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INTEREST LITIGATION

Law Quarterly Review

2011

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LAW QUARTERLY REVIEW

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A CULTURE OF HOSTILITY?

The rule of law is a basic postulate of democratic societies. It was acknowledged as such in the *Universal Declaration of Human Rights* of 1948¹. According to this principle, the exercise of power in a community must ultimately be susceptible to authoritative scrutiny against the touchstone of applicable laws. All persons must ultimately have access to independent courts and tribunals which can decide their contests². Moreover, in the modern understanding of the rule of law, the governing law, when accessed, must conform to certain basic principles, including compliance with human rights³ and the universal standards of civilised societies..

Public interest litigation includes the bringing of proceedings before courts and tribunals asserting that a government official or other person has acted unlawfully; seeking a binding ruling that the law be complied

* Text on which was based an address to the Public Interest Litigation Service Conference, Belfast, Northern Ireland, 15 November 2010.

** Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Gruber Justice Prize 2010.

¹ Adopted and proclaimed by the General Assembly of the United Nations, Resolution 217A(iii), 10 December 1948 (UDHR), Preamble.

² UDHR, Arts.7 and 10. See also *International Covenant on Civil and Political Rights*, Art.14.1; *European Convention for the Protection of Human rights and Fundamental Freedoms*, arts.5.3, 5.4, 6.1.

³ Lord Bingham, "The Rule of Law" (2007) 66 *Cambridge LJ* 67 at 81; cf Kirby, M.D., "The Rule of Law Beyond the Law of Rules" (2010) 33 *Australian Bar Rev.* 195 at 197-200.

with; or requiring orders clarifying the operation and meaning of the law as well as the obligations of those who are subject to it. Yet, if a concerned citizen seeks to bring and maintain such proceedings in a court or tribunal of the common law tradition, he or she often faces significant obstacles⁴.

To suggest that courts and tribunals of our tradition are sometimes hostile to public interest litigation involves a large proposition. Exploration of the proposition may be broken down into three questions:

1. What is the evidence of hostility towards public interest litigation?
2. What are the causes and explanations of the hostility revealed?
3. What measures (if any) could be taken to overcome such hostility?

The purpose of this paper is to demonstrate instances of suggested hostility in the relevant law and practice with respect to:

- (1) Standing, as conventionally applied by the courts;
- (2) Permitting interventions and *amicus curiae* participation by non-parties in such proceedings; and
- (3) Costs, which commonly present a very practical inhibition to the commencement and maintenance of public interest litigation.

The causes of the inhibitions are partly historical: bound up in the traditional features of the adversarial mode of trial observed in common law courts. In part, they are connected with the need to ensure the

⁴ Australian Law Reform Commission, *Standing in Public Interest Litigation*, (A.L.R.C. 27, 1985), xviii.

presence of the motivation to offer arguments before courts and tribunals forcefully and effectively. And, in part, they arise from a fear that interfering busy-bodies will needlessly waste the time of the courts and tribunals or run up substantial legal costs that have to be paid by those most immediately involved.

Each of these concerns needs to be addressed. However, the answer, it is suggested, is not to affirm or reinforce the inhibitions. By statute, by applicable court rules and other means, including judicial decisions and practice, we should diminish the obstacles. We should replace the *closed* doors of the courts and tribunals with a *screen* door, which will keep out the pests whilst allowing genuine litigants with arguable causes, invoking the rule of law, to engage and influence the legal process.

EVIDENCE OF HOSTILITY TO PIL

The law of standing

Inhibitions derived from Equity: A critical inhibition on the commencement of public interest litigation is, statute apart, the ordinary requirement that a person, wishing to invoke and enforce the ‘public law’ or ‘public rights’ in proceedings before a court or tribunal, must be able to demonstrate ‘standing’ (or ‘*locus standi*’) in order to secure the attention and engagement of the court⁵.

In the nineteenth century one important context in which issues of standing arose concerned the use and misuse of charitable trusts. Many

⁵ The origins of the notion of standing in English law can be traced to Medieval ecclesiastical law. Thus, an excommunicated person did not enjoy ‘*personam standi*’ to invoke the jurisdiction of an ecclesiastical court. See F.D. Logan, *Excommunication and the Secular Arm in Medieval England*, Pontifical Inst., Toronto, 1968, 14, n5. Cf. A.L.R.C 27, 27 n49. Another source of the judicial notion was the House of Commons practice in England.

such trusts were designed for public purposes and not simply for the advancement of the proprietary interests of those who controlled the trust fund. Accordingly, questions were frequently presented to the courts in England as to whether municipal corporations, acting as administrators of charitable trusts, had misapplied the funds, contrary to the public purposes intended by the settler or donor.

In such cases, it was accepted that the Attorney-General, representing the community, could apply to the Chancery Court for an injunction to restrain any such misapplication⁶. In time, it was accepted that an ordinary litigant could also obtain relief provided it had first sought, and been granted, the Attorney-General's *fiat* (or leave) to commence 'relator' proceedings, in effect on behalf of the public⁷. In such a case, the 'relator' did not require a demonstration of a personal interest in the controversy. The Attorney-General's *fiat* cured that obstacle. Without the *fiat*, it was not competent for a private individual to enforce a public trust by a private suit⁸.

Courts occasionally complained about this requirement of the law, especially where a misapplication allegedly arose out of a suggested failure of a public body to comply with its statutory powers⁹. Yet the rule was generally maintained by the courts of England and in its colonies as one of long-standing historical authority. If it had a rational purpose, this was usually justified as that of protecting the court from strangers who would otherwise seek to meddle officiously in the business of third parties or the public interest where the stranger had no relevant special

⁶ The power and its history are explained in *Wallis v Solicitor-General for New Zealand* [1903] 1 A.C. 173 at 181 per Lord Macnaghten.

⁷ *Attorney-General (Q); Ex rel Duncan and Andrew* (1979) 145 C.L.R. 573 at 582 per Gibbs J.

⁸ *Evan v The Corporation of Avon* (1860) 54 ER 581 at 585, per Sir John Romilly MR.

⁹ See e.g. *Pudsey Coal Gas Coy v Corporation of Bradford* (1873) LR 15 Eq 167 at 172.

or personal interest, over and above that of other members of the public¹⁰.

The rule in Boyce and Australian applications: In 1902, a partial judicial reform of the foregoing principle was adopted in England in *Boyce v Paddington Borough Council*¹¹. In that case, Justice Buckley expressed more broadly the principles that would apply where a private individual sought a declaration or an injunction in respect of public rights:

“A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with ...; and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.”

In the nature of public rights, it is rare that the first stated exception will sustain public interest litigation. However, the second, affording relief for ‘special damage’, became the foundation of a number of judicial decisions and much legal argument.

Notwithstanding this partial expansion of the right to sue in the public interest in England, courts in Australia generally remained resistant to attempts by litigants to rely on the second limb expressed in *Boyce*. Thus in *Anderson v The Commonwealth*¹², in the context of constitutional litigation, the High Court of Australia held:

“Great evils would arise if any member of the Commonwealth could attack the validity of the Acts of the Commonwealth whenever he thought fit. It is clear in law that the right of an individual to bring such an action does not exist unless he

¹⁰ The history is explained by McHugh J in *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 C.L.R. 247 at 275 [78].

¹¹ [1903] 1 Ch 193 at 114 (reversed, but on the facts) [1903] 2 Ch.556.

¹² (1932) 47 C.L.R. 50.

establishes that he is “more particularly affected than other people”.

As a solace to those who argued that statute law should always prevail, because representing the will of Parliament, it was pointed out that it remained open to a litigant to secure a *fiat* from the Attorney-General for the Commonwealth or for any of the States, to permit the bringing of such proceedings in Australia. However, because the Attorneys-General in Australia are always politicians (sometimes not lawyers), it is rare indeed in sensitive proceedings otherwise brought by or against a government, that the Attorney-General will grant the privilege to commence proceedings to a private individual¹³. The law officers tended to cling to their privilege, confining such challenges to governments alone unless an individual could show some *special* or individual damage, usually of a financial or pecuniary kind.

A broader rule of ‘special interest’: Despite this history, by the late twentieth century, decisions in Australia began to edge forward the circumstances in which an individual might bring litigation to secure enforcement of a public law. In *Robinson v Western Australia*¹⁴, the plaintiff had discovered the remains of the wreck of an early Netherlands vessel, lost in 1656 off the coast of Western Australia. Purportedly acting under legislation, a museum asserted its entitlement to the wreck. The plaintiff sought to counter this claim by challenging the constitutional validity of the legislation granting rights to the museum. He asserted that it constituted a confiscation of the property without just terms as

¹³ An exception was *Attorney-General (Vic); Ex Rel Black v The Commonwealth* (1981) 146 C.L.R. 559 where the Attorney-General for Victoria granted a *fiat* to the Defence of Government Schools organisation (DOGS) to challenge the constitutional validity of federal legislation appropriating public moneys to support religious schools.

¹⁴ *Robinson v Western Australian Museum* (1977) 138 C.L.R. 283.

required by the Constitution¹⁵. The High Court of Australia declared that the question of the standing of the plaintiff in such a case would frequently depend upon the resolution of factual questions. It was therefore not suitable for anterior determination. The attempt to strike out the plaintiff's claim failed.

In the course of his reasons in the case, rejecting the strike out application, Mason J. remarked¹⁶:

“Reflection on the considerations which underlie the rule does not provide much assistance in defining the nature of the interest which a plaintiff must possess in order to have *locus standi*. However, it does indicate that the plaintiff must be able to show that he will derive some benefit or advantage over and above that to be derived by the ordinary citizen if the litigation ends in his favour. The cases are definitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another. Here the plaintiff does not seek performance of a public duty; nor does he assert that he will suffer special damage through interference with a public right – cases which are notorious for their difficulties.”

Two Australian cases in the early 1980s pushed the applicable standing rule for public interest litigation forward still further. In *Australian Foundation v The Commonwealth*¹⁷, the Foundation, an incorporated body, sought to obtain declarations and injunctions challenging approvals given under federal legislation, purporting to permit the development of an environmentally sensitive island as a resort and tourist area. The Commonwealth applied to strike the proceedings out on the basis that the Foundation itself had no standing to seek such relief. It argued that the Foundation had suffered no special damage of

¹⁵ Australian Constitution, s.51(xxxi).

¹⁶ *Ibid.*, at 295.

¹⁷ *Australian Conservation Foundation v The Commonwealth* (1980) 146 C.L.R. 493 at 526-530.

its own. At first instance, this application succeeded. By majority, an appeal against that order was dismissed. However, statements in the majority reasoning in the case appeared to enlarge the second limb of the exceptions stated in *Boyce*.

Specifically, the High Court of Australia replaced the requirement of *Boyce* of 'special damage' with a requirement that the plaintiff must demonstrate a 'special interest' in the subject matter of the action. This would be sufficient, although a plaintiff could not demonstrate actual pecuniary loss, or an interference with its profits. Gibbs J. said¹⁸:

“I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for the present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle, or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.”

In the next case, *Onus v Alcoa of Australia Pty Ltd*, two Aboriginal women sought declarations and injunctions to restrain Alcoa from erecting an aluminium smelter on a proposed site in Victoria. They alleged that, if it were to do so, Alcoa would be in breach of a State Act passed for the preservation of Aboriginal relics buried in the vicinity. As descendants of the relevant Aboriginal people, the women claimed that they were custodians of the relics according to the laws and customs of their people. The High Court of Australia held that the rights being asserted were public, not private, rights. However, by majority, the

¹⁸ (1981) 149 C.L.R. 272.

Court concluded that the applicants' interests were greater than those of other members of the public and that they therefore had the necessary standing to bring their action.

Although the 'special interest' test recognised here constituted a step forward in standing rules in Australia, it remained a broad and somewhat unclear criterion¹⁹. Still it allowed a wider range of public interest litigants to get their foot inside the court doors.

In 1986, in *Ogle v Strickland*²⁰, the Full Court of the Federal Court of Australia upheld the standing of applicants in proceedings brought jointly by an Anglican and a Roman Catholic priest, challenging the classification of a movie "Hail Mary". The priests were held to be in a special position compared with ordinary members of the public. It was not necessary for their concern to be financial in order for them to be "aggrieved" within the standing requirement of the legislation providing for appeals to be brought to the Censorship Board. However, an analysis of the lower court cases that followed the decision in *Onus* suggested that much depended on the inclinations of the judicial decision-makers participating. Some were inclined simply to follow the time-honoured *Boyce* approach. Others were encouraged by the broadening of the rule in *Onus* to expand the recognition of the type of litigant to whom could be attributed the requisite 'special interest'²¹.

Absence of larger reforms: The full reach of the 'special interest' criterion was revealed by the High Court of Australia in *Bateman's Bay*

¹⁹ See A.L.R.C. 27, 65-66 [125].

²⁰ [1986] F.C.A. 262.

²¹ See J.D. Wilson and M. McKitterick, "*Locus standi* in Australia – A Review of the Principal Authorities and Where it is All Going", unpublished paper, University of Melbourne, 2010, 19.

*Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*²². In that case, the majority acknowledged that the current state of the “so-called rules” of standing at common law did not have a lot to commend them. The majority accepted that a mere intellectual or emotional belief was insufficient to sustain standing to bring a public interest proceeding before a court. A ‘special interest’ in the subject matter was necessary. That requirement was to be construed as adopting an ‘expansive approach to standing’²³. The differing approaches that had traditionally been taken by Attorneys-General respectively in the United Kingdom and Australia to the grant of *fiats* were mentioned as relevant to the approach that the Australian courts might take on the recognition of standing²⁴. The incoherent state of the law on standing in Australia was acknowledged and criticised²⁵. The possibility of legislation to clarify the law was postulated²⁶.

Still, despite two reports of the Australian Law Reform Commission proposing legislative reform (and a conclusion that such reform was compatible with the constitutional powers over proceedings reserved to the judiciary)²⁷, no general legislation has so far been enacted by the Australian Parliament to implement the Commission’s proposals. In the result, cases have proceeded from one decision to another. Except where standing rights have been expanded by legislation, Australian courts generally continued to apply the approach expressed in *Boyce* and as re-expressed in *Onus*. In recent years in Australia, perhaps they do so with a little more willingness to recognise the public interest litigant

²² (1998) 194 C.L.R. 247 at 267 [50].

²³ Discussed in Wilson and McKitterick, above n20, 21-22.

²⁴ See e.g. (1998) 194 C.L.R. 247 at 284 [107] per Hayne J.

²⁵ (1998) 194 C.L.R. 247 at 279 [91] per McHugh J.

²⁶ *Ibid.*, per McHugh J (diss).

²⁷ A.L.R.C. 27, 32-36 [59]ff. citing *Australian Conservation Foundation v The Commonwealth* (1980) 146 C.L.R. 493 at 551 per Mason J.

than before, by reason of the encouraging words of the majority of the High Court of Australia in the *Bateman's Bay* case. If the court doors are not locked and bolted against public interest litigation, as in the past, they are often certainly still substantially closed. It generally takes the establishment of a 'special interest', and commonly a pecuniary or financial interest, to open them in the face of much judicial hesitation and disinclination.

The law of intervention and *amici curiae*

Intervention: 'wise' refusals: The basic rule observed in Australia to govern intervention by non parties in other people's cases, brought by interveners or *amici curiae*²⁸, was initially stated by the High Court of Australia in 1930 in *Australian Railways Union v Victorian Railways Commissioner*²⁹. In that case, refusing leave to the States of Victoria and South Australia to present material to the court on the power of the national industrial court to make an industrial award affecting state railways (effectively in support of submissions being advanced for the Commonwealth), Dixon J. said, in words often later quoted³⁰:

"The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wished to maintain some particular right, power or immunity, in which they are concerned, and not merely to intervene to contend for what they regard to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as states or Commonwealth they may exercise."

In some ways, the *Australian Railway Union* case was a peculiar one. This was because the States concerned were supporting, and not

²⁸ Literally "friends of the court".

²⁹ (1930) 44 C.L.R. 319.

³⁰ (1930) 44 C.L.R. 319 at 331.

contesting, the federal government's arguments³¹. Nevertheless, an immediate link may be seen to the general approach to the law of standing. To be heard, it was not enough to have good legal arguments or to be motivated by a desire to uphold the correct understanding of the law. What was necessary was some special impact on the potential outcome of the case of the rights, powers or immunities of the would-be litigant. Without that special element, courts would not take up their time. Instead, they would adopt a "wise" discretion to exclude the stranger.

Amici curiae in Australia: The status in law of an intervener and that of an *amicus* can be distinguished. The intervener, once allowed leave to appear, becomes effectively a party to the proceeding. It does so on the basis that its interest is of the same kind as the litigants already before the court, so that the outcome of the case will be directly and immediately affected by the litigation. An *amicus* is ordinarily more indirectly affected. Its concern may arise on the basis that the outcome of the matter may indirectly affect it, or those associated with or like it, so that it desires to be heard on the general issues at stake, in terms that might not otherwise be placed before the court by the actual parties. The *amicus* does not, as such, become a party. Because of this differentiation in status, the *amicus* will generally play a much more circumscribed role (often confined to the provision of written submissions). Very occasionally, an *amicus curiae* may be permitted to step into the shoes of a departed party so as to provide a court with a contradictor that will permit the court to proceed with the hearing and to

³¹ See F.G. Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal L Rev* 365 at 377.

decide a matter³². However, as Professor George Williams has observed³³:

“Traditionally the *amicus* was a disinterested bystander who sought to assist a court by providing relevant information that had been overlooked or was otherwise unavailable”.

Although the position governing the acceptance of the participation of an *amici curiae* is influenced by court traditions and, occasionally, by the language of statutes and court rules, as with rulings on standing, there have been many apparently inconsistent (sometimes unreasoned) decisions that are quite hard to reconcile³⁴. In the Canadian context, this disparity of response was attributed to “... the deep ambivalence of the attitude of the courts towards public interest intervention”³⁵. In some jurisdictions having the same, or similar, traditions as Australia (the United Kingdom, Canada, South Africa, India and the United States), this ambivalence appears to have waned in recent years, so that many more interventions have been allowed³⁶. In Australia, however, a negative judicial approach has substantially persisted.

Enlarging governmental interventions: In one particular type of intervention, the Australian position was liberalised by the passage in 1976 of amendments to the *Judiciary Act* 1903 (Cth.). By that change, s.78A was introduced into the Act permitting, in the specified circumstances, the Attorney-General of the Commonwealth, and of a

³² *Attorney-General (Cth.) v Alinta Ltd* (2008) 233 C.L.R. 542 at 557-9 [28]-[33]; 567-8 [63]-[68]; 580 [104]; cf *Miron v Trudel* [1995] 2 S.C.R. 48; *Reference re Quebec Sales Tax* [1994] 2 S.C.R.715; *Re Reference re Secession of Quebec* [1998] 2 S.C.R.217. See generally, Patrick Keyser, *Open Constitutional Courts* (Federation, 2010), 117.

³³ Williams (2000) 28 *Federal L Rev* 365 at 386.

³⁴ *Ibid.*, 369.

³⁵ P.L Bryden, “Public Interest Intervention in the Court” (1987) 66 *Canadian Bar Rev.* 490 at 500.

³⁶ For an interesting recent case in the United States, see “Testing science” in *The Economist*, December 11, 2010, p84 concerning the standing of litigants, motivated by religious beliefs, who sought to challenge federal rules that attempted to amend an earlier statutory ban on destruction of human embryo cells for research. Standing was denied.

State or Territory of the Commonwealth, to intervene on behalf of their respective jurisdictions in proceedings before the High Court of Australia, any other federal court or a court of a State or Territory in which a matter had arisen under the Constitution or involving its interpretation³⁷. Where such intervention occurs pursuant to statute, the award of costs is reserved to the court. Where one Attorney-General intervenes under the section, the governmental interest then represented is to be “taken to be a party to the proceedings”³⁸.

Supplementary provisions, to make the foregoing legislation effective, oblige any party with a cause pending before any of the named courts, concerning a matter arising under the Constitution or involving its interpretation, to give notice of the cause to the Attorneys-General of the Commonwealth, the State or Territory. No court may proceed with a hearing in such a matter unless satisfied that such a notice has been given and a reasonable time has elapsed for the consideration of such intervention by the relevant law officers.

Despite these provisions, protective of governmental interests, no equivalent or other provisions protective of other public interest litigation has been enacted in Australia in general terms, whether for private, individual or community interests. Accordingly, the acceptance of interveners and *amici curiae*, other than the law officers pursuant to the foregoing statutory provisions, depends upon the exercise of the discretion of the courts concerned.

³⁷ *Judiciary Act 1903 (Cth.)*, s78A(1).

³⁸ *Judiciary Act 1903 (Cth.)*, s78A(3).

For three-quarters of the twentieth century, a negative approach to such participation prevailed in Australia, as stated in the *Australian Railways Union* case of 1930. However, after 1980, as with the law of standing, there was a slight shift in the disposition of the High Court of Australia to admit interveners and *amici*. In *Australian Conservation Foundation v The Commonwealth (Tasmanian Dam Case)*³⁹, it appears to have been concluded that a person or body which could establish some ‘special interest’ in the subject of the proceeding, would be entitled to be joined as an intervener, even though unable to demonstrate a private legal right in respect of which there was some ‘special damage’⁴⁰. Still, constitutional questions apart, a tight rein on interventions was preserved, even in the case of the law officers⁴¹.

Responding to this small shift to enlarge the exercise of a right to intervene, various applications have been presented in recent years to push the envelope in Australia beyond the very narrow rule established in 1930. Thus, in *Kruger v The Commonwealth*⁴², a case involving the removal of Aboriginal children from their parents in the Northern Territory, an application by the International Commission of Jurists, Australian Section, for leave to be heard as an *amicus curiae* was rejected by the High Court of Australia. Speaking for the Court, Brennan C.J. observed, in traditional terms⁴³:

“[Counsel] ... fails to show that the parties whose cause he would support are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case. The Court must be cautious in

³⁹ (1980) 146 C.L.R. 493.

⁴⁰ S. Kenny, “Interveners and Amici Curiae in the High Court” (1998) 20 *Adelaide L Rev* 159 at 160.

⁴¹ Thus, in *Corporate Affairs Commission v Bradley* [1974] 1 N.S.W.L.R. 391 at 396, the New South Wales Court of Appeal held that the Attorney-General for the Commonwealth had no right to intervene in non-constitutional litigation on a matter of public policy.

⁴² (1970) 190 C.L.R. 1.

⁴³ See *Amici Application* reported (1996) 3 Leg Rep 14.

considering applications to be heard by persons who would be *amicus curiae* lest the efficient operation of the Court would be prejudiced.”

Wider intervention practice?: Soon after the rejection of the application in *Kruger*, in an appeal to the High Court of Australia in *Super Clinics (Australia) Pty Ltd v CES*, a statutory majority of the Court (the casting vote decided by the Chief Justice) granted leave to be heard as *amici curiae* each to Australian Catholic Health Care Association and the Australian Episcopal Conference of the Roman Catholic Church. The case involved arguments concerning the law of abortion upon which the two permitted organisations asserted the possibility that they might advance submissions on abortion law different from those expected to be proffered by the parties. Following the success of this highly contested application, successful applications to intervene in the case were also made by the Abortion Providers’ Federation and the Women’s Electoral Lobby⁴⁴. In the event, the primary parties settled their differences. Accordingly, the appeal did not have to be heard; nor the submissions of the *amici* determined.

There followed a number of decisions where applications to intervene or to appear as *amici* were the subject of reasons published by the Court. Thus, in *Levy v Victoria*, in 1997, Brennan C.J., expressed the entitlement to intervene in conventional discretionary terms, confining the privilege to a case where the Court “would not otherwise have been assisted”⁴⁵. It was held that the costs to the parties, and any delay in consequence, should not be disproportionate to the assistance that was to be expected. In short, in the High Court of Australia, intervention (and

⁴⁴ Kenny (1998) 20 *Adelaide L Rev.* 159 at 164.

⁴⁵ (1997) 189 C.L.R. 579 at 604-5, per Brennan C.J..

also permission to appear as an *amicus curiae*)⁴⁶, while partly enlarged by more frequent grants of leave, remains generally unreasoned (even where refused). As well, it is sometimes “unpredictable and inconsistent”.

In contrast to the restrictive approach endorsed by the majority of the Court applying the traditional view as expounded by Brennan C.J. in *Levy*, I drew attention in my reasons to the changes that had occurred in the law since the *Australian Railways Union* case was decided in 1930; the large expansion in permitting interventions and other representations in countries following similar legal systems; and the reasons of principle as to why the old rule should no longer be followed in Australia⁴⁷:

“... [S]ince those words were written [in the *Australian Railways Union* case], this Court has become the final court of appeal for Australia. There has also developed a growing appreciation that finding the law in a particular case is far from a mechanical task. It often involves the elucidation of complex questions of legal principle and legal policy as well as decided authority. This appreciation has inevitable consequences for the methodology of the Court. Those consequences remain to be fully worked out.

In the United States of America and Canada, the practice of hearing submissions from interveners and *amici curiae* is well established. Such practice is particularly common where matters of general public interest are being heard in the higher appellate courts. In recent years, some Australian courts have also favoured a more liberal approach to permitting interveners and *amici*. So far, that course has not recommended itself to this Court.

There is no need for undue concern about adopting a broader approach. The Court itself contains full control over its procedures. It will always protect and respect the primacy of the parties. Costs and other inhibitions and risks will, almost always,

⁴⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 C.L.R. 355.

⁴⁷ See *Levy v Victoria* (1997) 189 C.L.R. 579 at 651 per Kirby J. (citations omitted). See also *Lange v A.B.C.* (1997) 189 C.L.R. 520 at 544-549. A large number of media interests were allowed intervention in *Lange* and provided oral argument on the substantive issues.

discourage officious busy-bodies. Those who persist can usually be recognised and easily rebuffed. The submissions of interveners and *amici curiae* will typically be conveyed, for the most part, in writing. But sometimes oral argument by them will be useful to the Court. Such interests may occasionally have perspectives that help the Court to see a problem in a larger context than that which the parties are willing, or able, to offer. The wider context is particularly appropriate to an ultimate national appellate court. It is especially relevant to a constitutional case.”

Analysis of more recent decisions shows that there is still a striking dissimilarity between the provision of leave to interveners and *amici* in Australia and that permitted in other common law countries. Sometimes, the foothold for the differentiation may be found in constitutional or statutory provisions in those other countries, encouraging the hearing of a broader range of interests on the basis of a wider range of relevant considerations⁴⁸. Nevertheless, as in a number of areas of law, the High Court of Australia tends to adhere to the approach established by older English authority whereas other jurisdictions have adopted a more ample approach, usually sustained by attention to more detailed and express judicial criteria.

Recent refusals to interveners: The clearest indication of this difference of approach and attitude can be seen in two recent decisions of the High Court of Australia where applications to intervene were refused.

The first such decision was *Minister for Immigration Multicultural and Indigenous Affairs v QAAH of 2004*⁴⁹. That case concerned the obligations that Australia has assumed under the *Refugees Convention*

⁴⁸ See e.g. *South African Bill of Rights*, Art.38(a) and rule 34(4) of the *Supreme Court Rules* (US), discussed in Williams (2000) 28 *Federal L. Rev.* 365 at 373-375.

⁴⁹ 231 C.L.R. 1.

and Protocol⁵⁰ in respect of a “change of circumstances” affecting a refugee application as envisaged by Art.1(C)(5) of the Convention. Reference was made, in the Federal Court, and in argument before the High Court of Australia, to the guidelines and *Handbook* of the United Nations High Commissioner for Refugees. The Australian Minister responsible for immigration expressed misgivings about the use of such materials. However, sensibly, they have quite commonly been utilised in securing an understanding of the meaning and effect of the relevant provisions of international law.

Exceptionally for Australia, the United Nations High Commissioner for Refugees (UNHCR), who is based in Geneva, sought to be heard in *QAAH* as *amicus curiae*. Australian counsel were retained by the High Commissioner. Two interstate barristers appeared at the hearing on a circuit in Brisbane to apply for leave to be heard by the Court. In the result, the Court refused to hear their oral submissions. It confined the grant of leave to the filing of written submissions. The barristers were sent away, unheard in oral argument, even for a restricted time. Expressing my disagreement with this ruling, I said⁵¹:

“The intervention of the UNHCR is recorded in important proceedings in national courts overseas⁵². In my view it should be welcomed, not resisted. Decisions of national courts play an important role in expressing the meaning of the Convention and decision the application of such treaty law. In effect, in deciding cases such as the present, national courts are exercising a species of international jurisdiction⁵³. The more assistance courts

⁵⁰ 1951 and 1976: (1954) A.T.S. 5; (1973) A.T.S. 37, as given effect by the *Migration Act* 1958 (Cth.), s36(2)(a).

⁵¹ *QAAH* (2001) 231 C.L.R. 1 at 29 [78].

⁵² See e.g. *R v Immigration Appeal Tribunal; Ex Parte Shah* [1999] 2A.C.629. See also *Immigration and Naturalisation Service v Cardoza-Fonseca* 480 US 421 at 439 n22 (1987); *R v Secretary of State for the Home Department; Ex Parte Adan* [2001] 2A.C.477 at 500 per Lord Woolf MR; at 419-420, per Lord Steyn.

⁵³ *Al-Kateb v Godwin* (2005) 219 C.L.R. 562 at 662 [168] citing Brownlie, *Principles of Public International Law*, 5th Ed. 1998, 584.

can receive from the relevant international agencies, in discharging such international functions, the better.”

In a later decision, *Wurridjal v The Commonwealth*⁵⁴ (with the support of Crennan J⁵⁵), I again disagreed with the majority who refused leave in the case even to make written submissions as *amici curiae*. The request was presented by two experts in international law. They sought to place materials before the Court, asserted to have relevance for the purposes of background and context, on developments of international law relating to indigenous peoples and, especially, to the meaning of “property” in the particular context.

The majority⁵⁶ of the High Court of Australia in *Wurridjal* was not satisfied that the Court would be assisted by the materials propounded by the applicants. Accordingly, their summons was dismissed. Noting that the parties to the proceedings had themselves expressed no objection to the reception of the written submissions of the *amici*, I observed that neither should the Court. I went on⁵⁷:

“The practice of this Court in recent years has moved in the direction of widening the circumstances in which *amici curiae* will be heard, or at least permitted to tender written submissions and materials. In taking this course, the Court has simply, if somewhat belatedly, followed the practice of other final national courts in common law countries. It has done so out of recognition of the special role played by such courts, including this Court, in expressing the law, especially in constitutional cases in a way that necessarily goes beyond the interests and submissions of the particular parties to litigation. ... Whether the Court would be assisted by submissions of the proposed *amici* is difficult, or impossible, to decide at this stage, before the Court has heard any argument.”

⁵⁴ (2009) 237 C.L.R. 309 at 312-314. See also at 408-409 [260]-[261].

⁵⁵ (2009) 237 C.L.R. 309 at 314.

⁵⁶ Expressed by French C.J. for himself and for Gummow, Hayne, Heydon and Keiffel JJ, *Ibid.* at 312-313.

⁵⁷ (2009) 237 C.L.R. 309 at 313.

I remarked that, whilst much supporting material was provided, the actual submissions of the proposed *amici* were “quite brief, being but 20 pages”; that they referred to international law materials which were in any case publicly available; that the Court was now on notice of those materials; and that most such materials could be accessed and used in any case, as background or contextual matters. Which is what I proceeded to do⁵⁸.

Contrasting overseas practice: Statistical and other analysis of the practice of the Supreme Court of Canada, the Constitutional Court of South Africa and the Supreme Court (and other courts) in the United States of America, undertaken by Professor George Williams, demonstrates the difference that now exists between the practice followed in respect of applications by interveners and *amici* in those courts and that generally followed by the High Court of Australia (and, consequently by other Australian courts).

For example, whereas in the 1980s, the High Court of Australia allowed only 11 instances of intervention (20 in the 1990s), the Supreme Court of Canada in the same periods, with a marginally larger caseload, allowed respectively 56 and 174 interventions⁵⁹. Anecdotal evidence suggests that, in the following decade, the differential has widened still further. In these circumstances, to speak of a judicial ‘hostility’ towards or ‘disinclination’ to allow, interventions and the provision of *amicus curiae* submissions does not seem to be excessive.

⁵⁸ (2009) 237 C.L.R. 309 at 409-413 [264]-[273].

⁵⁹ Williams, (2000) 28 *Federal L. Rev.* 365 at 368.

The law on costs

General principles and usual rule: In the common law tradition, orders for costs for parties and other participants in litigation is governed by statute. It is generally reserved to a broad discretion in the court concerned. However, this general principle is subject, in most Commonwealth countries (but not in the United States of America), to a normal practice, of awarding basic (party and party) costs at the conclusion of the litigation in favour of the party which has succeeded in the proceedings⁶⁰.

The fact that this is the ordinary principle and that it is known to everyone entering into litigation, presents particular risks for those who embark on public interest litigation, not for their own private profit but in support of their view of the public interest and requirements of the rule of law. If they lose, 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 now 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?

It was considerations such as these that led the Hon. John Toohey, then a Justice of the High Court of Australia, writing extra-curially, to draw to

⁶⁰ See e.g. *Donald Campbell v Pollack* [1927]A.C.732 at 811-812 [HL] and *Latoudis v Casey* (1990) 170 C.L.R. 534 at 569. Discussed K. Edwards, "Costs and Public Interest Litigation After *Oshlack v Richmond River Council*" (1999) 21 *Sydney L. Rev.* 680 at 684

attention the inescapable connection between cost rules and the maintenance of public interest proceedings⁶¹:

“Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that ‘costs follow the event’ is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.”

In a number of jurisdictions, acknowledging the costs considerations mentioned by Justice Toohey, courts have begun, in environmental litigation and elsewhere, to provide relief to those who justifiably bring proceedings in the public interest, even where they ultimately fail⁶². Two developments have happened which have modified the usual approach to the ordinary common law cost rule of ‘winner take all’.

Special costs orders in environmental case: The first development has arisen in litigation where statute has provided for costs to be awarded in the discretion of the Court but, at the same time, has expressly widened the standing of those who may enliven the court process beyond the requirement to demonstrate a ‘special interest’ or ‘special damage’. This was the case in an Australian proceeding that unusually proceeded all the way to the High Court of Australia in a challenge against a costs order made by a judge at first instance in the

⁶¹ Address to international conference quoted in *Oshlack* (1994) 82 L.G.E.R.A. 236 and in Australian Law Reform Commission, *Costs-shifting – Who Pays For Litigation?* (A.L.R.C. 75, 1995) [13.9].

⁶² G. Cazelet, “Unresolved Issues: Costs in Public Interest Litigation in Australia” (2010) 29 C.J.Q. 109 at 123.

Land and Environment Court of New South Wales (Stein J.). In that Court, by s.123(1) of the *Environmental Planning & Assessment Act* 1979 (N.S.W.), “any person” is authorised to bring proceedings for an order to remedy, or restrain, a breach of the Act and to do so “whether or not any right of that person has been or may be infringed by, or as a consequence of, that breach”.

In invoking this provision, a local resident, Mr. Al Oshlack, brought proceedings against his local government authority and a property developer seeking relief on the basis that the local authority had unreasonably concluded that a proposed development by the developer was unlikely significantly to affect the environment of endangered native fauna (koalas). The substantive argument on the issue was rejected by the trial judge.

However, the trial judge decided that, exceptionally, there should be no order as to costs in favour of the authority and the developer, notwithstanding that they had succeeded on the merits. He took into account the broader standing rule provided by s123 of the Act which envisaged, and sustained, the applicant’s pursuit of the litigation. He held that this pursuit was undertaken solely for worthy motives, seeking to uphold the condition of the local environment and the protection therein of an endangered species, such as koalas⁶³. The statute provided an “absolute and unfettered” discretion in the Court to permit the proceedings. The trial judge held that he should ordinarily observe the ‘usual rule’, being the principle against the background of which the statute had been enacted. Nevertheless, he decided that the challenge brought by the applicant had been legally arguable. It raised significant

⁶³ *Oshlack v Richmond River Council* (1994) 82 L.G.E.R.A. 236 at 246, per Stein J.

issues about the interpretation and administration of the statute. For these reasons, he held, there were “sufficient special circumstances” to justify a departure from the ordinary rule as to costs⁶⁴.

The Court of Appeal of New South Wales reversed this decision. It held that the trial judge’s discretion had miscarried⁶⁵. In an appeal by special leave, the High Court of Australia, by majority, restored the costs orders of the trial judge⁶⁶. The majority⁶⁷ rejected the contention that the judge at first instance had taken into account extraneous considerations which were outside the objects of the legislation. They pointed out that there was no absolute rule with respect to the exercise of a discretionary power conferred on the Court⁶⁸.

In my reasons, the peculiar statutory enlargement of the standing rights in the specialised trial court was identified as a consideration relevant to the costs order appropriate in litigation that necessarily involved a legitimate public interest. This was especially so where it could be shown that the proceedings brought ‘in the public interest’ were ventured without any hope or expectation of private gain⁶⁹. On the other hand, the dissenting judges concluded that the legislature had not, with sufficient clarity, departed from the traditional costs approach in litigation of this kind⁷⁰. The minority judges would have dismissed the appeal and confirmed the order for costs entered against the plaintiff by the Court of Appeal.

⁶⁴ (1994) 82 L.G.E.R.A. 236 at 246.

⁶⁵ *Richmond River Council v Oshlack* (1996) 39 N.S.W.L.R. 622 (CA).

⁶⁶ *Oshlack v Richmond River Council* (1998) 193 C.L.R. 22.

⁶⁷ Per Gaudron and Gummow JJ and per Kirby J.

⁶⁸ *By Land and Environment Court Act 1979* (N.S.W.), s.69(2).

⁶⁹ (1998) 193 C.L.R. 72 at 124 [136]-[137].

⁷⁰ (1998) 193 C.L.R. 72 at 75 [2] per Brennan C.J.; 104 [84]-[85] per McHugh J.

Despite the hopeful signs evident in the *Oshlack* decision, subsequent developments in Australia have indicated the exceptional character of the decision in that case and the persisting general disinclination of Australian courts to depart from the ‘usual rule’ as to costs, including in litigation that can be described as involving the public interest.

Many cases illustrate this point (as do similar developments in the provision of ancillary orders obliging applicants for injunctive relief to offer the ‘usual undertaking as to damages’ before such relief will be granted⁷¹). In the absence of some specific or general legislative change, the general position adopted by the Australian courts has been outlined by the Chief Judge of the Land and Environment Court (Justice Brian Preston)⁷². It appears to be sustained by the decisional authority of Australia’s highest court, including some observations of my own in a decision that sought to explain *Oshlack* by reference to the particular statutory provisions of the New South Wales Act rather than as evidencing a broader shift in judicial approach⁷³.

Occasionally, there have been particular discretionary orders (sometimes made by a majority⁷⁴) based on the fact that there had been “genuine uncertainty about the interpretation of a document or statute” or because “the legal issue is novel and has consequences extending beyond the litigation” or where the “losing party may have had very good legal grounds for its position and conducted itself ... in an entirely

⁷¹ Described in A. Kallies and L. Godden, “What Price Democracy – *Blue Wedges* and the Hurdles to Public Interest Environmental Litigation”(2008) 33 *Alternative L.J.* 194: citing *Blue Wedges Inc v Port of Melbourne Corporation* [2005] V.S.C. 305; *Blue Wedges Inc v Minister for the Environment* (2008) 165 F.C.R. 211 and (2008) 157 L.G.E.R.A. 428.

⁷² B.J. Preston, “The Role of Public Interest Environmental Litigation”, (2006) 23 *Environment & Planning Law Journal* 337.

⁷³ *North West Forest Defence Foundation Inc v Land & Forest Commission (WA) [No.2]* (1995) 86 L.G.E.R.A. 382 at 386.

⁷⁴ *Ruddock v Vadarlis [No.2]* (2001) 115 F.C.R. 229 per Black C.J. and French J.

reasonable way”⁷⁵. Still, any reflection on the Australian judicial decisions in this area shows that they have generally been adverse to requests for relief by losing litigants in proceedings, arguably involving the public interest. More so in Australia than in other countries.

Gary Cazelet in a survey of the Australian experience of costs orders in this context, concluded⁷⁶:

“That a proceeding is in the public interest and exhibits characteristics that courts have regarded as relevant may still not be sufficient to persuade a court to depart from the usual costs order. In decisions over almost 15 years, Australian courts have considered that departing from the usual costs order should be confined to “very rare”⁷⁷ and “most unusual”⁷⁸ cases. This approach mirrors the attitude of English courts in their early decisions about protective costs orders in public interest cases, that they should be restricted to “the most exceptional cases”⁷⁹. More recently, English courts have modified their approach to remove the requirement for exceptionality to allow judges greater flexibility in dealing with applications⁸⁰. Australian courts have not shown any inclination to adapt their approach to reflect the practice of contemporary English courts”.

Rules for protective costs orders: This brings me to the second innovation of protective costs orders, referred to in the extract just quoted. Such orders have been most unusual in Australia where costs orders have normally been made, in the traditional way, only at the *conclusion* of proceedings. Necessarily, this means that individuals and

⁷⁵ (2001) 115 F.C.R. 229 at 235. In September 2008, French J became the Chief Justice of the High Court of Australia.

⁷⁶ Cazelet, (2010) 29 C.J.Q. 108 at 123.

⁷⁷ (1997) 152 A.L.R. 83; *South-West Forests* (1995) 86 L.G.E.R.A. 382 at 384. See also *Buddhist Society of WA Inc v Shire of Serpentine and Jarrahdale* [1999] W.A.S.C.A. 55 at [19]; *Save The Ridge Inc v The Commonwealth* (2000) 230 A.L.R. 411 at 413.

⁷⁸ *Ruddock v Vadarlis* (2001) 115 F.C.R. 229 at 242.

⁷⁹ *Corner House Research v Secretary of State for Trade and Industry* [2005] E.W.C.A. Civ. 192 at [72].

⁸⁰ Zuckerman, “Protective Costs Orders – A Growing Cost Litigation Industry” (2009) 28 C.J.Q. 161. In Australia, the first provisions in rules of court were order 62A of the Rules of the Federal Court of Australia. Special provisions have appeared in relation to particular legislation. See e.g. *Judicial Review Act 1991* (Q), s49.

organisations, contemplating the commencement of proceedings avowedly in the public interest, have only limited means of knowing their ultimate maximum potential liability. Before the adoption of recent rules, permitting preliminary or earlier costs orders, to fix the maximum exposure of litigants to costs liabilities, they were extremely rare, as Dyson J. pointed out in 1998 in the *Child Poverty Action*⁸¹.

Yet even after changes in court rules in the 1990s, to permit protective costs orders to be made, they have remained very unusual in Australia. In 2008, in *Corcoran v Virgin Blue Airlines Pty Ltd*⁸², the Federal Court of Australia made its first protective costs order in a public interest case, although that court had enjoyed the facility to do so under its rules for 13 years. In that case, an individual challenged the travel criteria imposed by Virgin Blue Airlines alleging that they discriminated against handicapped passengers, contrary to the provisions of the *Disability Discrimination Act 1992* (Cth.). The applicants, who were physically disabled, received some public legal aid to support their action. The Federal Court differentiated between the protective costs orders that it made. It held that costs should be capped, providing for the payment of \$15,000.00 by one plaintiff (who was unemployed) and \$30,000.00 by the other plaintiff (who had a job and assets). The total cap envisaged was thus \$45,000.00. This was “already in the region of the costs estimate made by Virgin”⁸³.

Since the protective costs order made in the *Corcoran* case, more attractive orders, capping costs in advance, have been made by the

⁸¹ The developments in the UK are described in Environment Defenders Office, *Policy and Law Reform, Costing the Earth? The Case for Public Interest Costs Protection in Environmental Litigation* (Melb. 2010), 17.

⁸² [2008] F.C.A. 864.

⁸³ Cazalet, (2010) 29 C.J.Q. 108 at 119.

New South Wales Court of Appeal⁸⁴ and also by the Federal Court of Australia⁸⁵. In the Court of Appeal, a dispute arose as to the operation of a costs rule in the Land & Environment Court controlling maximum costs orders in proceedings brought “in the public interest”. However, all judges found that the special costs order made by the judge at first instance revealed no error of principle. Getting the affirmative order from the primary judge is thus usually of critical importance, as the cases demonstrate. This is probably inevitable because appellate courts are extremely reluctant to grant leave to appeal against discretionary costs orders. Still, in Australia, it is not easy to obtain a protective costs order and especially one that departs very far from the conventional rule requiring the loser to indemnify the winning party for costs⁸⁶.

The position in both the United Kingdom⁸⁷ and in Canada⁸⁸ on the availability of protective costs orders is more supportive of public interest litigation. In the United Kingdom, the view seems now to have been accepted that “there is a public interest in the elucidation of public law by the higher courts”⁸⁹. In Australia, “something more” appears to be required by the courts in order to reach this conclusion in a particular case. And even then, the protective costs orders made may effectively dissuade even the most intrepid of litigants from pursuing in court their devotion to the public interest and the law of the land.

⁸⁴ *Delta Electric v Blue Mentors Soc Inc* [2010] N.S.W.C.A. 263;

⁸⁵ *Haraskin v Murrays Aust Ltd* [2010] F.C.A. 1133.

⁸⁶ *Carooma Coal Action Group Inc v Coal Mines Association Pty Ltd and Minister for Mineral Resources [No.3]* [2010] N.S.W.L.E.C. 59.

⁸⁷ *R. (on the application of Corner House Research) v Secretary of State for Trade* [2005] 1 W.L.R. 2600 at [70].

⁸⁸ *British Columbia (Minister of Forests) v Okanagan Indian Band* (2003) 114 C.C.R. 2d 108.

⁸⁹ *In Re Cornerhouse* [2005] 1 W.L.R. 2600 at [70]. See also *R (Davey) v Aylesbury Vale District Council* [2008] 1 W.L.R. 878.

Law reform proposals: In 1995, at the request of the Federal Attorney-General, the Australian Law Reform Commission (A.L.R.C) delivered a special report on costs⁹⁰. In that report, the Commission recognised the benefit to the community sometimes arising from public interest litigation and the significant deterrent which the present costs allocation rules have presented against the bringing of such litigation and procuring that benefit. The Commission proposed particular legislation to permit public interest costs orders to be made by federal courts and tribunals where satisfied that the proceedings will:

- Determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community;
- Affect the development of the law generally and may reduce the need for further litigation; or
- Have the character of public interest or ‘test case’ proceedings.

The Commission suggested a number of criteria for the making of orders which could be available before, during and after the conclusion of litigation. In the Northern Territory of Australia, the Local Court Rules have been amended to incorporate the A.L.R.C recommendations⁹¹. However, so far, no general federal legislation has been introduced to implement the Commission’s proposals. The New South Wales Law Reform Commission is examining public interest costs orders and is expected to report on the subject in 2011⁹².

Failure of law reform: In the federal sphere in Australia, a special fund, known as the Commonwealth Government Public Interest and Test

⁹⁰ A.L.R.C 75 (above).

⁹¹ Local Court Rules (N.T.), Rule 38.10.

⁹² G. Namey, “Litigation Costs Strategies for the Public Interest Lawyer”, Public Interest Advocacy Centre, Sydney, 2010, 15.

Cases Scheme, has been established by the Federal Government to provide some support for select litigation⁹³. The total amount available from this Fund is small. Most grants have been made in the field of family law. Once again, the parsimony and resistance of governments towards public interest litigation can be demonstrated.

It follows that, although there have been some glimmerings of hope in the making of special costs orders and the ordering of protective costs, the overwhelming practice of costs in Australia remains conventional, unreformed and largely unsympathetic. Costs stand as a third obstacle in the way of those who contemplate public interest litigation. This attitude effectively rejects the view that governments, private corporations and well-resourced individuals, such as national and sub-national governmental authorities, local government authorities, corporations (like Virgin Airlines), and other parties have an interest, and obligation, occasionally to establish that they are complying with the law. Or that they should have to accept the occasional public interest proceeding and protective costs order, as consequences (and operational obligations) for conducting their activities in a rule of law society where, at least theoretically, all participants are subject to the scrutiny of the courts.

REASONS AND CAUSES FOR HOSTILITY

1. Dislike of the evils of litigation

Some of the reasons for the narrow state of the law on standing, intervention and special costs orders in public interest litigation have already been suggested by the analysis of the impediments in these three areas of the law. However, several general considerations may be

⁹³ Cazalet, (2010) 29 C.J.Q. 108 fn14.

identified to explain the common response both of legislative and judicial law-makers in Australia, hostile to change in the traditional law.

Thus, in *Anderson's Case*, the designation of intervention in litigation involving other parties, otherwise than to maintain a particular right, power or immunity provided by law⁹⁴, as “evil” is equally applicable to many of the responses to attempts to enlarge standing rights and to reduce the obstacle presented by the usual costs rules.

Litigation in such matters is widely seen as “unwise”, if not “evil”. It is perceived as likely to overload the courts with what are essentially political controversies that should be thrashed out in a political party or a parliamentary forum, rather than in a court room⁹⁵.

This approach displays a simplistic view about the nature of the decisions that courts often have to make. In much public law litigation (particularly, for example, litigation concerning the powers and duties of ministers and relating to the environment) the decision that is made is inescapably “political”, in the broad sense of that word. A separation of powers exists under the Australian Constitution⁹⁶. Yet it is not rigid and each branch of government makes ‘political’ choices. The contention that *all* political decisions have to be made by the legislature and by elected politicians is simply not the way any modern government operates. It represents a naive view of the institutions of society. It is a highly formalistic opinion that owes more to romantic mythology than to actual experience.

⁹⁴ *Anderson v The Commonwealth* (1930) 44 C.L.R. 319 at 331.

⁹⁵ L. Campbell, “Who Should Right the Public Wrong? The A.L.R.C.’s proposal for a Text for Standing” (1997) 5 *Australian Journal of Administrative Law* 48 at 63.

⁹⁶ See e.g. *R. v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254.

Some protection against decision-making that is wholly political, in the sense of involving divisive partisan politics, is provided by the requirement that court proceedings must be about a justiciable issue. In Australia, a proceeding in a federal court, must constitute a ‘matter’ of the kind contemplated by the Constitution⁹⁷. Federal courts enjoy jurisdiction under the Constitution only in resolving such “matters”. However, this precondition cannot be pressed too far. As Dixon J. acknowledged in the *Melbourne Corporation* case in 1947⁹⁸, the Constitution itself, and court decisions about it, are inescapably “political”, in at least one sense.

At the heart of the resistance to public interest litigation appears to lie an old-fashioned view that conflict is bad; that conflict in courts is worse; and that conflict that challenges firm and considered governmental decisions is worst of all. Such conflict is regarded, in some cases, as undermining respect for the Acts of Parliament, the application of such laws by ministers and their administration by officials. Litigation in pursuit of such conflict is viewed as distracting, time-consuming and expensive. Requirements of standing, and the limitations imposed by restricting interventions and heavy costs orders, are accepted because they contribute to firm and stable government. If people wish to make contentions about illegality and the public interest, unless they have a special interest of their own, they should be confined to doing so in the political *fora*.

⁹⁷ Australian Constitution, ss75, 76 and 77. Cf. *Lindon v The Commonwealth* (1996) 136 A.L.R. 251; *Thorpe v The Commonwealth [No.2]* (1997) 144 A.L.R. 677.

⁹⁸ *Melbourne Corporation v The Commonwealth* (1947) 74 C.L.R. 31 at 82; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management* (2000) 200 C.L.R. 591 at 640 [131].

Most observers today will understand the limitations of the foregoing view about conflict and litigation over at least important legal requirements governing powerful public and private authorities and individuals in society. Any exposure to contemporary legislative processes will acknowledge the general erosion of real power from elected politicians to executive government. From the executive government to the government's leadership. And sometimes from the elected leadership to an inner core of the governing political party or parties that commonly, in practice, make the most important political decisions in every polity.

The *Realpolitik* of contemporary governments in most countries is rarely sensitive to political agitation for change, at least without much external stimulus. Some of the same opponents to enlarging the enhancement of individual rights in the form of public interest litigation are those in Australia who oppose the introduction of a Bill or Charter of Rights⁹⁹. Those who presently control the levers of power in society do not readily accept a loss of their control to individuals or groups which seek to enlist the courts to enforce the law and, occasionally, a different perception of the public interest. For them, the potential access of citizens and groups to such alternative sources of power is truly "evil".

2. *Trusting public and private officials*

A connected way to explain the negative approach of legislative and judicial decision-making to reform of the law of standing, intervention and costs is to suggest that, if there is a choice in society, we should generally resolve it by enhancing democratic and political solutions to

⁹⁹ M.D. Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 ALJ 299 at 312-314 referring to A.F. Mason, "Democracy and the Law: The State of the Australian Political System" (2005) *Law Soc J. (N.S.W.)* 68 at 69.

public interest conflicts rather than promoting their resolution in courts, constituted by unelected judges. Necessarily, judges will generally be obliged to decide such conflicts by reference to principles of law rather than pure arguments of policy or politics. Sometimes, perhaps often, the governing law will be silent, outdated, ambiguous or inadequate, meaning that judges will be authorised to solve the challenge in a principled, informed and rational way.

This reason for resisting an enlargement of public interest litigation is a variation on the theme of the first and an elaboration of that approach. It may be willing to acknowledge that the political process is imperfect and defective. However, it will suggest that transferring what are, or should be, political disputes into courtrooms is more undesirable than working harder to improve the democratic, accountable and political institutions of the state.

A hint of this approach appears in the short supplementary reasons of Hayne J. in the *Bateman's Bay* case in the High Court of Australia¹⁰⁰. There, Hayne J. acknowledged that:

“As the reasons given by the other members of the Court show, the position of an Attorney-General in this country is different from the position of the holder of that office in England. Whether those differences suggest, or warrant, departure from the application of the test for standing of “special interest” is a difficult question which may require consideration of matters of the kind mentioned in the reasons of the other members of the Court ... Only [when the interests involved are identified] is it possible to consider how and at whose instance decision-makers are to be made accountable and compliance with legislation ensured. At present, accountability and compliance are sought at two levels: by means that might be described broadly as “political” and, if a plaintiff has a special interest in the subject matter of the proceedings, by legal

¹⁰⁰ (1998) 194 C.L.R. 247 at 284 [108].

process. References in cases ... to the role of the Attorney-General as being “constitutional” rather than technical or procedural can be seen as emphasising what I have referred to as the political aspects of ensuring accountability and compliance.”

Because in that case it was held that the plaintiffs actually possessed a “special interest” in the subject matter of the proceedings, it was unnecessary for Hayne J. to decide “whether the balance between the legal and political aspects of ensuring accountability and compliance should be struck differently”. But what Hayne J. wrote is an acknowledgement of the essentially political task which the courts must often accept in ‘striking the balance’ between, on the one hand, a purely *political* or, on the other hand, a partly *legal* occasion of accountability.

Whilst sometimes accepting the imperfections of political accountability, courts in public interest litigation (especially in Australia) and many law-makers are loath to expand standing, intervention and costs rules where to do so would allow contentious and controversial subjects to be fought out in courtrooms, with resulting public calumny and suspicion directed at the judges. Yet if the result of the present rigidities and imperfections of the political process is that it will often not yield any, or any effective, response to challenges addressed to alleged non-compliance of public actions with the Constitution, statute or common law, a question is then posed. It is whether in such cases increasing the effective access of disaffected citizens to judicial determinations of sufficiently legal contentions is socially desirable and conducive to a greater compliance with the law in the relevant society rather than the effective rule of sheer political or economic power?

3. *The need to sharpen controversies*

By and large, judges know how important it is to have maximum assistance in deciding controversies submitted to them for judicial determination. Although it cannot be a universal rule, generally the existence of a 'special interest' in a party or a susceptibility to 'special damage', will be seen as enlivening the self-interest of a litigant to advance all the best possible arguments to support its legal contentions.

The 'ordinary citizen', who has no such *special* involvement may sometimes lack the motivation to sharpen the submissions into a winning formulation. Such a litigant, having no more than a 'theoretical' or 'emotional' stake in the outcome, may be too dispassionate or not sufficiently committed to winning the cause for the immediate financial or similar reward that such a victory will commonly promise to those with a 'special interest'. This is why, in many of the cases on standing (and some relating to intervention and costs), scepticism is expressed, or felt, about those who seek to advocate in court a political, philosophical or academic position as distinct from one based purely on a 'special interest' or susceptibility to 'special damage'¹⁰¹.

Advocates for this approach to access to the courts suggest that it is tied to the distinctive characteristics of adversarial litigation, as practised in most litigation before common law courts¹⁰². At the time of the writing of its report on costs law reform, the Australian Law Reform Commission was considering, in a separate reference, whether any fundamental change should be recommended (subject to the Constitution) to the

¹⁰¹ With reference to *Gouriet v Union of Post Office Workers* [1978] A.C.435 at 481, per Lord Wilberforce

¹⁰² L. Campbell (above) (1997) 5 *Australian Journal of Administrative Law* 48 at 49.

adversarial system as practised in Australia. Ultimately, the Commission was not persuaded that any such change was justified¹⁰³.

Having so concluded, adherence to the self-interest that tends to work the processes of adversarial litigation (usually a financial or proprietary interest) is still seen by many common lawyers as an essential motivating ingredient that one must be extremely cautious to disturb. In Tennyson's words, the history of the common law has generally been, about "property, property, property"¹⁰⁴. Perhaps for this reason, many judges, appointed to serve in the courts (especially appellate courts) come to the judicial seat from backgrounds in property and commercial law. Their experience may sometimes colour their approach to, and occasional suspicion of, public interest litigation. It may cause them to view public interest litigation as an unwelcome visitor to the natural, traditional and "real" work of the courts, in which those institutions have well-developed skills and recognised advantages¹⁰⁵.

Those who have spent their lives as lawyers engaged in problems of insolvency, charterparties, wills and contract law may not develop much familiarity with, or empathy for, citizens who live on housing estates; are trans-gender, environmental enthusiasts, civil libertarians or refugee applicants. Yet the fact is that most citizens who come into contact with the legal system and the courts make that connection in Local and Magistrate's courts; in the criminal law; in matters of family and industrial law; and in cases that often concern intangible factors such as liberty, reputation, family relations, statutory rights, the environment and

¹⁰³ . Australian Law Reform Commission, *Managing Justice: A Review of the Federal Court Justice System* (A.L.R.C. 89, 2000). See also *Ibid.*, *The Judicial Power of the Commonwealth* (A.L.R.C 92, 2001).

¹⁰⁴ A. Tennyson, *Northern Farmer*, (1847).

¹⁰⁵ L. Campbell (above) 49.

neighbourhood. The law and its institutions serve them and not only the propertied interests which can demonstrate a financial stake in the outcome of legal disputes.

4. *Absence of special legislation*

A consideration repeatedly referred to in resisting attempts to secure judicial reform of the law on standing, intervention and costs rules is that changes on such subjects should be effected by enacted legislation, and not by decisions of the courts.

In *Oshlack*¹⁰⁶, in the context of a suggested new approach to costs in “public interest litigation” in Australia, the dissenting judges emphasised the undesirability of effecting a change in a basic rule as to costs without absolutely clear authority to do so, granted by Parliament. This approach was said not only to be warranted by general principles governing the relationship between the courts and the legislature. It also had a specific and practical reinforcement. Thus, McHugh J. pointed out¹⁰⁷:

“As a matter of policy, one beneficial by-product of the compensatory purpose [of costs orders] may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expenses involved. Large-scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice.”

Because in rare and particular cases, the legislature has enacted special rules governing costs¹⁰⁸, the failure to do so in the instant case was

¹⁰⁶ (1998) 193 C.L.R. 72 at 97 [67].

¹⁰⁷ (1998) 193 C.L.R. 72 at 97 [68].

¹⁰⁸ (1998) 193 C.L.R. 72 at 104 [84].

advanced as a reason for the High Court to stay its hand. In any case, McHugh J. was sceptical about the existence of a category of “public interest litigation” which, he said, was difficult, or probably impossible, to define with precision¹⁰⁹.

Obviously, the economic consequences of shifting costs to governmental or private bodies or to specific individuals, to whatever degree (or to enlarging the potential for the bringing of proceedings presently unsustainable or applying for intervention in cases now forbidden) all involve an economic cost that someone has to bear. The issue is then posed as to whether the marginal utility of enhancing the rule of law and the judicial determination of public interest issues that would otherwise be ignored, is outweighed by the marginal costs of doing so by an increase in litigation.

Various other possibilities (such as specific legislation in particular fields) have been mentioned as an alternative to a change of such basic legal principles as those governing standing, intervention or costs. At one stage, Mr. Daryl Williams QC (later Federal Attorney-General in Australia) suggested that, instead of generic legislation, the creation of an office of Advocate-General might be warranted to take up public representations and to advise members of the public or public interest groups¹¹⁰.

¹⁰⁹ (1998) 193 C.L.R. 72 at 72 [99].

¹¹⁰ D. M. Williams, “The Australian Parliament and the High Court: Determination of Constitutional Questions” in C. Sampford and B. Preston (Eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation, Sydney, 1996), 216.

Sir Anthony Mason once suggested a similar idea. However, he records that it did not, at the time or afterwards, attract much support¹¹¹. Nor did Mr. Williams promote his proposal when he was in a position to do so, after his appointment in 1996 as Australia's Attorney-General. Giving voice to the "invisible" and the "unspeakable" does not tend to be high on the priorities of those who once attain important political or judicial office¹¹².

For these and other reasons, although small changes have been achieved, little has been done in Australia by any of the relevant law-makers to enhance public interest litigation or to overcome the obstacles that presently stand in the way of such proceedings. Taking into account the reasons, beyond the usual ones of institutional lethargy and conservatism, that explain the present *impasse*, should any change in the governing law and practice be effected and, if so, what?

ANSWERING THE HOSTILITY

1. Standing, the powerful and the rule of law

Many of the arguments that are collected above to oppose reform of the law of standing, or of the practice of permitting intervention and the making of special costs orders in public interest litigation, can be answered convincingly, as the successive Australian Law Reform Commission reports on the subjects have shown. Courts need a break on the intrusion of mere busy-bodies into other parties' disputes. However, the spectre of hordes of troublesome litigants, willing, without justification, to devote the time, money and energy required by public interest litigation is unconvincing. To describe the current standing rules

¹¹¹ A.F. Mason, "Interveners and *Amici Curiae* in the High Court: A Comment" (1998) 20 *Adelaide L. Rev.* 173 at 176.

¹¹² *Ibid.*, 176, quoting Professor Penelope Pether.

as essential to stave off the ‘evil’ of public interest litigants challenging legislative validity and applicability postulates a sacrosanct status to legislation and governmental conduct that few citizens would today be willing to accord to the product of their officials and the institutions operating in society.

The notion that officers of the state (the Crown or the Attorney-General) can always be trusted to make lawful, fair and rational decisions is simply not consistent with the large and growing body of administrative law that has developed in the past 30 years in most common law countries, including the United Kingdom and Australia.

Judges play their constitutional part in the law-making of their polity. The judicature is one of the most important of governmental institutions. The genius of those institutions is that they collect, in a special mixture, elements of elected officials (such as the legislature and the ministry in parliament) and unelected officials (such as the Crown, the military forces, the public service and the judiciary).

It was this thought that caused Lord Bingham, then senior Law Lord, in 2004, in *A & Ors v Secretary of State for the Home Department*¹¹³, to observe in a case concerned with the detention without trial of foreign nationals accused of terrorist offences:

“It is of course true that the judges in this country are not elected and are not answerable to Parliament. ... But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney-General is fully entitled to insist on the proper limits of

¹¹³ [2004] U.K.H.L. 56 [42].

judicial authority; but he is wrong to stigmatise judicial decision-making as in some way undemocratic. ”

By upholding the law and the Constitution, as they are determined to be, judges serve as part of a democratic government. It is not particularly democratic to enact or make laws and then to ignore them. Or to place unreasonable obstacles in the way of their maintenance and enforcement – whether by way of a narrow standing rule; by a severe restriction on curial intervention; or by discouraging special and protective rules as to costs.

The track record of Attorneys-General in Australia is generally to deny or refuse *fiats* for the commencement of proceedings in the public interest where no litigant can be found with an interest sufficiently special to allow a test case. This fact suggests the essential flaw to the current postulate of the law. In the politically charged circumstances of contemporary society, it can no longer be expected that political law officers will always exercise their powers according to dispassionate rule of law considerations. Experience suggests that all too often they will exercise their powers for political, partisan or personal and electoral advantage. Yet that is precisely when effective access to the courts can be most important and potentially beneficial. As I have shown, there are often serious obstacles created by the present law and current institutional practices.

The notion that only economic interests help to refine and sharpen advocacy before courts is highly dismissive of the role of civil society organisations in a democratic polity. Much modern writing on this topic emphasises the great importance of vitality in such organisations, in all

of their variety¹¹⁴. The diminishing engagement of citizens with political parties in Australia and other Western countries, and the apparent inability that political parties share in winning decisive electoral support¹¹⁵, suggests a practical and institutional reason for enlarging the availability of public interest litigation rather than restricting or diminishing it.

There is a certain irony in the repeated insistence, in the making of costs orders, of the importance of a lack of any personal interest on the part of the public interest litigant. This is so because critics of such litigants commonly contend that *only* personal interest fuels well-targeted adversarial litigation. Strange as it may seem to those who view the world solely or mainly, in economic terms, there are citizens who are strongly motivated by instances of arguable illegality on the part of political and other officials. And by concerns about the environment and for disadvantaged minorities. Such minorities may not always be able to work the levers of democratic power. However, access to the courts may sometimes afford relief even for the most unpopular and unwelcome of minorities¹¹⁶.

In the short term, little seems likely to change in these legal obstacles, at least in Australia, to correct the present *impasse*, whether by legislation or by a change in court rules made under legislation or by a widespread change in judicial practice. So far as the law of standing is concerned, the Australian Law Reform Commission has recommended changes to

¹¹⁴ Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, NY, 2000)

¹¹⁵ Recent very close election results in the United Kingdom, Canada and Australia (including the Federal, Tasmanian, South Australian and Victorian elections) are examples.

¹¹⁶ Contrast *Combet v The Commonwealth* (2005) 224 C.L.R. 494 (where the plaintiff's standing was challenged) and *Roach v Electoral Commissioner* (2007) 233 C.L.R. 162 where it was not.

federal law¹¹⁷. It has also done so on the provision of special cost orders in public interest litigation, as defined¹¹⁸. These proposals have remained for too long in the 'too hard basket' of successive governments and ministers. Especially if they are not willing substantially to increase the public funds provided to support litigants with standing in well-chosen test litigation; or to maintain access to litigation funding that makes proceedings at law more practicable for the ordinary litigant¹¹⁹; or to adopt a more supportive stance towards representative proceedings¹²⁰, proposals of the kind recommended by the Law Reform Commission for public interest litigation and funding should be promptly enacted.

The suggested danger of the "floodgates" that is always raised to resist even modest changes of the kind proposed by the A.L.R.C can be adequately answered in the words of Deane J., then writing in the Federal Court of Australia¹²¹:

"The argument that to give the words which the parliament has used their ordinary meaning would, to use a popular phrase, 'open the floodgates of litigation' strikes me as irrelevant and somewhat unreal. Irrelevant, in that I can see neither warrant for concluding that the Parliament did not intend that floodgates be opened on practices which contravene the provisions of the Act nor reason for viewing that prospect, if it were a realistic one, with other than equanimity. Unreal, in that the argument not only assumes the existence of a shoal of officious busybodies agitatedly waiting, behind the 'floodgates', for the opportunity to institute costly litigation in which they have no legitimate interest but treats as novel and revolutionary an approach to the enforcement of laws which has long been established in the ordinary administration of

¹¹⁷ A.L.R.C 78 *Beyond the Door-keeper: Standing to Sue for Federal Remedies*, 1996.

¹¹⁸ A.L.R.C 75 *Cost-Shifting: Who pays for Litigation*, 1995.

¹¹⁹ See e.g. *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 C.L.R. 386.

¹²⁰ See e.g. *Carnie v EANDA Finance Corporation Ltd.* (1992) 29 N.S.W.L.R. 382; (1995) 182 C.L.R. 398 at 404; cf. *Wong v Silkfield Pty Ltd* (1999) 192 C.L.R. 255 at 261-3 [13]-[17].

¹²¹ *Phelps v Western Mining Corporation Ltd* (1978) 33 F.L.R. 327 at 333-334.

the criminal law. ... One may be permitted the comment that the broken public telephones around the cities of Australia perhaps provide mute testimony of how dry the ground beneath the floodgates has remained.”

2. *Intervention: Judicial and other reforms*

In the case of third party interventions (and of applications by *amici curiae* to place submissions before a court), the present rules originate from a time when judges did not admit (and usually denied) the law-making role that they fulfil in a common law system. Because few judges and lawyers today adhere to the “fairy tale” view of the judicial role in declaring the law, this altered perception should produce adjustments to the previous law on intervention. As Mason C.J. once said¹²²:

“When in the 1980s the appeal to the High Court [of Australia] was conditioned on the grant of special leave, the law-making function of the High Court was elevated to a new level of importance. Since then most appeals coming before the High Court involve an important question of principle and have the potential to engage the Court in law-making, even if they do not go beyond the clarification of principle. The special leave requirement recognises and reinforces the importance of the Court’s law-making function, notwithstanding that it is incidental to its adjudicative function.”

To the considerations mentioned must now also be added the termination of all Australian appeals to the Privy Council¹²³ and the High Court’s own recognition that its decisions rest not only on judicial and legal authority, but also, necessarily, on considerations of legal principle and legal policy¹²⁴.

¹²² Mason, (1998) 20 *Adelaide L. Rev.* 173 at 174.

¹²³ *Australia Act* 1986 (Cth. and U.K.), s11.

¹²⁴ *Oceanic Sunline Special Shipping Co Inc v Fay* (1988) 165 C.L.R. 197 at 252; *Northern Territory v Mengel* (1995) 185 C.L.R. 304 at 347.

Means are readily available to bring the practice of the High Court of Australia more into line with that of equivalent courts in Canada, South Africa, India and now the United Kingdom¹²⁵. Legislation would be a most obvious way. The adaptation of rules of court, based on the rule applicable in South Africa and the practice observed in Canada would be another possible step. So would be the legislative creation of a generic category of interveners (to subsume *amici curiae*), as recommended by the Australian Law Reform Commission¹²⁶.

If clear rules were established for the grant or refusal of leave to intervene, it would be more likely that decisions on such applications would be less apparently idiosyncratic and more susceptible to reasoned rulings and thus accurate professional prediction. Many agree that the present law and practice on interventions is unsatisfactory, unpredictable and inconsistent.

3. *Reform of costs rules and practice*

Proposals for legislative change on costs have also been made by the Australian Law Reform Commission which it would be timely and just to consider, adapt and introduce. What is needed is a parliamentary champion whose interests in an active democracy and real observance of the rule of law are greater than a commitment to the quietening call of ambition or the control of party managers and the whispered advice of officials, unsympathetic to troublesome outsiders and civil society bodies. In Australia, there have been such law officers and parliamentarians who champion reform. However, they tend to be rare birds.

¹²⁵ Williams, (2000) 28 *Federal L. Rev.* 365 at 400.

¹²⁶ A.L.R.C 78, (1996), 69 [6.31].

No-one is suggesting an abandonment of the primacy of parties in litigation of their own choosing. Yet, Australian practice on standing, intervention and cost orders in public interest litigation has fallen considerably behind that in other like countries. As with the three times unsuccessful project for a federal Charter or Bill or Statute of Rights, Australia may now be the only developed jurisdiction in step. A survey of the growing law and practice followed elsewhere in the world suggests otherwise.

The time has come to remove the present door, often closed to the public interest litigant in Australia, and to replace it with a protective screen, controlled by the judges. Armed with new powers, the judges can be trusted to exercise a wider mandate prudently. They can be expected to keep out the pests; but to enliven a more active democracy in appropriate instances and to enhance the larger accountability of politicians, officials, corporations and powerful individuals. They can be allowed to uphold the rule of law in a way that goes beyond lip service and reflects the reality observed in other jurisdictions. At stake is a more effective engagement of citizens and the courts with the real governance of society. And greater realism about the potential of the courts, and lawyers, to hold the governors and the powerful in the land accountable to compliance with the law. And a larger awareness of the legitimate concerns of society to which the law can sometimes respond¹²⁷.

¹²⁷ Cf. A. Durbach, "Interveners in High Court Litigation: A Comment", (1998) 28 *Adelaide L. Rev.* 177 at 181-2.