Joint Submission to the Attorney-General's Department's review into an appropriate cost model for Commonwealth anti-discrimination laws

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Grata Fund is Australia's first specialist non-profit strategic litigation incubator and funder. We remove financial barriers to court, and support people and communities facing injustice to integrate litigation with movement-driven campaigns. We focus on supporting public interest cases in the areas of human rights, climate justice and democratic freedoms.

Grata Fund is a partner of the University of New South Wales Faculty of Law and Justice.

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The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

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Introduction

Grata Fund and the Public Interest Advocacy Centre (**PIAC**) welcome the opportunity to make a submission to the Attorney-General's Department's review into an appropriate cost model for Commonwealth anti-discrimination laws.

We make this joint submission based on our collective experience of working with numerous public interest litigants who have been deterred from the courts due to the significant risk of adverse costs orders.

We support the Government's commitment to strengthening anti-discrimination protections and ensuring that victim-survivors of sexual harassment and other forms of discrimination can assert their rights effectively. In particular, we welcome the recognition that costs reform has the potential to significantly improve access to justice for victim-survivors of discrimination, and ensure that matters of public importance reach the courts.

Adverse costs are a barrier to justice in federal discrimination proceedings

As detailed in the Attorney-General's Department's consultation paper (**Consultation Paper**), the status quo for costs in litigated discrimination claims acts as a barrier that prevents applicants from enforcing their rights through the courts. For federal discrimination matters lodged in the Federal Court and Federal Circuit and Family Court, courts will generally apply the usual rule where costs follow the event. This creates significant uncertainty for applicants, and for many, the risk of an adverse costs order is the single largest barrier to pursuing and litigating a claim. The costs risk posed by proceeding, even with a meritorious claim, can be simply too great to overcome.[1] In many instances, applicants are left with little choice but to accept unsatisfactory settlement offers that do not adequately compensate them or address the discriminatory practices underlying their claim.

Of the alternative costs models that have been proposed, we submit that hard costs neutrality, soft costs neutrality and applicant choice approaches do not adequately remedy the systemic power imbalances that exist between parties in discrimination matters, and the significant financial risk borne by applicants when commencing

[1] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation* (Report, 25 March 2022) 90.

litigation. In order for federal discrimination law to operate effectively and enable victim-survivors of discrimination to access the courts to vindicate their rights, costs reform needs to go further.

Our recommendation: the equal access model

We recommend that the 'equal access' asymmetrical costs model be adopted in all federal discrimination proceedings.

The equal access model proposes to amend the *Australian Human Rights Commission Act 1986* (Cth) (**the AHRC Act**) to remove the costs risk for applicants in discrimination and harassment matters so they can take meritorious cases to court with the confidence that, even if they happen to lose, they will not be subject to an adverse cost order.

Under this model:

- Applicants will generally not be liable for adverse costs, except where vexatious claims are made, or an applicant's unreasonable conduct in the course of proceedings has caused the other party to incur costs;
- Where an applicant is successful and the court has found that a respondent has engaged in discriminatory conduct or sexual harassment, the respondent will be liable to pay the applicant's costs; and
- Where an applicant is unsuccessful, each party will bear their own costs.

This model recognises and seeks to remedy the significant inequality in power and resources that often exists between applicants and respondents in discrimination and harassment matters of all kinds. It not only ensures greater access to justice for marginalised communities, but also encourages more discrimination matters of public interest and value to be brought before the courts for judicial consideration. Increased judicial consideration of meritorious matters has the ability to contribute to better up-front compliance with the law in all areas of public life where discrimination and harassment may occur.

The equal access model would also ensure that applicants can continue to secure solicitors and counsel who are willing to act on a 'no-win no-fee' basis, as the applicant's legal team will recoup their costs if the case is successful. This will increase access to justice for victim-survivors of discrimination and harassment.

Under both the hard and soft costs neutrality models in comparison, many applicants will be limited to representing themselves or finding pro bono legal

assistance, in the absence of any guarantee that their legal costs will be recoverable if their case is successful. Obtaining appropriate pro bono legal assistance can be difficult and time consuming, and is often dependent on the resources of pro bono legal service providers at the relevant time. The availability of pro bono assistance from commercial law firms may also be limited if the respondent is a large corporation or government agency, as some firms will be conflicted out if they act for the respondent in other matters. Applicants should not need to face these challenges in accessing legal representation.

Where a court has found that a respondent has unlawfully discriminated against or sexually harassed an applicant, our view is that the respondent should not be excused from paying the applicant's costs. Under the equal access model, people and organisations that are found to have engaged in unlawful discrimination will have to pay the applicant's legal costs. This could also have a wider normative impact, in line with the purposes of the legislation and Respect@Work reforms, by encouraging potential respondents to take active steps to ensure that discrimination does not occur in their operations and, where it does occur, to make reasonable settlement offers early on.

As acknowledged in the Consultation Paper, this model is not new. It has already been adopted for whistleblowers under the *Corporations Act 2001* (Cth) at section 1317AH, the *Public Interest Disclosure Act 2013* (Cth) at section 18, and the *Taxation Administration Act 1953* (Cth) at section 14ZZZC. In introducing the change to the *Corporations Act*, Parliament recognised that:[2]

> Legal costs can be prohibitive to any person seeking compensation for damage, and the risk of being ordered to pay the costs of other parties to the proceedings may deter whistleblowers and other victims of victimisation from bringing the matter to court.
>
> The new law addresses this by protecting victims from an award of costs against them in court proceedings seeking compensation except in limited circumstances.

We submit that these same principles should apply to discrimination matters. In the same way that the public interest is served when whistleblowers come forward with concerns about corporate misconduct and breaches of the law, the public interest is also served when victim-survivors of unlawful discrimination exercise their rights and take steps to ensure that the discrimination is publicly censured and stopped.

This is especially important as the federal anti-discrimination system relies on the

[2] Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth), 44.

willingness of individual victim-survivors to act and enforce their rights and reduce harassment and discrimination in public life, a benefit which is ultimately enjoyed by the wider community. This is an extraordinary burden for individual victim-survivors to bear, particularly as we know that harassment and discrimination disproportionately affect people experiencing social and economic disadvantage.

The equal access model seeks to remedy this imbalance for the benefit of victim-survivors of unlawful discrimination, and society as a whole. The system must do more to support the individuals taking action to vindicate their rights, a process which ultimately furthers Parliament's aim of eliminating discrimination. In order for federal anti-discrimination legislation to be effective and enforceable, costs risks should not be a barrier preventing applicants from bringing their meritorious discrimination claims to court.

Equal access will not encourage more unmeritorious complaints

The concern that an equal access model will encourage more unmeritorious discrimination complaints misunderstands the way in which a litigated claim fits within the broader infrastructure of the federal anti-discrimination system. There are several non-costs-related safeguards that currently prevent vexatious and even unmeritorious complainants from reaching the courts. These procedural safeguards will continue to operate effectively, even if the existing costs regime is replaced with the equal access model.

For example, all complainants must begin by lodging a complaint with the Australian Human Rights Commission (**the Commission**). For a complaint to be valid, it must be 'reasonably arguable' that the alleged acts, omissions or practices the subject of the complaint are unlawful discrimination (section 46P(1A)).

Complaints will generally then be referred to the President of the Commission for inquiry. The President has a discretionary power to terminate a complaint on various grounds under section 46PH(1) of the AHRC Act, including if they consider that the alleged acts or omissions do not constitute unlawful discrimination, if they are satisfied that the complaint does not warrant further inquiry, or if another more appropriate remedy is available to the affected person.

Further, the President has a mandatory duty under sections 46PH(1B) and (1C) to terminate complaints that are trivial, vexatious, misconceived or lacking in substance, and complaints where there is no reasonable prospect that the Federal

Court or Federal Circuit and Family Court would find that unlawful discrimination had occurred.

If a complaint is terminated on any of these grounds, the applicant must seek leave from the court in order to bring an application to the Federal Court or Federal Circuit and Family Court. A complaint that is unmeritorious, vexatious or lacking in substance is very unlikely to be granted leave.

If an equal access model is introduced, these provisions will continue to ensure that unmeritorious complaints do not progress through the Commission and court system.

It is worth noting that an applicant does not require leave if their complaint is terminated on the basis that the President is satisfied it involves a matter of sufficient public importance that it should be considered by the court, or on the basis that there was no reasonable prospect that the matter could be settled by conciliation. It is unlikely that complaints terminated on these exceptional grounds would be unmeritorious.

Finally, under the equal access model, courts will retain a discretion to order costs against an applicant that has brought a vexatious claim, or where an applicant's unreasonable[3] conduct in the course of proceedings has caused the other party to incur costs. This provides an important safeguard against unmeritorious complaints.

Equal access will not place an unfair burden on respondents

Respondents will not be unfairly burdened by the introduction of an equal access model.

We note that under each of the other models proposed in this consultation, if an applicant is unsuccessful, a respondent would typically be required to bear their own costs.[4] That is, there is generally little difference between the proposed models for unsuccessful claims.

[3] We suggest that it may be appropriate to prescribe certain conduct that will or will not be considered unreasonable under an equal access model. For example, rejecting a Calderbank offer should not in itself be considered unreasonable and deprive an applicant of their costs protection. The tactical use of Calderbank offers by respondents in an equal access model has the potential to re-create the cost risks and chilling effects that these reforms seek to address. Consideration should be given as to how to limit or eliminate their use entirely.

[4] This is the default position under each of the hard and soft costs neutrality models, and applies in the applicant choice model where the applicant chooses the hard costs neutrality option.

The difference between these models is primarily where the applicant is successful: the equal access model ensures that applicants do not bear the cost of enforcing their rights where respondents are found to have broken the law. In bearing their own costs, corporate respondents will also continue to be able to claim their legal costs as tax deductions. Most corporate respondents will also retain the ability to fund their legal expenses through public liability and other insurance policies, an option that is not available to applicants.

The Consultation Paper suggests that the equal access model means increased exposure to the risk of an adverse costs order for respondents, and diminished capacity for respondents to secure legal representation on a conditional costs basis.[5] We submit both propositions are unfounded.

First, the equal access model does not increase respondents' exposure to the risk of an adverse costs order in comparison to the current 'costs follow the event' model. It is the same level of adverse costs exposure for respondents. From a business and insurance risk perspective, there is no change from the status quo.

Second, in our experience, respondents are not commonly represented on a conditional costs basis. We would expect the number of respondents represented on this basis to be minimal, if they exist at all.

As observed in the Consultation Paper, the equal access model seeks to "level the playing field" for applicants when it comes to enforcing their rights under federal anti-discrimination law. This model focuses on opening up the courts by remedying the challenges faced by meritorious applicants in managing costs risk and accessing legal representation, rather than by imposing a disadvantage on respondents. We submit that the equal access model strikes an appropriate balance between the rights of applicants and respondents within the broader purpose and context of federal anti-discrimination protections.

Further information on the equal access model is also contained in the **enclosed** Grata Fund report: *The Impossible Choice: losing the family home or pursuing justice - the cost of litigation in Australia*.

[5] Consultation Paper, 29.

The other proposed models will not increase access to justice

Aside from the equal access model, the Consultation Paper identified three alternative options for reform, referred to as the hard costs neutrality model, the soft costs neutrality model and the applicant choice model. We submit that each of these alternative proposals will not achieve the Government's stated goal of increasing access to justice in federal discrimination and sexual harassment matters.

Hard costs neutrality model

Under a hard costs neutrality model, parties would bear their own costs, subject only to the court's discretion to award costs against a party if that party has acted vexatiously or unreasonably. While this model offers the benefit of significant costs certainty for both applicants and respondents, we submit that this benefit is outweighed by the difficulty that applicants will face in securing legal representation and the likely reinforcement of power imbalances between parties.

Currently, many victim-survivors of discrimination rely on barristers and solicitors to assist them on a conditional cost or 'no-win, no-fee' basis, which allows their costs to be recovered from an unsuccessful respondent. Under a hard costs neutrality model, applicants will generally be limited to engaging pro bono legal representation or must be prepared to pay their own legal fees out of any damages they are awarded, the quantum of which is notoriously low.[6] The difficulty of finding legal teams willing to assist on a nonrecoverable costs basis is already faced by applicants in proceedings under the *Fair Work Act 2009* (Cth) and in Administrative Appeals Tribunal proceedings under the *National Disability Insurance Scheme Act 2013* (Cth).

We expect many applicants in these circumstances would be unable to secure representation at all. Others might be able to find, for instance, solicitors who are willing to act for them pro bono, but have difficulty finding barristers with the necessary skills and experience in the complex area of discrimination law. Additionally, applicants are likely to face significant challenges in funding

[6] See, for example, Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation* (Report, 25 March 2022) 94; Beth Gaze, 'Damages for Discrimination: Compensating denial of a human right' (2013) 116 *Precedent* 20, 22: 'The majority of awards [in discrimination cases] are under $10,000, with many around $1,000-2,000. In the lifetime of anti-discrimination law in Australia, very few total awards have been over $50,000…'.

disbursements such as fees for expert witnesses, which are an increasingly vital and costly part of discrimination and sexual harassment litigation.[7] These factors are likely to force applicants in this model to forgo pursuing meritorious claims, or to run them at a serious disadvantage as compared to well-resourced respondents.

While respondents must also be prepared to bear their own costs, this will not materially impact their ability to engage legal representation. Legal teams generally do not act for respondents on conditional cost or 'no-win, no-fee' bases, so respondents will likely be able to retain the legal representation of their choice to defend claims as they always have.

Indeed, respondents stand to benefit under the hard costs neutrality model relative to the status quo, because they will generally not have to pay an applicant's costs even if they are found to have broken the law.

A hard costs neutrality model may also create an incentive for respondents to prolong proceedings, short of vexatious conduct, with a view to exhausting the resources of the applicant.

The model may therefore reinforce the structural power imbalances that often exist between victim-survivors and perpetrators in discrimination proceedings.

On balance, this model will offer some level of costs certainty to both applicants and respondents, but will unjustifiably increase other barriers to justice for applicants by limiting their ability to secure legal representation, heightening the risk that they will be left out of pocket even if they are successful in their discrimination claim, and reinforcing any dynamics of resource inequality between parties.

We further note that if this model were to be adopted, the above factors can be expected to lead to a dramatic increase in demand for pro bono and publicly funded legal assistance for victim-survivors of discrimination and sexual harassment. The Government would need to invest in a substantial and effective manner to provide this assistance, such as by large targeted grants of funding to community legal centres. Failure to provide this support would quickly overwhelm existing services, deny justice to applicants, and run counter to the purpose of the intended reforms.

[7] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation* (Report, 25 March 2022) 91.

Soft costs neutrality model

The soft costs neutrality model, as framed in the Government's Respect at Work Bill 2022, also proposes to have parties bear their own costs by default. However, this default position would be subject to a broader court discretion to award costs where this would be in the interests of justice, with reference to a range of statutory criteria.

While this model seeks to provide some level of protection against a costs award and leaves open the possibility that a successful party will be able to recover their costs at the end of proceedings, we submit that it will not offer sufficient reassurance to prospective applicants who are weighing up the risks of litigation and deciding whether or not to commence proceedings. Applicants will continue to bear significant costs risk throughout the entire proceedings, with any costs orders only being made at the very end of a case.

This risk will still have a substantial chilling effect. In our experience, the quantum of a possible adverse costs award is so high relative to most applicants' resources that they are unwilling to absorb even a lower level of risk. However, given that the default position is still one of costs neutrality, applicants will continue to face challenges in securing legal representation (as detailed above in relation to hard costs neutrality) while also being exposed to adverse costs risk over the course of the entire proceedings. That is, it carries the downsides of both the hard costs neutrality and the current 'costs follow the event' model.

Under this model, the financial risk will still be too great to bear for many applicants. To ameliorate the risk of a significant adverse costs order, applicants might seek to apply for a maximum costs order at the beginning of proceedings.[8] However, obtaining a maximum costs order in itself will not ensure a greater level of access to the courts. Maximum costs applications are complex, costly and resource-intensive, and our experience is that applicants will need to be legally represented to make these applications successfully. Even when maximum costs orders are made, the amounts of maximum costs ordered can remain prohibitively high, meaning that plaintiffs may still be unable to take their case forward without litigation funding, including obtaining an indemnity.

Where the applicant is ultimately unsuccessful and has a maximum costs order in place, the court may exercise its discretion to award costs notwithstanding the default position. In our experience, even in matters where a maximum costs order

[8] For example, under rule 40.51 of the *Federal Court Rules 2011* (Cth).

has been made, many applicants feel significant pressure to settle or abandon their claim due to the (even reduced) risk of a final unlimited costs order. The soft costs neutrality model would therefore do little to reduce the costs risk barriers that victim-survivors currently face when considering whether to enforce their rights through the courts.

We are also concerned that the soft costs neutrality model fails to provide adequate guidance to judges when exercising their discretion to award costs at the end of proceedings. The soft costs neutrality model bears some resemblance to the costs regime currently operating in state-based discrimination jurisdictions like New South Wales. Research has shown that while the NSW Civil and Administrative Tribunal retains a relatively wide discretion to award costs at the end of sexual harassment and discrimination proceedings with reference to factors including the relative strength of parties' claims and any other matters they consider relevant, parties have still been ordered to bear their own costs in 81% of cases.[9]

Without further refinement (such as the inclusion of more specific statutory direction that judges must follow when making costs orders "in the interests of justice" and an avenue to achieve greater costs certainty at an earlier stage of proceedings), we are concerned that the soft costs neutrality model will not produce costs outcomes that are more favourable to applicants, and will not therefore materially change the status quo in federal discrimination proceedings.

Applicant choice model

The Consultation Paper canvassed the applicant choice model as a final alternative. This model would require an applicant to choose between a 'costs follow the event' model or a hard costs neutrality model at the beginning of court proceedings. We submit that this model would unhelpfully complicate and increase the decision-making burden borne by prospective applicants, ultimately adding to the barriers they face when pursuing discrimination claims in the courts.

Under this model, applicants would be required to make a significant decision about costs models based on whatever advice and support, if any, they have at the specific point of filing. They would then be bound to this point-in-time decision, having committed to either bearing the risk of an adverse costs order from the outset in order to have a chance of recovering costs from the respondent at the end of proceedings ('costs follow the event'), or opting to bear their own costs (hard costs

[9] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation* (Report, 25 March 2022) 41.

neutrality), which would likely limit their options for securing legal representation and reduce the damages they actually take home after their lawyers are paid. In making this decision, an applicant has the difficult task of weighing up a range of factors including their own financial means, their costs risk appetite, legal advice about the strength of their claim, the availability of any indemnity/other litigation funding, the respondent's position, and the fee structure they have agreed to with their lawyer.

The realities of discrimination litigation mean that many of these factors are contingent on one another and can constantly shift, making it extremely challenging for a prospective applicant to make an informed choice before commencing proceedings. For example, the relative strengths and weaknesses of an applicant's claim often shift throughout proceedings and require ongoing assessment. If a respondent has failed to engage meaningfully in the conciliation process at the Commission, it may be very difficult for an applicant to ascertain the merit of their claim without having had the benefit of court-facilitated discovery processes.

It is therefore unlikely that an applicant of ordinary means would opt for a 'costs follow the event' approach unless they were very confident about their prospects of success before even filing their originating application. As detailed earlier in this submission, however, the alternative option of a hard costs neutrality approach would likely limit an applicant's ability to access legal representation and also shield unsuccessful respondents from an adverse costs order even if they are found to have broken the law.

We are especially concerned that unrepresented litigants would face acute challenges in navigating this choice. We expect that applicants would regularly face the difficult choice between abandoning their claim or proceeding without legal assistance, or accepting a substantial costs risk in order to obtain 'no-win, no-fee' representation. This could also in some cases lead to applicants feeling pressured by lawyers to accept a 'costs follow the event' approach, and could introduce serious ethical issues to the lawyer-client relationship.

Even if the applicant choice model was refined to incorporate a mechanism for flexibility throughout proceedings, this would add further complexity to the system for both applicants and respondents, and potentially cause further costs to be incurred by all parties.

Finally, we note that the costs options proposed under the applicant choice model are already available to applicants at the stage of choosing the forum within which to bring their harassment and discrimination claims. All state and territory-based tribunal jurisdictions currently apply some form of costs neutrality to discrimination

proceedings, while costs generally follow the event in federal discrimination proceedings. When it comes to workplace sexual harassment cases, applicants now have the option of bringing claims under the *Fair Work Act* which applies a hard costs neutrality model.

In this sense, applicants are already choosing between a 'costs follow the event' model and a costs neutrality approach when they elect the jurisdiction in which to pursue their claim. It is in this existing context that discrimination experts, practitioners, academics and community organisations have told the Government that the costs regimes in discrimination proceedings prevent victim-survivors from exercising their rights in court. Simply replicating this binary costs model choice at the federal level would therefore not go far enough to remedy the longstanding inequalities between parties in discrimination proceedings and improve access to justice for victim-survivors of discrimination.

Conclusion

For these reasons, Grata Fund and PIAC recommend that the equal access costs model be adopted in all federal discrimination proceedings. The alternative models would fail to achieve the Government's goal of opening up the courts and ensuring that people are able to enforce their rights to be free from harassment and discrimination.

This opportunity to reform the costs regime in federal anti-discrimination law is incredibly significant. We urge the Government to implement an equal access model to improve access to justice for victim-survivors of discrimination, and ensure that matters of public importance reach the courts.

We would welcome the opportunity to discuss our submission and proposal with the Attorney-General's Department.

THE IMPOSSIBLE CHOICE

Losing the family home or pursuing justice - the cost of litigation in Australia.

GRATA FUND

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About Grata Fund

Grata Fund is Australia's first specialist non-profit strategic litigation incubator and funder. Grata develops, funds, and builds sophisticated campaign architecture around high impact, strategic litigation brought by people and communities in Australia. We focus on communities, cases and campaigns that have the potential to break systemic gridlocks across human rights, climate justice and democratic freedoms.

We do this by removing the financial barriers that prevent test cases in the public interest from getting to court, for people or organisations who do not have the resources to fund litigation themselves. We specialise in granting recoverable adverse cost relief (guarantees) and disbursements (hard legal costs).

Grata Fund adopts a movement lawyering approach: working with communities, legal experts and advocacy partners on integrated litigation and campaign strategies that tackle injustice while centralising the voices of affected people.

For further information about Grata Fund visit www.gratafund.org.au.

Grata Fund is a partner of the University of New South Wales Faculty of Law and Justice

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Executive summary

All Australians should be able to use the courts to defend their rights. Taking legal action is one the most effective ways for ordinary people to hold governments and corporations accountable under the law. Landmark public interest cases in our history, including Mabo and Wik, demonstrate the power of the courts to right injustices.

Public interest cases are inherently risky. They often involve novel questions of law, or novel circumstances, requiring courts to deal with issues for the first time. Many countries recognise the importance of public interest cases, and limit the cost of bringing them. However, in Australia, the losing party in a case is usually required to pay the winning party's costs of the litigation, known as **adverse costs**. This can often be thousands, if not hundreds of thousands of dollars. The risk of having to pay adverse costs is a significant deterrent to public interest cases. It is estimated that the adverse costs risk deters 9 out of 10 people bringing meritorious public interest cases from going to court.

This adverse costs risk means that access to justice is determined by the plaintiff's bank balance rather than the merits and public interest importance of their case. This has a disproportionate impact on people seeking to defend their rights – for example, women in sexual harassment claims against employers, First Nations communities seeking justice against governments and mining companies, and children with disability seeking access to inclusive education.

The courts should not be the domain of the wealthy. The adverse costs system is in urgent need of reform, so our courts can hear - and decide - public interest cases without litigants fearing bankruptcy or the loss of what little assets they own.

In this report, prepared with the assistance of our colleagues across the not-for-profit sector and pro bono barristers, we examine the problems with the current adverse costs system in Australia, and make recommendations for reform.

Our key recommendation is to **introduce an Equal Access model**, which removes the adverse costs risk for people bringing public interest cases (applicants), except in limited circumstances. This would shift the financial burden of running public interest cases from the applicant to the respondent, who often has significant resources as a government or major corporation.

Where the applicant is successful however, the government or corporation being sued (the respondent) will still be liable to pay the applicant's costs. This is because respondents should not be excused from paying costs where they have been found by a court to have breached laws, including anti-discrimination laws or environmental protection laws, or where they have failed to meet statutory obligations.

This model is already in use in Australia for cases involving whistleblowers. It has also been introduced in the UK, Scotland and South Africa. In the US, a similar principle has been operating since 1978 in employment discrimination cases.

Australia has some of the highest financial barriers to public interest litigation in common law countries. It’s time we fixed this.

Adverse costs and the public interest

The courts are the third pillar of our democracy. Independent of government and parliament, the courts ensure that everyone is held accountable to the same standards and laws. All Australians should be able to use the courts to defend their rights. Often, where traditional advocacy tactics have failed to gain traction with decision-makers, strategic litigation is the only tool available to marginalised people to assert their rights. For every high-profile public interest legal case, such as *Mabo* and *Wik*, there are several smaller but important cases where the courts have helped to right injustices.

However, public interest litigants are increasingly being priced out of our legal system. In large part, this is because of the risk of adverse costs.

In Australia, the losing party in the case is usually required to pay the winning party's legal costs. This can often be thousands, if not hundreds of thousands of dollars. The risk of having to pay adverse costs is a significant deterrent to public interest cases, because most public interest litigants cannot afford to take on the risk of losing, even if they have a strong case. Because litigation is inherently unpredictable, it is difficult to estimate the financial risk involved when commencing litigation.

Adverse costs are a critical barrier to public interest litigation in Australia. For example, Justice Connect estimates that 9 out of 10 meritorious cases do not make it to court because of the adverse costs risk.[1]

The unfortunate effect is that access to justice for many is determined by their bank balance and assets, rather than the merits and importance of their case. Even when they do decide to bring litigation, plaintiffs with strong claims may decide to settle their case to avoid the adverse costs risk. Settlement means that public interest matters – especially strong cases – are not heard publicly or determined by a court. This means precedents are not set, and there is no declaration of rights by the court, which prevents systemic change from being achieved.

The ability to bring a public interest case to court should not just be the domain of the wealthy. The adverse costs system is in urgent need of reform, so our courts can hear - and decide - public interest cases without litigants fearing bankruptcy or the loss of what little assets they own.

This report, prepared with the assistance of our colleagues across the not-for-profit sector and pro bono barristers, outlines:

1. How the adverse cost system is a barrier for public interest litigants;
2. Existing options to limit adverse costs in Australia; and
3. Options for reform of the adverse costs system in Australia.

Our strong recommendation is for the introduction of an **Equal Access model**, where people bringing public interest cases (applicants) would not be liable for adverse costs if their case is unsuccessful, except in limited circumstances. If they are successful, applicants would retain the ability to seek costs from the respondent. This is a model that has been introduced successfully internationally, including in the UK, as well as in domestic legislation for whistleblowers. We recommend expanding this model to all public interest proceedings.

Case study: Over-policing of Aboriginal youth

In 2014, the Public Interest Advocacy Centre (PIAC) brought a case against NSW Police on behalf of an Aboriginal young man, who alleged assault by the police.

The young man alleged that when he was 14 years old, two police officers abducted him from a skate park in Wellington, NSW, and took him to two separate locations where they assaulted and intimidated him. The officers were subsequently charged with a range of criminal offences in relation to the incident, but never convicted.

The proceeding was ultimately settled with NSW Police. It could only be brought because a litigation funder, IMF Bentham, provided a $100,000 adverse costs indemnity to the client.

Adverse costs are a barrier to justice

Public interest litigation enables plaintiffs to challenge unlawful government and corporate actions, and to ensure powerful institutions comply with the law. It also ensures that actions taken by the government are consistent with our Constitution.

In this section, we outline the concepts of public interest and adverse costs, and argue that the current adverse costs framework is harmful to the public interest.

What is the public interest?

The term ‘public interest’ is widely used but does not have an overarching, substantive definition in law. The public interest, at its core, is about promoting the welfare of individuals and communities in society. As Kaye, Fullagar & Ormiston JJ noted in *DPP v Smith*:[2]

> The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals...

What is public interest will likely always involve a value judgment. For example, whether a case has been brought ‘in the public interest’ likely depends on the circumstances of the matter and on a person’s particular perspective.

To better understand the concept, it is helpful to explore what public interest is not. According to Chris Wheeler,[3] the public interest can be distinguished from:

- Private interests of a particular individual or individuals;
- Personal interests of public officials and decision-makers;
- Parochial interests, or interests of a small or narrowly defined group of people; and
- Partisan political interests.

The concept of 'public interest' directs consideration and action away from private, personal, parochial or partisan interests towards matters of broader societal concern.[4] Accordingly, public interest litigation involves 'proceedings where the benefits of a successful outcome extend beyond the parties and have positive consequences for a broader section of society'.[5]

In *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)*,[6] Lloyd J put forward five key factors in determining whether a case can be characterised as public interest litigation:[7]

- The public interest served by the litigation;
- Whether that interest is confined to a relatively small number of people in the immediate vicinity of a development, or whether the interest is wide;
- Whether the applicant sought to enforce public law obligations;
- Whether the prime motivation of the litigation is to uphold the public interest and the rule of law; and
- Whether the applicant has no pecuniary interest in the outcome of the proceedings.

The benefits of public interest litigation are numerous. For example, public interest cases:

- Can result in systemic change with benefits to a large section of Australian society;
- Encourage better government and corporate decision-making to avoid future litigation;
- Allow for public discussion and education of cultural changes needed, for example in the workplace;
- Allow for the development of the law;
- Allow for judicial interpretation and clarification of the law;
- Give voice to marginalised peoples;
- Lead to increased public confidence in the administration of the law;
- Provide impetus for reform to reduce future disputes; and
- Cement the role of the courts and the rule of law in our society.

What are adverse costs?

In Australian courts, the usual rule in civil proceedings is that 'costs follow the event'.[8] This means that the unsuccessful party in the litigation is usually required to pay the successful party's legal costs. We refer to these costs in this report as 'adverse costs'.

Courts have broad discretion when deciding whether to make adverse costs orders, and if so, the amount of adverse costs the losing party should pay and how that is determined.

The risk of having to pay adverse costs, and the potential size of those costs, is unpredictable at the start of litigation. This is for a number of reasons, including:

- The difficulty of predicting the likelihood of winning a case at the start of proceedings. Even cases that appear strong at the start may seem weaker or less predictable once the respondent's defence and evidence have been filed, documents have been discovered, or even where social and political circumstances change, such as where new laws are passed in the middle of proceedings;
- The size of the other side's legal costs, and therefore the size of the costs that might be ordered, can be difficult to predict. The size of costs will depend on how many lawyers the other side instructs, the size of their fees, and the time taken to prepare for hearing;
- The unpredictability around how proceedings will run – for example, whether confidentiality orders, strike-out applications and other interlocutory applications will be sought; and
- The discretion of the court as to how it will determine costs orders. For example, the court may decide to apportion costs where a party has only partially succeeded, or it may depart from the general rule where a party has acted unreasonably or has unnecessarily protracted the proceedings, or where the party is only nominally successful.

For individuals, cost orders may have devastating impacts, including bankruptcy and loss of assets like their residential homes.

Adverse costs in public interest litigation

In Australia, there is no blanket public interest exception to the risk of adverse costs. This means that in most jurisdictions across Australia, public interest litigants risk substantial adverse cost orders being made against them if they lose their case.

Public interest litigation is normally pursued against governments, or large corporations with significant resources that often claim their legal costs as a tax deduction. In these circumstances, people considering bringing a case must do so knowing that if they are unsuccessful, they face adverse costs potentially amounting to hundreds of thousands of dollars, depending on the nature and complexity of the litigation.

On the other hand, individuals generally have little to gain from running public interest litigation. For instance, compensation awarded in discrimination cases is notoriously low.[9] This discourages all but the most determined litigants from bringing public interest cases.

As noted by Justice Toohey:

> ....there is little point opening the doors of the Courts if litigants cannot afford to come in...the fear, if unsuccessful, of having to pay the costs of the other side...with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court....[10]

In Australia, many potential litigants abandon their claims due to the adverse costs risk. For example, in estimating the frequency with which adverse costs risks results in meritorious cases not being pursued, the Public Interest Law Clearing House (now Justice Connect) noted:

> This is especially the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a disadvantaged or marginalised applicant will pursue the test case.[11]

The Honourable Michael Kirby AC CMG noted the inherent difficulties adverse costs orders have on prospective public interest plaintiffs:

> If [the plaintiff] lose[s], will they generally suffer not only the disappointment in the case, but also the burden of a substantial costs order? Is this consequence justifiable where the private individual, or perhaps a small civil society organisation, takes on a minister or a governmental department or agency or a large corporation? If that is the risk that must be run by private litigants, who would be so bold as to put themselves in peril of the obligation to pay very large costs that are not incurred in taking a matter to court, especially if that matter proceeds to the appellate hierarchy with an ever-growing accumulation of potential costs burdens?[12]

Adverse costs orders make existing inequalities worse

There is an inherent power imbalance in public interest litigation. Those seeking to defend their rights are normally taking on more powerful institutions with greater resources at their disposal. Adverse costs orders make existing inequalities worse, because they are another barrier that already marginalised people have to overcome.

For example, First Nations people, seeking to protect their traditional lands, culture and community from developments like mining or gas projects, come up against multinational corporations or major Australian companies. These corporations can afford to brief large, expensive legal teams, substantially increasing the amount of adverse costs that the community could have to pay if their case is unsuccessful.

For First Nations communities already facing marginalisation and disadvantage, the risk of bankruptcy and further economic disadvantage is especially disempowering, and adds to the difficulties that First Nations people already face when undertaking legal action in a Western court system.

Refugees and asylum seekers face similar issues with adverse costs when considering whether to challenge their detention in court. If their case is unsuccessful, and they are unable to meet adverse cost orders, they will end up owing a debt to the Government and may be unable to obtain visas in future until those debts have been paid.[13]

Case study: adverse costs in federal discrimination proceedings

For federal discrimination matters lodged in the Federal Court and Federal Circuit and Family Court, the usual rule of costs follow the event applies. In adopting this rule for federal discrimination claims, it was considered that clients were more likely to receive legal representation, as the lawyers could have their costs reimbursed in a successful case.[14]

However, a study conducted by Gaze and Hunter highlights that the usual rule regarding costs was the factor that led most lawyers (both private and community legal centres) to "always advise their clients to settle if possible."[15] This was even more pronounced in CLC lawyers who were "much clearer about the need for clients to try to settle their cases if at all possible and avoid a hearing at which they would not be represented."[16]

A lawyer advising people with disabilities in a CLC, for example, indicated that under the usual rule in regard to costs, "even if the case had merit, the client must either have no assets, or have a better than reasonable prospect of success to go to hearing."[17]

Respondents also know that the risk of adverse costs means applicants are unlikely to take a matter to court, especially where the potential damages award is low. This means that respondents may offer no or very low compensation at conciliation.

Stakeholders have told Grata that many clients settle for much lower amounts than they would be rightly entitled to, in order to avoid the risk of losing and having to pay adverse costs.

There are few options to limit costs risks

Currently, our higher courts, including the High Court of Australia, the Federal Court of Australia and State and Territory Supreme Courts, generally apply the usual rule as to costs – that is, costs follow the event.[18] While judges in these courts generally have broad discretion in determining costs,[19] including to depart from the usual rule, they rarely do so. For further detail on cost rules across the country, see the **Appendix** to this report.

In this respect, the position in Australia lags those of comparable jurisdictions. Jurisdictions such as Canada, the UK and US have models which provide greater protection against adverse costs to public interest litigants. Indeed, Canadian courts have introduced advance costs orders, where public interest litigants can, in rare cases, have their legal costs paid for by the respondent during the course of proceedings, to ensure the proceeding is not discontinued for lack of resources. These alternative models are discussed later in this report.

In this section, we outline the limited avenues that currently exist to limit costs risks for public interest litigants in Australia, and look at previous inquiries which have called for adverse costs reform.

Existing options for limiting adverse costs

Australian courts are empowered with broad discretion to determine costs. In *Ruddock v Vadarlis (No 2)*, Black CJ and French J stated:[20]

> The power of the Court [in awarding costs] is not fettered by any stated legislative presumption about the manner of its exercise. That is consistent with the long standing authority of the House of Lords in *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 that "the Court has an absolute and unfettered discretion to award or not to award [costs]": per Viscount Cave LC; Viscount Dunedin, Lord Phillimore and Lord Carson agreeing (at 811).

Notwithstanding this broad discretion, the position remains that there is no general 'public interest' exception to the general rule that costs follow the event.[21]

There are two primary ways in which public interest considerations may be factored in, when exercising the costs discretion.

Courts can make **no costs orders** which displace the ordinary rule entirely and no costs are awarded in favour of either party. This means each party pays for their own costs, regardless of the outcome. The court will exercise its discretion on costs 'having regard to all the circumstances of the case'.[22] That is, public interest considerations alone will not generally justify the making of no costs orders.

In rare cases, the *Land and Environment Court Rules 2007* (NSW) provide that public interest considerations alone may enliven the Land and Environment Court's discretion not to make costs orders against the losing applicant.[23] But this is a high threshold, requiring the public interest consideration alone to be 'of such moment or magnitude as to ground that justification'. In *Anderson v Minister for Planning (No 2)*, Biscoe J gave an example of such a case as one brought to 'stop or limit the development of one of the last habitats of an endangered species'.[24] In all other cases, it would be required to establish additional special circumstances alongside the public interest consideration to enliven the discretion.

The difficulty in obtaining no costs orders for public interest litigation is compounded by the fact that costs orders are generally made only after the conclusion of proceedings.[25] Given the broad discretion for judges, there can be no expectation or assumption that they will be made. This means that no costs orders provide minimal reassurance to a potential litigant who must decide whether bringing a public interest case is worth the risk of having to pay adverse costs.

Maximum costs orders, otherwise known as protective costs orders or cost-capping orders, can provide some certainty of costs risks at earlier stages of proceedings. These orders operate to 'cap' the potential amount of liability of a party to the other party's legal costs. These orders are generally sought early in proceedings and, if successful, can reduce the costs risk and provide some level of certainty.

Maximum costs orders were first introduced in Australia by the Federal Court due to concern by the Court that:[26]

> the cost of litigation, particularly for persons of ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice.
>
> A deterrent to the assertion or defence of rights in civil litigation is a fear of the ultimate exposure in terms of the legal costs to which an unsuccessful party may be subjected.

However, maximum costs orders remain discretionary and rarely made. Factors that courts will take into account in deciding whether to make such an order include the complexity and length of the matter, whether the applicant seeks damages (and if so, the amount of damages sought), the costs likely to be incurred by the parties, and the public interest elements raised.[27] These factors have been codified in Victoria, following recommendations by the Department of Justice and Regulation.[28]

Public interest considerations are only one of a number of factors to be considered and are not sufficient in and of themselves to determine a maximum costs order application.

Even where maximum costs orders are made, the amount set is often prohibitively high, meaning plaintiffs may still be unable to take their case forward without financial backing. These orders also do not cover events in the proceedings not contemplated by the parties at the time proceedings are filed – for instance, any interlocutory applications, including where it is necessary to amend pleadings or challenge applications for suppression orders made by the respondents.

The fact that cost-capping orders remain discretionary, rare and may, in any case, exceed the applicant's financial means, provides little comfort for prospective public interest plaintiffs.

This is especially so because of the costs associated with the *application* for maximum costs orders. Grata has been told by stakeholders that the application for a maximum costs order is often more detailed and substantive than the initiating application. It can also take up to six months for a court to make a decision on a cost-capping application, in which time costs to the client continue to run. This results in a risk to the client even before any substantive steps are taken in the proceeding, and means clients also require adverse costs indemnities to cover this initial application.

In some cases, public interest litigants may be able to agree a costs cap with the other party, or agree that each party will bear their own costs. However, this is dependent on the will of the respondent to engage in cost-capping negotiations and agreements in each particular case. Respondents will often decline to limit their recoverable costs for commercial or strategic reasons.

Public interest litigants may be able to secure litigation funding, via an adverse cost indemnity, to protect them against an adverse cost order should they be unsuccessful in their case. However, the availability of litigation funding for public interest cases is limited. Grata Fund is the first specialist not-for-profit litigation funder in Australia, and the need for litigation funding far outweighs the amount of funding available. We note commercial funders are often unable to fund public interest litigation where there is no financial return.

Finally, After The Event (**ATE**) insurance has gained some traction in Australia in recent years. ATE insurance is a type of insurance policy that covers exposure to adverse costs orders. This indemnifies claimants for adverse costs up to the policy amount, and may provide an alternative form of support for public interest litigants. However, the ATE insurance market in Australia remains small, meaning premiums are high. The development of the ATE insurance market is not a solution to the adverse costs issue - indeed it demonstrates the need for reform to better protect public interest litigants.

Examples of maximum costs orders

There are varying attitudes of the judiciary towards cost capping applications, which increase the uncertainty of how these applications are considered. In the case of *Hudson v Australian Broadcasting Corporation*,[29] the Public Interest Advocacy Centre's client sought a cost cap of $15,000. However, while it was agreed that there was a public interest element in the case, there was a dispute between the parties about whether the proceedings were likely to give rise to complex issues. Instead of determining the orders based on the complexity, the Court sought to strike a balance in relation to the application and decided instead, on its own motion (neither party made submissions to the effect), that costs should be assessed according to the Federal Circuit Court's costs scale, and that the cost cap should match the estimated costs of the proceedings under that scale, being $40,000. This is a departure from the usual basis the court would consider a cost cap application.

In the case of *Haraksin v Murrays Australia Ltd* [2010] FCA 1133, the applicant filed a disability discrimination complaint against the respondent in its operation of a coach service between Sydney and Canberra. The applicant had a partial indemnity from Legal Aid, which protected her against an adverse cost order of up to $15,000, and applied for a maximum costs order up to that amount. However, the Court decided that a maximum costs order should be set at $25,000, meaning Ms Haraksin would be personally liable for another $10,000.

In the NSW Land and Environment Court decision of *Nerringillah Community Association Inc v Laundry Number Pty Ltd* (2018) 236 LGERA 102, Pepper J set the maximum costs order at $40,000, notwithstanding the applicant had sought a maximum costs order for $20,000. In doing so, her Honour noted that there was no suggestion that the additional $20,000 would 'stifle the litigation'.[30]

Recommended reforms have not been implemented

Numerous inquiries looking into access to justice issues in Australia have identified adverse cost reform as necessary to remove barriers to public interest litigation and open up access to the courts.

In its 1995 *Costs Shifting - Who Pays for Litigation* report, the Australian Law Reform Commission (**ALRC**) made concrete recommendations to reform the adverse cost system for public interest matters. The ALRC noted that the significant benefits of public interest litigation meant that it should not be impeded by the adverse cost rules.[31] The ALRC recommended legislation be introduced that would allow the courts to make a *public interest costs order* upon the establishment of certain criteria.[32] The ALRC considered that courts were already well-placed to manage any potential increase in vexatious litigation and delays, in response to scepticism and concern regarding vexatious claims and delays.[33] The ALRC also recommended an objects clause be introduced to the legislation, stating that the object of such orders is to 'assist the initiation and conduct of litigation that affects the community or a significant sector of the community or will develop the law'. [34]

These public interest cost orders could, depending on the circumstances of the parties, include orders that:[35]

- Costs follow the event;
- Each party bear their own costs; or
- The party applying for the order is not liable for the other party's costs, or is only liable to pay a specified proportion of the other party's costs, but be able to recover all or part of their costs.

The Government did not implement these recommendations.

In 2008, the Victorian Law Reform Commission recommended that there should be an express legislative provision empowering courts to protect public interest litigants from adverse costs.[36]

In 2009, the Senate Legal and Constitutional Affairs Committee's *Inquiry into Access to Justice* noted that the submissions it received generally expressed the view that public interest litigants with meritorious claims should be relieved of the risk of an adverse costs order.[37] Notwithstanding this, it decided there was no need for any reforms in respect of adverse costs in public interest litigation.[38]

In 2013, the New South Wales Law Reform Commission concluded that it was desirable to legislate to make explicit the power of New South Wales courts to provide public interest litigants protection from adverse costs. It recommended the adoption of a rule based on rule 4.2 of the *Land and Environment Court Rules 2007* (NSW),[39] as that rule is described above. This recommendation has not been adopted.

In 2014, the Productivity Commission's *Inquiry into Access to Justice Arrangements* recognised that adverse costs orders deter public interest litigation, which results in a loss of the potential benefits to the wider community.[40] Specifically, while the decision not to pursue the public interest case may be in the best financial interests of the prospective litigant if they are concerned about the costs risk, it 'leaves society as a whole worse off'.[41]

To address this issue, the Productivity Commission recommended that Courts should grant protective costs orders to parties involved in matters deemed to be of public interest that, in the absence of such an order, would not proceed to hearing.[42] Courts should formally recognise and outline the criteria used to assess whether a protective cost order is applicable. The Government did not adopt this recommendation.

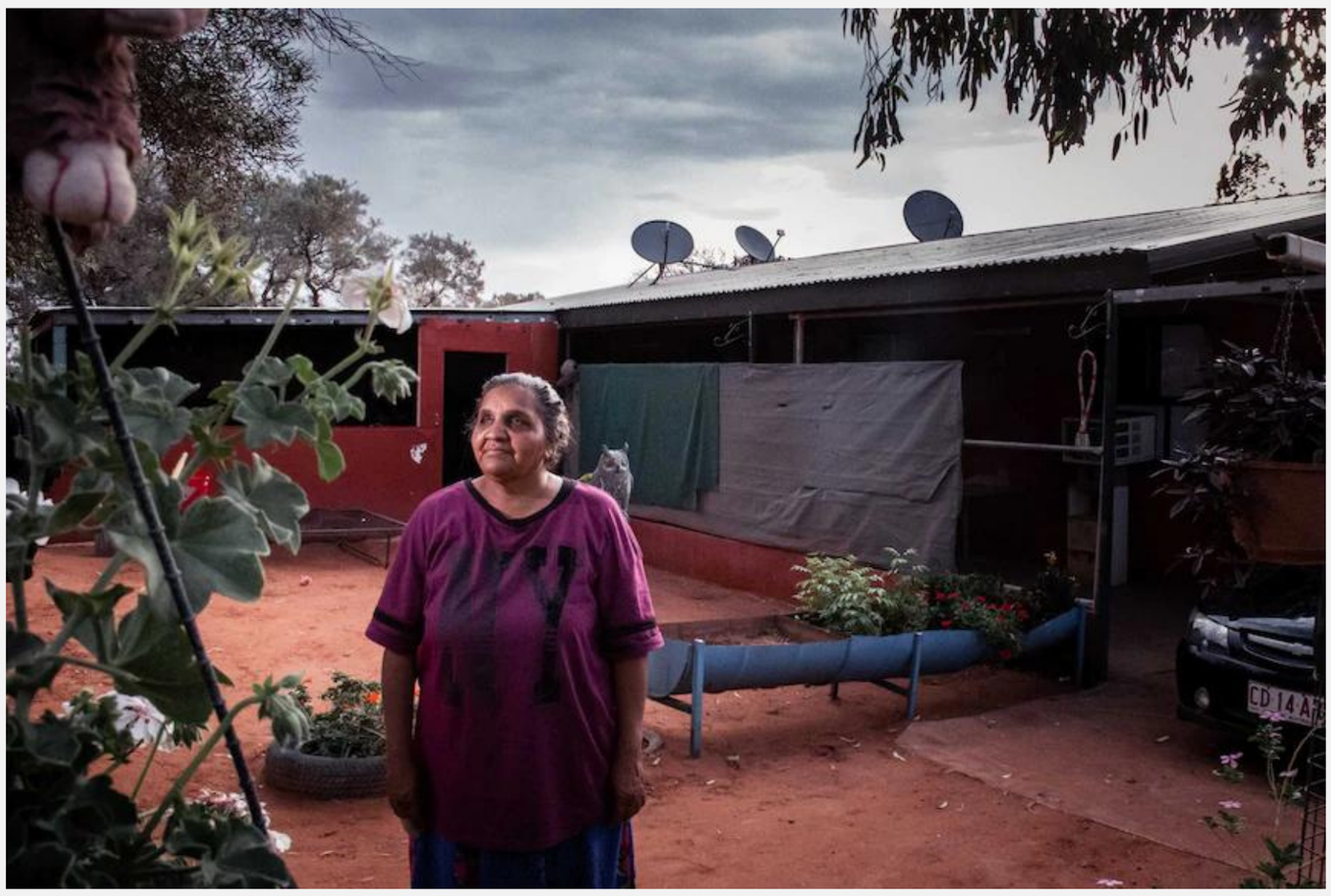
The Productivity Commission also considered the viability of establishing a public interest litigation fund, but ultimately recommended against establishing such an entity given the set-up and maintenance expense in the context of scarce resources across the sector.[43]

Most recently, the Australian Human Rights Commission's *Respect@Work* Report considered the risk of adverse costs orders in the context of sexual harassment matters, noting the 'negative impact on access to justice, particularly for vulnerable members of the community'.[44] It recommended that a costs protection provision similar to s 570 of the *Fair Work Act 2009* (Cth) be inserted in the *Australian Human Rights Commission Act 1986* (Cth).[45] The *Fair Work Act* provision is discussed further in the next section of this report. The Australian Government is currently consulting in relation to this recommendation.

In short, while there have been numerous inquiries touching on adverse costs reform and the public interest, progress remains glacial.

Case study: Santa Teresa community's fight for housing rights

Jasmine Cavanagh, an Eastern Arrernte woman and young mother living in Santa Teresa, NT, and 69 other households in her community have been fighting for 600 urgent repairs to their rental properties since 2015. Many houses posed serious health and safety risks to the residents: some were structurally unsound, or were without running water, sewerage and ventilation, despite the temperatures regularly hovering above 40 degrees in summer and below zero degrees in winter.



With the support of Grata and lawyers from Australian Lawyers for Remote Aboriginal Rights, they challenged their landlord, the Northern Territory government, for failing to maintain their housing. In February 2022, the Northern Territory's Court of Appeal confirmed that the NT Government must provide the community with decent housing, and rejected the NT Government's third attempt to water down its obligations. The matter is currently awaiting special leave determination in the High Court. Grata provided an adverse costs indemnity, without which the community would not have been able to pursue their case.

How to reform the adverse cost system

There are several options for reform of the adverse cost system, some of which have been considered by the various inquiries. In our view, the approach adopted by the UK in personal injury claims, and South Africa in constitutional claims, is the preferred model and should be implemented here. This approach, which we refer to as an Equal Access model, shifts the burden of costs risks from the plaintiff to the defendant. This approach is not new to Australia: it has already been adopted in some domestic legislative frameworks.

In this section, we outline the Equal Access model, as well as examine alternative approaches – some of which would also improve access to justice and should be implemented alongside the Equal Access model.

Introducing an Equal Access model

The Equal Access model

The Equal Access model, also known as qualified one-way costs shifting or 'QOCS', works by removing the adverse costs risk for applicants in public interest proceedings except in limited circumstances.

Under this model, where an applicant is unsuccessful in their proceedings, each party will bear their own costs, except in limited circumstances. These circumstances are where vexatious claims are made by the applicant, the proceedings are an abuse of process, or where the applicant's conduct is otherwise unreasonable and has caused the other party to incur costs.

Where the applicant is successful however, the respondent will be liable to pay the applicant's costs.

This model should be applied in public interest proceedings, which should be defined under statute. It may be that a certification process is required at the first opportunity following the filing of proceedings, for the court to determine whether the proceeding is one which falls within the definition of 'public interest'. This provides certainty to all parties at the early stages of litigation as to whether the applicant is subject to adverse costs risk.

This model removes the adverse costs risk for applicants in all circumstances, other than those limited exceptions. It not only ensures greater access to justice for marginalised communities, but also encourages greater public interest litigation, leading to the benefits described in this report.

As we discuss below, this model has already been adopted both internationally and in some domestic circumstances. Ultimately the decision as to whether a proceeding is a 'public interest' one which enlivens this model is a matter for the court.

Respondents should not be excused from paying costs where they have been found by a court to have breached laws, including human rights and anti-discrimination laws or environmental protection laws, or where they have failed to meet statutory obligations. When it comes to human rights cases in the public interest, such as anti-discrimination proceedings, this costs model will act as an incentive to change workplace and societal cultures that permit discriminatory conduct. Similarly, it will ensure environmental protection laws are upheld in practice, not just on paper.

The model also ensures that applicants can continue to secure solicitors and counsel who are willing to act on a no win-no fee basis, as the legal team will recoup their costs if the case is successful. Applicants in human rights and environmental protection matters are particularly reliant on 'no win-no fee' representation because these sorts of matters are rarely funded by commercial litigation funders due to the low quantum of damages available. Legal aid is generally also not available for these types of cases.

The Equal Access model in Australian law

An Equal Access model has already been adopted domestically for whistleblowers under the *Corporations Act 2001* (Cth). Section 1317AH was inserted into the Corporations Act by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth). That provision requires that where a claimant applies to the court for compensation in relation to their detrimental treatment as a result of whistleblowing activities, that claimant must not be ordered to pay the costs of the other party unless they have instituted proceedings vexatiously or their unreasonable behaviour caused the other party to incur costs. It does not exclude the respondent's liability (or the liability of any other party) to pay the claimant's costs – that remains a matter for the court's discretion.

In introducing this change to the usual costs rule, Parliament recognised that:[46]

Legal costs can be prohibitive to any person seeking compensation for damage, and the risk of being ordered to pay the costs of other parties to the proceedings may deter whistleblowers and other victims of victimisation from bringing the matter to court.

The new law addresses this by protecting victims from an award of costs against them in court proceedings seeking compensation except in limited circumstances.

An identical provision was inserted into the *Taxation Administration Act 1953* (Cth) at s 14ZZZC.

This model is also consistent with the recommendation made by the ALRC in its 1995 report, where it recommended that public interest cost orders should allow courts to order that the applicant is not liable for the respondent's costs, but be able to recover all or part of their costs.

The Equal Access model in other jurisdictions

Internationally, the Equal Access model has been adopted in several jurisdictions.

Since 1 April 2013, this model has been applied to personal injury claims in the UK, where it is referred to as 'qualified one-way costs shifting'.[47] In short, claimants in personal injury cases who are unsuccessful will not be liable for the defendant's costs, except in a limited set of circumstances.

Similar provisions in respect of personal injury claims were also introduced in Scotland in 2021.[48]

South Africa has adopted this model in constitutional challenges. Specifically, in *Biowatch Trust v Registrar Genetic Resources & Others* (2009), the Constitutional Court of South Africa affirmed the general principle that an unsuccessful litigant in constitutional litigation against the state ought not to be ordered to pay costs, with each side bearing its own costs, unless the claim brought was frivolous, vexatious, or where there was conduct on the part of the litigant that deserves censure.[49] Where the state is unsuccessful, it should pay the costs of the other side.[50]

The Constitutional Court noted that the rationale for this rule is three-fold. First, it diminishes the 'chilling effect' that adverse costs orders have on parties with meritorious claims seeking to assert their constitutional rights.[51] Secondly, it recognises the inherent public interest in constitutional litigation, since a successful outcome will affect the rights of all those in similar situations.[52] Finally, the rule acknowledges the state's primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution.[53]

The Constitutional Court also set out criteria for determining whether to apply this rule in constitutional litigation. Specifically, the following issues should be considered:

- Whether the litigation raises genuine and substantive constitutional issues;[54]
- The character of the litigation and not the nature of the parties or the causes they advance;[55] and
- The extent of public controversy in the outcome of the litigation.[56]

Notably, the Constitutional Court also acknowledged the importance of this rule for public interest groups given the vital role they play in the development of the Constitutional Court's jurisprudence.[57] However, the Constitutional Court held that these groups will not be privileged by the rule simply because they are acting in the public interest, as the focus must remain on the character of the litigation.[58]

While the adoption of this model in South Africa is limited to constitutional challenges, the South African Constitution is a much more rights-focused constitution compared to Australia's, containing within it a Bill of Rights.[59] This means that the Equal Access model in South Africa applies broadly to rights-based public interest proceedings involving the Bill of Rights.

In the US, the Supreme Court decision of *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*,[60] has long held that in relation to employment discrimination claims, successful plaintiffs are generally awarded costs but will only be subject to adverse costs where the Court has found the plaintiff's action was frivolous, unreasonable or without foundation.

Similarly, the State of California has an established system where the plaintiff in public interest litigation can recover costs if successful.[61] Here, the *Code of Civil Procedure* provides that a court may award attorneys' fees to a successful party 'against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting public interest' provided three criteria are satisfied. These include whether:

- A significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large class of persons;
- The necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; and
- Such fees should not in the interest of justice be paid out of the recovery, if any.

Our recommendation for reform

In our view, the Equal Access model should be introduced for public interest proceedings. This model is not new, unique or controversial in jurisdictions where it has been introduced, including domestically. This has been the position in the US for employment discrimination claims since at least 1978, and has already been introduced domestically for whistleblower protections.

A clear starting point for the introduction of the Equal Access model is in the High Court's original jurisdiction and environmental protection and anti-discrimination legislation. This is because these provide a clear starting point for the development of case law in relation to the Equal Access model. These are matters which are more likely to raise public interest issues, being challenges based on the Constitution or matters raising fundamental human rights or environmental concerns.

Case study: How the adverse costs system shuts down criticism

Public interest cases often involve challenges to government decisions that affect a private company. For example, Traditional Owners or a local community group might seek judicial review of a state government's decision to approve a coal mine. In these instances, the company in question will normally be a party to or seek to join the proceedings - dramatically increasing the adverse costs risk.

Cases involving the coal company Adani Australia - recently renamed Bravus - are a good illustration of the life-changing impact of adverse costs. Following unsuccessful legal challenges to Adani's Carmichael mine, a Traditional Owner has been bankrupted and a community group entered voluntary liquidation. The eye-watering sums involved have the potential effect of scaring off potential litigants, regardless of how strong or important their case might be.

Adrian Burragubba, a Wangan and Jagalingou Traditional Owner, has been fighting the Adani Carmichael coal mine, which is located on his ancestral lands. Mr Burragubba and four other Traditional Owners took Adani to court, arguing that the company's Indigenous Land Use Agreement (ILUA) was invalid. When he appealed his case to the full bench of the Federal Court, Adani asked the court to order the plaintiffs to provide $160,000 in security for costs - an upfront payment before the case could proceed. This was reduced by the Court to $50,000 - at which point Grata Fund stepped in and agreed to cover it to ensure the case went ahead.

Mr Burragubba's case was dismissed in July 2019, on the basis that once the ILUA was registered it was valid according to the legal requirements of the Native Title Act.

Case study: How the adverse costs system shuts down criticism (continued)

Adani pursued Mr Burragubba for over $600,000 in adverse costs, and when he was unable to pay, it bankrupted him. “They’ve taken everything else,” Mr Burragubba said later. “They took our land. They’re trying to destroy our culture. They’ve taken away our heritage. And then they expect us to pay for standing up for our rights.”

The company took a similar approach to a local community group, Whitsunday Residents Against Dumping (WRAD). WRAD, which was concerned about the impact on the Great Barrier Reef, sought judicial review of the Queensland government’s decision to approve Adani’s application to expand its Abbot Point coal export terminal. The case was unsuccessful, and in August 2017, Adani obtained a successful costs order against WRAD. That same month, the group went into voluntary liquidation.

Implementing an Equal Access rule will enable access to justice by ensuring that an unsuccessful litigant will not have to pay costs, as opposed to an ordinary maximum costs order which may only cap the costs recoverable. It will also facilitate public interest litigants' access to legal representation, as counsel and legal teams who often act pro bono will be able to recover their costs if the case is successful.

Further reforms to ensure the courts are open to all

While our preferred approach to adverse costs reform for public interest proceedings is the introduction of the Equal Access model, we recognise that other reforms would also improve access to justice, some of which should be implemented alongside the Equal Access model. These alternatives have been proposed in other inquiries and we explore them in this section.

Reform of maximum costs orders

Maximum cost orders remain a key positive development in Australia to protect public interest litigants from adverse costs risk and allow them to pursue their matters. Many previous inquiries and reform recommendations have focused on the need for greater clarity in the application of maximum costs orders.

However, particularly at the federal level, the granting of maximum costs orders has been limited, and the factors are extremely restrictive.

For example, a maximum cost order has never been granted in the High Court of Australia's appellate or original jurisdiction. As the cases illustrate, having a personal financial interest in the outcome of a case is a relevant factor in deciding whether proceedings were brought in the public interest.[62] The relevance of personal financial interest in the success of applications for maximum costs orders may deter applicants from seeking damages in public interest proceedings. This should not be the case: applicants alleging sexual harassment or racial discrimination against their employer, for instance, should not forfeit their claim for damages in the hopes that may reduce their adverse costs risk.

Additionally, as maximum costs orders are rarely sought, there is limited knowledge of their existence or operation in the legal sector in Australia.[63] In Grata's experience, the rare granting of maximum costs orders, differences in the exercise of judicial discretion, and uncertainty around process or delays caused to litigation in having a maximum costs order application determined have led to some public interest litigants deciding not to apply for maximum costs orders at all. This is on top of the costs associated with the *application* for maximum costs orders itself which, as discussed above, act as a further disincentive.

Where maximum costs orders are granted, they are often granted at prohibitively high amounts, which place public interest litigants at risk of not being able to meet the capped adverse cost order if they are unsuccessful in their case, or not being able to secure litigation funding to cover the adverse cost order.

A distinction has also been drawn between the maximum costs order rules in the Federal jurisdiction and equivalent rules in NSW and Victoria, in relation to whether maximum costs orders made must apply the cap equally to all parties to the proceeding. The maximum costs order rule in the Federal Court provides that 'A party may apply to the Court for an order specifying the maximum costs as between party and party that may be recovered for the proceeding.'[64] Similar rules apply in the Federal Circuit and Family Court.[65] The Federal Court has taken the approach that this rule requires the cap to be applied equally to all parties. There is no discretion for the court to order otherwise. For example, a successful application for a cost cap of $20,000 would fix the amount recoverable by *any* successful party at $20,000.[66]

In contrast, the provisions in NSW and Victoria do not impose such a restriction. In NSW, the rule provides that 'The court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered *by one party from another*'.[67] In Victoria, the provision does not include reference to the parties, only referring to the power to make an order to 'fix or cap recoverable costs in advance'.[68] The NSW and Victorian courts have interpreted the respective provisions to mean that it may be available to the court to only cap the costs recoverable by one party, for instance, the defendant, but not by the plaintiff.[69] The question is 'where the financial burden should lie'.[70]

We support the adoption of the NSW and Victorian approaches, which would allow the court to determine whether, in a particular proceeding, the cost cap should apply to all parties or only to the respondent(s). The imbalance in financial positions between parties in public interest proceedings should not mean that pro bono counsel and solicitors are restricted in the amount of legal costs they are able to recover in successful public interest litigation. Removing this restriction will encourage the provision of pro bono services by lawyers.

We recommend that reform to maximum costs orders should be made to:

- Codify the factors for determining such orders in the court rules and civil procedure legislation of all jurisdictions, similar to the Victorian codification in s 65C(2A) of the *Civil Procedure Act 2010* (Vic);
- Remove as a relevant factor whether the applicant is seeking damages or other financial compensation;
- Remove the constraint at the Federal Court and Federal Circuit and Family Court which requires maximum costs orders to be applied equally to all parties; and
- Streamline the application process for maximum costs orders to minimise costs and delay involved in this interlocutory procedure.

Judicial commissions, bar associations and law societies should also educate the legal sector in relation to the availability and use of maximum costs orders.

Case study: fighting for accessible technology

In 2018, PIAC represented Graeme Innes and Nadia Mattiazzo in their challenge to the accessibility of the Commonwealth Bank of Australia's (CBA) touch-screen 'Albert' EFTPOS machines for people who are blind or vision-impared. The matter settled, with CBA agreeing to introduce a range of changes to ensure better accessibility of the Albert machines and committing to accessibility in future product development.

In settling the claim, CBA acknowledged the difficulty Mr Innes, Ms Mattiazzo and other Australians who are blind or vision-impaired have experienced using Albert's touchscreen technology to enter their PINs.

Grata Fund indemnified both Mr Innes and Ms Mattiazzo, whose cases would not have been able to proceed otherwise. In Nadia's case, CBA agreed to the maximum costs order she had proposed, and the Court made orders by consent setting that cap.

Amending the model litigant obligations

The Commonwealth Government is obliged, under the *Legal Services Directions 2017* (Cth), to behave as a model litigant in the conduct of litigation. While this obligation does not prevent the Commonwealth from seeking to recover costs, the Office of Legal Services Coordination at the Commonwealth Attorney-General's Department has issued guidance in relation to factors that Commonwealth parties should consider when seeking to recover costs.

The guidance begins with two presumptions, being:

- The Commonwealth may seek costs where there is a legal basis for doing so; and
- The Commonwealth may enforce any costs order in its favour.

We recommend inserting a carve-out to the first presumption, in respect of public interest litigation. That is, the presumption should read '*Except in cases involving the public interest*, the Commonwealth may seek costs where there is a legal basis for doing so'. The guidance should then contain a non-exhaustive list of factors which the Commonwealth should take into account in deciding whether the matter is a public interest matter.

The guidance should also be amended to ensure this approach is taken where applications for maximum costs orders have been made. In these circumstances, the Commonwealth should consider whether the matter is a public interest matter, and if so, consent to a maximum cost order being set at a reasonable amount for the applicant.

Most States and Territories have similar model litigant obligations, largely based on the Commonwealth model, with the exception of Western Australia. We recommend that this change be adopted by all States and Territories as well.

Parties to bear their own costs

One proposal has been to alter the usual costs rule to require that parties bear their own costs, either in relation to certain types of proceedings or in relation to public interest proceedings more broadly. This would be consistent with the common law position in the US, whereby parties usually bear their own legal costs unless there is a statutory carveout.

This proposal differs from the existing discretion for courts to decide not to order costs at the end of proceedings, including the discretion under r 4.2 of the *Land and Environment Court Rules 2007* (NSW) not to order costs in public interest proceedings. The existing discretion is broad and is generally exercised at the end of proceedings. This proposal would instead carve out certain types of proceedings from the usual costs rule altogether.

Australia already has no-costs jurisdictions carved out by statute. An example of this is the statutory carve out of matters arising under the *Fair Work Act 2009* (Cth) at the conciliation stage (s 611) and in the courts (s 570). The usual rule that costs follow the event does not apply in these matters. The parties are to bear their own costs unless one of the following exceptions applies:

- the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
- the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
- the court is satisfied of both of the following:
  - the party unreasonably refused to participate in a matter before the Fair Work Commission;
  - the matter arose from the same facts as the proceedings.[71]

The ability of the courts to award costs in workplace relations matters has been limited since 1904 and is part of the policy of discouraging legalism in proceedings before industrial courts.[72]

In *Ryan v Primesafe*,[73] Mortimer J described s 570 as being an 'access to justice' provision, to ensure 'the spectre of costs being awarded if a claim is unsuccessful does not loom so large in the mind of potential applicants (in particular, in my opinion) that those with genuine grievances and an arguable evidentiary and legal basis for them are put off commencing or continuing proceedings.'[74]

The Australian Human Rights Commission has also recommended the *Fair Work Act* approach be applied to claims brought under the *Australian Human Rights Commission Act 1986* (Cth).[75]

However, in Grata's discussions with barristers and community legal centres, concerns were raised that this model will create new access to justice issues in the form of disincentivising pro bono work.

Currently, public interest litigants rely on barristers and solicitors to assist on a conditional cost basis or no win, no fee model, where their costs can be recovered from either the damages received by litigants or can be sought from the respondent. Expanding this model will reduce the capacity for such services, especially in complex public interest cases which may run for years. These complex cases would essentially require barristers to work for free for lengthy periods of time. The difficulty of finding legal teams willing to assist on a non-recoverable basis is already faced by applicants in proceedings under the Fair Work Act and Administrative Appeals Tribunal proceedings under the *National Disability Insurance Scheme Act 2013* (Cth).

For these reasons, we believe expanding this approach would have a limited impact on improving access to justice and public interest litigation and is not the most desirable option.

Advance costs orders

The Supreme Court of Canada has recognised the availability of 'advance costs' or 'interim costs' in rare public interest cases. Advance costs refer to the jurisdiction of the courts to grant costs to a litigant prior to the final determination of the case. Such awards 'forestall the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed.'[76]

In essence, these orders require the respondent to pay the applicant's costs at an interim stage of the proceeding, so that the case may proceed.

In *British Columbia (Minister of Forests) v Okanagan Indian Band*, the Supreme Court found that the power to award such costs is inherent in the nature of the equitable jurisdiction as to costs, and the court's broad discretion extends to determining *when* and by *whom* costs are to be paid.[77]

There are strict conditions for the award of advance costs when it comes to public interest litigation:[78]

- Impecuniosity: the party seeking the order genuinely cannot afford to pay for the litigation, and the litigation would be unable to proceed if the order were not made;
- Meritorious case: the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means; and
- Public interest: the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

If all three conditions are met, courts will still need to exercise discretion to determine whether it is appropriate to order the impecunious party's costs be paid prospectively.

The Supreme Court had occasion to revisit *Okanagan* in the recent decision of *Anderson v Alberta*. The Court affirmed the decision in *Okanagan*, further holding that in relation to First Nation governments in Canada, the impecuniosity requirement may be met despite that party having access to resources, if those resources are required to meet other pressing needs.[79] In doing so, the Supreme Court reiterated that:[80]

> Access to justice is an important policy consideration underlying advance costs awards where a litigant seeks a determination of their constitutional rights and other issues of broad public significance, but lacks the financial resources to proceed.

Where such orders are made, there must be oversight by the court in the form of a definite structure, setting limits on the rates and hours of legal services and caps on the award at an appropriate global amount.[81]

We consider that this approach should be examined by law reform commissions in the Australian context, especially in relation to matters of significant public interest, including the rights of First Nations people.

Government-funded adverse costs fund - The Justice Fund

In 2008, the Victorian Law Reform Commission (**VLRC**) recommended the establishment of a new funding body, 'the Justice Fund', to provide:

- Financial assistance to parties with meritorious civil claims;
- Indemnity for adverse costs orders; and
- Indemnity for any order for security of costs.[82]

It was proposed that the Justice Fund be initially funded by government, and eventually become self-funding through a statutory entitlement to a percentage share of the proceeds of litigation, recovery of costs from parties against whom the funded party obtains an order of costs, receipt of funds by order of the court where cy-près remedies[83] are awarded, and through entering into joint venture arrangements with commercial litigation funders.

Grata Fund supports the establishment of a Justice Fund in principle, to increase access to justice. If established, the Justice Fund eligibility criteria for funding should prioritise funding for public interest matters.

However, we note that given the vast extent of unmet need for adverse cost protection and litigation funding, any fund is unlikely to ever meet the extent of need in the community unless Australia's adverse cost system is adequately reformed for public interest matters.

Extending legal aid indemnities for public interest matters

Some Legal Aid legislation exempt legally aided persons from liability to pay adverse cost orders in specific circumstances. For example, Victoria Legal Aid may provide adverse cost indemnities to assisted persons if the proceedings are a 'test case'.[84] Similarly, Legal Aid NSW generally pays for adverse costs awarded against legally aided persons up to $15,000.[85] In NSW, there is also a general statutory protection to legally aided persons against paying costs. This means the maximum amount recoverable by the other party in these cases would be $15,000, as recovered from Legal Aid NSW.[86]

However, both Victoria Legal Aid and Legal Aid NSW apply a strict means and merits test in processing applications from public interest plaintiffs, which may consequently leave many ineligible for assistance. The limit of $15,000 for adverse costs protection is also very low. In the case of *Haraksin v Murrays Australia Ltd*,[87] which was brought in the Federal Court, the applicant had to seek a maximum costs order to protect herself against the risk of adverse costs orders exceeding $15,000. The Court in that case made orders setting the maximum costs at $25,000, meaning the legal aid indemnity did not cover the full costs risk.

Due to the difficulty of plaintiffs in public interest matters accessing legal aid indemnities and the low amount of costs protection, we recommend that:

- Existing legal aid indemnities be extended, to impose less stringent means tests to ensure a greater number of public interest litigants can access indemnities; and
- Statutory limits to the recovery of costs against legally aided persons be introduced in other States and Territories, similar to the position in NSW.

Removing tax deductibility of legal fees for corporations where they engage in unreasonable conduct

Currently, public interest litigants pursuing civil claims are unable to claim their legal costs as a tax deduction, in contrast to corporations, who are able to claim the costs of litigation if it occurs in the course of conducting their business.

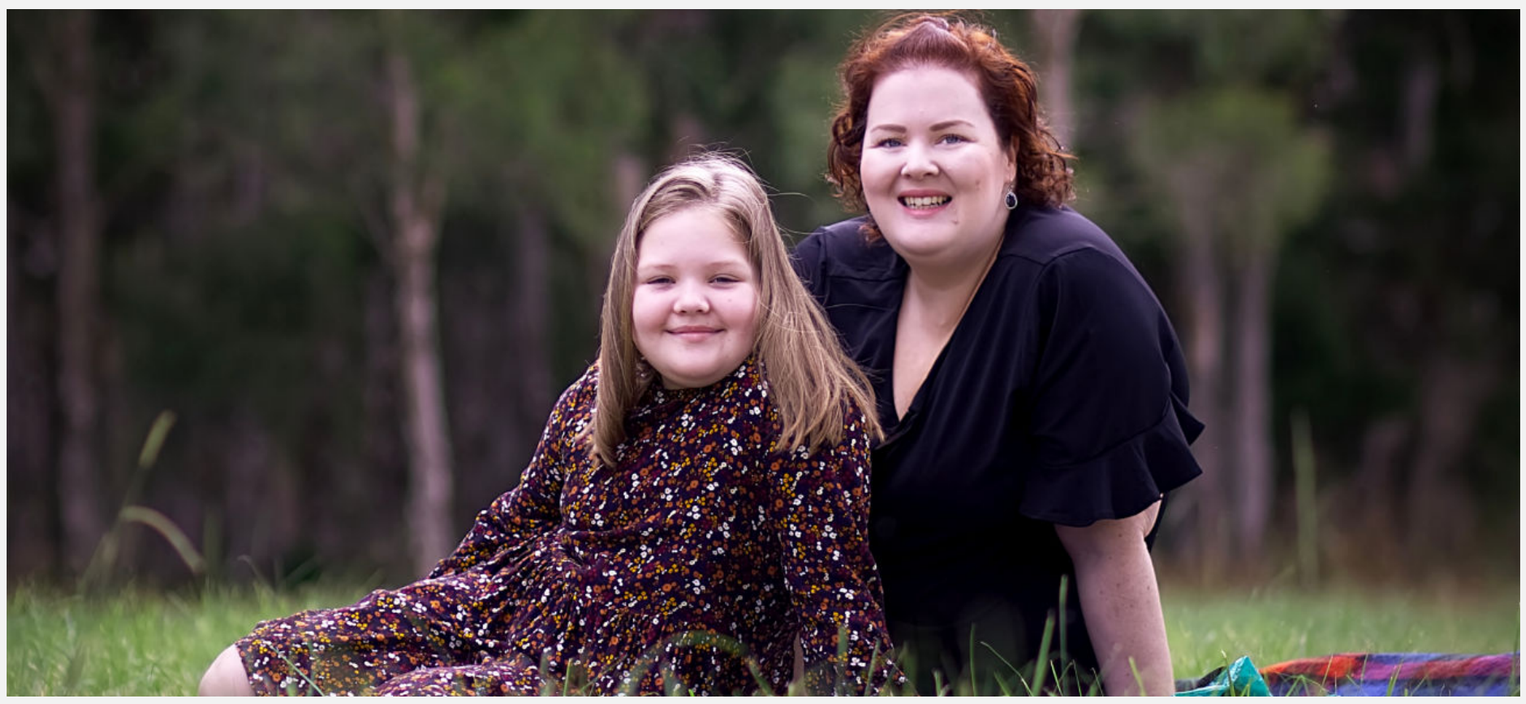
This means that while public interest litigants often face bankruptcy in order to pursue meritorious matters, well-resourced corporations can deduct legal fees from otherwise taxable income, often where they have engaged in the wrongful act that is being challenged through litigation. This causes another power imbalance in litigation.

We recommend reforms to ensure that tax deductibility of legal costs are not available to corporations where they have engaged in unreasonable conduct in the course of litigation, as determined by the court.

While many of the options explored above represent alternative approaches to mitigating adverse costs risk in Australia, this proposal is an additional and complementary measure that would improve equity in the apportionment of legal costs. We recommend reforms to the tax deductibility of legal fees are implemented in addition to the Equal Access costs model.

Case study: Catherine and her family fight for her right to education

In 2020, PIAC represented an 8-year-old autistic girl in a disability discrimination claim, after she was expelled from her primary school in Year 2. The case alleged that the school discriminated against Catherine because of her autism, by banning her from the school bus and by expelling her from school.



The case was ultimately settled with agreement from the school to implement disability awareness training and undertake a comprehensive review of its behaviour management policy.

Catherine and her mother, Hannah, would not have been able to file the case if PIAC and Grata Fund had not agreed to provide them with adverse cost protection.

Adverse costs reform is vital to democracy

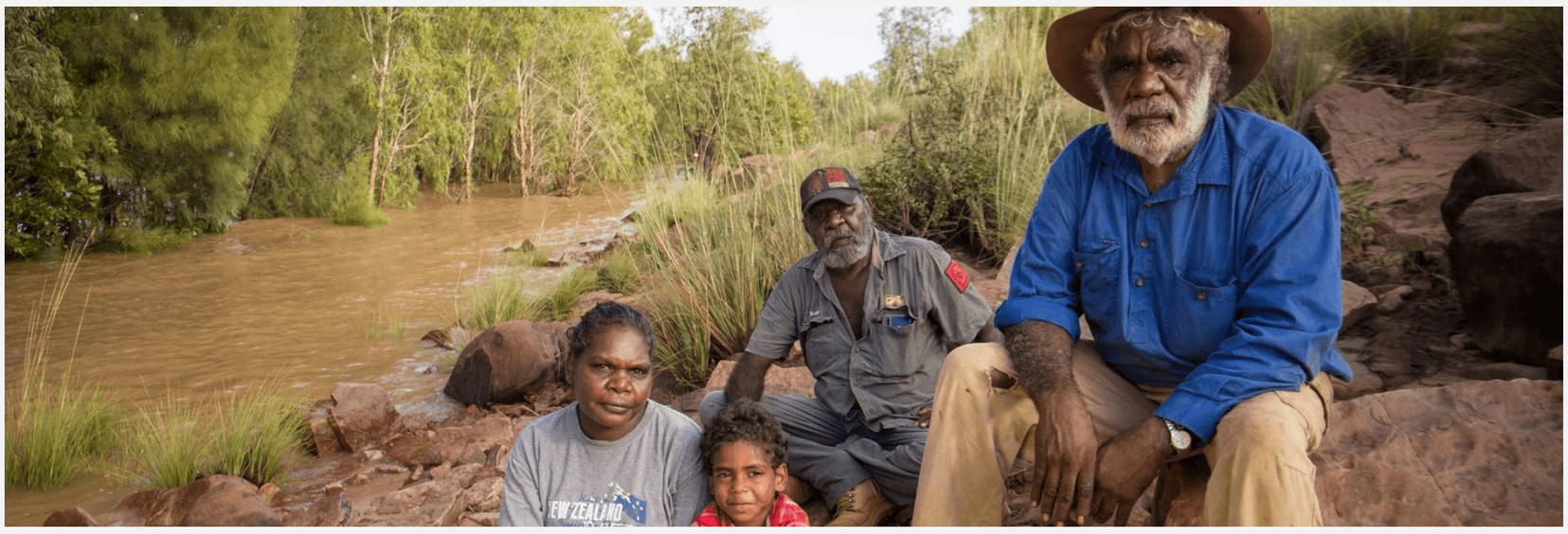
As detailed in this report, adverse costs pose a major barrier to public interest litigation. Due to their prohibitive character, adverse costs thwart the pursuit of meritorious claims, and the rule of law is circumvented due to hip-pocket limitations.

The ability to challenge government and corporate decision-making is vital to our democracy. Public interest cases have significant benefits for the community, including through developing and clarifying the law, increasing public confidence in our legal system, and catalysing systemic change that impacts marginalised communities.

We consider adverse costs reform is now critical. Comparative jurisdictions have introduced, and continue to build on, alternative costs models for public interest litigation. It's time for Australian governments to commit to adverse costs reform to ensure public interest cases can be brought, and courts can fulfil their role in our democracy.

Case study: Traditional Owners challenging the McArthur River Mine

Grata is currently supporting Gudanji woman and traditional owner Josie Davey Green, Garawa elder Jack Green, and the Environment Centre NT who are challenging the NT government in relation to Glencore's McArthur River zinc lead mine.



The open cut mine - which is situated on the traditional lands of the Gudanji people - is polluting the lands and waters of the Garawa, Gudanji, Marra and Yanyuwa peoples. The plaintiffs, represented by the Environmental Defenders Office, have launched a judicial review challenge of the NT government's decision to reduce the amount of money Glencore needs to put aside to clean up the site.

It would not have been possible for the Traditional Owners to go up against the resources of the NT Government without adverse costs protection.

Appendix

Cost rules across Australia at a glance: Federal [88]

Court	Power to determine costs	Application of rule in public interest cases
High Court of Australia	Rule 50.01 of the *High Court Rules 2004* (Cth) provides that the power to determine costs are in the full discretion of the Court.[89]	While the High Court has made a no cost order in the determination of proceedings before it, it has not made a protective costs order to date. **No cost orders** The High Court is willing to take the 'public interest' into account when making costs orders in matters that are brought in its original jurisdiction and on appeal. *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 228 CLR 651 demonstrated that the High Court will consider making a no costs order when it concerns the determination of a public interest question.[90] *Oshlack v Richmond River Council* (1998) concerned whether a public interest element within a case could allow a departure from the usual rule. The High Court upheld the decision of the trial judge and indicated that it was open to the judge to look to the purpose of the litigation in their exercise of their judicial discretion on costs.[91]

Federal Court of Australia	Section 43 of the *Federal Court of Australia Act 1973* (Cth) provides that the Court or Judge has the discretion to award costs in all proceedings before the Court, other than proceedings in respect of which that or any other Act provides that costs must not be awarded.[92] The Federal Court has the power to make no adverse cost orders.[93] The Federal Court has the explicit power to determine the maximum costs in a proceeding.[94] If a maximum costs order is granted, the costs of proceedings will be capped from the beginning of the case. Though no adverse costs orders and protective costs orders are available, there is no legislative requirement on the Federal Court to account for the public interest when making cost orders.	**No cost orders** *Ruddock v Vardalis (No 2)* (2001) is the leading case for the granting of an order for no costs at the conclusion of proceedings.[95] However, there are no general principles providing guidance on when the Federal Court should depart from the usual rule.[96] The existence of a public interest element alone has not been strong enough grounds to grant a no adverse costs order. **Protective Cost Orders (or Maximum Cost Orders)** A determinative set of factors for the court to consider in making a PCO does not exist. In *Corcoran v Virgin Blue Airlines Pty Ltd* Bennett J identified the following factors as relevant in exercising the Federal Court's discretion in regard to PCOs: (a) the timing of the application; (b) the complexity of the factual or legal issues raised in the proceeding; (c) the amount of damages the applicant seeks to recover and the extent of any other remedies sought; (d) whether the applicant's claims are arguable and not frivolous or vexatious; (e) the undesirability of forcing the applicant to abandon the proceedings; (f) whether there is a public interest element to the case; (g) the costs likely to be incurred by the parties in the preparation for, and hearing of, the matter; and

Federal Court of Australia (continued).		(h) whether the party opposing the making of the order has been uncooperative and/or has delayed the proceedings, and (i) any other matters which may go towards establishing that there should be a departure in advance from the usual rule.[97] *Houston v New South Wales* [2020] FCA 502, in an interlocutory application for a maximum cost order, considered the purpose of r 40.51. Griffiths J suggested the rule is not designed to limit a party's exposure to an adverse cost order in lengthy commercial litigation but to facilitate 'access to justice, public interest, and a desire to limit the costs of all parties, particularly in less complex and shorter cases.'[98] The application was ultimately unsuccessful and the litigation was not found to be in the public interest.

Cost rules across Australia at a glance: State and Territory Supreme Courts

Court	Power to determine costs	Application of rule in public interest cases
Supreme Court of the Australian Capital Territory	Section 15 of the *Australian Capital Territory Supreme Court Act 1933* (Cth) provides that the Court or Judge has the discretion to award costs in all matters brought before the Court.[99] The ACT Supreme Court has the power to order costs at any stage of the proceeding.[100] In theory, the ACTSC has the power to order a protective costs order or no cost order, but the discretion to has rarely, if ever, been exercised. [101]	The ACT Supreme Court has found that the usual rule, that costs follow the event, should be followed unless there are 'special circumstances' warranting a departure.[102] The ACTSC has acknowledged the decision in *Oshlack v Richmond River Council* [1993] HCA 11, in finding that "special circumstances" may be established where a case has been brought to forward the public interest.[103] **No cost orders** *Kent v Cavanagh* (1973) 1 ACTR 43 was one of the early, and few cases where the court found that the legal issue to be debated was sufficiently important to the greater public, and the Government's access to public funds so 'unlimited', that it would be excessive and not in the public interest to require a plaintiff to pay costs. In this case, the Court made no order as to costs.

Supreme Court of NSW	Section 98 of the *Civil Procedure Act 2005* (NSW) ('**CPA**') provides that subject to the rules of the Court, costs are at the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent costs are to be paid.[104] The 'usual rule' is captured in rule 42.1 of the UCPR, which states that in the ordinary course of proceedings, costs follow the event. It has been held that "the circumstances in which a court may depart from the usual costs rule are varied, but there must be something out of the ordinary in the case to justify the departure."[105] **Protective Costs Orders** Rule 42.4 of the UCPR empowers NSW courts with a qualified discretion to set a maximum amount on the costs that can be recovered by one party to proceedings from another. There is no statutory requirement to take into account the public interest in making a protective cost order. Section 60 of the CPA provides direction as to the proportionality of costs: 'in any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is so proportionate to the importance and complexity of the subject-matter in dispute.	**No cost orders** It appears that the NSW Supreme Court has not granted a no cost order at the conclusion of any public interest proceedings. **Protective Cost Orders** *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] was the first case that granted a PCO in NSW.[106] It remains the leading case that established the factors used to decide whether a PCO should be granted. The full list of factors considered by Justice Pain at first instance, derived from the Corcoran Factors, included: (a) the timing of the application; (b) whether the claim appears arguable; (c) whether the matter constitutes public interest litigation; (d) whether the plaintiff has a private interest; (e) whether the proceedings will continue if the protective costs order is not made; (f) whether counsel for the applicant are acting pro bono; (g) the parties' financial means; and (h) whether the making of such an order is rewarding inefficient litigation.

Supreme Court of NSW (continued)	**No cost orders** While there is no express rule for no cost orders, given the breadth of r 98, it is within the Court's discretion to make a no cost order.	
Supreme Court of Victoria	Section 24 of the *Supreme Court Act 1986* (Vic) provides that the Supreme Court of Victoria has full discretion to determine by whom and to what extent costs are to be paid in all matters in the Court.[107] This is reinforced by section 65C of the *Civil Procedure Act 2010* (Vic) which stipulates that courts have the power to make any order as they consider appropriate to advance the overarching purpose of that act.[108] One of the specific alternative costs orders identified in section 65C of the CPA is that the Court may "fix or cap recoverable costs in advance".[109] Section 65C(2A) of the VIC CPA provides a set of criteria that Courts can consider when deciding to fix or cap recoverable costs in advance, including the timing of the application, the complexity of the legal and factual issues raised, whether the party seeking the order is claiming damages, the financial circumstances of the parties, and whether there is a public interest element.	**No cost orders** It appears that Victorian courts have not granted a no cost order at the conclusion of any public interest proceedings. **Protective Costs Orders** A set of criteria for the granting of a PCO was identified in *Bare v Small & Others:* The Court expressed that when granting such an order, it must be satisfied that: 1. the issues raised are of general importance; 2. the public interest requires that those issues should be resolved; 3. the applicant has no private interest in the case; 4. having regard to the financial resources of the applicant and the respondent(s), and to the amount of costs that are likely to be involved, it is fair and just to make the order; and 5. if the order is not made, the applicant will probably discontinue the proceeding and will be acting reasonably in doing so.[110] When a case does not have a significant public interest element, a PCO will not be granted.

Supreme Court of Queensland	Section 681(1) of the *Uniform Civil Procedure Rules 1999* (Qld) provides the Supreme Court of Queensland with the discretionary authority to order both costs of proceedings and costs applications that follow the event.[111] Rules 682 and 684 of the UCPR specify that the assessment of costs may occur after the proceeding and that costs can be awarded for a particular question in the proceeding.[112] If the proceeding would unnecessarily continue but for a costs issue, the parties may apply for costs orders.[113] Section 49 of the *Judicial Review Act 1991* (Qld) provides that on application by a party, the Court may make an order that another party indemnify the applicant for reasonable costs incurred; or that the applicant bear their own costs, regardless of the outcome.[114] In determining whether the Court is to make an order declaring that a party to a judicial review application bears only its costs of the proceeding, the Court may consider whether the proceeding involved an issue that affects, or may affect, a public interest.[115]	It appears there is yet to be a successful attempt to have a no adverse cost order issued on the basis of 'public interest' within Queensland. The Court has previously dismissed 'public interest' claims on the ground that the applicant has a private interest in the proceeding.[116] In *Meizer v Chief Executive, Dept of Corrective Services* [2005], Douglas J ordered that, pursuant to section 49 of the *Judicial Review Act 1991*, the respondent indemnify the applicant in relation to his costs properly incurred in the judicial review application.[117]

Supreme Court of the Northern Territory	Under rule 63.03(1) of the *Supreme Court Rules 1987* (NT), the costs of a proceeding are at the discretion of the Court.[118] While there is no express provision in Northern Territory legislation for protective costs orders, the NT Supreme Court has recently determined that it has the power, in its discretion, to make a protective costs order.[119]	It appears there is yet to be a successful attempt to have an order resembling a PCO or no cost order issued in a public interest matter in the Supreme Court of the Northern Territory. The recent decision in *Phillips v Chief Health Officer* [2022] NTSC 29 dismissed an application for a PCO.
Supreme Court of South Australia	Under section 40 of the *Supreme Court Act 1935* (SA), the Supreme Court of South Australia has full power to determine by whom and to what extent costs are to be paid.[120] While there is no express provision for protective costs orders or no adverse cost orders in South Australia, the *Uniform Civil Rules 2020* (SA), which came into effect on 18 May 2020, provide a non-exhaustive list of factors that South Australian courts may have regard to in exercising its discretion as to costs.[121] Rule 194.5 lists general costs principles. But these are subject to other applicable rules/principles and, importantly, the overriding discretion of the Court as to costs.[122] Guiding factors for the Court to consider in exercising this direction include: (f) the value and importance of the relief sought or any relief obtained;[123]	It appears there is yet to be a successful attempt to have an order resembling a PCO or no cost order issued in a public interest matter in the Supreme Court of South Australia.

Supreme Court of South Australia (continued)	(g) any public interest in the subject matter of the proceedings or public benefit from the prosecution or defence of the proceeding;[124] or (h) whether costs awarded are to be met by a person or out of a fund.[125] As such, the inclusion of 'public interest' as a discretionary factor in costs provides an explicit basis for South Australian courts to make costs orders to the same effect as protective costs orders or no adverse costs orders.	
Supreme Court of Western Australia	Section 37 of the *Supreme Court Act 1935* (WA) provides that costs are at the discretion of the Court or judge, and they have the full power to determine by whom or out of what estate, fund, or property, and to what extent such costs are to be paid.[126] The *Supreme Court Rules 1971* (WA) provide that subject to the express provisions of any statute, the Court will generally order that the successful party to any action or matter recover their costs.[127] Order 66, rule 51 of the *Supreme Court Rules 1975* (WA) provides that the Court may make an order fixing the costs of a party to the action or matter.[128]	The WA Supreme Court has made no cost orders and orders fixing the costs to be paid. In *Conservation Council of Western Australia (Inc) v Hon Stephen Dawson MLC* [2018] Martin CJ outlined a set of criteria for deciding whether 'special circumstances' apply and a departure from the usual rule is warranted, including whether: • The proceedings raise novel legal issues of general public importance; • The extent of public support for the position adopted by the unsuccessful party; • The lack of any prospect of private benefit or advantage to be gained from the proceedings by the unsuccessful party;

Supreme Court of Western Australia (continued)	Order 66, rule 25 of the *Supreme Court Rules 1971* (WA) provides that the Court may, on an application by a claimant make an own costs order at any time during the proceedings on a claim for relief in connection with:[129] • An alleged breach of any provision of the Australian Consumer Law; or • Unconscionable conduct from a financial services licensee;[130] or • Unconscionable conduct in relation to body corporates giving a benefit to a director;[131] or • An allegation of unconscionable conduct; or • Allegation of economic duress or abuse of power.[132]	• The arguability of the case brought; • The special relationship between Aboriginal people and their land; and • The efficiency with which the case was presented.[133] The WA Court of Appeal has also held that the court must consider whether 'special circumstances' exist to justify a departure from the usual order, which requires a balancing exercise by the court.[134] The court noted that litigants 'espousing a public interest' are not granted immunity from costs or a 'free kick.'
Supreme Court of Tasmania	Section 12 of the *Supreme Court Civil Procedure Act* 1932 (Tas) provides that the Supreme Court of Tasmania has jurisdiction to award costs in all causes and matters, including proceedings for judicial review.[135] Similarly, rules 57 and 58 of the *Supreme Court Rules 2000* (Tas) provides the Court with full discretion to determine the costs of judicial proceedings.[136] There is no express provision in Tasmanian legislation for protective costs orders or no adverse cost orders.	It appears there is yet to be a successful attempt to have an order resembling a PCO or no cost order issued in a public interest matter in the Supreme Court of Tasmania.

Endnotes

1. Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Access to Justice (Report, December 2009) 70-1 [4.30]-[4.31].
2. [1991] VR 63, 76.
3. Chris Wheeler, 'The Public Interest: We know it's important, but do we know what it means' (2006) 48 *AIAL Forum* 12, 15.
4. Ibid, 24.
5. Eliza Ginnivan, 'Public Interest Litigation: mitigating adverse costs order risk' (2016) 136 *Precedent 22*.
6. [2004] NSWLEC 434.
7. *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* [2004] NSWLEC 434 [15]; These factors were summarised by Hodgson JA in *Minister for Planning v Walker (No 2)* [2008] NSWCA 334 [6].
8. *Oshlack v Richmond River Council* (1998) 193 CLR 72 [67] (McHugh J). There are some specific types of civil proceedings where statutory provisions alter the usual costs rule. For example, proceedings conducted under the *Fair Work Act 2009* (Cth) (see s 570) and particular provisions of the *Corporations Act 2001* (Cth) (see s 1317AH concerning whistleblowers). These provisions are discussed further in Parts 2 and 3 of this report.
9. See, for example, Beth Gaze, 'Damages for Discrimination: Compensating denial of a human right' (2013) 116 *Precedent 20, 22*: 'The majority of awards [in discrimination cases] are under $10,000, with many around $1,000-2,000. In the lifetime of anti-discrimination law in Australia, very few total awards have been over $50,000…'.
10. John Toohey and Anthony D'Arcy, Environmental Law - its Place in the System' in Robert John Fowler (ed), *Proceedings of the International Conference on Environmental Law* (National Environmental Law Association of Australia and the Law Association for Asia and the Pacific, Sydney, 14-18 1989) 79, quoted in *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150 [19].
11. Public Interest Law Clearing House (Vic) Inc, Submission 33 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into Access to Justice* (30 April 2009) 14.
12. The Honourable Michael Kirby AC CMG, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 2529 *Law Quarterly Review* 1, 22.
13. See M*igration Regulations 1994* (Cth) sch 4, Public Interest Criterion 4004.
14. Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation (2009) 32(3) *UNSW Law Journal* 699, 704.
15. Ibid 710.
16. Ibid.
17. Ibid.
18. *Court Procedures Rules 2006* (ACT) r 1721; *Supreme Court Rules* (NT) r 63.03; *Uniform Civil Procedure Rules 2005* (NSW) r 42.1; *Uniform Civil Procedure Rules 1999* (Qld), r 681(1); *Supreme Court Civil Rules 2006* (SA) r 263(1); *Rules of the Supreme Court 1971* (WA), O 66 r 1(1).
19. See for example, *Civil Procedure Act 2005* (NSW) s 98.
20. *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, [9].
21. *Edgley v Federal Capital Press of Australia Pty Ltd* (2001) 108 FCR 1, 25 (Beaumont ACJ, Higgins and Gyles JJ agreeing).

22. *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, [25] (Black CJ and French J).
23. *Land and Environment Court Rules 2007* (NSW), r 4.2
24. *Anderson v Minister for Planning (No 2)* (2008) 163 LGERA 132, [11].
25. See, for example, *Federal Court Rules 2011* (Cth), r 40.51; *Uniform Civil Procedure Rules 2005* (NSW), r 42.4
26. See *Sacks v Permanent Trustee Australia Limited* (1993) 45 FCR 509, 511 (Beazley J), quoting from a letter dated 6 November 1991 from Chief Justice Black to the President of the Law Council of Australia.
27. *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.
28. *Civil Procedure Act 2010* (Vic), s 65C(2A).
29. [2016] FCCA 917.
30. *Nerringillah Community Association Inc v Laundry Number Pty Ltd* (2018) 236 LGERA 102, [205].
31. The Australian Law Reform Commission, Costs Shifting - *Who Pays for Litigation* (ALRC Report 75, October 1995) [13.11].
32. Ibid [13.19], Recommendation 45.
33. Ibid [13.14]–[13.19].
34. Ibid [13.21], Recommendation 46.
35. Ibid [13.25], Recommendation 47.
36. Victorian Law Reform Commission, *Civil Justice Review*, (Final Report, 2008) 676.
37. Senate Legal and Constitutional Affairs Committee, Parliament of Australia *Inquiry into Access to Justice* (Report, December 2009), [4.31]-[4.32].
38. Ibid [4.35].
39. New South Wales Law Reform Commission, *Security for costs and associated costs orders* (Report 137, December 2012), Recommendation 4.1.
40. Productivity Commission, *Access to Justice Arrangements - Inquiry Report* (Final Report, 2014) 481.
41. Ibid.
42. Ibid 483, Recommendation 13.6.
43. Ibid 484.
44. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 507.
45. Ibid, Recommendation 25.
46. Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Cth) 44.
47. *Civil Procedure Rules* (UK), r 44.13-44.17.
48. *Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018*, s 8.
49. *Biowatch Trust v Registrar Genetic Resources & Others* (2009) 6 SA 232 (CC) [22].
50. Ibid.
51. Ibid [23].
52. Ibid.
53. Ibid.
54. Ibid [25].
55. Ibid [16], [20].
56. Ibid [45].
57. Ibid [19].
58. Ibid [20].
59. *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2.
60. 434 U.S. 412 (1978).

61. *Code of Civil Procedure* (California) § 1021.5.
62. See for example, *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited* and *Minister for Mineral Resources (No 3)* (2010) 173 LGERA 280, [45]; *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd (No 2)* [2021] NSWLEC 147, [55]; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [6].
63. See, for example, *Rogic v Samaan (No 2)* [2018] NSWSC 1573, [42] where Kunc J stated: 'In my experience and understanding, the Court's power to order maximum costs under UCPR r 42.4 is little used at the commencement of proceedings. Similarly, applications for costs capping orders at the end of litigation are relatively infrequent.'
64. *Federal Court Rules 2011* (Cth), r 40.51(1).
65. *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth), r 22.03(1).
66. See, e.g., *Hanish v Strive Pty Ltd* (1997) 74 FCR 384, 389; *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 513; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [5]; *Hudson v Australian Broadcasting Corporation* [2016] FCCA 917, [85]; *Shurat HaDin, Israel Law Center v Lynch (No 2)* [2014] FCA 413, [10].
67. *Uniform Civil Procedure Rules 2005* (NSW) r 42.4.
68. *Civil Procedure Act 2010* (Vic) s 65C(2)(d).
69. *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [187]-[190] (Basten JA) and [222] (MacFarlan JA); *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165, [12]-[13]; *Bare v Small* (2013) 47 VR 255, [48].
70. *Bare v Small* (2013) 47 VR 255, [48].
71. *Fair Work Act 2009* (Cth) s 570.
72. Explanatory Memorandum, Fair Work Bill 2008 (Cth) [2228].
73. [2015] FCA 8.
74. Ibid, [64].
75. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), Recommendation 25.
76. *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] 3 SCR 371, [31].
77. Ibid [35].
78. Ibid [40].
79. *Anderson v Alberta* [2022] SCC 6, [4].
80. Ibid [20].
81. Ibid [28].
82. Victorian Law Reform Commission, *Civil Justice Review* (Report 14, 1 January 2008) ('*VLRC - Civil Justice Review*') 44 [133] - [140].
83. Cy-près remedies refer to remedies, especially in class action litigation, where class action members may not receive the benefit of funds from a settlement or judgment against the defendant, due to class closure orders, the ignorance of class members as to their entitlements, a lack of proof of entitlement or practical and procedural obstacles to making a claim. In such cases, to avoid the defendant from retaining the proceeds of unlawful conduct, orders to distribute the funds elsewhere could be considered, for instance to nominated organisations which have interests or aims that are judged to be aligned with the class members. For further discussion, see Peter Cashman and Amelia Simpson 'Class action remedies: cy-près; 'an imperfect solution to an impossible problem' [2020] UNSWLRS 67.

84. Victoria Legal Aid, 'Limits on the costs payable by VLA', *Victoria Legal Aid: Handbook for Lawyers* (Web Page, updated 21 February 2022) <https://www.handbook.vla.vic.gov.au/limits-costs-payable-vla>.
85. Legal Aid NSW, '17.11. Costs Legal Aid NSW must pay on behalf of the client under s47 of the Act', Legal Aid NSW (Web Page, updated 21 December 2016) <https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/17.-costs-and-fees/17.11.-costs-legal-aid-nsw-must-pay-on-behalf-of-the-client-under-s47-of-the-act>.
86. *Legal Aid Commission Act 1979* (NSW), s 47(1)(b).
87. [2010] FCA 1133.
88. The table outlines cost rules across the High Court, Federal Court and State and Territory Supreme Courts. We recognise the important work that has been done to reform adverse cost rules in Land and Environment courts across the country, and the broader contribution made by environmental cases to the development of cost principles in public interest cases in the higher courts. For further detail on reform of cost rules in environmental matters, see Environmental Defenders Office, *Costing the Earth? The case for public interest costs protection in environmental litigation* (Report, 2010).
89. *High Court Rules 2004* (Cth) r 50.01.
90. *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 228 CLR 651.
91. *Oshlack v Richmond River Council* (1998) 193 CLR 72.
92. *Federal Court of Australia Act 1976* (Cth) s 43.
93. *Federal Court of Australia Act 1976* (Cth) s 43(3)(e).
94. *Federal Court Rules 2011* (Cth) r 40.51.
95. *Ruddock v Vardalis (No 2)* (2001) 115 FCR 229.
96. *Animals' Angels v Secretary, Department of Agriculture* [2014] FCAFC 173.
97. *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 [6].
98. *Houston v New South Wales* [2020] FCA 502 [19].
99. *Australian Capital Territory Supreme Court Act 1933* (Cth) s 15.
100. *Court Procedure Rules 2006* (ACT) r 1701.
101. See *Court Procedure Rules 2006* (ACT) r 1701 s(1)(a).
102. *Jacka v Australian Capital Territory* [2015] ACTSC 239 [18]-[19].
103. *Electro Optic Systems Pty Ltd v The State of New South Wales; West and West v The State of New South Wales* [2013] ACTSC 155 [23].
104. *Civil Procedure Act 2005 (*NSW) s 98.
105. *Hasting Point Progress Association Inc v Tweed Shire Council (No 3)* [2010] NSWCA 39 at [19].
106. *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263.
107. *Supreme Court Act 1986* (Vic) s 24.
108. *Civil Procedure Act 2010* (Vic) s 65C.
109. *Civil Procedure Act 2010* (Vic) s 65C(2)(d).
110. *Bare v Small & Others* [2013] VCSA 204 at [38] – [46].
111. The legislation has granted the District and Magistrates Courts (hereafter 'the courts', collectively) with the same authority: see *Uniform Civil Procedure Rules 1999* (Qld) r 3(1); *Uniform Civil Procedure Rules 1999* (Qld) r 681(1).
112. *Uniform Civil Procedure Rules 1999* (Qld) r 682, 684.
113. Ibid r 685.
114. *Judicial Review Act 1991* (Qld) s 49.
115. Ibid s 49(2)(b).

116. See for example, *Anghel v Minister for Transport (No 2)* [1994] QCA 232.
117. *Meizer v Chief Executive, Dept of Corrective Services* [2005] QSC 35.
118. *Supreme Court Rules 1987* (NT) r 63.03(1).
119. *Phillips v Chief Health Officer* [2022] NTSC 29, [12].
120. *Supreme Court Act 1935* (SA) s 40.
121. *Uniform Civil Rules 2020* (SA) r 194.6.
122. Ibid r 194.5(1).
123. Ibid r 194.6(2)(f).
124. Ibid r 194.6(2)(g).
125. Ibid r 194.6(2)(h).
126. *Supreme Court Act 1935* (WA) s 37.
127. *Supreme Court Rules 1971* (WA) ord 66 r 1.
128. *Supreme Court Rules 1971* (WA), ord 66 r 51.
129. Ibid ord 66 r 1.
130. See *Corporations Act 2001* (Cth) s 991A.
131. See *Corporations Act 2001* (Cth) s 1325C.
132. *Supreme Court Rules 1971* (WA), ord 66 r 26.
133. *Conservation Council of Western Australia (Inc) v Hon Stephen Dawson MLC* [2018] WASC 34.
134, *Jacob v Save Beeliar Wetlands (INC)* [2016] WASCA126 at [37].
135, *Supreme Court Civil Procedure Act 1932* (Tas) s 12.
136. *Supreme Court Rules 2000* (Tas) r 57, 58.

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