the conclusion that the factors taken into account and relied on by Stein J were 'definitely extraneous' to what the legislature had in mind when enacting s 69(2).[97] They were unable to make that finding.[98] Justice McHugh, with whom Brennan CJ agreed, was of the view that the characterisation of a legal proceeding as public interest litigation had no relevance to the question of whether the successful defendant should be deprived of an award of costs in its favour.[99]

It is apparent from the brief summary provided above that *Oshlack (High Court)* did not, with respect, provide a clear and useful guide to Australian courts as to the approach that they are required to take when asked not to award costs against unsuccessful plaintiffs because of the public interest nature of the litigation in question.[100] As explained by the Full Federal Court two months after the ruling in *Oshlack (High Court)* was handed down:

> Accordingly, the majority decision of the High Court does not lay down a rule for application in other cases in the making of costs orders. It affirms the width of the discretion conferred upon a court in relation to costs, with particular reference to the specially wide discretion it held to exist under the [relevant] legislation …[101]

[94] *Richmond River Council v Oshlack* (1996) 39 NSWLR 622, 627 (Clarke JA), 636 (Sheller JA), 638–9 (Cole JA).

[95] *Oshlack (High Court)* (n 53) 91 [50] (Gaudron and Gummow JJ), 127 [145] (Kirby J).

[96] Ibid 84 [31].

[97] Ibid 84 [31], 91 [49].

[98] Ibid 91 [49]–[50].

[99] Ibid 91–2 [51] (McHugh J, Brennan CJ agreeing at 75 [3]).

[100] See Edwards (n 59) 681; Cazalet (n 56) 122.

[101] *Friends of Hinchinbrook Society Inc v Minister for the Environment [No 5]* (1998) 84 FCR 186, 188 (Northrop, Burchett and Hill JJ). See also *South West Forest Defence Foundation Inc v Executive Director, Department of Conservation and Land Management [No 2]* (1998) 154 ALR 411, 412 [5]–[6] (Kirby J); Narelle Bedford, 'The Winner Takes It All: Legal Costs as a Mechanism of Control in Public Law' (2018) 30(1) *Bond Law Review* 119, 126; Edwards (n 59) 681; *Sangare* (n 56) 175–6 [33] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ); Ginnivan (n 63) 24; *Ruddock* (n 19) 239 [21] (Black CJ and French J); Enid Campbell, 'Public Interest Costs Orders' (1998) 20(2) *Adelaide Law Review* 245, 252–3.

It is therefore not surprising that only a limited number of Australian plaintiffs have persuaded courts that the public interest nature of their proceedings (either on its own or together with other factors) should lead to the outcome that they will pay either none,[102] or a reduced portion,[103] of the costs incurred by their victorious opponents.

IV Synergies between Class Actions and Public Interest Litigation

As noted in Part II(A) above, the ability of class action litigation to bind non-parties is intended to facilitate the attainment of access to justice, judicial economy and deterrence of illegal conduct. The fact that a single class action may cover thousands, if not millions, of claimants[104] strengthens the judicially accepted conclusion that there is an important public interest dimension to class action litigation.[105] Indeed, at least one judge has observed that all or most class action proceedings may potentially be characterised as public interest litigation.[106] The same judge has also noted that a 'matter of public interest can extend to but is not confined to matters that advance the [three] goals' of class action regimes.[107]

In recent times, great judicial reliance has been placed on the public interest dimension of the pt IVA regime to render far more difficult the issue of confidentiality orders, given that these orders would preclude the public release —

[102] See, eg, *Ruddock* (n 19) 242 [29] (Black CJ and French J); *Shelton v Repatriation Commission* (1999) 85 FCR 587, 590 [11]–[12] (Burchett, RD Nicholson and Finkelstein JJ); *Kent* (n 18) 55–6 (Fox J); *Ferneley v Boxing Authority (NSW)* (2001) 115 FCR 306, 326 [97] (Wilcox J); *Bob Brown Foundation Inc v Commonwealth [No 2]* (2021) 387 ALR 219, 223–4 [15]–[17] (Griffiths, Moshinsky and SC Derrington JJ); *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 165 FCR 211, 228 [73]–[75] (Heerey J); *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities [No 3]* [2012] FCA 744, [27]–[28] (Besanko J).

[103] See, eg, *Mees v Kemp [No 2]* [2004] FCA 549, [24] (Weinberg J); *Jacomb* (n 26) [10], [12] (Crennan J); *North Australian Aboriginal Legal Aid Service Inc v Bradley [No 2]* [2002] FCA 564, [106]–[107] (Weinberg J).

[104] See, eg, *Johnson Tiles Pty Ltd v Esso Australia Ltd [No 2]* (1999) ATPR ¶41-698, 42,897–8 [13] (Black CJ, North and Finkelstein JJ); *Eisen v Carlisle & Jacquelin*, 417 US 156, 175 (Powell J for Burger CJ, Stewart, White, Blackmun, Powell and Rehnquist JJ) (1974) ('*Eisen*'); *Vollmer v Publishers Clearing House*, 248 F 3d 698, 702 n 3 (Ripple J) (7th Cir, 2001).

[105] See, eg, *Pan v Royal National Capital Alliance Ltd* [2020] FCA 1834, [8] (Lee J).

[106] *1146845 Ontario Inc v Pillar to Post Inc* [2015] ONSC 1115, [17] (Perell J) ('*1146845 Ontario Inc*'); *Hodge v Neinstein* [2014] ONSC 6366, [92] (Perell J); *Sorbara v A-G (Canada)* [2009] OJ No 657, [14] (Perell J) ('*Sorbara*'). But see Friedlander (n 64) 82.

[107] *Ruffolo v Sun Life Assurance Co of Canada* (2008) 90 OR (3d) 59, 78 [76] (Perell J) ('*Ruffolo (Superior Court)*').

and, as a result, external scrutiny — of important documents and information concerning proposed class action settlements.[108]

The synergies between class action litigation and public interest litigation are also apparent when comparing the aforementioned three policy goals of class action proceedings with the major expected benefits of public interest litigation. These latter benefits were conveniently summarised as follows by the ALRC in 1995:

1 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;

2 economies of scale;

3 impetus for reform and structural change to reduce potential disputes;

4 contribution to market regulation and public sector accountability by allowing greater scope for private enforcement; and

5 reduction of other social costs by stopping or preventing costly market or governmental failures.[109]

An 'almost universal issue in public interest litigation'[110] has been the significant disparity between the usually modest means of public interest litigants[111] and the significant resources available to defendants in this type of litigation: usually governments and their entities.[112] Similarly, as Rachael Mulheron explained, one of the judicially recognised aspects of the access-to-justice goal of

[108] See, eg, *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289, [101]–[120] (Lee J); *Santa Trade Concerns Pty Ltd v Robinson [No 2]* [2018] FCA 1491, [26] (Lee J).

[109] *Costs Shifting* (n 17) 144 [13.6]. See also *NSWLRC Report* (n 63) 85 [4.41]; Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No 78, 1996) 22 [2.32]–[2.33]; Friedlander (n 64) 85–91; Ginnivan (n 63) 22; *A-G's Taskforce Report* (n 76) 112; Durbach et al (n 64) 219–20.

[110] Cazalet (n 56) 108.

[111] See Edwards (n 59) 694; Durbach et al (n 64) 219–20; Zuckerman (n 83) 163; Ginnivan (n 63) 23. Cf Friedlander (n 64) 98–9.

[112] See Cazalet (n 56) 116–18; *Kent* (n 18) 55 (Fox J); Chris Tollefson, 'When the "Public Interest" Loses: The Liability of Public Interest Litigants for Adverse Costs Awards' (1995) 29(2) *University of British Columbia Law Review* 303, 326. See also *Productivity Commission Report* (n 1) vol 1, 483; Wilcox, 'Tying the Threads' (n 63) 232, which states:

> There may be a non-government defendant, but this will usually be a wealthy company that stands to benefit from the impugned decision and will, in any event, be able to deduct its unrecovered costs from its taxable income.

class actions is ensuring that parties in class actions are 'on an equal footing'.[113] It should also be borne in mind that class action litigation is substantially more expensive than non-group litigation for a number of reasons, including the fact that class action litigation binds potentially numerous claimants.[114] But, as noted by the Supreme Court of Canada in 2007,

> caution must be exercised not to stereotype class proceedings. '[T]he David against Goliath scenario … does not necessarily represent an accurate portrayal of the real conflict'.[115]

These comments are apposite to the biggest category of pt IVA proceedings: funded pt IVA proceedings.[116] For instance, in three hard-fought class actions against the Commonwealth government concerning the adverse impact of toxic foam, which eventually settled for a combined total of over $212 million, Lee J of the Federal Court pointed out that

> [w]ithout litigation funding, the claims of these group members would not have been litigated in an adversarial way but, rather, they would likely have been placed in the position of being supplicants requesting compensation, in circumstances where they would have been the subject of a significant inequality of arms.[117]

As noted in Part I above, the involvement of commercial litigation funders in Australian class actions appears to be decreasing, and this trend is likely to continue given the licensing requirements that came into operation in August 2020,[118] especially if some of the recommendations made in December 2020 by

[113] Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004) 54 ('*The Class Action*'). See also at 54 n 57, where Mulheron quotes *Eisen* (n 104) 186 (Douglas J): 'The class action is one of the few legal remedies the small claimant has against those who command the status quo.'

[114] See Ben Slade and Jarrah Ekstein, 'Class Actions and Social Justice: Achievements and Barriers' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 281, 287–94; *PJC Report* (n 9) 40 [5.15], 93 [8.41].

[115] *Kerr v Danier Leather Inc* [2007] 3 SCR 331, 365 [69] (Binnie J for the Court) (citations omitted) ('*Kerr*').

[116] Morabito and Duffy (n 3) 387–8.

[117] *Smith v Commonwealth [No 2]* [2020] FCA 837, [82].

[118] See above n 11 and accompanying text.

the government members of the Parliamentary Joint Committee on Corporations and Financial Services, like recommendation 20 on settlements,[119] are implemented by the Commonwealth government. Reference should also be made to the fact that, according to the available empirical data, approximately half of the funded pt IVA proceedings were shareholder class actions[120] — a category of class action litigation that the Supreme Court of Canada has not characterised as litigation raising issues of public importance.[121]

It will also be recalled, from Part I above, that litigation funders have traditionally avoided class actions brought on behalf of vulnerable or disadvantaged claimants. They have also completely avoided personal injury class action proceedings.[122] However, over the last four years or so, they have started to support several non-commercial class actions in areas such as racial discrimination, industrial law and protection of the environment.[123]

Another form of protection from adverse costs awards that may be available to some lead plaintiffs is ATE insurance. But, as adverted to in Part I above, ATE insurance is very expensive[124] and only provided by a small number of suppliers (mostly based in the United Kingdom). Furthermore, like litigation funders, suppliers of this type of insurance do not approve all the applications they receive.[125] It should also be noted that, like other insurance policies, ATE

[119] It was recommended that the Commonwealth government consult on the best way to provide a guarantee of a statutory minimum return of the gross proceeds of a pt IVA proceeding to class members, including providing a legislated minimum gross return of 70%: *PJC Report* (n 9) 202 [13.62] recommendation 20. A slightly modified version of this recommendation was included in Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (Cth) sch 1 item 6 (as proposed s 601LG(5)). This Bill was passed by the House of Representatives.

[120] Morabito and Duffy (n 3) 389.

[121] *Kerr* (n 115) 363–4 [65] (Binnie J for the Court). See also *Kowch v Gibraltar Mortgage Ltd* [2013] ABQB 498, [15] (Master WS Schlosser). Cf *Moyes v Fortune Financial Corp* [2002] OJ No 4298, [7] (Nordheimer J); Julian Donnan, 'Class Actions in Securities Fraud in Australia' (2000) 18(2) *Company and Securities Law Journal* 82, 94; Peta Spender, 'Securities Class Actions: A View from the Land of the Great White Shareholder' (2002) 31(2) *Common Law World Review* 123, 145. See generally Michael J Duffy, 'Australian Private Securities Class Actions and Public Interest: Assessing the "Private Attorney-General" by Reference to the Rationales of Public Enforcement' (2017) 32(2) *Australian Journal of Corporate Law* 162.

[122] See Julian Schimmel, Nina Abbey and Vince Morabito, 'Empirical and Practical Perspectives on Twenty-Seven Years of Product Liability Class Actions in Australia' in Brian T Fitzpatrick and Randall S Thomas (eds), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press, 2021) 391, 409.

[123] They are summarised in Morabito and Duffy (n 3) 389–90.

[124] See also *PJC Report* (n 9) 133 [10.18] (citations omitted): 'The cost of ATE insurance was variously viewed by submitters as "substantial" to "astronomical"'.

[125] See, eg, *Kelly v Willmott Forests Ltd (in liq) [No 3]* [2014] FCA 78, [26], [31]–[33] (Murphy J).

insurance does not provide absolute protection in that it is governed by terms and exclusions.

One major difference between class action litigation and public interest litigation is that in class actions, lead plaintiffs have a pecuniary or other material interest in the litigation (as have the class members that they represent in the litigation), whilst that is not normally the case in the latter type of litigation.[126] But, as explained in Parts V and VI below, this difference should not lead to a general inability to characterise class actions as public interest litigation. Indeed, in the context of non-class action litigation, the Supreme Court of Canada has recognised the existence of two categories of public interest litigants. The first category encompasses those litigants who have no direct pecuniary or other material interest in the litigation (eg a non-profit organisation).[127] The other category includes litigants who do have a pecuniary interest, but whose interest is modest relative to the cost of the litigation in question.[128]

V Public Interest Costs Orders in pt IVA Proceedings

We now consider, in some detail, the five judicial pronouncements that have been handed down in relation to applications for public interest costs orders filed by lead plaintiffs[129] in pt IVA proceedings.[130]

A Woodlands v Permanent Trustee Co Ltd

The first was the 1995 judgment of Wilcox J with respect to a request for a maximum costs order, filed by the lead plaintiffs in the early stages of two pt IVA

[126] See Tollefson, Gilliland and DeMarco (n 28) 475; Ginnivan (n 63) 23.

[127] *Estate of Manish Odhavji v Woodhouse* [2003] 3 SCR 263, 304 [76] (Iacobucci J for the Court).

[128] Ibid. See also *Smith v Airservices Australia* (2005) 146 FCR 37, 56 [69] (Stone J); *Ayrton* (n 1) 249 [28] (Conrad, Paperny JJA and Romaine J). Cf *Jacomb* (n 26) [10] (Crennan J).

[129] There has also been a *class member* that relied — in seeking a maximum costs order with respect to an appeal it filed challenging an unsuccessful post-trial ruling in a pt IVA proceeding brought on behalf of Pizza Hut franchisees against the Australian franchisor — on the alleged public interest element of the appeal. The sections of the 'public' relied upon by this class member were its own creditors, including the ATO, and the class members. This application was rejected largely on the basis that the interests which the class member sought to vindicate in the appeal were essentially its own, and the other class members', private commercial interests: *Virk Pty Ltd v Yum! Restaurants Australia Pty Ltd* [2016] FCA 1468, [23]–[24] (Nicholas J).

[130] We have not characterised the application for a maximum costs order in *Shurat HaDin* (n 67) as an application for a public interest costs order. This is because the potential public interest nature of the litigation was not a significant aspect of the application in question: at [14] (Robertson J).

proceedings, under ord 62A of the *Federal Court Rules 1979* (Cth), the precursor of r 40.51 of the *Federal Court Rules 2011* (Cth).[131] This litigation was brought on behalf of thousands of persons who participated in a home loan scheme (the 'HomeFund scheme') set up by the New South Wales government to provide low-start home loans to low-income earners in that State.[132] The losses, in relation to which this litigation was commenced, were essentially caused by the use of fixed interest rates under the scheme.[133]

His Honour made an order under ord 62A that the maximum amount of costs that could be recovered as between the lead plaintiffs and each of the respondents, having a separate interest in the proceeding, was $12,500.[134] The primary reason for this order was that it would have been undesirable to force the abandonment of the class action proceedings even before resolution of the preliminary issues — because of fear of exposure to costs — particularly in light of the fact that the claims that were advanced, if successful, could benefit thousands of people, most of them likely to be of limited means.[135] Reference was also made by his Honour to the fact that the claims pursued by the lead plaintiffs were 'at least seriously arguable'.[136] As Wilcox J remarked, 'the public interest element in the cases … was a factor of some significance'.[137] These class actions were eventually settled in 2000.[138]

B Qantas Airways Ltd v Cameron [No 3]

The lead plaintiff, Cameron, sought damages and compensation for herself and on behalf of class members who suffered loss or damage as a result of being exposed to cigarette smoke onboard the respondent's aircraft.[139] She also sought various declaratory and injunctive relief.[140] By the time the Full Federal Court

131 *Woodlands* (n 1) 143–5.

132 Ibid 141–2 (Wilcox J).

133 See Morabito and Ekstein (n 13) 73.

134 *Woodlands* (n 1) 149 (Wilcox J). As confirmed in a subsequent case, this order applied equally to the lead plaintiffs and the respondents: *Hanisch v Strive Pty Ltd* (1997) 74 FCR 384, 390 (Drummond J).

135 *Woodlands* (n 1) 148 (Wilcox J).

136 Ibid.

137 Ibid.

138 Morabito and Ekstein (n 13) 74.

139 *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246, 248 (Davies J), 263–4 (Lindgren J).

140 Ibid 248 (Davies J), 264 (Lindgren J).

considered the merits of the claims advanced by Cameron, the group represented by her had decreased to 10 class members.[141] The Full Federal Court awarded damages to just one class member equal to $200.[142]

The lead plaintiff submitted that the litigation was public interest litigation given that its primary purpose was, in substance, 'to establish the nature of the duty owed by Qantas in respect of environmental tobacco smoke on international flights'.[143] Justices Lindgren and Lehane felt that the relief sought by the lead plaintiff was 'mixed' to the extent that the declaratory and injunctive relief was sought in the public interest but the same could not be said for the damages sought for the 10 class members.[144]

Justices Lindgren and Lehane concluded that the lead plaintiff should pay 75% of Qantas' costs.[145] This conclusion appears to have been based on two factors: (a) that Qantas admitted, in light of the award of damages to one of the class members, it had a liability to pay some of the lead plaintiff's costs; and (b) the fact that the litigation had in fact served the public interest to the extent that it had elucidated the duty of care owed by international airlines to passengers in relation to environmental tobacco smoke.[146] It is important to note that it is not entirely clear whether, in the absence of the win in relation to the individual claim of just one class member, any discount on costs would have been extended to the lead plaintiff.

C DBE17 v Commonwealth [No 2]

In this pt IVA proceeding, damages were claimed on behalf of class members for unlawful imprisonment.[147] Justice Mortimer revealed that, in substance, the class represented by the lead plaintiff (a five-year-old child) could be described as 'those people who remain in Australia, mostly having been granted visas, but having arrived here by boat seeking asylum and having been detained' during some or all of several periods specified in the pleadings.[148] Her Honour concluded that the Federal Court had no jurisdiction to hear and determine

[141] Ibid 248 (Davies J), 263–4 (Lindgren J).

[142] Ibid 290, 297 (Lindgren J, Lehane J agreeing at 298).

[143] *Qantas Airways Ltd v Cameron [No 3]* (1996) 68 FCR 387, 389 (Lindgren and Lehane JJ) ('*Qantas Airways [No 3]*').

[144] Ibid 390.

[145] Ibid.

[146] Ibid.

[147] *DBE17 v Commonwealth* (2018) 265 FCR 600, 602 [1] (Mortimer J).

[148] Ibid.

the matters raised by the lead plaintiff, by reason of a section in the *Migration Act 1958* (Cth).[149]

Her Honour was of the view that making no order as to costs in this proceeding would best serve the overall interests of the administration of justice.[150] Reliance was placed by Mortimer J on a number of considerations. The most important of these considerations was the importance of the subject matter of the proceeding: liberty — which she described as 'one of the foundational rights recognised by the common law'[151] — and the lawful scope of executive detention as authorised by statute, 'a matter of considerable public importance'.[152] Reference was also made by Mortimer J to the fact that awards of costs can have a chilling effect and that '[t]here should be no chilling effect on responsibly conducted and arguable proceedings' with respect to such an important subject matter.[153]

The fact that the class members were ultimately seeking payment of damages should not prevent, according to her Honour, a decision not to make an award of costs.[154] Two reasons were advanced to support this conclusion: the same conclusion had been arrived at by a majority of the Full Federal Court in *Ruddock*,[155] and the fact that monetary relief would have been received by class members only following a judicial finding that their liberty had been unlawfully infringed.[156]

The final matter considered by Mortimer J is the most relevant for present purposes. Her Honour drew attention to the fact that it was a class action and to the nature of the class represented by the lead plaintiff.[157] In relation to the latter consideration, Mortimer J noted that the class members were all migrants from non-English-speaking backgrounds, many of whom came to Australia (or Manus Island in Papua New Guinea or Nauru) in 'dire circumstances' and may therefore not have the means to secure legal representation.[158] Attention was also drawn to the fact that it was clear from the way the pleadings defined the group represented by the lead plaintiff that all class members had 'experienced

149 See ibid 622–32 [108]–[156], 632–3 [158]–[159].

150 *DBE17 v Commonwealth [No 2]* [2018] FCA 1793, [24] ('*DBE17 [No 2]*').

151 Ibid [23].

152 Ibid.

153 Ibid.

154 Ibid.

155 Ibid, citing *Ruddock* (n 19).

156 *DBE17 [No 2]* (n 150) [23] (Mortimer J).

157 Ibid.

158 Ibid.

significant disadvantage'.[159] In that sense, bringing a pt IVA proceeding on behalf of all the class members was 'a matter which should be recognised as taking this proceeding outside the realm of one which is brought solely for personal gain or benefit'.[160]

D Turner v MyBudget Pty Ltd [No 2]

The respondent in this pt IVA proceeding was a provider of budget management services to 'persons experiencing difficulty in managing their financial affairs'.[161] The class members were persons who entered into standard-form service agreements with MyBudget upon terms that included a term relating to interest.[162] In a nutshell, this class action turned on the proper construction of this interest provision.[163] Justice Lee found in favour of the respondents[164] but declined to award costs against the lead plaintiff.[165]

Justice Lee drew attention to the fact that s 43(1A) of the *Federal Court Act* — which, as noted in Part I above, prevents an award of costs against class members — recognises the reality that the matters considered in class actions 'have a public dimension which transcends ordinary *inter partes* litigation and the rights of the parties to the litigation *inter se*'.[166] This class action was regarded by the Court as 'an exemplar' of the type of group litigation which the LRC had in mind when it recommended grouped proceedings in 1988.[167] Emphasis was placed on the fact that the dispute concerned 24,222 persons (many of whom were likely to have financial vulnerability) and that for each of these claimants a 'very small amount of money [was] at stake'.[168]

This scenario, together with the fact that the lead plaintiff was assisted by a community legal centre, led Lee J to distinguish this proceeding from a commercial class action, where the litigation is a part of a scheme designed to produce a significant financial advantage for the participants of the

159 Ibid.

160 Ibid.

161 *Turner v MyBudget Pty Ltd* [2018] FCA 1407, [2] (Lee J).

162 Ibid [1].

163 Ibid [10]–[11], [57]–[59].

164 Ibid [81].

165 *Turner v MyBudget Pty Ltd [No 2]* [2018] FCA 1509, [6] ('*MyBudget [No 2]*').

166 Ibid [8].

167 Ibid [9].

168 Ibid [9], [13].

scheme, including a litigation funder.[169] We will revisit this dichotomy in Part VI(B) below.

According to Lee J, the fact that this was not a 'pure' public interest claim — as damages were sought for the class members — should not be allowed to obscure the fact that the lead plaintiff and his lawyers had 'performed a valuable service for the benefit of others': the respondent and over 24,000 persons 'obtained certainty as to their position' under this interest provision.[170] As a result, although

> the class action did seek to vindicate Mr Turner's claim, it had a very significant benefit transcending the parties relative to the stake of the personal financial claim of the applicant.[171]

E Cumaiyi v Northern Territory [No 2]

This represents the most recent judicial pronouncement in this area, as it was handed down by White J in December 2020. It differs from the other judgments summarised above, other than *Woodlands v Permanent Trustee Co* ('*Woodlands*'),[172] to the extent that it dealt with allocation of costs, not with respect to a post-trial ruling, but instead in relation to an application to strike out the pleadings, on which the respondents were partly successful.[173]

This pt IVA proceeding was filed against the Northern Territory government.[174] It was claimed that the Indigenous population of the remote Northern Territory community of Wadeye had been subject to institutional racism at the instance of the Northern Territory government in respect of justice, policing, and health services.[175]

In seeking to persuade White J that this pt IVA proceeding was public interest litigation and therefore each party should bear its own costs, reliance was placed on the similarities between this proceeding[176] and the case before Mortimer J in *DBE17 v Commonwealth [No 2]* ('*DBE17 [No 2]*').[177] It was pointed out that, as in *DBE17 [No 2]*, the unlawful discrimination alleged here

169 Ibid [10].

170 Ibid [13]–[14].

171 Ibid [13].

172 *Woodlands* (n 1).

173 *Cumaiyi v Northern Territory [No 2]* [2020] FCA 1804, [1] (White J) ('*Cumaiyi*').

174 Ibid.

175 Ibid [5].

176 Ibid [16].

177 *DBE17 [No 2]* (n 150).

related to an entire community and affected fundamental human rights and that orders for costs could have a chilling effect on arguable claims concerning the exercise of executive powers affecting fundamental rights.[178] Emphasis was also placed on the fact that, like the class members in *DBE17 [No 2]*, the class members here 'experienced significant disadvantage'.[179]

But White J indicated that '[g]enerally, the courts have not accepted that the public interest nature of the litigation warrants a different approach to the exercise of the cost discretion'.[180] His Honour also distinguished *DBE17 [No 2]* on the basis that the proceeding before him did not 'concern executive detention or (other than indirectly) the liberty of the individual'.[181] His Honour also noted that there was no indication that an award of costs in this case would have the 'chilling effect' to which Mortimer J adverted.[182]

F *Commentary*

The existence of just five judgments on the alleged public interest nature of pt IVA proceedings, in the context of the allocation of litigation costs over a period of almost 30 years, represents a disappointing result in absolute terms and also when compared with the overall use of this regime. For instance, available empirical data has revealed that 87 federal non-investor class actions were filed on behalf of vulnerable claimants in the first 22 years of the operation of the pt IVA regime.[183] This constituted just over one in every three non-investor pt IVA proceedings filed during that period.[184] Even more significant, for present purposes, is the fact that the vast majority of the class actions filed during this period on behalf of Indigenous persons, migrants and refugees were unsuccessful.[185]

178 *Cumaiyi* (n 173) [16] (White J).

179 Ibid.

180 Ibid [18].

181 Ibid [19].

182 Ibid [20].

183 Morabito and Ekstein (n 13) 87.

184 Ibid.

185 Ibid 88. See generally at 63–5, 76–7 for a brief discussion of the significant disadvantages generally suffered by Indigenous persons and refugees and migrants. See also *DBE17 [No 2]* (n 150) [23] (Mortimer J); *Pearson v Queensland* [2017] FCA 1096, [14] (Murphy J); *Pearson v Queensland [No 2]* [2020] FCA 619, [294], [297] (Murphy J) ('*Pearson [No 2]*').

Other empirical data has revealed that one out of every five class actions filed in Australia up to 30 June 2020 was a so-called public sector class action.[186] The term 'public sector' covers Commonwealth, state and territory governments and their ministers as well as local councils and public authorities, state-owned companies, commissions and similar entities.[187] The success rate in this category of class actions was 46.2%.[188] Clearly, the current rules and principles governing public interest costs orders have discouraged solicitors acting for lead plaintiffs from making applications for such orders.[189] This is hardly surprising when one considers the unsatisfactory state of the law on public interest costs orders outlined in previous Parts of this article.

Do the facts that three out of the five lead plaintiff applications for public interest costs orders in pt IVA proceedings over the last 30 years were filed in the last three years, and that two of those were totally successful, mean that legislative intervention is not required? We do not believe that this is the case. Whilst the enlightened judgments issued by Mortimer J and Lee J may well encourage further applications, they are judgments by single judges and, with respect, they are not entirely consistent with the only decision by an appeal court in this area: the decision of the Full Federal Court in *Qantas Airways Ltd v Cameron [No 3]*.[190]

The recent ruling by White J in *Cumaiyi v Northern Territory [No 2]* provides a salutary reminder of the fact that, at least in the context of pt IVA proceedings, it cannot be assumed that we are seeing a general judicial movement in the right direction.[191] His Honour's conclusion that claims of institutional racism against an entire community of historically disadvantaged persons did not raise sufficient matters of public interest and importance to displace an entitlement to costs that flowed from the plaintiffs' poorly pleaded case[192] was, with respect, disappointing. The summaries of these five judgments reveal, in our view, the need for legislative guidance to facilitate a more principled and consistent judicial approach to applications for public interest costs orders.

186 Vince Morabito, 'Government Has Shelled Out $1.1B in Class Actions', *Lawyerly* (Web Page, 23 July 2020) <https://www.lawyerly.com.au/government-has-shelled-out-1-1b-in-class-actions>, archived at <https://perma.cc/7MHB-X4VF>.

187 Ibid.

188 Ibid.

189 In Part VI(C), we reveal another disincentive which applies solely to maximum costs orders.

190 *Qantas Airways [No 3]* (n 143).

191 *Cumaiyi* (n 173).

192 Ibid [19]–[20] (White J).

VI Main Lessons from the Canadian Experience with Express Legislative Powers to Make Public Interest Costs Orders

A *Legislative Provisions*

Section 31(1) of Ontario's *Class Proceedings Act*, SO 1992, c 6 ('*Ontario Class Proceedings Act*') provides that, in exercising its discretion with respect to costs, 'the court may consider whether the [class] proceeding was a test case, raised a novel point of law or involved a matter of public interest'. This provision was based on a recommendation made in February 1990 by the Attorney-General's Advisory Committee on Class Action Reform ('Advisory Committee').[193] Unlike the OLRC, which had recommended in 1982 the use of a modified no-costs rule,[194] the Advisory Committee was of the view that the English Rule should be retained in class action litigation as long as two other measures were implemented.[195] The first measure was the provision that s 31(1) was based on, which was intended to provide 'less disincentive to test the … procedure in ways which may benefit the public'.[196] The second measure was the creation of a public fund to provide assistance to lead plaintiffs with respect to disbursements and protection against adverse costs orders.[197]

As noted in Part I above, Saskatchewan and Nova Scotia subsequently enacted broadly similar legislative provisions, whilst a similar provision was added to Alberta's rules of court. Saskatchewan's legislation provides a list of four criteria that may be considered by the court when determining whether a costs award should be made, with the court having the discretion to consider 'any other factor that the court … considers appropriate'.[198] The first criterion is the public interest, whilst the fourth criterion is 'access to justice for members of the public using class action proceedings'.[199] A very similar approach was

[193] See *Ontario Committee Report* (n 1) 49, 56–60.

[194] The OLRC recommended that costs could be awarded against unsuccessful lead plaintiffs, in the court's discretion, only where they had engaged in vexatious, frivolous or abusive conduct or where, in respect of an application for an order certifying the action as a class action, the court is of the opinion that it would be unjust to deprive the successful party of costs: *OLRC 1982 Report* (n 2) vol 3, 874. The OLRC's rejection of the English Rule, in relation to class action litigation, was justified on the basis that it might discourage the filing of meritorious class actions: at vol 3, 663.

[195] *Ontario Committee Report* (n 1) 56–7.

[196] Ibid 57.

[197] Ibid 57–60.

[198] *Saskatchewan Class Actions Act* (n 35) s 40(2)(e).

[199] Ibid ss 40(2)(a), (d).

followed in Alberta.[200] Nova Scotia's class action legislation contains a provision identical to Ontario's provision[201] plus another subsection which permits the court to consider whether 'a cost award would further judicial economy, access to justice or behaviour modification'.[202]

It will be recalled that the VLRC's recommendation included Ontario's list of factors, plus access to justice, and is thus similar to Saskatchewan's and Alberta's models. We do not agree with this approach. Whilst access to justice is widely regarded as the most important of the intended benefits of class action regimes,[203] the benefits of judicial economy and behaviour modification are also of great importance.[204] Expressly enumerating just one of them may result in the other two not being considered at all by judges when dealing with costs order applications in pt IVA proceedings. This has been the approach followed by judges in Saskatchewan to date.[205] Paradoxically, the absence of any reference in s 31(1) of the *Ontario Class Proceedings Act* to any of the policy goals of class actions has not prevented judges in that province from considering each of them when considering costs awards.[206] Given that it cannot be assumed that a similar approach (to that adopted by Ontario judges) will be adopted by

200 See *Alberta Rules of Court* (n 37) r 10.32.

201 *Nova Scotia Class Proceedings Act* (n 36) s 40(2)(a).

202 Ibid s 40(2)(b).

203 See, eg, *Turner v Tesa Mining (NSW) Pty Ltd* (2019) 290 IR 388, 408 [71] (Lee J); *Pearson v Inco Ltd* (2006) 79 OR (3d) 427, 432 [13] (Rosenberg JA for the Court) ('*Pearson (Court of Appeal)*'); *NZLC Issues Paper* (n 32) 11; *McCracken v Canadian National Railway Co* [2012] ONCA 797, [9] (Winkler CJO, Laskin JA agreeing, Cronk JA agreeing) ('*McCracken (Court of Appeal)*'); *Jeffery v London Life Insurance Co* [2018] ONCA 716, [44] (Benotto JA, Doherty JA agreeing).

204 See, eg, *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 124 [53]–[54] (Finkelstein J); *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 67–8 [8]–[9] (Finkelstein J); Alberta Law Reform Institute, *Class Actions* (Final Report No 85, December 2000) 45 [98]; *LCO Report* (n 32) 89; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 24 [12] (Gleeson CJ); *NZLC Issues Paper* (n 32) 89 [4.37], 101 [5.30], 103–11 [5.38]–[5.63]; *PJC Report* (n 9) 37 [5.4]; *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [37]–[39] (Ellen France J for the Court); Australian Competition and Consumer Commission, Submission No 15 to Parliamentary Joint Committee on Corporations and Financial Services, *Litigation Funding and the Regulation of the Class Action Industry* (10 June 2020) 1.

205 See, eg, *Schneider v McMillan LLP* [2017] SKQB 222, [21]–[28] (Scherman J).

206 See, eg, *Das v George Weston Ltd* [2018] ONCA 1053, [239] (Doherty JA, Feldman JA agreeing at [5], Gray J agreeing at [274]) ('*Das*'); *Broutzas v Rouge Valley Health System* [2019] ONSC 559, [22] (Perell J) ('*Broutzas*'). See also *Ruffolo v Sun Life Assurance Co of Canada* (2009) 95 OR (3d) 709, 716–17 [33] (Blair JA for the Court) ('*Ruffolo (Court of Appeal)*'), where it was stated that '[t]he proper approach to the application of s 31(1) is that it be seen … "through the lens of the goals of the Act in the factual context of the case"', quoting with approval *Caputo v Imperial Tobacco Ltd* (2005) 74 OR (3d) 728, 737 [32] (Winkler RSJ) ('*Caputo*').

judges presiding over pt IVA proceedings, the best strategy would be to emulate the Nova Scotia legislation.

B *Judicial Interpretation of These Legislative Provisions*

One of the first principles to be formulated by Canadian courts was that, pursuant to these provisions, costs awards may be made 'on a continuum, from full costs to reduced costs to no costs for the successful party'.[207] Another issue that needed to be addressed by courts was to determine whether these provisions merely codified the existing law or whether they added to the court's general discretion on costs. In an early case, the former position was adopted,[208] but in subsequent cases it was held that whilst the provisions dealing with public interest costs orders did not replace the court's existing broad discretion, the factors mentioned in those provisions, where they applied, 'should be given significance'[209] and 'special weight'[210] when assessing allocation of costs in class action litigation.[211]

It has also been held that the effect of provisions like s 31(1) of the *Ontario Class Proceedings Act* is to encourage courts to find that class actions tend towards, among other things, 'the adjudication of matters of public interest'.[212] But, in 2009, Ontario's Court of Appeal noted that making a determination that one or more of the criteria specified in s 31(1) applied in a given class action proceeding did not preclude a court from awarding costs against an unsuccessful lead plaintiff in a class action proceeding.[213] In 2014, Nova Scotia's Court of Appeal opined that this principle — together with the Supreme Court of Canada's warning in 2007 against assuming that class action litigation invariably raises access-to-justice concerns that would justify not making costs orders in favour of successful defendants[214] — has led in recent years to lead plaintiffs

[207] *Smith v Inco Ltd* (2013) 79 CELR (3d) 1, 11 [29] (JC MacPherson JA, David Watt JA agreeing at 19, SE Pepall JA agreeing at 19) ('*Smith v Inco*').

[208] *Gariepy v Shell Oil Co* (2002) 23 CPC (5th) 393, 396 [4] (Nordheimer J).

[209] *Pearson (Court of Appeal)* (n 203) 431 [11] (Rosenberg JA for the Court).

[210] *Caputo* (n 206) 737 [32] (Winkler RSJ).

[211] See *Ruffolo (Court of Appeal)* (n 206) 715–17 [25]–[33] (Blair JA for the Court). See also *Ruffolo (Superior Court)* (n 107) 73 [52] (Perell J), describing s 31(1) as 'catalytic but not determinative of the exercise of the court's discretion'.

[212] *Sorbara* (n 106) [12] (Perell J). See also *Fantl v Transamerica Life Canada* [2013] ONSC 5198, [27] (Perell J).

[213] *Ruffolo (Court of Appeal)* (n 206) 717–18 [36] (Blair JA for the Court). See also *Das* (n 206) [237]–[239] (Doherty JA, Feldman JA agreeing at [5], Gray J agreeing at [274]); *Austin v Bell Canada* [2019] ONSC 6310, [25] (EM Morgan J) ('*Austin*').

[214] *Kerr* (n 115) 365 [69] (Binnie J for the Court).

in Ontario facing a significantly higher threshold when applying for an order that no costs, or costs for a nominal sum in the low thousands of dollars, be awarded.[215]

We agree and suggest, with respect, a third possible contributing factor: the fear that a favourable approach towards the vast majority of unsuccessful lead plaintiffs (who placed reliance on public interest in costs-related applications) might be perceived as the judicial introduction of a 'one-way' rule in this area; a rule that was not expressly endorsed by the drafters of these legislative regimes.[216]

The most challenging task that courts have faced in applying these provisions has been determining the scope and content of the phrase 'a matter of public interest'. One of the most cited definitions is that a case involves a matter of public interest if it has 'some specific, special significance for, or interest to, the community at large beyond the members of the proposed class'.[217] It is important to note that this notion of public interest is narrower than that adopted in *Turner v MyBudget Pty Ltd [No 2]* ('*MyBudget [No 2]*') and *DBE17 [No 2]* as it focuses on the impact of the litigation on members of the public *beyond the class members*, whilst Lee J and Mortimer J placed emphasis on the impact of the litigation *beyond the formal parties* to the pt IVA proceeding.[218]

Public interest has also generally been found in relation to class action proceedings that sought to achieve behaviour modification of wrongdoers,[219] par-

[215] See *A-G (Canada) v MacQueen* (2014) 377 DLR (4th) 647, 659–60 [24] (Farrar JA for the Court) (Nova Scotia Court of Appeal). See also *LCO Report* (n 32) 79; *1146845 Ontario Inc* (n 106) [17] (Perell J), where it was observed that '[a]lthough class actions are by design intended to be in the public interest … it remains the case that it will be relatively rare that the court's discretion to negate or diminish a costs award will be exercised'.

[216] See, eg, *Cavanaugh v Grenville Christian College* [2012] ONSC 4786, [37] (Perell J) ('*Cavanaugh*'); *Ruffolo (Court of Appeal)* (n 206) 717–18 [37] (Blair JA for the Court); *McCracken v Canadian National Railway Co* [2012] ONSC 6838, [65]–[75], [95] (Perell J) ('*McCracken (Superior Court)*').

[217] *Williams v Mutual Life Assurance Co of Canada* (2001) 6 CPC (5th) 194, 199 [24] (Cumming J), cited in *Turner v York University* [2011] ONSC 7146, [15] (Horkins J). See also *Pearson (Court of Appeal)* (n 203) 430 [9] (Rosenberg JA for the Court). It was further stated in *Moyes v Fortune Financial Corporation* [2002] OJ No 4298, [7] (Nordheimer J) that it would be sufficient if '[t]he action … raised issues that are of interest well beyond the specific interests of the members of the proposed class'. But see *Edwards v Law Society of Upper Canada* [1998] OJ No 6192, [13] (Sharpe J) ('*Law Society of Upper Canada*').

[218] See *MyBudget [No 2]* (n 165) [13]–[14] (Lee J); *DBE17 [No 2]* (n 150) [23] (Mortimer J).

[219] See *Law Society of Upper Canada* (n 217) [14] (Sharpe J).

ticularly where the defendants operated in a regulated industry such as the tobacco, insurance and banking industries,[220] or the defendants' conduct occurred in heavily regulated spheres of activity such as the regulation of personal privacy in the health care system.[221] Providing access to justice to disadvantaged persons or groups,[222] including those 'who have historically faced significant disadvantages when seeking legal redress for alleged wrongs',[223] also constitutes evidence of matters of public interest. In a 2018 judgment, Ontario's Court of Appeal explained that

> [p]ublic interest can also refer to the subject matter of the claims. Claims that raise issues that transcend the immediate interests of the litigants and engage broad societal concerns of significant importance are matters of public interest.[224]

Judicial attention has also been placed on the fact that, whilst widespread concern with respect to a matter does not generally render that matter one of public interest, it can nevertheless *support* a court's conclusion that a particular class action raised a matter of public interest.[225]

Class actions which have been characterised by Canadian courts as raising matters of public interest have been brought on behalf of a wide range of persons, including:

1 16,000 Aboriginal children removed from their families and communities over a 19-year period;[226]

[220] See, eg, *Cassano v Toronto-Dominion Bank* [2005] OJ No 6332, [6], [11] (Cullity J); *Jeffery v London Life Insurance Co* [2016] ONSC 5506, [83]–[86] (JN Morissette J); *Yordanes v Bank of Nova Scotia* [2006] OJ No 1553, [5], [8] (MC Cullity J). With respect to tobacco litigation, another crucial factor has been that the 'use of tobacco products is considered to constitute a serious risk to the health of the public': *Caputo* (n 206) 739 [38] (Winkler RSJ).

[221] *Broutzas* (n 206) [25]–[26] (Perell J).

[222] *Vennell v Barnado's* (2004) 73 OR (3d) 13, 23 [32] (Cullity J) ('*Vennell*').

[223] *Das* (n 206) [248] (Doherty JA, Feldman JA agreeing at [5], Gray J agreeing at [274]). See also *Kerr* (n 115) 364 [67] (Binnie J for the Court).

[224] *Das* (n 206) [248] (Doherty JA, Feldman JA agreeing at [5], Gray J agreeing at [274]). See also *Peters* (n 70) [13] (Perell J); *Vennell* (n 222) 23 [31] (Cullity J):

> Issues of 'public importance' … include those that affect the rights, privileges, obligations or welfare of the public at large as well as those that relate to the formulation, or implementation, of public policy.

[225] *Smith v Inco* (n 207) 15 [48] (JC MacPherson JA, David Watt JA agreeing at 19, SE Pepall JA agreeing at 19). See also *Broutzas* (n 206) [25] (Perell J).

[226] *Brown v A-G (Canada)* (2013) 114 OR (3d) 355, 359 [4], 374 [59] (Rosenberg JA for the Court).

2 grossly underpaid factory workers, making garments for international export in abysmal working conditions, who died or were injured as a result of the collapse of a building in Bangladesh;[227]

3 victims of alleged systemic abuse in residential schools for Aboriginal children;[228]

4 incarcerated persons at a maximum-security facility who suffered from serious mental illness and were subjected to experimental treatment programmes;[229]

5 'long-term care facility residents, primarily elderly and disabled' persons who paid increases in their accommodation charges which they claimed were unlawful;[230]

6 orphans and other needy children placed with farming families in Canada by a British charity who were allegedly abused by those families;[231]

7 owners of properties whose values went down because of the operation of a nickel refinery, many of whom were 'elderly persons and others on fixed incomes, as well as partially employed or unemployed persons, persons with disabilities and recipients of social assistance';[232]

8 persons who borrowed money, payable on their next pay day, from payday loan companies and were allegedly charged 'criminal rates of interest', and victims of unconscionable conduct in contravention of consumer protection legislation;[233] and

9 employees of federally regulated entities claiming unpaid overtime pay.[234]

[227] *Das* (n 206) [252]–[262] (Doherty JA, Feldman JA agreeing at [5], Gray J agreeing at [274]).

[228] *Cloud v A-G (Canada)* [2002] OJ No 687, [12] (Haines J).

[229] *Joanisse v Barker* (2003) 46 CPC (5th) 348, 353 [14] (Cullity J).

[230] *Elder Advocates of Alberta Society v Alberta Health Services* (2021) 457 DLR (4th) 298, 305 [3] (Brian O'Ferrall, Frederica Schutz and Jo'Anne Strekaf JJA).

[231] *Vennell* (n 222) 26 [44] (Cullity J).

[232] *Pearson v Inco Ltd* (2006) 78 OR (3d) 641, 670–1 [84] (Rosenberg JA for the Court).

[233] *Ayrton* (n 1) 242–3 [1], 251 [37] (Conrad, Paperny JJA and Romaine J).

[234] *McCracken (Court of Appeal)* (n 203) [1], [9] (Winkler CJO, Laskin JA agreeing, Cronk JA agreeing).

Canadian courts have also been acutely aware of the sad reality that large costs awards against unsuccessful lead plaintiffs will have a chilling effect, discouraging future meritorious class actions.[235] The concern here is not just in relation to potential lead plaintiffs but also to potential funders of future class actions: the public class action fund that operates in Ontario (the Class Proceedings Fund), plaintiff lawyers, and commercial litigation funders.[236]

It has also been held, consistently with the approach outlined in the preceding paragraph, that in determining the correct approach to the allocation of costs, it is inappropriate to draw a distinction between 'altruistic' litigation and 'entrepreneurial' litigation.[237] Judicial reliance has been placed on the facts that '[c]lass actions are generally entrepreneurial litigation' and that '[t]hat aspect of class proceedings is part of ensuring access to justice'.[238] This appears to constitute a different, and broader, approach than that endorsed by Lee J in *MyBudget [No 2]* who did not appear to regard entrepreneurial litigation, when it involved litigation funders, as a form of public interest litigation.[239]

With respect, we prefer the approach adopted by Canadian courts as it focuses on more important and relevant factors such as the vulnerability of the relevant class members and the subject matter of the proceedings.[240] A good illustration of the unfairness that may flow from the implementation of the strategy for which Lee J appeared to be advocating is provided by the stolen wages pt IVA proceeding.[241] It was brought against the Queensland government

235 See, eg, *Cavanaugh* (n 216) [21] (Perell J); *Morrison Estate v A-G (Nova Scotia)* [2012] NSSC 386, [26] (MacAdam J).

236 See, eg, *McCracken (Court of Appeal)* (n 203) [10] (Winkler CJO, Laskin JA agreeing, Cronk JA agreeing); *McCracken (Superior Court)* (n 216) [57]–[59], [113] (Perell J); *Austin* (n 213) [23], [26] (Morgan J). In *McCracken v Canadian National Railway Co* [2010] ONSC 6026, [11]–[13] (Perell J), the Court described as a legal fiction the notion that lead plaintiffs in Ontario are actually exposed to adverse cost orders. This is because, as it was put in the *LCO Report* (n 32), '[i]n reality, representative plaintiffs are routinely indemnified by class counsel, the Class Proceedings Fund or a commercial litigation funder against those orders': at 78.

237 *Yip v HSBC Holdings plc* (2018) 425 DLR (4th) 594, 617 [80] (P Lauwers, ML Benotto and IVB Nordheimer JJA).

238 Ibid. See also *Caputo* (n 206) 739–40 [41]–[42] (Winkler RSJ).

239 See *MyBudget [No 2]* (n 165) [10] (Lee J).

240 See, eg, *Das* (n 206) [248] (Doherty JA, Feldman JA agreeing at [5], Gray J agreeing at [274]); *Incredible Electronics* (n 81) 756–7 [99] (Perell J); *LCO Report* (n 32) 82. This approach is also broadly consistent with the reasoning underpinning a recent decision handed down by the Full Federal Court setting aside a security-for-costs order made against a litigation funder in the context of a pt IVA proceeding where, as a result of a legislative provision, no costs orders could be made against unsuccessful parties: see *Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* (2020) 384 ALR 340, 374 [131]–[132], 375 [136]–[137] (White J).

241 *Pearson [No 2]* (n 185).

on behalf of extremely disadvantaged persons (Aboriginal and Torres Strait Islander workers in respect of wages earned but not paid between 1939 and 1972) and would have been a strong candidate for public interest litigation status.[242] The fact that it was supported by litigation funders should not, in our view, alter this conclusion.

A related principle — which has been enunciated by courts in these three jurisdictions and which is of great relevance to pt IVA proceedings — is that the public interest nature of a class action is not undermined by the fact that the relief sought in the litigation encompasses pecuniary compensation for the lead plaintiffs and/or the class members.[243] This approach is based, to some extent, on a judicial acknowledgment of the simple fact that '[i]n many cases, there is a mix of private interest and public interest'.[244]

C *Our Recommended Provision*

The brief overview of the Canadian experience with legislative public interest costs order regimes provided above demonstrates quite clearly that any fears that including similar provisions in pt IVA would 'open the floodgates' are misplaced. In our view, these provisions have been applied by Canadian courts in a way that has fallen well short of expectations.[245] In light of the fact that, in relation to the relevance of the notion of public interest to costs in orthodox

[242] Ibid [1] (Murphy J). As explained by Murphy J of the Federal Court at [297],

> [t]his case was a good example of the successful operation of the Part IVA and analogous regimes. It shows, yet again, that when class actions are properly conducted and appropriately managed by the courts, many affected persons can recover compensation for civil wrongs which they would not otherwise have been able to obtain, including people suffering from substantial disadvantages in terms of economic capacity, education, geographic location and cultural issues, which otherwise present significant barriers to their access to justice.

[243] *Smith v Inco* (n 207) 13 [39] (JC MacPherson JA, David Watt JA agreeing at 19, SE Pepall JA agreeing at 19), citing *Ruffolo (Court of Appeal)* (n 206) and *McCracken (Court of Appeal)* (n 203).

[244] *Smith v Inco* (n 207) 13 [39] (JC MacPherson JA, David Watt JA agreeing at 19, SE Pepall JA agreeing at 19).

[245] A similar view has been expressed in Mulheron, *The Class Action* (n 113) 450 and the *LCO Report* (n 32) 79, 82. As a result, in 2019 the LCO recommended for Ontario's class action regime the legislative introduction of a no-costs rule with respect to certification motions, given that '[s]ome of the most frequent and largest costs orders … are made at the conclusion of the certification motion': at 81. The LCO's expectation was that this legislative measure would 'improve access to justice, especially for public interest class actions': at 86. Conversely, Australia's class action regimes do not require lead plaintiffs to seek the court's authorisation or 'certification' at the early stages of the litigation, before they are able to proceed with the class action proceeding.

non-class litigation, Canadian courts have displayed a far more favourable approach than Australian courts, it is unlikely that judges presiding over pt IVA proceedings will interpret and apply these provisions in a far more generous manner than their Canadian counterparts.

A more legitimate concern is instead whether the VLRC was overly optimistic in its assessment that the transplant in Australia of these Canadian provisions would reduce the barrier to the commencement of class actions that is erected by the threat of an adverse costs order in the event of a loss for the class. In this context, it is useful to refer to the provision that was included in pt IVA to allow winning lead plaintiffs to recoup some of their costs. Section 33ZJ empowers trial judges to allow lead plaintiffs to receive, out of damages awarded in favour of the class, reasonably incurred costs not covered by the costs order made in their favour.[246] As observed by Wilcox J in *Woodlands*,

> [t]his provision does not meet the problem of people being deterred from acting as a representative party at all, because of the possibility of the proceeding failing.[247]

In the current context, the uncertainty faced by potential lead plaintiffs is exacerbated by the significant discretionary element entailed in ascertaining the presence of a 'matter of public interest' in the litigation and, if so, the impact that it will have in relation to the question of costs.[248]

These considerations point towards the desirability of judicial determinations on this issue at the early stages of class action litigation. The public interest costs order regimes recommended by, among others, the ALRC,[249] the VLRC,[250] and the OLRC,[251] with respect to all legal proceedings, envisage the ability to make such orders at any time during the course of the litigation. Despite the introduction at around the same time that pt IVA came into operation of a rule of court — ord 62A, now r 40.51 — that empowered courts to make maximum costs orders at the early stages of a legal proceeding, we have seen

[246] *Federal Court Act* (n 40) s 33ZJ(2).

[247] *Woodlands* (n 1) 146. See also Ginnivan (n 63) 24; *OLRC 1982 Report* (n 2) 660.

[248] See Mulheron, *The Class Action* (n 113) 451; Rachael Mulheron, 'Costs Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 183, 199; *LCO Report* (n 32) 82–3; Chinomso Iliya-Ndule and Jason Unger, Environmental Law Centre, *Environmental Rights in Alberta: A Right to a Healthy Environment* (Report, October 2017) 17–18.

[249] *Costs Shifting* (n 17) 151 [13.26]–[13.27].

[250] *VLRC 2008 Report* (n 72) 676.

[251] *OLRC 1989 Report* (n 74) 179 recommendation 11.

there has been only one instance of an application for such orders by lead plaintiffs in pt IVA litigation.[252] Leading plaintiff solicitors, who have filed numerous pt IVA proceedings which arguably raised matters of public interest, have advised us that their decision not to seek maximum costs orders was attributable to the fact that any caps on costs would have been applied in relation to not only their opponent's costs, but also their own costs in the event of a win. As recently explained by Beach J of the Federal Court, the present state of the authorities is that 'r 40.51 does not permit a unilateral costs capping order'.[253]

With respect, it makes little sense to make a maximum costs order in favour of a plaintiff, following a judicial finding that such an order is desirable to ensure that the proceeding continues, but at the same time erect another potentially significant barrier to the continuation of the litigation: namely, imposing a similar cap to the costs of these plaintiffs should they win. It should also be noted that in New South Wales and the United Kingdom, courts have the power to make unilateral maximum costs orders.[254] In the context of class action litigation, the following comments made by Ontario's Superior Court of Justice are apposite:

> [T]here [are] some asymmetries in costs awards in class proceedings because of access to justice concerns and to further the policies of the legislation. As a result, costs awarded against unsuccessful plaintiffs … have typically been more modest than the awards against unsuccessful defendants.[255]

We therefore recommend that the provision recommended by the VLRC should expressly include the ability to make such orders at any stage of the litigation and that where the orders take the form of a maximum costs order, such an order is to apply only to the costs of successful respondents.

Any criticism of this proposal on the basis that it will increase the workload of judges presiding over pt IVA proceedings, increase costs, and cause delays, can be addressed by pointing out that a broadly similar process, pursuant to the so-called common fund doctrine, was undertaken by the Federal Court before the High Court held in December 2019 that it was not authorised by pt IVA.[256]

[252] See above nn 131–138 and accompanying text.

[253] See *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd [No 2]* (2019) 135 ACSR 278, 292 [70]. See also *Shurat HaDin* (n 67) [10] (Robertson J).

[254] See Shulman (n 86) 78; *NSWLRC Report* (n 63) 90 [4.62]; Ginnivan (n 63) 23.

[255] *McCracken (Superior Court)* (n 216) [107] (Perell J). See also *Rosen v BMO Nesbitt Burns Inc* [2013] ONSC 6356, [5] (Belobaba J).

[256] *BMW Australia Ltd v Brewster* (2019) 374 ALR 627, 649 [93] (Kiefel CJ, Bell and Keane JJ), 657 [125] (Nettle J), 667 [166] (Gordon J).

Pursuant to this doctrine, in the early stages of pt IVA litigation, litigation funders could ask the Federal Court to approve the funding agreements they executed with the lead plaintiffs, so as to render them binding on *all* the class members eligible to receive any settlement proceeds or damages generated by the class action, regardless of whether these class members had executed individual funding agreements with the funder.[257]

This doctrine was not imposed on trial judges by legislation but was instead formulated by the Full Federal Court in order to secure a number of significant benefits, the most important of which was to facilitate attainment of the access-to-justice goal in funded pt IVA proceedings.[258] Empowering trial judges to make public interest costs orders, before there is an outcome in pt IVA litigation, seeks to achieve a similarly positive impact on access to justice. Determining, inter alia, the public interest nature of a pt IVA proceeding does not appear to be more burdensome than the review of litigation funding agreements, including the reasonableness of the remuneration envisaged for the funders in the event of a favourable outcome. Furthermore, as aptly explained by the Attorney-General's Department's Access to Justice Taskforce,

> [a]lthough hearing an application for a costs order will add another interlocutory proceeding to the matter, the main benefit in removing the barrier to litigation is only achieved in practice if litigants are aware of where they will stand as regards costs before those costs are incurred.[259]

Similarly, the fact that the VLRC's recommendation envisages the application of the same criteria to security-for-costs applications (which must be filed at an early stage of a legal proceeding) as those that apply to applications for costs awards[260] does not remove the need for courts to be able to make public interest costs orders at any stage of the litigation. As is the case in Canada, the legislative criteria recommended by the VLRC in relation to class action litigation are not exhaustive. Therefore, other criteria that have been applied to date in security-for-costs applications in class action proceedings will continue to apply and may produce a different outcome to applications for maximum costs orders in

[257] See ibid 630 [1] (Kiefel CJ, Bell and Keane JJ).

[258] See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 194–5 [7]–[8], 196–7 [14] (Murphy, Gleeson and Beach JJ).

[259] *A-G's Taskforce Report* (n 76) 112. See also *Productivity Commission Report* (n 1) vol 1, 483; Law Institute of Victoria, Submission to Attorney-General for Victoria, *Protective Costs Orders* (19 February 2010) 7:

> The [Law Institute of Victoria] agrees with the VLRC and ALRC reports that the benefits of [maximum costs orders] in increasing access to justice outweigh any additional costs which might be incurred, by ensuring that genuine public interest litigation is pursued.

[260] See above n 30 and accompanying text.

similar litigation. More importantly, being able to secure an order, at the outset of the litigation, that limits the lead plaintiff's liability for costs in the event of a loss represents a significantly different scenario from being able to resist a security for costs order. This is because the latter scenario hardly guarantees a similarly positive outcome for the lead plaintiffs on costs following a loss.

The inability, on the part of Canadian courts, to 'provide a precise and comprehensive definition'[261] of the concept of public interest (revealed by the analysis above) does not provide support for maintenance of the status quo. Instead, it confirms the cogency of the following line of reasoning embraced by the Full Federal Court in *Ruddock*:

> The term may best be seen as an envelope or class description for a range of circumstances which, upon examination, may be found to be relevant to the question whether there should be a departure from the ordinary rule that costs follow the event.[262]

We therefore recommend that this 'range of circumstances' be expressly added to the provision recommended by the VLRC. This will facilitate the interpretation and application of the recommended provision and reduce the uncertainty faced by potential lead plaintiffs because of the risk of an adverse costs order. They can be drawn from the case law outlined above, which has been developed with respect to both orthodox proceedings and class action proceedings, and the recommendations made by the ALRC and similar entities.

We believe that the approach adopted in *MyBudget [No 2]* and *DBE17 [No 2]*[263] — that in considering the impact of a pt IVA proceeding on the public, class members must be considered as part of the public — is preferable to the approach followed by Canadian courts, which considers only the impact beyond class members. We base this preference on the fact that the Australian approach is far more consistent with attainment of the access-to-justice goal.

VII Conclusion

The federal class action regime will be reformed significantly if the Commonwealth government implements many, or even some, of the 31 recommendations put forward in December 2020 by the government members of the Parliamentary Joint Committee on Corporations and Financial Services.[264] These

[261] *Vennell* (n 222) 22 [28] (Cullity J).

[262] *Ruddock* (n 19) 236 [14] (Black CJ and French J).

[263] *MyBudget [No 2]* (n 165); *DBE17 [No 2]* (n 150).

[264] See *PJC Report* (n 9) xxiii–xxxi.

recommendations deal with various dimensions of the federal regime, but the main theme that appears to unite most of these recommendations is a belief on the part of the government that many class actions have not been in the public interest. Various strategies have been suggested by this committee's government members to address this perceived problem, but, unfortunately, they do not encompass measures designed to facilitate the filing of class actions that *can properly be characterised as public interest class actions*.

We have shown that, short of the creation of a public class action fund, the most appropriate strategy for dealing with this problem requires the enactment by the Commonwealth Parliament of a modified version of a provision recommended by the VLRC in 2018. This provision would expressly direct courts to consider, when dealing with applications for (a) maximum costs orders filed by lead plaintiffs in the early stages of a class action, and (b) costs by a victorious class action respondent, the three policy goals of class actions and whether the class action in question involves a matter of public interest. The main circumstances in which a class action may be said to raise a matter of public interest would be provided. It would also be expressly indicated that caps on costs prescribed in maximum costs orders would not apply to the lead plaintiff's costs in the event of a victory for the class.

We have also shown that such a provision is likely to achieve at least two desirable outcomes. The first outcome is the reduction of the uncertainty faced by potential lead plaintiffs because of the risk of an adverse costs order. The second beneficial effect would involve federal judges presiding over class actions expressly considering, and giving special weight to, the public interest nature of the proceeding and the three policy goals of class actions when dealing with applications for costs and maximum costs orders. As explained by the Queen's Bench for Saskatchewan in relation to that province's provision on public interest costs orders,

> [t]he considerations involving costs are not just about who won or lost but about the potential greater public good in advancing a class action claim. The greater public good being centred around the concept of societal justice issues identified in s 40(2) [of the Saskatchewan class action legislation]. Section 40(2) contemplates that just being successful in defence of a claim against you does not mean that you will be entitled to costs that in a normal action would flow in your favour.[265]

[265] *Holmes v Jastek Master Builder 2004 Inc* [2017] SKQB 78, [17] (Mills J).