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Keywords
redress, power, imbalance

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Abstract

Fear of an adverse cost order in public law litigation can prevent potential applicants from seeking judicial review in courts with serious consequences for diminishing access to justice. If people are deterred from commencing public law proceedings, then government actions and decisions will not be subject to oversight and review by the courts. The issue of the impact of adverse costs orders is critical to understanding the operation of public law in Australia. While the general rule remains that costs follow the event, so that the unsuccessful party pays the legal costs of the successful party in a judicial review action, there have been some encouraging recent developments towards a more flexible approach. In one Australian state jurisdiction with a judicial review statute, Queensland, important provisions concerning costs have been inserted into the statutory framework. These provisions have not yet been widely utilised and their potential remains unfulfilled. Moving beyond the court system, the role that merits review by tribunals can play in terms of enhancing access to justice must be championed. Tribunals are cheaper to apply to than courts. They also resolve matters faster and seldom impose adverse costs orders. In conclusion, there is a pressing need for further reform on legal costs. Reform is justified on the basis of greater public accountability and access to justice, and might also go some way towards correcting the inherent power imbalance between citizens and the government.

I Introduction

One method for individuals to redress the power imbalance between themselves and the government, and to exercise a measure of control over government, is to challenge decisions made by governments in court. This ability to apply for review of government decisions is one of the major foundational elements of public law, which is broadly speaking any legal issue involving the government as a party.[1] Some public law matters

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1 See generally Anthony Connolly, *The Foundations of Australian Public Law: State, Power, Accountability* (Cambridge University Press, 2017) 25 where he proposes a similar definition:

involve government decisions that affect private interests (such as an application for review of a parole or visa refusal decision), while other decisions can impact on the public interest (such as approval for a new coal mine). Judicial review is the process whereby the courts conduct an independent review of government decision-making to ensure legality, without considering the merits of that decision. A different and discrete aspect of public law litigation is challenging the legal validity of Acts of Parliament, and this can be termed constitutional judicial review.[2] In contrast to both types of judicial review, various tribunals perform *merits reviews* by conducting a fresh re-consideration of the merits of government decision-making. Both merits and judicial review form part of the system designed to hold governments accountable.

The term 'legal costs' refers to a formal order issued at the end of proceedings stating which party pays for the costs of legal representation incurred during the proceedings. One principle underlying this system is fairness, in that it provides a mechanism to deter people from using the court system as a tool to place unfair pressure on others by commencing legal action and thereby forcing the other party into incurring costs for legal representation to defend or respond to the claims.[3] The general rule is that costs 'follow the event' in judicial review proceedings, whereas in merits review the general rule is that each party bears their own costs.[4] This means that the unsuccessful party in judicial review proceedings pays not only their own costs of legal representation but also the costs of legal representation for the successful party. Thus, an individual applying for judicial review of a decision made concerning themselves might ultimately be unsuccessful and face the prospect of paying the government's legal costs. In this sense, the general rule on costs is encapsulated by the idiom 'the winner takes it all'. The first part of this analysis concentrates on the judicial review costs landscape and includes an examination of the laudable statutory reforms undertaken in Queensland. These reforms are unique in Australia, and this innovation forms the basis of Queensland's selection as a case study.

In Queensland, judicial review is conducted by the Queensland Supreme Court, and these applications are commenced under the *Judicial Review Act 1991* (Qld) ('the *JR Act Qld*'). This Act represents a major reform of judicial review in the State, which aims to improve access to justice and secure legal accountability of public power.[5] It also codifies the

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"Put very simply, public law comprises the total set of legal rules which create, empower, regulate and call to account State officials and institutions".

2 See Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010).

3 See generally the judgment of McHugh J in *Oshlack v Richmond River Council* (1998) 193 CLR 123.

4 Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis, 4th ed, 2015) 355; Enid Campbell, 'Award of Costs on Applications for Judicial Review' (1983) 10(1) *Sydney Law Review* 20; Peter Bayne, 'Costs Orders on Review of Administrative Action' (1994) 68 *Australian Law Journal* 816.

5 Peter Billings and Anthony Cassimatis, 'Twenty-One Years of the Judicial Review Act 1991: Enhancing Access to Justice and Promoting Legal Accountability? (2013) 32(1) *University of Queensland Law Journal* 65, 67 ('*Twenty-One Years of the Judicial Review Act 1991*').

common law of judicial review in Queensland.[6] Relevantly, it also contains an innovative reform relating to costs.[7] This article explains this innovation, analyses decisions in which applicants have sought to rely on the new costs provision, and concludes that the reforms are praiseworthy but not widely utilised.

The second part of the article contrasts the costs rules applicable in the Federal Administrative Appeals Tribunal ('AAT') with those applicable in the Queensland Civil and Administrative Tribunal ('QCAT'). It also identifies exceptions to the general rule on costs. The article concludes that tribunals provide an effective alternative to courts exercising judicial review and thus form an important part of the Australian legal landscape. Without the spectre of an adverse costs orders, tribunals serve to enhance ordinary citizens' access to justice.

The third part of the article analyses previous recommendations for reform made by various expert bodies and academics. The potential impact of adverse costs orders as an area of public law with a distinct impact on access to justice has been considered in the past by the Australian Law Reform Commission, the Australian Productivity Commission and a Queensland Parliamentary Committee, yet recommendations for reform on costs have not been implemented by successive governments.[8]

The fourth part of the article reflects on modern developments in the legal sector and the possible implications of these developments for legal costs rules. These developments include the phenomenon of self-represented litigants and the increasing prevalence of no-fee or fixed-fee legal representation. Consideration is also given to the phenomenon of crowd-funding, which involves using an online platform to raise third party funding for an identified purpose.

Finally, following an analysis of the current state of the law on legal costs in Australian public law, the article concludes that there is still a pressing need for reform towards greater flexibility in departing from the general rule. Reform is justified on the basis of greater public accountability and access to justice, and might also go some way towards correcting the inherent power imbalance between citizens and the government.

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6 Ibid; see generally Peter Billings and Anthony Cassimatis, 'Australia's Codification of Judicial Review: Has the Legislative Effort Been Worth It?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 180 ('*Australia's Codification of Judicial Review*').

7 *Judicial Review Act 1991* (Qld) ss 49–50.

8 Australian Law Reform Commission, *Costs Shifting - Who Pays for Litigation*, Report No 75 (1995); Australian Productivity Commission, *Access to Justice Arrangements*, Report No 72 (2014).

II Costs Orders in Australian Judicial Review

A *The General Rule and Recent Judicial Authority*

In Australia, at the Federal level, there are two sources of jurisdiction for seeking judicial review: the first is under s 75(v) of the *Constitution* and the complementary provisions for the Federal Court contained in section 39B of the *Judiciary Act 1903* (Cth); and the second is a statute-based option, the *Administrative Decisions (Judicial Review) Act 1975* (Cth) ('the *ADJR Act*'). Section 75(v) entrenches the High Court's original jurisdiction to conduct judicial review, while s 39B grants the Federal Court a judicial review jurisdiction which is 'almost identical'.[9] When an applicant commences judicial review proceedings in the Federal Court under the *ADJR Act*, it is common for s 39B to be pleaded cumulatively and in the alternative.[10]

Significantly, the issue of costs is not expressly referenced in any of these legal sources. Thus, the Australian position on costs in judicial review at the Federal level remains contextual and sits within the High Court and Federal Court's discretionary exercise of inherent powers (though also subject to specific provisions in the rules of each court).[11] Costs are dealt with on a case-by-case basis, but the general rule remains that the unsuccessful party pays the costs of the successful party unless there are special circumstances.[12]

In his 2010 book, which promotes an open constitutional court in Australia, Keyzer makes a compelling argument for 'the abolition of the rules of standing and costs in constitutional cases'.[13] Keyzer, citing from the experience of an actual constitutional judicial review case, notes:

> Throughout the litigation, the potentially catastrophic financial impact of an ultimate failure mounted. The fiscal leverage that the respondent enjoyed over the applicant was clear. And no expense had been spared by the respondents in their preparation for the litigation ... The full weight of the government's legal resources was invoked …[14]

The general rule on costs in all legal proceedings originates in private law. It is also sometimes described as the 'indemnity rule', as it covers recovery of costs from the losing party for both substantive legal issues and any procedural issues raised.[15] In effect, the loser indemnifies the winner. In the private law context this approach to costs legal dispute resolution has a logical basis. However, when the government is one of the parties (as

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9 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 51.

10 Ibid 52.

11 *High Court Rules 2004,* pt 50*; Federal Court Rules 2011*, pt 40.

12 Australian Law Reform Commission, above n 9, 40 [5.2].

13 Keyzer, above n 2, 164. See also Patrick Keyzer, 'A Battle and a Gamble: The Spectre of an Adverse Costs Order on Constitutional Litigation' (2010) 22(3) *Bond Law Review* 82 ('*A Battle and a Gamble*').

14 Keyzer, above n 2, 14.

15 Australian Law Reform Commission, above n 9, 31 [4.1].

may be the case in both private and public law matters), the imbalance of power and resources between the parties means that the loser pays approach may not be the most suitable, especially when one aim of commencing proceedings is to hold the government to account. As Hickman argues:

> Many individuals would be bankrupted by an adverse costs order. Even those who would not be bankrupted could not rationally be expected to risk their savings, or the equity in their house, in bringing a judicial review claim to protect themselves and their family from arbitrary action by a public body.[16]

Over time, a number of different rationales have been offered to explain the general (loser pays) rule, including: (1) to compensate successful litigants for at least some of the costs they incur in litigating; (2) allowing people without means to litigate; (3) deterring vexatious or frivolous or other unmeritorious claims or defences; (4) encouraging the settlement of disputes by adding to the amount at stake in the litigation; and (5) deterring delay and misconduct by making the responsible party pay for the costs his or her opponent incurs as a result of that delay or misconduct.[17] However, not all of these rationales are applicable and relevant in the public law context of judicial review where the government is a party and the issue at stake is the potential illegal exercise of public power, as opposed to a fiscal amount which can be the subject of a compromise or settlement.

Costs are not awarded to punish an unsuccessful party; rather, the primary purpose of an award of costs is to indemnify the successful party.[18] If the litigation had not been instigated the successful party would not have incurred the expense that it did. Therefore, it has been argued that fairness dictates that the unsuccessful party should typically bear liability for the costs of the unsuccessful litigation.[19] McHugh J has stated that:

> As a matter of policy, one beneficial by-product of this compensation purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved.[20]

However, this logic may also be applied to explain the barrier that the fear of an adverse costs order can create to deter people from commencing legal action to hold the government to account for its decision-making.

Alternatives have developed to the general rule on legal costs, which are sometimes applied by Australian courts. These include apportionment of costs (where only partial indemnification occurs based on the specific facts in the matter litigated) or where the court decides to decline to issue a costs order. In the latter circumstance, each party must bear their own costs. Two examples where the Federal Court declined to make a costs

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16 Tom Hickman, 'Public Law's Disgrace' on UK Constitutional Law Association, *UK Constitutional Law Blog* (9 February 2017) <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/>.

17 Australian Law Reform Commission, above n 9, 32 [4.5].

18 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97 (McHugh J).

19 Ibid.

20 Ibid.

order are the 2008 case of *Blue Wedges Inc v Minister for Environment, Heritage & the Arts*, and the 2012 case of *Buzzacott v Minister for Sustainability, Environment, Water, Population & Communities*.[21] It was concluded in both cases that the issues at stake were novel and raised questions of general importance, such that a departure from the general rule on costs was warranted in the circumstances. An early example of partial indemnification was the 2008 Full Federal Court decision in *Wilderness Society Inc v Hon Malcolm Turnbull, Minister for Environment & Water Resources*.[22] The Federal Court ordered that the Wilderness Society should pay 70 per cent of the Minister's costs and 40 per cent of the second respondent's (Gunns Ltd) costs. A similar order was made by Griffiths J at first instance in *Australian Conservation Foundation Inc v Minister for Environment (No 2)* where ACF were ordered to pay 70 per cent of the Minister's costs and 40 per cent of the second respondent's (Adani Mining Ltd) costs, but this was overturned on appeal by the Full Federal Court in *Australian Conservation Foundation Inc v Minister for Environment & Energy (No 2)*, which ordered that the general rule on costs should be applied.[23] Keyzer concludes, in respect of constitutional judicial review:

> The indemnity rules are almost invariably applied, but when they are not the exceptions are hard to predict. The practical consequence of the High Court's jurisprudence is that litigants seeking to argue that an exception to the indemnity rule should apply to them not only take on significant financial risk but do so without guidance from the court as to the type of argument that might warrant a departure from the ordinary rule.[24]

Keyzer's conclusion in respect of constitutional judicial review extends to public law litigation more generally. Certainly, the need to access justice in respect of individual government decisions and actions is just as pressing, if not more so, when the interests of individuals or the greater public interest (as opposed to the constitutionality of legislation) are at stake. This is because in judicial review an individual decision has been made and, without judicial oversight and intervention, it will be implemented and become operational, thus having a direct and tangible consequence on a particular person. Whereas in constitutional judicial review there may not yet be an interest impacted if the challenged legislation, despite being operational, has not yet been applied to a particular party.

Although not strictly a judicial review matter, the High Court of Australia had occasion to consider the issue of the award of costs in public interest litigation (as distinct from constitutional judicial review) under NSW environmental legislation in *Oshlack v Richmond River Council* ('*Oshlack*').[25] This case concerned a planning decision that granted

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21 *Blue Wedges* (2008) 165 FCR 211; *Buzzacott* [2012] FCA 744 (13 July 2012).

22 *Wilderness Society* (2008)101 ALD 1.

23 *ACF (No. 2)* [2016] FCA 1095 (8 September 2016); *ACF (No.2)* [2017] FCAFC 216 (15 December 2017).

24 Keyzer, *Open Constitutional Courts*, above n 2, 35. See also Keyzer, *A Battle and a Gamble*, above n 14, 82.

25 (1998) 193 CLR 72.

approval for a development, which it was alleged would result in the destruction of a koala habitat. The majority three justices (in two separate judgments) determined that costs should not be awarded in accordance with the normal rule that the unsuccessful party pays the legal costs of the successful party, but for differing reasons.

The joint judgment of Gaudron and Gummow JJ upheld the reasoning of the trial judge, Stein J, that this matter was concerned with public rights (as opposed to private rights) and that 'something more than the categorisation of proceedings as public interest litigation was needed before a successful defendant should be denied costs'. [26] Applying principles of statutory interpretation to the discretion to issue costs conferred in the NSW legislation, Stein J then concluded that 'sufficient special circumstances' did exist such that the usual rule regarding costs should not apply.[27] Gaudron and Gummow JJ agreed with this approach and confirmed that in doing so Stein J had not taken into account or applied any extraneous factors. [28] Their Honours then issued orders with the practical effect of re-instating Stein J's original decision that no costs on the original litigation should be applied and that the respondents pay the appellant's costs for the appeal to the High Court.[29]

Also in the majority, although issuing individual reasons, Kirby J likewise applied the principles of statutory interpretation and reasoned that, given the

> statutory context and the clear purpose of Parliament to permit, and even encourage, individuals and groups to exercise functions in the enforcement of environmental law before the Land and Environment Court, a rigid application of the compensatory principle in costs orders would be completely impermissible. It would discourage, frustrate, or even prevent the achievement of Parliament's particular purposes.[30]

His Honour then cautioned that litigants asserting that they commenced legal proceedings in the public interest should not however be granted a blanket exemption from the usual costs rules, as 'litigants espousing the public interest are not thereby granted an immunity from costs or a free kick in litigation'.[31] Rather, a statutory discretion had been conferred so that courts could 'permit the fair allocation of the costs which the parties have necessarily incurred'.[32]

It is important to record that there was a strong dissent by McHugh J, with whom Brennan CJ agreed, who held that the issue of public interest litigation was irrelevant to the question of costs.[33] Observing the inherent imprecision in the concept of public interest litigation, McHugh J noted

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26 Ibid 91 [49], distinguishing *Latoudis v Casey* (1990) 170 CLR 534.
27 Ibid.
28 Ibid.
29 Ibid [50].
30 Ibid 122 [134].
31 Ibid 123 [134].
32 Ibid.
33 Ibid 75 [3], 110 [101] and applying *Latoudis v Casey* (1990) 170 CLR 534.

that much 'litigation concerns the public interest. Prosecutions and most constitutional and administrative law matters almost invariably affect or involve the public interest'.[34] McHugh J expressed the view that courts must formulate principles and guidelines on the issue of costs that can be

> applied with precision in most cases. If characterisation as public interest litigation is a factor to be considered when making costs orders, courts must be able to define the term with precision. They must eschew any notion of the 'I know when it I see it' type of reasoning. If courts are to retain the confidence of litigants and the wider community, they must continually reaffirm and demonstrate that their decisions are based on objective reasons that are articulated and can be defended.[35]

Making a 'floodgates' styled argument, McHugh J further stated that:

> Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice.[36]

That there was such a divergence of judicial opinion within the High Court in this case is revealing of the complex nature of costs orders.[37] The *Oshlack* case sparked a widespread debate in the Australian legal community and the matter of costs in public interest litigation has not since been authoritatively resolved. It has only rarely been considered by the High Court subsequently. First, in 2007, the High Court in *Bodruddaza v Minister for Immigration and Multicultural Affairs* held that 'there is no absolute rule with respect to the exercise of the power to award costs', citing with approval the decision in *Oshlack*.[38] Secondly, in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*,[39] Kiefel and Keane JJ[40] cited r 50.01 of the High Court Rules 2004, which provides that '[s]ubject to the provisions of any law of the Commonwealth and to these Rules, the costs of and incidental to all proceedings in the Court are in the discretion of the Court or a Justice.' Both of these authorities reaffirm the power of the court to award costs at its discretion, but they did not address the specific issue of costs in public interest litigation. Indeed, the High Court has not yet found occasion to address this substantive issue.

That said, *Oshlack* remains the guiding authority on the issue of costs in public law litigation.[41] It has since been followed by several full benches of the Federal Court. In 2007, the full Federal Court composed of Kiefel,

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34 Ibid 98–9 [71].
35 Ibid 99 [72].
36 (1998) 193 CLR 72, 97 [68].
37 See Bruce Dyer, 'Costs, Standing and Access to Judicial Review' (1998) 23 *AIAL Forum* 1, 67, 8–9.
38 (2007) 228 CLR 651, 675.
39 (2013) 251 CLR 322.
40 Ibid 393 [241].
41 See Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 336.

Gyles and Buchanan JJ in *Tristar Steering and Suspension Australia Ltd and Another v Industrial Relations Commission of New South Wales and Another (No 2)* held that there 'can be no question that the Court's discretion to award costs, or decline to do so, is a very wide one'.[42] In 2016, in *State of Western Australia v Banjima People*, the full Federal Court composed of Mansfield, Kenny, Rares, Jagot and Mortimer JJ applied *Oshlack* as the leading authority on the issue of costs orders in public interest litigation.[43] Finally, in *AEK15 v Minister for Immigration and Border Protection and Another*,[44] the full Federal Court composed of McKerracher, Griffiths and Perry JJ held that:

> We are not satisfied that there is any sufficient basis for not applying the general rule that costs should follow the event. In particular, the appellant has not persuaded us that he initiated and conducted this litigation in the public interest, as opposed to his own personal interests.[45]

Thus, the approach to the awarding of costs at common law remains highly contextual. Notwithstanding the justification for such a tailored approach, it can have an unintended consequence of prolonging the uncertainty facing potential litigants because it is difficult to predict the courts likely reaction on the issue of costs in the absence of any general guiding principles.

In an encouraging innovation, an alternative avenue for reform has been found to exist at an individual agency level. The Australian Taxation Office ('ATO') has established a 'Test Case Litigation Program', which provides financial assistance to taxpayers to help them meet some or all of their reasonable litigation costs for approved cases that have broader implications beyond the individual's dispute with the ATO.[46] It may be that the individual agency level provides the greatest potential for systemic reform in the face of judicial reticence to articulate general principles applying to public interest litigation and costs.

B *A Legislative Response to the Issue of Costs in Judicial Review*

Queensland has dealt with the entire issue of judicial review, including costs, through an innovative statute. In Queensland, the *JR Act Qld* codified the common law of judicial review in Queensland, including remedies, and also implements in the same Act a separate statutory source of judicial review jurisdiction. The Act is therefore now the sole source of jurisdiction for judicial review in the State. Although not explicitly referred to in the Act, it was introduced in response to the Fitzgerald report with the

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42 (2007) 159 FCR 274, 280.
43 [2016] FCAFC 46 (29 March 2016) [16].
44 (2016) 244 FCR 328.
45 Ibid 342–3.
46 See ATO, Test Case Litigation Program (23 August 2017) <https://www.ato.gov.au/tax-professionals/tp/test-case-litigation-program/>. See also Eliza Ginnivan, 'Public Interest Litigation' (2016) 136 *Precedent* 22, 24.

aims of promoting access to justice and securing legal accountability over public power.[47]

The Queensland system offers itself as a useful case study because it is one of only four Australian states or territories to have passed a statutory judicial review Act, and the only one to include provisions on costs.[48] In this sense it provides a model that can be assessed and potentially adopted in other Australian jurisdictions with a statutory judicial review scheme. The Supreme Courts in the remaining four states and territories rely on common law judicial review and have an inherent power to award costs, which is dealt with generically (that is not adapted specifically to judicial review proceedings) in the relevant court rules.[49]

The issue of the negative impact on access to justice arising from adverse costs orders in Queensland has been managed by the insertion of s 49 into the *JR Act Qld,* based on the recommendations in the report on judicial review of administrative decisions by the Electoral and Administrative Review Commission.[50] Section 49(1) of the *JR Act Qld* provides that the Queensland Supreme Court may make an order:

> (d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made;
>
> or
>
> (e) that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.

Costs orders are generally considered to be an exercise of inherent power by superior courts in Australia (usually dealt with in the rules applying to and issued by the court itself) but the Queensland statutory provision provides a clear and express indication of Parliament's intention that courts should exercise their powers in a judicial review application in a manner that enhances access to justice rather than impedes it.[51] Two options are provided: either a prospective order to indemnify the costs or, alternatively (and it is argued more commonly and realistically), an order that each party bears their own costs.

Section 49(2) then enumerates factors that the Court is to take into account. To paraphrase, these factors are: (1) financial resources; (2) whether the proceeding involves an issue that affects, or may affect the public interest, (3) whether the proceeding discloses a reasonable basis for

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47 Billings and Cassimatis, *Twenty-One Years of the Judicial Review Act 1991,* above n 5, 67.

48 Other states or territories with a judicial review Act are Victoria (*Administrative Law Act 1978* (Vic)); Tasmania (*Judicial Review Act 2000* (Tas)) and the ACT (*Administrative Decisions (Judicial Review) Act 1989* (ACT)).

49 Civil Procedure Act 2005 (NSW), s 98; *Supreme Court Rules 2006* (SA), ch 12; *Rules of the Supreme Court 1971* (WA) r 56.7; *Supreme Court Rules* (NT) r 63.

50 Queensland, Electoral and Administrative Review Commission, *Report on Review of Appeals from Administrative Decisions* (1993).

51 See generally Victorian Public Interest Litigation Clearing House, Protective Costs Orders in Public Interest Litigation: Jurisprudence Review 2011, 28 February 2011.

the review application; and (4) whether the case can be supported on a reasonable basis. The term 'public interest' is not defined in the Act.

Section 49 does not operate automatically and must be the subject of a specific application to the court by a party to the judicial review proceedings. Crucially, it also only applies prospectively from the time that the costs application is made, so time is of the essence. Knowledge of the provision means that an early application can be made with the advantage that certainty as to costs can be obtained at the commencement of proceedings rather than parties having to wait until the matter is finally determined. Section 50 enables the Supreme Court to make an adverse costs order for the respondent to pay the costs of an applicant if the applicant makes a successful (in whole or part) application for reasons for a decision.[52] Conversely, where the applicant is wholly unsuccessful, and the application does not disclose a reasonable basis, or is frivolous or vexatious or an abuse of power of the court, then the Supreme Court may order that the applicant pay the respondent's costs.

Sadly, these provisions are not well known and have not received the academic attention and recognition within the legal profession that they deserve. Billings and Cassimatis conclude that s 49(1)(d) 'does not appear to have been relied upon in a manner that would maximise the potential benefit of the provision'.[53] Nor does s 49 receive much attention and use from parties to judicial review proceedings in Queensland. The *Austlii* database records only 74 Queensland cases where this provision has been cited in the period since 1991 to the present. The Queensland Parliament's Legal, Constitutional and Administrative Review Committee addressed consideration of the limited use of these statutory provisions in its 2008 report on *The Accessibility of Administrative Justice,* and after receiving detailed submissions from multiple interested organisations, concluded that reform was needed. They recommended that s 49 be amended to clarify that the court's discretion should be exercised to ensure that the risk of adverse costs orders does not deter meritorious applications under the Act, including those regarding 'public interest matters'. Unfortunately, successive Queensland governments have not implemented the recommendation.[54]

A prominent early case to consider the costs provision in detail was *Anghel v Minister for Transport (No 2)* ('*Anghel*').[55] In that case, the Queensland Court of Appeal considered the nature of the legislative power and the factors in s 49(2). Fitzgerald P explained that making a costs order pursuant to s 49(1)(e):

> will be less likely to deter private citizens from challenging government decisions which affect them, and thus advance the general intent of the Act that

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52 Section 32 of the *Judicial Review Act 1991* (Qld) provides for an application to request reasons for a decision.

53 Billings and Cassimatis, *Twenty-One Years of the Judicial Review Act 1991*, above n 5, 82.

54 Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *The Accessibility of Administrative Justice* (2008) 107.

55 [1994] QCA 232 (28 June 1994).

> persons aggrieved should have a practical means of calling such decisions into question.[56]

Ultimately in this case, the Queensland Court of Appeal ordered that costs would lie where they fell (that is each party would bear their own costs) and overturned the first instance judge's costs order that the Minister should pay costs.

In *Sharples v Attorney-General of Qld*, Mullins J refused to make a special costs order on the basis that there was no sufficient display of the public interest at stake in the proceedings.[57] Mullins J warned that many matters may be claimed to concern the public interest, but that a broader public interest was necessary to justify the grant of a special costs order:

> On the hearing of the costs application, the respondent conceded that the general subject matter of the principal proceeding may be said to involve issues affecting the public interest. By the very nature of the decision to which a review application under the Act applies, there is always an element of public interest. It is apparent from the observations made in *Anghel v Minister for Transport (No 2)* … and *Cairns Port Authority v Albietz* … that there will usually be some broader public interest involved in the particular application to justify a special costs order, than the usual public interest which must be present in every review application to which the Act applies.[58]

The cited case of *Cairns Port Authority v Albietz* [59] considered whether, as a result of judicial review proceedings, the applicant — Cairns Port Authority — should pay the costs of the first respondent, Mr Albietz, the Queensland Information Commissioner at the time. Thomas J stated:

> An obvious example calling for the exercise of this particular power is the case of an impecunious applicant who applies for an indemnity at an early stage of proceedings in which a public authority may obtain the benefit of a test ruling or clarification of some point of practice or of public importance.[60]

Thomas J then noted that the power to award special costs orders under s 49 was broader than the example he provided. His Honour continued:

> To date there has been no decision of authority on the question of the breadth of the discretion conferred by s. 49(4) but a number of decisions of single Justices in this State show an awareness of the oppression that may result to an unsuccessful applicant or respondent if multiple orders for costs are made against it.[61]

Another example of a case where the court granted a costs order under s 49(1)(e), requiring each party bear their own costs, was *Alliance to Save Hinchinbrook Inc v Cook (as Delegate of the Chief Executive, Environmental Protection Agency)* ('*Alliance*'). [62] This case was

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56 *Anghel v Minister for Transport (No 2)* [1994] QCA 232 (28 June 1994).
57 [2000] QSC 333 (2 November 2000) [29].
58 Ibid [19].
59 [1995] 2 Qd R 470.
60 Ibid 470, 475.
61 Ibid.
62 [2005] QSC 355 (1 December 2005).

significant as the Court was satisfied that all elements of s 49(1)(e) were fulfilled and made the costs order 'regardless of the outcome of those proceedings', which at that point were yet to be determined.[63]

Another case to consider s 49 was *Murphy v Legal Services Commissioner (No 2).*[64] Jackson J held that a matter which concerned judicial review of a decision on a legal practitioner's ability to continue to practice was, in reality, concerned with the public interest.[65] Engaging in statutory interpretation, Jackson J reasoned that:

> Having regard to the text and ordinary meaning of s 49, it would be erroneous to view a costs application within the meaning of s 49(1) as one where the exercise of discretion in relation to costs is that costs should follow the event unless there are special circumstances. If an application is a costs application within the meaning of s 49(1), the court must have regard to the factors raised under s 49(2) as set out above. The ordinary rule in the UCPR [Uniform Civil Procedure Rules] that costs follow the event is 'subject to' s 49, as expressly provided in s 49(4).[66]

By contrast, and highlighting the piecemeal development of the jurisprudence, the requisite public interest element necessary to engage the powers contained in s 49 was held not to exist in *Australian Society for Kangaroos Inc v The Chief Executive of the Department Environment and Heritage Protection.*[67] Despite the statutory objectives of the relevant Queensland Act including 'the protection of native wildlife and its habitat', Daubney J held:

> That submission, it seems to me, amounts to nothing more than a submission that the application was brought in the general public interest of seeing that the statutory obligations were fulfilled and the statutory objectives of the NCA [*Nature Conservation Act 1992* (Qld)] were observed. This was not, for example, presented as a test case or one which sought a ruling on some point of general practice or public importance. Nor, for that matter, did it concern the preservation of endangered fauna, given the status of the agile wallaby as a 'least concern animal' under the Wildlife Management Regulation.[68]

The operation of s 49 is prospective only, as was held in *Attorney-General (Qld) v Barnes.*[69] The Court of Appeal ruled that s 49 did not:

> apply to a situation such as the present case where the application for costs was made only after the substantive decision allowing the application for judicial review was handed down and the costs had been incurred before the costs application was made.[70]

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63 *Alliance to Save Hinchinbrook Inc v Cook (as Delegate of the Chief Executive, Environmental Protection Agency)* [2005] QSC 355 (1 December 2005) [14].
64 [2016] QSC 284 (5 December 2016).
65 Ibid [7].
66 Ibid [10].
67 [2015] QSC 67 (1 April 2015).
68 Ibid [146].
69 [2014] QCA 152 (24 June 2014).
70 Ibid [44].

Despite the promising application of s 49(1)(e) powers in *Anghel,* they have not been widely used. More recently, in *Calanca v The Queensland Parole Board,*[71] *Weston v The Central & Northern Queensland Regional Parole Board* ('*Weston*'), [72] *Day v Queensland Parole Board* ('*Day*'),[73] and *Finn v Central and Northern Queensland Regional Parole Board,*[74] the applicants were all ordered to pay the respondents' costs following an unsuccessful application for judicial review. What is striking about the *Weston* and *Day* cases is that, in each, the applicant was a prisoner who was self-representing — that is, appearing without the assistance of a legal representative and therefore not incurring legal costs. It is questionable whether imposing a costs order on a current prisoner serves any public purpose, given the extremely low likelihood of an ability to pay. One explanation for this costs outcome may be that the prisoners did not seek a special costs order under s 49. No consideration was given in the judgments as to the public law values underpinning the debate around costs orders, rather the costs orders were made without explanation or justification. It may be that the judges had in mind the personal (rather than public) nature of the judicial review applications and found they did not meet the requirements for the exercise of discretion on the point of costs or that the matters were assessed to be frivolous or vexatious. Sadly, the reasons for imposing the costs orders were not articulated in these cases. The importance of such an explanation was highlighted by McHugh J in his dissent in *Oshlack*.[75]

A successful application for a special costs order was made in *Foster v Shaddock*.[76] In a unanimous Court of Appeal decision, McMurdo P and Fraser JA separately concurred with Atkinson J that the parties should bear their own costs of the appeal pursuant to s 49(1)(e). The judgment of Atkinson J was instructive in its articulation of what would amount to public interest:

> As to whether or not the proceedings involved an issue that affects the public interest the topic of this proceeding relates to a matter of clear public interest, dealing as it did with the impact of an administrative order on the length of a sentence prior to a prisoner's release on parole that had been imposed by a judge. This concerned a number of issues of public interest, in particular the respective roles of two quite separate arms of government - the administrative branch and the judicial branch. It involved the liberty of the person which is a fundamental right capable of being taken away only by clear words in a statute; the certainty of terms of imprisonment; and it potentially has an effect on many sentences imposed by the courts on serving prisoners and into the future. It is in the public interest that the issues involved in this appeal have been clarified.[77]

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71 [2016] QSC 3 (8 January 2016).
72 [2016] QSC 10 (8 February 2016).
73 [2016] QSC 11 (8 February 2016).
74 [2016] QSC 233 (23 September 2016).
75 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 99 [72].
76 [2016] QCA 163 (17 June 2016).
77 Ibid [19].

The most recent case to consider a special costs application under s 49 was *Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection (No 2)*.[78] Daubney J held that it was not an appropriate matter for a special costs award:

> The present was not a test case. Nor was it a case which determined principles of general application. Rather, it was a case which, while concerning the operations of a proposed coal terminal, turned on a plain reading of the environmental objective assessment. So much is apparent from the principal reasons for judgment. I accept that there is a public interest in the due administration of the *Environmental Protection Act 1994*, and its application to the operation of infrastructure such as ports. But that fact alone does not warrant a departure from the general rule as to costs.

Thus, from a review of the cases touching on special costs orders under s 49, it can be concluded that the provision has operated in a piecemeal manner with mixed success. In order to persuade the courts that a matter has been commenced in the public interest, it is insufficient merely to *assert* that there is a public interest in determining whether a statutory power has been exercised correctly. The explanation provided by the Queensland Court of Appeal in *Foster v Shaddock* illustrates that a detailed explanation may be required of applicants, and represents an exemplar for future costs applications.

The express inclusion of a provision that details when a special costs order may be issued is praiseworthy, and s 49 offers a model that other jurisdictions in Australia with a statutory judicial review regime might emulate. The unimplemented recommendation to insert a clarification into s 49 — stating that discretion should be exercised so as not to deter meritorious applications including in 'public interest matters'— remains a sound proposition that will hopefully be implemented by a future Queensland government. Although a small body of jurisprudence is developing on this issue, in reality the provisions are not widely known nor utilised. Hopefully this innovation will continue to attract the increased attention it deserves and, in future, more applicants will seek these orders in appropriate judicial review matters in Queensland.

III Costs in Merits Review

A *The Federal Administrative Appeals Tribunal ('AAT')*

Leaving judicial review, there is much to be said for the Australian initiative of a centralised merits review tribunal at the federal level, which improves access to justice through the provision of affordable dispute resolution. The origins of the Australian Tribunal system date from the recommendations of three seminal Committees established by the Australian Government, which deliberated and issued reports over the period 1968–1973. The first was the Commonwealth Administrative

[78] [2017] QSC 159 (2 August 2017).

Review Committee (the 'Kerr Committee'), which in 1971 produced a report containing recommendations that would fundamentally alter the Australian administrative law institutional landscape.[79] Subsequently, the Committee on Administrative Discretions (the 'Bland Committee') and the Committee of Review on Prerogative Writ Procedures (the 'Ellicott Committee') refined aspects of the earlier Kerr Committee report.[80] One of the ultimate combined effects of the reports was the establishment of a new Australian merits review tribunal at the Federal level, named the Administrative Appeals Tribunal ('AAT').

The AAT was designed to provide individuals with a mechanism for review on the merits of the matter as 'this is usually what the aggrieved citizen is seeking'.[81] Whereas review tribunals existed in many forms, usually in a discrete jurisdiction (such as dust diseases), the Kerr Committee's Report provided the foundation for a general recognition and acceptance of the role a centralised tribunal could play in Australia's administrative justice landscape.[82]

The creation of the AAT has been described by Pearce as 'one of the most innovative steps ever taken to provide citizens with a means of review of the merits of a decision taken by a government agency'.[83] The AAT can review decisions made under more than 400 federal acts and legislative instruments.[84] The impact of the AAT can best be seen through the volume of applications it receives in a year. The latest figures record that the AAT finalised 40,669 applications in the period 2015–2016.[85] Furthermore, less than four per cent of all decisions that have been made by the AAT are set aside on judicial review.[86] By any standard this is a significant and substantial contribution to the ability of the public to receive reviews of government decisions. Costs orders are not the norm in the AAT, with each party typically expected to bear their own costs.[87] However there are some distinct exceptions where the AAT does have the power to make cost orders.[88]

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79 Commonwealth, *Administrative Review Committee Report*, Parliamentary Paper 144 (1971).

80 Commonwealth, *Committee on Administrative Discretions Report*, Parliamentary Paper 316 (1973); Commonwealth, *Committee of Review on Prerogative Writ Procedures Report*, Parliamentary Paper 56 (1973).

81 *Kerr Committee*, above n 78, [58].

82 Robin Creyke, 'Tribunals "Craving out the Philosophy of their Existence": The Challenge for the 21st Century' (2012) 71 *AIAL Forum* 19, 19.

83 Pearce, above n 8, xxi.

84 Administrative Appeals Tribunal, *Annual Report 2015–2016* (28 September 2016) 10 <http://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2015-16-annual-report>.

85 Ibid 20.

86 Ibid 21.

87 Pearce, above n 8, 405.

88 Exceptions include the *Administrative Appeals Tribunal Act 1975* (Cth) s 69B ('the AAT Act'), in relation to reviews of adverse or qualified security assessments; the *Military Rehabilitation and Compensation Act 2004* (Cth) s 357; the *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 67; the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 92; the *Freedom of Information Act 1982* (Cth) s 66; the *Mutual Recognition Act 1992* (Cth) s 35; the *Trans-Tasman Mutual Recognition Act 1997* (Cth) s 34; and the *Land Acquisition Act 1989* (Cth) s 131.

In respect of a successful review application made under the AAT Act for a security assessment, the AAT has the power to order that the government pay the costs of a successful applicant. In parallel provisions in the three compensation Acts, the AAT has the power to order that all or part of the costs of the proceedings be paid by the government authority where the AAT makes a decision that is more favourable to the applicant than the decision under review. Similarly, if a government authority unsuccessfully seeks review of a decision in favour of a claimant, the AAT may order that the authority pay the claimant's costs. Finally, where a decision is set aside by the AAT and remitted to the authority, the AAT must order that the authority pay the applicant's costs. The evident purpose of such provisions is to ensure that compensation paid to applicants is appropriate and that they are not monetarily disadvantaged by the merits review process, particularly where they have successfully argued the government's decision was incorrect.

In respect of the mutual recognition and trans-Tasman acts, the power of the AAT to award costs is contingent upon a party 'acting unreasonably'. The drafting of each provision is such that a costs order could be made against an applicant as well as a decision-maker if either behaved unreasonably. These provisions are designed to target behaviour that is unreasonable so that the other party does not incur expenses as a result of that standard of behaviour.

The land acquisition legislation confers on the AAT the power to make a recommendation to the Attorney-General that costs of a successful applicant should be paid. A similar provision can be found in the freedom of information legislation. These are a different power to those described above in relation to security decisions and the compensation Acts, as it does not permit the AAT to award costs directly, but nonetheless recognises that in a specific jurisdiction and in specific circumstances a costs outcome diverging from the usual (that each party bears their own costs) may be warranted.

The AAT issued a Practice Direction under s 18B(1) of the *AAT Act* with effect from 1 July 2015, titled 'Taxation of Costs', which details the procedure to be followed in circumstances where a costs order has been issued but the parties are subsequently unable to agree between themselves on the amount of costs incurred. Such costs are assessed on a party by party basis.[89] This is simply a machinery provision issued to ensure that costs disputes were subject to a recognised process for resolution.

B *The Queensland Civil and Administrative Appeals Tribunal ('QCAT')*

At the state level in tribunals, the situation is more nuanced, reflecting the diversity of jurisdiction exercised in state tribunals, which covers both civil and administrative matters. The state tribunals perform an enormous

[89] See *Administrative Appeals Act 1975* (Cth) s 69A.

volume of dispute resolution. For example, the Victorian Civil and Administrative Tribunal ('VCAT') claims to be the busiest tribunal in Australia, exercising both original and review powers and finalising more than 86 000 cases per year.[90] The relevant Queensland tribunal is the Queensland Civil and Administrative Tribunal ('QCAT') established by legislation in 2009, with an annual case load in 2015–2016 of 30 858 applications.[91]

The issue of costs is dealt with in s 100 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('the *QCAT Act*'), which explicitly states that, unless otherwise provided, the general rule is that each party bears their own costs. Section 102 of the *QCAT Act* confers upon QCAT the power to award costs where it determines it is 'in the interests of justice'. Further guidance is provided by a list of factors in s 102 to which the tribunal may have regard in reaching its decision on costs. The factors are:

> (a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party…;
>
> (b) the nature and complexity of the dispute…;
>
> (c) the relative strengths of the claims made by each of the parties…;
>
> (d) for a proceeding for the review of a reviewable decision—
>
> (i) whether the applicant was afforded natural justice by the decision-maker for the decision; and
>
> (ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits;
>
> (e) the financial circumstances of the parties…;
>
> (f) anything else the tribunal considers relevant.[92]

These provisions were considered by the QCAT Deputy President, Justice Kingham, in a 2010 matter where she stated:

> The public policy intent of the provisions in the QCAT Act is plain. The tribunal was established as a no costs jurisdiction. That may be departed from where the interests of justice require it. The considerations identified in s 102(3) are not grounds for awarding costs. They are factors that may be taken into account in determining whether, in a particular case, the interests of justice require the tribunal to make a costs order.[93]

In 2013, the issue was considered by the President of QCAT, Justice Wilson, who stated that:

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90 Victorian Civil and Administrative Tribunal, *Annual Report 2016–2017* (21 November 2017) 3. < file://staff.ad.bond.edu.au/home/iafield/Profile/Downloads/annual-report-2016-17.pdf>.

91 *Queensland Civil and Administrative Tribunal Act 2009* (Qld); Queensland Civil and Administrative Tribunal, *Annual Report 2016–2017* (28 September 2017) 14 <http://www.qcat.qld.gov.au/__data/assets/pdf_file/0005/509288/qcat-2015-16-annual-report.pdf#QCAT%20annual%20report%202015-16>.

92 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102(3)(a)–(f).

93 *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364 (2 August 2010) [8].

> the provisions of the QCAT Act relating to costs require the Tribunal to ask itself whether the circumstances relevant to the discretion inherent in the phrase 'the interests of justice' point so compellingly to a costs award that they overcome the strong contra-indication against costs.[94]

Most recently, in a 2017 matter, Member Pennell stated that:

> The presumption as provided in the legislation tends to place an award of costs as an exception rather than as a rule. There must be a sufficiently compelling or persuasive reason for the Tribunal to depart from the legislative presumption.[95]

Thus, although QCAT decisions are not binding in terms of precedent, these three decisions evidence a consistent and considered approach to the granting of costs in QCAT and a recognition and commitment by QCAT members to the principle of it being a no costs jurisdiction.

IV Previous Academic Analysis and Expert Advisory Bodies Recommendations

The need for reform of costs orders, particularly in public interest judicial review litigation, has been the subject of academic attention in Australia since the ground-breaking article by Campbell, titled *Award of costs on applications for judicial review*.[96] Campbell cited with approval a decision by Fox J of the ACT Supreme Court in the public interest litigation on the Black Mountain (now Telstra) Tower that it would be:

> undesirable that responsible citizens with a reasonable grievance who wish to challenge Government action should only be able to do so at risk of paying costs to the Government if they fail. They find themselves opposed to parties who are not personally at risk as to costs and have available to them almost unlimited public funds. The inhibiting effect of the risk of paying costs is excessive and not in the public interest.[97]

Campbell was a consistent advocate for a broad discretionary approach to costs orders in administrative law judicial review and public interest litigation, writing a further article in 1998.[98] Bayne also considered the issue in his 1994 article,[99] which has been cited with judicial approval.[100] Bayne argued for a wide approach to be taken to public interest litigation, adopting similar reasoning to the Queensland Court of Appeal in *Foster v Shaddock*[101] when he stated that 'it is not appropriate to confine the notion

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94 *Warren v Queensland Law Society Incorporated (No 2)* [2013] QCAT 234 (21 May 2013) [11].

95 *Bode v Queensland All Codes Racing Industry Board (No 2)* [2017] QCAT 84 (3 March 2017) [59].

96 Campbell, above n 4.

97 Ibid 29.

98 Enid Campbell, 'Public Interest Costs Orders' (1998) 20 *Adelaide Law Review* 245.

99 Bayne, above n 4, 816.

100 *Shanvale Pty Ltd v Council of The Shire of Livingstone* [1998] QSC (5 November 1998) [17]; *Cairns Port Authority v Albietz* [1995] 2 Qd R 470.

101 [2016] QCA 163.

of public interest litigation … Any kind of administrative law matter may have a public interest dimension'.[102]

Three members of the federal judiciary have also been public advocates on the need for reform of costs in public law litigation. In an extra-curial piece, the Hon John Toohey explained the central, and dominant impact of the general costs rule:

> There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual … bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.[103]

In a broad-ranging 2011 article, the Hon Michael Kirby argued that there was a link between public interest litigation and the rule of law, as judicial review proceedings ensured that government officials made decisions that were lawful and could be held accountable for their decision-making.[104] Referencing his judgment in *Oshlack*, Kirby noted that in the time since that decision there has been a 'persisting general disinclination of Australian courts to depart from the "usual rule" as to costs'.[105]

In the same year, the Hon Murray Wilcox considered the reasoning in *Oshlack* and stated that:

> In my opinion the Oshlack approach is not unreasonable. Most public interest litigation is brought against a government agency; it is not unreasonable that taxpayers bear the cost of resolving any public interest claim reasonably made against that agency. 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.[106]

He noted that while the *Oshlack* decision did represent an advance in the flexible application of the general costs rule, it did not entirely remove the uncertainty of whether costs might or might not be awarded in a particular case. There continued to be no certainty on the possibility of predicting financial detriment, and the fact 'that some risk remains may be enough to dissuade the client from undertaking the case.'[107]

The issue of costs has also been the subject of recommendations by various expert independent bodies including the Australian Law Reform

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102 Bayne, above n 4, 816.

103 Justice John Toohey, 'Environmental Law — Its Place in the System' (Speech delivered at the Lawasia/Nela International Conference on Environmental Law, Sydney, 1989).

104 Justice Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 *Law Quarterly Review* 537.

105 Ibid 564.

106 Justice Murray Wilcox, 'Tying the Threads Together' (2011) 22 (3) *Bond Law Review* 226, 232.

107 Ibid.

Commission ('ALRC') in its report *Costs Shifting — Who Pays for Litigation*.[108] Tellingly, the referral to the ALRC arose from a recommendation in the Access to Justice Advisory Committee's report published the previous year, titled *Access to Justice: An Action Plan*, highlighting the importance of costs in access to justice generally.[109] Thus, there has been recognition among government advisory agencies of the link between costs orders and access to justice.

Within the chapter on administrative law, the ALRC specifically considered judicial review proceedings and made recommendation 11, that costs should follow the event subject to the court determining that such an order would materially and adversely affect the ability of a party to present his or her case properly or negotiate a fair settlement.[110] This represents only a slight refinement to the prevailing general rule and yet has not been implemented by subsequent governments.

Additionally, in the chapter on public interest costs orders the ALRC made recommendation 45 that courts and tribunals make a public interest costs order where it was satisfied that:

- the proceedings will determine, enforce, or clarify an important right or obligation affecting the community or a significant sector of the community;
- the proceedings will affect the development of the law generally and may reduce the need for further litigation;
- the proceedings otherwise have the character of public interest or test case proceedings.[111]

However, the ALRC did not agree that there should be a broader reform of the general rule that costs follow the event, as many judicial review proceedings are of personal or commercial matters and thus appropriately treated in the usual manner. According to the ALRC website 'as yet there has been no direct implementation of the Commission's recommendations in ALRC Report 75'.[112]

In 2012, the Administrative Review Council issued a Report on *Federal Judicial Review in Australia,* which contained recommendation 15 on costs.[113] It recommended that the judicial review statute, the *ADJR Act*, should be amended to provide that, unless the court orders otherwise, parties to judicial review proceedings should bear their own costs. Like previous expert recommendations, none of the recommendations made in this report have been implemented and no amendments have been drafted and placed before the Australian Parliament.

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108 Above n 9.

109 Commonwealth, Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994).

110 ALRC, above n 9, 41 [5.5].

111 Ibid 87 [13.19].

112 See <https://www.alrc.gov.au/inquiries/costs-shifting>, accessed on 2 February 2018.

113 Commonwealth, Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012).

Finally, in terms of reform proposals, in 2014 the Australian Productivity Commission in its *Access to Justice Arrangements Report* issued recommendation 13.6 to promote the use by courts of protective costs orders in public interest litigation (which they defined to include judicial review).[114] A protective costs order is a ruling by the court that a particular party is exempt from the general rule that the losing party must pay costs. Again, this expert recommendation has not been adopted.

The issue of public interest costs orders has also been the subject of submissions from various community legal centres such as the Victorian and Queensland Public Interest Clearing Houses (as they were then known) and the Environmental Defenders Office.[115] The significance of these submissions is that community legal centres have direct contact with potential litigants and are at the forefront of awareness on the challenges surrounding access to justice, so their views should also be considered as expert in the field.

V The Impact of Modern Legal Developments

Modern legal developments are changing the way the Australian law and justice system operates. There has been a rise in the number of self-representing litigants, accompanied by innovations within the legal sector to make legal services more affordable.[116] The important role of pro-bono representation continues and newer initiatives such as crowd-funding have also started to emerge.[117] Although these are emergent issues, they do have consequences for the application of traditional legal rules, including the issue of legal costs.

The prospect of an adverse costs order is strikingly significant in circumstances where the non-government party may be self-representing or have secured legal representation on the basis of a conditional fee arrangement — also known as 'no win, no fee'. In such circumstances, the impact of an adverse costs order, whereby an unsuccessful litigant has to pay the government's legal costs, is particularly harsh and arguably unjust. Here, the applicant has taken deliberate action to reduce or eliminate their own legal costs and yet, if unsuccessful, could potentially face the prospect of having to pay the government's legal costs. In situations where a party commences judicial review on a no- or fixed-cost basis, a better and more

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114 Commonwealth, Productivity Commission, *Access to Justice Arrangements* (2014).

115 Victorian Public Interest Clearing House, *Protective Costs Orders in Public Interest Litigation: Jurisprudence Review 2011* (2011) <https://www.justiceconnect.org.au/sites/default/files/Protective%20Costs%20Orders%20in%20Public%20Interest%20Litigation%20-%20Jurisprudence%20Review%202011.pdf>; Queensland Public Interest Law Clearing House Incorporated, *Costs In Public Interest Proceedings In Queensland* (2005) <http://www.lawright.org.au/_dbase_upl/Costs_pi_litigation.pdf>; Environment Defenders Office, *Costing the Earth? The Case for Public Interest Costs Protection in Environmental Litigation* (2010) <https://envirojustice.org.au/major-reports/costing-the-earth-the-case-for-public-interest-costs-protection-in-environmental>.

116 Productivity Commission, above n112, 487.

117 Ibid, 474.

nuanced approach to the issue of legal costs should be taken with preference to imposing the rule that each party bears their own costs.

This circumstance is to be distinguished from that where an applicant may receive the benefit of pro-bono legal assistance, whether by a community legal centre or a private law firm or legal representative. Presently, the indemnity principle only recognises legal obligations (usually as a result of a contractual arrangement) to pay costs, and without a legal obligation to pay legal fees such as the situation with pro-bono representation, there can be no basis for a successful party to recover costs.[118] There is a further asymmetry in that a pro-bono represented party may still be liable for the government's costs if unsuccessful.[119] The specific circumstances for costs and pro-bono applicants was the subject of recommendation 13.4 by the Australian Productivity Commission for reform to allow greater flexibility in the application of rules on costs, but this has similarly not been implemented by successive federal governments, nor adopted at the state or territory level.[120]

Crowd-funding has been proposed as a potential source of funding for public interest litigation and as one measure that may help to alleviate the barriers to accessing the law and justice system. The phenomenon of crowd-funding involves using an online platform to raise third party funding for an identified purpose. Crowd-funding is regarded as having the potential to redress the resource dilemma that is confronted when individuals or small organisations try to obtain funding to launch judicial review litigation. Community support and willingness may wane if there is widespread awareness of the prospect that crowd-funds might be used to pay for the government's legal expenses if litigation is unsuccessful, and an adverse costs order is granted. Although yet to receive much academic attention, there has been a ground-breaking analysis of crowd-funding in a public law context.[121] The author, Tomlinson, concludes:

> Crowd-funding can — in certain cases — solve the resource dilemma and be a key part of procuring reform via public interest litigation. However, it is far from a foolproof solution and there are multiple risks inherent in its use. The nature and possible extent of such risks are such that the crowd-funding of public interest litigation should be approached with great caution.[122]

VI Conclusion

While judicial review remains a crucial element of the Australian administrative justice system, it is generally accepted that access to justice

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118 Ibid 474.

119 Ibid. See also Kay Lauchland, 'Access to Justice: Lawyers' Costs When Acting Pro Bono in Public Interest Litigation' (2003) 9(1) *The National Legal Eagle* 1.

120 Productivity Commission, above n 112, 475.

121 Joe Tomlinson 'Crowd-funding and Public Interest Judicial Review: A Risky New Resource for Law Reform' (Working Paper for University of Oxford Centre for Socio-Legal Studies Discussion Group) (2018). https://ssrn.com/abstract=3106355. Permission to cite this work was gratefully received on 30 July 2018.

122 Ibid 2.

is best served by a complex and complimentary system of institutions, each with a unique role. This article has highlighted the role of tribunals in enhancing access to justice. Supporters of the existence of choice via diverse institutions within the Australian administrative law landscape include Sir Anthony Mason, who wrote that '[a]dministrative justice is now as important to the citizen as traditional justice at the hands of the orthodox court system'.[123] A growing body of academic, community organisation and expert opinion exists that adverse costs orders inhibit the ability of citizens to effectively challenge government decisions. Modern developments in the sector suggest that these issues are unlikely to dissipate and might, in fact, create new challenges for citizens.

Promising statutory reforms have been implemented in Queensland. Legislative initiatives to explicitly confer statutory powers on superior courts conducting judicial review that enhance discretion to adopt a context-based, individual approach in respect of costs are to be encouraged. The model should be actively considered in other jurisdictions. However, these provisions have yet to reach their full potential and the guidance from existing jurisprudence is piecemeal. Additionally, the provisions have been the subject of recommendations for refinement that remain unimplemented. There are also unimplemented recommendations for reform at the federal level too. Governments at both state and federal levels should be reminded of the importance of this issue and the need for reform recommendations to be implemented, in order to ensure the Australian law and justice system remains responsive and accessible.

Costs orders in legal proceedings can be an instrument of control, in a negative sense, over those citizens or groups who may consider speaking truth to power and challenging a government decision. Indeed, it is not just the actuality of a costs order at the conclusion of unsuccessful litigation that may deter potential litigants, but also the prospective worry of a potential adverse costs order. The imbalance of power between government and citizens is acute when access to financial and legal resources is at stake. Zuckerman's exhortation in the UK remains applicable to the Australian context too:

> No matter how fine the constitution, how advanced our private and public laws, we can derive little benefit from them if we cannot afford to seek court assistance when our legal rights are threatened or violated.[124]

The general rule on legal costs is capable of elegant and nuanced application to permit recognition of the unique circumstances that arise when the government is a party in litigation and the broader role performed by the courts when conducting judicial review in terms of public accountability over public power. Examples such as the statutory reform in

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[123] Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 130.

[124] Adrian Zuckerman, 'The Law's Disgrace', on UK Constitutional Law Association, *UK Constitutional Law Blog* (27th February 2017) <https://ukconstitutionallaw.org/2017/02/27/adrian-zuckerman-the-laws-disgrace/>.

the *JR Act Qld* and the differing approach to costs in merits review provide potential models for reform. Courts with the discretion to issue costs awards, whether relying on statutory or inherent powers, should be mindful of the desirability of law being predictable and seek to develop clear, uniform principles to provide guidance to prospective litigants. A contextual approach remains appropriate so that individual situations can be taken into consideration alongside the application of uniform principles.

In conclusion, although there have been promising reforms and merits review presents a definite option with a fundamentally opposite approach on costs there is still a pressing need for further reform in Australia. The justifications for reform on costs to enable judicial review proceedings can be found in the desire for public accountability of government — increasing access to justice and upholding the rule of law. Ultimately, costs reforms would increase the power of citizens to exercise a form of control over the government and thus bring more balance to the relationship between those parties.